Federal Judicial Center
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memorandum

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TO: Advisory Committee on Civil Rules

FROM: Thomas E. Willging

SUBJECT: Data from "Middle Ground" Districts

Two districts in the Federal Judicial Center's discovery survey have local rules that require less disclosure than does Fed. R. Civ. P. 26(a)(1). The Northern District of Alabama (centered in Birmingham) and the Central District of California (centered in Los Angeles) each modifies the federal rule by limiting document disclosure to those that support the disclosing party's claims or defenses. Experiences with disclosure in these two districts is of special interest to the Advisory Committee on Civil Rules as it attempts to draft a uniform national rule on initial disclosure and explores the middle ground between the current requirement and abolition of disclosure requirements. To address the subject, we focused on survey responses in which disclosure took place under a federal or local rule (as opposed to an individual judge's case management practices). Approximately 10% of such responses came from Northern Alabama or Central California.

For many analyses, the number of cases is too small to test meaningfully for statistically significant differences between the two types of rules. For example, we did not find statistically significant differences in any of the effects attorneys reported under the two types of rules. Nevertheless, it seems useful to present the data simply to describe the attorneys' responses. As with attorneys responses to initial disclosure generally,[1] attorneys in the

[1] See Thomas E. Willging, John Shapard, Donna Stienstra, and Dean Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change 26-27 (FJC 1997).

two districts found the effects of initial disclosure to be generally favorable, that is, in the direction intended by the drafters (Table 1).

Table 1
Percentage of attorneys reporting specific effects of initial disclosure in two districts with local rules referring to disclosure of supporting documents

Effect of initial disclosure on	Increased	Had no effect	Decreased
Your client's overall litigation expenses (N = 37)	24%	27%	49%
Time from filing to disposition (N = 34)	3	50	47
Overall procedural fairness (N = 35)	43	49	9
Fairness of case outcome (N = 36)	22	75	3
Prospects of settlement (N = 36)	36	58	6
Amount of discovery (N = 35)	9	37	54
Number of discovery disputes (N = 31)	3	61	35

Data indicate that cases in which disclosure took place under middle ground local rules were statistically significantly more likely (94%) to have terminated within a year of filing than cases in which disclosure was under Rule 26(a)(1) (65%). Cases from the middle ground districts were also significantly more likely to be contract cases (46% vs. 17%) and to have far lower average total litigation expenses ($22,656 vs. $52,557). These data suggest that either the case mix is different in the middle ground districts compared to all other districts or that the selection of cases for disclosure works differently in the middle ground districts. Either way, it appears that the cases with disclosure are distinctly different and that the differences in time from filing to disposition cannot be attributed solely to the rule. On the other hand, it appears that the middle ground rules are associated with prompt disposition times in district with a large percentage of contract cases (and a commensurately small percentage of tort and federal statutory actions).

Some intriguing data suggests a possibility that the two types of disclosure rules work in different ways. Attorneys in the middle ground

districts reported that they spent a higher percentage of their litigation expense on meeting and conferring than attorneys in the other districts (16% vs. 11%, statistically significant). The data also showed that judges were less likely to have held a conference to plan discovery in the middle ground districts, but those differences were not statistically significant. Overall, the data are compatible with a scenario in which the attorneys spend more time meeting and conferring, without the need for judicial involvement, in the middle ground districts.

The increase in the percentage of time spent meeting and conferring suggests that the process is fruitful, that is, lower percentages of time are spent on other activities, including discovery. Data on case outcomes tend to show shorter times to disposition and lower costs. It may be that the process is fruitful because the parties do not face the conflict-laden need to disclose information that does not support their claims or defenses. Cases from the middle ground, more likely to be lower stakes contract cases, settle more quickly and with far lower litigation expenses. While this scenario is plausible, our data from these two districts are too sparse to support any sweeping generalization. We report them here as hypotheses that might be tested if middle ground rules are adopted nationally.