DRAFT

SELF-EXECUTING DISCLOSURE IN THE EASTERN DISTRICT OF PENNSYLVANIA

One of the more innovative, and at the same time more controversial, provisions of the Eastern District's CJRA Plan is that imposing on the litigants the obligation to provide their opponents with entire categories of information, including copies of certain types of documents, without awaiting a formal request.[1]

The basic idea was simple enough: the recipient of the information would be spared the need to resort to formal discovery with respect to any material that her opponent was obligated to disclose, the process would be speeded up,[2] and, hopefully, the requirement itself would communicate the appropriateness of a level of civility and cooperation that would reduce the amount of wasteful quibbling about the technicalities of the discovery process.[3]

This district was not alone in experimenting with the basic idea. The 1993 amendments to the Federal Rules of Civil Procedure introduced in Rule 26 (a) the concept of "initial disclosures"

---

[1] Section 4:01, Civil Justice Expense and Delay Reduction Plan. The full text is included in Attachment 1 to Appendix A of this Report. This obligation does not apply to cases on the Special Management Track, which are governed by other provisions designed to facilitate exchange of information with dispatch and efficiency.

[2] The "effect would be to accelerate the preparation and disposition of actions." William W Schwarzer, Symposium: The Future of Federal Litigation: The Federal Rules, The Adversary Process, and Discovery Reform, 50 U. of Pitt. L. Rev. 703, 723 (1989).

[3] The rule would "make it clear the witnesses are required to disclose material information even in response to poorly phrased questions, and [that] obstructionist tactics are out of order." Schwarzer, supra n. 2 at 722.

This district was not alone in experimenting with the basic idea. The 1993 amendments to the Federal Rules of Civil Procedure introduced in Rule 26 (a) the concept of "initial disclosures" of material that was to be turned over to the other party without awaiting a request, including names, addresses and telephone numbers of certain witnesses, copies of documents, and certain computations of damages.

One might have hoped that implementation of an innovative provision of a national rule would yield valuable data, or at least useful information, by which to come to a conclusion as to the utility and desirability of this requirement. The national rule, however, allows each individual district to opt-out of its provisions and over half of the federal districts have done so.[4]

To complicate matters further, a district opting out of the national rule may nonetheless choose to provide for self-executing disclosure, but with the obligation defined as it chooses rather than as provided in Federal Rule 26(a).[5] Moreover, individual judges remained free, under

---

[4] It has been reported that 52 of 94 districts have opted out of the provisions of Rule 26. However, 16 "districts have voluntarily included some form of prediscovery disclosure in either their CJRA plan or in local rules." Joseph R. Biden, Jr, The Civil Justice Reform Act of 1990, For the Defense (September 1995) 4, 7.

Cf. Frank W. Hunger and Cynthia C. Lebow, The Civil Justice Reform Act and the Rulemaking Process: Where Do We Go From Here? For the Defense (September 1995) 8, 11: "Fifty-two CJRA plans provide for some form of mandatory disclosure....Rule 26(a)(1) is in effect in thirty-two districts, while thirty-one districts 'opted out' in some fashion; in the remaining districts the provision to opt in or out was 'provisional.'"

For more recent data see note 5 infra.

[5] The most recent account of the status of self-executing disclosure, by district, is Donna Stienstra's, *Implementation of Disclosure in the United States District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 22, 1996) reprinted at 164 F.R.D. lxxxiii, et seq. (April, 1996).

Some twenty pages of tables illustrate the variations between districts. A brief summary is to be found at lxxxv.

the terms of the national rule and under the terms of local alternatives, to fashion their own provisions. Depending on the precise terms of a district's rules, judges might even choose to opt-out of the opt-out, as it were, with or without fashioning a substitute.

