



memorandum

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DATE: February 23, 1998
TO: Advisory Committee on Civil Rules
FROM: Tom Willging
SUBJECT: Data on discovery cutoffs

This memorandum presents empirical information about time limits on discovery (“discovery cutoffs,”) as gleaned from further analysis of our survey data. I provided this information by memorandum to the Discovery Subcommittee on December 22, 1997 and, in the current memorandum, I expand on the differences between our finding and Rand’s finding on the same question, namely the relationship between imposing discovery cutoffs and litigation costs and case duration.

Summary. Discovery cut-offs—typically six months—were imposed in about two-thirds of the cases in the FJC’s survey of counsel in 1,000 closed civil cases. Attorneys reported relatively few problems with the limits. We did not find any statistically significant relationship between imposition of discovery cutoffs and litigation costs or delays.

Issues. This memo addresses the following questions:

- How often were time limits on discovery (“discovery cutoffs”) imposed? How much time did courts allow for discovery?
- What relationships did discovery limits have to litigation costs, especially discovery costs, and to the life span of the litigation?

Findings. Of attorneys who reported some discovery or disclosure in their case, 65% said the court imposed discovery cutoffs. Table 1 shows the range of the limits attorneys reported.¹ About 70% of these attorneys said the judge set limits of six months or shorter, while about 20% reported limits of 9 months or longer. The mean and median lengths were six months.

¹ About 70% of the attorneys who reported discovery cutoffs also gave information about the length of such limits.

Table 1
Length of discovery cutoffs
(N = 421)

<u>Length of cutoffs (months)</u>	<u>% of attorneys</u>
1-3	15
4	19
5-6	37
7-8	9
9-10	12
more than 10	9

For the most part, attorneys appeared to be satisfied with the court's involvement in discovery planning, including the discovery limits imposed. In only 10 instances, fewer than 1% of the responses, did attorneys report that there were no time limits on discovery and such limits were needed.

Attorneys were more likely to complain that the limits imposed on discovery were too short than to complain that they were too long. In 63 instances (7%), attorneys reported that the time allowed for discovery was too short, compared to 12 reports (1%) that the time allowed was too long.² Attorneys were no more likely to complain that discovery took too long when there were no discovery cutoffs than when there had been discovery cutoffs. In each type of case, the rate of complaint was about 1%.³ Plaintiffs' attorneys (9%) were more likely than defendants' attorneys (5%) to report that the time was too short.

Table 2 presents the rate at which attorneys complained about the shortness of the time allowed for discovery, according to the length of discovery cutoff imposed. Not surprisingly, the shorter cutoffs tended to generate more complaints that discovery time was too short.

Table 2
Percentage of attorneys who complained that time for discovery was too short
by length of discovery cutoffs imposed

<u>Length of cutoffs (months)</u>	<u>% who complain</u>	<u>Number of attorneys</u>
1-3	27%	17
4	13%	10
5-6	6%	10
7 or more	4%	5

² In 7 of those 12 reports, no time limit had been imposed. In 3 instances, a limit of unspecified length was imposed and in the other 2 instances, the limit imposed was 8 months or longer.

³ These differences are not statistically significant, but seem worth reporting because one would expect some association between imposing a time limit and reducing complaints that discovery took too long.

Relationship to litigation cost and duration. We have been unable to detect any substantial relationship between the length of discovery cutoffs and either the cost of litigation or the length of time it takes to conclude a case.⁴ This finding differs from the Rand finding presented to the Advisory Committee in September⁵ and from the finding presented in Rand's CJRA report.⁶

Using attorneys' reports of the discovery cutoff periods and of discovery and total litigation costs, we were unable to find that the amount of time allowed for discovery had any substantial relationship to case duration or to attorneys' estimates of the cost of discovery or the cost of litigation as a whole.⁷ These findings suggest that discovery cutoffs may not be linked to early, firm trial dates or other disposition activity. They also suggest that altering the rules regarding the length of discovery may not reduce litigation time. On the other hand, the data also show that discovery cutoffs do not appear to have harmful effects.

We offer two possible reasons for the discrepancy between the FJC and Rand studies. First, the populations studied are quite different. Rand studied a random sample of cases from ten pilot districts and ten comparison districts, which were selected by the Judicial Conference from the 94 federal districts. We examined a random sample of closed cases in 86 of 94 districts. Those districts account for 97% of federal civil cases.

Second, the research methods are different. To measure discovery cutoff time, Rand used a district-wide median. We used case-specific information—that is, each attorney's report of the amount of time permitted for discovery in the case under study. While attorneys' after-the-fact recollections leave some degree of uncertainty, studying discovery cutoffs on

⁴ See Willging, T., Shapard, J., Stienstra, D., and Miletich, D., *Discovery and Disclosure Practice, Problems, and Proposals for Change* 53-55 (Federal Judicial Center 1997) (multivariate analyses).

⁵ Kakalik, J., et al., *Discovery Management: Further Analyses of the Civil Justice Reform Act Evaluation Data*, __ B.C. L. Rev. __, draft at 45-46, 55-56 (1998) (finding that "the district's median days to discovery cutoff is a statistically significant predictor of time to disposition; shorter cutoff predicts shorter time to disposition" and estimating that a 60-day reduction in median discovery cutoff would correspond to a 55-day reduction in time to disposition).

⁶ Kakalik, J., et al., *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* 62-63 (Rand 1996) (estimating "a 1.5 month reduction in the median time to disposition for cases that survive at least nine months if the district median discovery cutoff is reduced from 180 days to 120 days.")

⁷ We also examined the bivariate (two variable) relationships between the cost and duration of the litigation and court imposition of case management orders to limit the time for discovery. We found very little relationship between discovery cutoffs and case duration ($r = .16$; $p = .001$), total discovery and disclosure expenses ($r = .09$; $p = .07$), total expense due to discovery or disclosure problems ($r = .13$; $p = .08$), total litigation expenses ($r = .10$; $p = .04$), or percentage of total litigation expense associated with discovery or disclosure ($r = .03$; $p = .58$). Similarly, using multivariate analyses, we found no strong or statistically significant relationship between any of the forms of case management studied (such as limits on the length of time or the amount of discovery, issuance of a discovery plan, or court conferences to address discovery issues) and cost and duration variables. Willging, et al at 53-55.

a case-by-case basis yields a more precise measure of discovery time than does a district-wide median. Moreover, analysis on a district-wide basis may be misleading because districts with an established practice of expediting litigation may have chosen shorter cutoffs precisely because they fit the local practice. Either of these differences—or other reasons not addressed here—might account for the different outcomes. Clearly, further research, including an independent analysis of the data from the two studies, would be welcome.