In the Eastern District of Pennsylvania the present rule governing disclosure was modeled on a proposal then before the national Advisory Committee, a proposal that appeared headed for promulgation. The Advisory Committee on Rules of Civil Procedure, however, decided against any requirement of initial disclosures, then changed its mind and decided in favor of a provision imposing the present requirement, one that differs substantially from what had been previously circulated.[6]

It is likely that at some point the national experience will yield useful information. However, already in 1994 it appeared clear to the Advisory Group that it would not be prudent to postpone examination of the operation of our present rule until such information became available. The local requirement has been in effect in this district since the effective date of this district's original plan promulgated pursuant to the CJRA, December 31, 1991. By the end of calendar 1995 it would be law in this district for fully four years. Moreover, planning for what would happen at the end of the period provided by the Congress for the CJRA Plan to remain in effect, the court has asked for the recommendation of the Advisory Group concerning what action it should take either to continue, to modify or to abrogate these provisions.

---

[6] "The committee abandoned an earlier, much broader definition that called for disclosure of anything that "bears significantly on a claim or defense...." Ann Pelham, Federal Court Watch: Panel Flips, OKs Discovery Reform, The National Law Journal, Apr. 20, 1992 at 22.

This was a propitious time to learn how the present rule was working. Accordingly, the Advisory Committee undertook to find out what the experience of judges and lawyers has been under the new rule. Does it save time? money? Does it make it possible to represent the client more effectively? Or has the rule proved counter-productive? Does it operate smoothly as originally envisioned or has it spawned satellite litigation and a proliferation of motions?

We were interested in detailed information based on actual experience and we were also interested in the opinions that had been developed by bench and bar as a result of that experience. Moreover, we desired to learn whether the rule appeared to work better in certain types of cases than in others, and whether opinions concerning the rule related to background variables of the lawyers: age, type of practice, size of firm. There was anecdotal evidence aplenty, but more credible data was needed before recommendations to the court could be formulated with any level of confidence.

To that end the Advisory Group retained the services of Dr. Abba Krieger, Professor of Statistics in the Wharton School of the University of Pennsylvania,[7] developed a suitable questionnaire with his help,[8] and proceeded to send out these instruments to about one-fourth of the 17,000 attorneys of record in cases subject to the rule governing self-executing disclosure in this district.[9] At the same time, again under the guidance of Dr. Krieger, the Advisory Group

---

[7] Dr. Krieger also holds appointments as Professor of Marketing and Professor of Operations and Information management, all in the Wharton School.

[8] The questionnaire is reprinted in Attachment 2 to Appendix A.

[9] The procedure used to select the recipients of the questionnaire is detailed in Attachment 3 to Appendix A.

developed an analogous instrument to learn the experience and gain the benefit of the views of the judicial officers of the district.[10] This instrument, modified to reflect the differences in perspective, served as the basis for interviews of United States District Judges and Magistrate Judges by members of the Advisory Group. Thirty-four interviews provided a significant data base, which will be discussed below.

On the order of 1,200 questionnaires were returned,[11] of which approximately 1,100 were usable, 1,090 to be exact.[12] This was within the range of usable responses that was set as a goal when the project was designed. Whether and to what extent these respondents are typical of the total population of litigating lawyers is another question, one that we shall address in due course.

This report presents and analyzes the data generated by that questionnaire. It was also enriched by questions and comments of members of the Advisory Group during the course of a preliminary presentation of the results of the study.

Structure of the Questionnaire

The questionnaire consists of three sections. The first focuses on the lawyer's last case "that was concluded at the district court level and to which the promulgated rule governing self-executing disclosure applied." Within this section questions were of two types: background

[10] The text is set forth in Attachment 4 to Appendix A.

[11] The yield was, roughly, as anticipated. We were hoping for a response somewhere between 1,000 and 1,200. No attempt at follow-up of any type was made following the initial mailing of the questionnaires.

[12] Some of the responses had too much data missing to be useful.

questions and outcome questions, all focusing, however, on that single, most recent experience.[13] The early questions seek information about the case and the attorney's role in it: what kind of a case was it? tort? contract? civil rights? Which side did the respondent represent? plaintiff? defendant? At what stage was the case terminated?

Then came a series of questions designed to provide information on what are termed outcome variables: to what extent was there compliance with the rule: on your part? on the part of your opponent? to what extent did the rule decrease time, if at all? were the results of the case any different as a result of the rule? All of the responses, quite obviously, simply provided the attorney-respondent's opinion on these questions, but they were opinions concerning very specific facts and all were limited to the respondent's opinion with respect to that one case.

A second section of the questionnaire related to general views of the respondent about self-executing disclosure. Do you have problems with the rule? What is your opinion, in general, about

---

[13] The data show that in 22.3% of the cases, all of which had been terminated, a trial had begun. This is substantially higher than the published statistics would have led one to expect. For example, in statistical year 1993 in all federal courts only 3.4% of all civil cases terminated that year even had a trial begin. Table C-4, Annual Report of the Director of the Administrative Office of the U.S. Courts (1993).

One should note, however, great variations between cases involving different subject matter and also between courts. Thus, for the same year the percentage was more than three times as large (10.6%) for employment civil rights cases. Id. Arkansas Eastern, for example, had an overall average of 11.6% reaching trial, with certain categories of tort cases no doubt much higher. Id.

That year in the Eastern District of Pennsylvania 3.8% of the terminated civil cases reached trial, id., but in many categories (e.g., prisoner petitions and social security cases) the percentage would have been much lower while in others very significantly higher.

However, the most likely explanation for this figure may lie elsewhere. It has been suggested that respondent lawyers, thinking back to the most recent case in which the rule on self-executing disclosure applied, tended to ignore cases that were settled early in the process, increasing the percentage of those in which a trial is commenced.

the rule? And, again, there were questions seeking background information, about knowledge, for example: how many cases have you seen in which self-executing disclosure applied? Finally, the third section of the questionnaire was simply a list of background variables concerning the attorney -- a list of demographics. What percentage of the time are you on the side of the plaintiff versus the defendant? What size is the law firm in which you practice?

The Background Variables

Who were the respondents? Whom do they typically represent? We asked each to provide the percentage of his or her cases, instituted since the beginning of 1992, in which they appeared on the side of plaintiff and on the side of defendant (III-1). The average was 42.1% for plaintiff, 57.9% for defendants. The subject matter of these cases (III-2) is set forth in Table I and the results correlate nicely with the responses concerning a similar question asked about the most recent case.

Personal injury cases represent the largest category (31.1%) to which should be added 7.9% for personal property damage resulting from tort. Insurance contract litigation (10.2%) and other contract cases (14.4%) account for almost one-fourth of the respondents' filings. If one add prisoner petitions (1.6%) and other civil rights cases (14.1%), we have accounted for approximately four-fifths of the cases brought by these lawyers. The age of the respondents (III-3), also set forth in Table I, shows relatively small percentages below 30 (6.8%) or above 60

TABLE I: Description of Background Variables

III-1. Average Side:

Plaintiff	42.1%
Defendant	57.9%

III-2. Case:

Contract-Insurance	10.2%
Other Contract	14.4%
Personal Injury	31.1%
Tort-Personal Property	7.9%
Prisoner Petitions	1.6%
Other Civil Rights	14.1%
Labor	5.8%
Social Security	.4%
Other	14.5%

III-3. Age:

Under 30	74	6.8%
30-39	453	41.6%
40-49	375	34.4%
50-59	143	13.1%
60-over	45	4.1%

III-4. Gender:

Female	216	19.8%
Male	874	80.2%

(4.1%). More than three-fourths of these lawyers were between 30 and 60 years of age. The gender of the respondents (III-4) approximates what might have been expected from this cadre of respondents:[14] 19.8% female and 80.2% male.

Years in practice (III-5): Only a little more than a third of the respondents have been in practice nine years or less, and less than a fourth have been in practice twenty years or more (Table II).

[14] This is less than half the percentage of women currently enrolled in law schools, but this group of litigators in federal court reflect both a choice of specialization and the fact that when these respondents were in law school the percentage of women was far smaller.

TABLE II: Further Description of Background Variables

III-5. Years in Practice:

Less than 4 years	128	11.7%
5-9 years	268	24.6%
10-14 years	237	21.7%
15-19 years	195	17.9%
20-29 years	192	17.6%
30 years or over	70	6.4%

III-6. Size of Firm:

Fewer than 5	281	25.8%
5-9	154	14.1%
10-29	262	24.0%
30-49	39	3.6%
50-99	79	7.9%
100 or more	275	25.2%

Correlation Among Background Variables

	PLAINTIFF	AGE	GENDER	YRSPRAC	LAWYERS
PLAINTIFF	1.000	.144	-.150	.142	-.485
AGE	.144	1.000	-.269	.818	-.215
GENDER	-.150	-.269	1.000	-.317	.184
YRSPRAC	.142	.818	-.317	1.000	-.203
LAWYERS	-.485	-.215	.184	-.203	1.000

If we define small firms as those with fewer than five attorneys and large firms as those with 100 or more, we find (III-6) that 281 respondents come from small firms, almost identical with the 275 who come from the large firms. See Table II. In this connection it is important to remember that we did not sample firms, but rather attorneys. These data suggest that there are far more small firms than large firms, perhaps on the order of 20 or even 25 to 1.

We examined the relationship among various of the demographic variables. Some of the results are quite intuitive, almost to the point of providing a validity check. Thus, for example,

there is a very high correlation between age and years in practice, precisely what would be expected. Females tend to have been in practice a shorter period of time than males, a result that would be expected in view of the history of women at the bar.

Whatever the reason, defense lawyers seem to be concentrated more in the big firms. This is an important relationship because when we study the relationship of demographic variables to opinions concerning self-executing disclosure we will find that defense lawyers, as a group, tend to have a less favorable view of the present rules than do plaintiff lawyers. To say that large firms also have a less favorable view of the present provisions than do some other groups is basically to repeat ourselves; we are reporting on the same phenomenon.

Comparing background variables in section one, dealing with the type of practice respondents have and the responses to the same type of questions in section 3, which focuses on the last case this attorney had in which the rule concerning self-executing disclosure was applicable, we find some remarkable similarities. Thus, 42% of the respondents reported that they generally represented plaintiffs and 43% of the respondents reported that they represented plaintiff in their last case.

Similarly, our respondents reported that 32% of the last cases were personal injury cases, consistent with the 31% response to the earlier question concerning the nature of the respondent's practice generally. Thus, to the extent that their responses are accurate, the last case appears to be representative of the caseload of these respondents more generally.

Almost 14% more of the respondents to the questionnaire represented defendants in the last case reported on, 56.9% compared to 43.1%. In terms of raw numbers, there were only 470

lawyers representing plaintiffs compared to 620 representing defendants, a difference of 150 respondents. It may be that there are more cases with multiple defendants than there are cases with multiple plaintiffs, an example of what is often alleged as the familiar phenomenon of suing "everyone in sight."

There may, however, be a simpler explanation. In general, more defense attorneys were unhappy with the obligation to disclose than was true of plaintiffs, defense attorneys were among those who exhibited the strongest feelings, for example some bitter complaints that they were being made to do the work of opposing counsel.[15] This may have motivated a greater response rate among the defense bar. If so, the overall results that we report below, are the more striking.

At What Point in the Litigation Were These Cases Terminated?

Focusing on the last case subject to the rule on self-executing disclosure, we asked at what stage in the litigation it had been terminated: before self-executing disclosure, after self-executing disclosure but before discovery had been completed, after discovery had been completed but before trial had commenced, during trial or after trial. (The results are set forth in Table III.) One-fourth of the cases (24.9%) were terminated before discovery had been completed. Of these, close to a fifth of all the cases (18.4%) were terminated after self-executing disclosure but before the

[15] Some members of the bar had expressed concern about the impact of the rule on the adversary process, more specifically that it unfairly required one side (typically the defendant) to "do the opponent's work for him." One is reminded of Justice Jackson's remark in connection with work product: "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." Hickman v. Taylor, 329 U.S. 495, 516, 67 S. Ct. 385, 396 (1947) (Jackson, J. concurring).

completion of discovery. These data indicate the possibility that self-executing disclosure had some influence in facilitating settlement, although without comparative data shedding light on what happens without the rule, it is not possible to draw any significant conclusions.

TABLE III: Background for Last Case

I-1. Side:		
Defendant	620	56.9%
Plaintiff	470	43.1%
I-2. Type of Case:		
Contract-Insurance	105	9.6%
Other Contract	152	13.9%
Personal Injury	349	32.0%
Tort-Personal Property	87	8.0%
Other Civil Rights	167	15.3%
Labor	68	6.2%
Prisoner Petitions, Social Security, Other	162	14.9%
I-3. Case Terminated:		
Before Self	71	6.5%
After Self, Before Full	201	18.4%
After Full, Before Trial	576	52.8%
During Trial	55	5.1%
After Trial	187	17.2%
I-4. How Terminated:		
Settlement	763	70.0%
Verdict	327	30.0%

A second question is relevant to the stage at which these cases were terminated. Still focusing on the last case subject to the rule on self-executing disclosure, we asked <u>how</u> it was terminated, by settlement or by verdict. A surprising 30% responded that the case in question had been terminated by verdict. The remainder, 70%, said that termination had been by settlement.

At first blush, two difficulties present themselves in understanding these data. First, they appear inconsistent with the responses to the earlier question that asked, still with respect to the last case subject to the rule on self-executing disclosure, at what stage in the litigation the case

had been terminated. As shown in Table III, only 17.2% had stated that this last case had been terminated after trial. This is far short of the 30% terminated by verdict and it is hard to square termination by verdict for cases in which there has been no trial.

Some of the difficulty, however, may be accounted for by cases that went to verdict, but were terminated thereafter by settlement rather than by judgment on the verdict. In one sense these were cases terminated by the influence of the verdict; in another sense they were terminated during the trial process, before post-trial motions had been acted upon. Adding some or all of the cases that respondents reported as having been terminated during trial reduces the discrepancy.

Some may perceive a second difficulty. The data appear inconsistent with an oft-repeated statistic that far fewer than five per cent of all civil cases terminated in federal court even get to the point of having a trial begin.[16] Moreover, this phenomenon is quite consistent with the experience of state courts. A finding that 30% of these civil cases were terminated by verdict clearly raises questions.

To a great extent the difficulty is more apparent than real. The figure given for civil litigation generally includes a great many civil cases not subject to self-executing disclosure and evidencing very different litigation patterns. These include prisoner petitions, suits on defaulted government loans, and some types of social security appeals, for example. If we examine the data for categories of litigation relevant to our concerns, the discrepancy is substantially reduced.

Another phenomenon may also be at work, one which may help explain the responses to this question and which also may be relevant to an understanding of the responses to the question

[16] See detailed discussion footnote 13 supra.

discussed earlier. Asked to deal with the last case subject to the rule on self-executing disclosure many lawyers may exclude from consideration cases that settled almost immediately upon filing: those really aren't "cases" worth discussing in the context of how the rule is operating. Indeed, such exclusion may be done subconsciously. Phrased differently, the inconsequential fades from our memories more rapidly.

It is true that in answer to the earlier question our respondents reported 6.5% of the last cases terminated even before self-executing disclosure, but to the extent that we have meaningful data against which to evaluate this figure, there is reason to believe that this figure is quite low. Excluding the cases that settle so early in the process will yield a low figure for "early washouts" and a higher figure for verdicts as distinguished from settlements. Nor can we rule out the possibility that some respondents were inconsistent in dealing with these two questions.

What Happened in Your Last Case?

The first question concerned the level of compliance with the rule, on the part of the respondent and on the part of the respondent's opponent. To what extent did you comply and to what extent did your opponent comply? The results are set forth in Table IV. Of course, there is an asymmetry in the results, as one would expect. People believe that they have complied to a far greater extent than their opponent thought they did; that's human nature. The striking thing is that over two-thirds of our respondents (67.1%) thought that their opponents had complied more than minimally. Over 90% (91%) thought that they themselves had complied more than minimally; only 4.8% thought that they had not complied at all.

Table IV

I-5, 7. Last Case Results - Level of Compliance:

	You		Opponent	
Not at all	52	4.8%	134	12.3%
Minimally	46	4.2%	225	20.6%
Partially	157	14.4%	449	41.2%
Fully	835	76.6%	282	25.9%

It seems fair to characterize the level of compliance as high. This is particularly true when we recognize that patterns of behavior, the mores of the profession, tend to change slowly and we are dealing here with a rule still in its infancy. Moreover, it is a rule that, in terms of its effort to change fundamental attitudes of litigating lawyers, can be considered revolutionary.

Did the rule on self-executing disclosure save any time? We are dealing here with the perceptions of the respondents, not only on the question of whether they saved any time but particularly on the question of whether their opponents saved time. Here, of course, any savings must come as a result of compliance with the rule. Since the perception of the respondents clearly was that they had complied to a far greater extent than had their opponents, it was to be expected that the opponents would be perceived as saving far more time than the respondents did.

The data bear this out. Close to one half of the respondents (46.2%) thought that their opponents had time saved for them compared to a little more than a fourth (27.3%) who thought that they had time saved for themselves. With approximately one-fifth of the respondents neutral, the same relative responses are reflected on the opposite side of the question: disagreement that time had been saved. The results are displayed in Table V.

Table V

I-6, 8. Last Case Results - Decreased Time:

	You		Opponent	
Disagree	**293**	**26.9%**	**197**	**18.1%**
Mildly Disagree	**262**	**24.0%**	**193**	**17.7%**
Neutral	**238**	**21.8%**	**196**	**18.0%**
Mildly Agree	**232**	**21.3%**	**350**	**32.1%**
Strongly Agree	**65**	**6.0%**	**154**	**14.1%**

The same basic patterns are repeated in the responses concerning decreasing costs, the attorney's costs, and ability to represent one's client. If I complied, I didn't really feel that it aided my client very much, but if my opponent complied, it did to some VI and VI-A respectively.

Table VI

I-6, 8. Decreased Cost:

	You		Opponent	
Disagree	329	30.2%	212	19.4%
Mildly Disagree	260	23.9%	199	18.3%
Neutral	246	22.6%	212	19.4%
Mildly Agree	182	16.7%	315	28.9%
Strongly Agree	73	6.7%	152	13.9%

I-6, 8. Improved Ability:

	You		Opponent	
Disagree	279	25.6%	177	16.2%
Mildly Disagree	180	16.5%	147	13.5%
Neutral	361	33.1%	276	25.3%
Mildly Agree	193	17.7%	331	30.4%
Strongly Agree	77	7.1%	159	14.6%

Does having a requirement of self-executing disclosure have any impact on the outcome of the case? Almost ninety per cent of the respondents (88.9%) answered in the negative. Because so many cases are terminated by settlement, it is quite possible that outcomes might be affected, but only somewhat. The data show this to happen relatively infrequently, (9.2%) of the time. Great differences in outcome were perceived by fewer than two percent (1.9%) of the respondents.

Table VI-A: Correlations

	YOUCOMP	*YOUTIME*	*YOUCOST*	*YOUABLTY*	*OPPCOMP*	*OPPTIME*	*OPPCOST*	*OPPABLTY*	*OUTCOME*
YOUCOMP	1.000	.040	.019	.092	.433	.049	.048	.070	-.058
YOUTIME	.040	1.000	.859	.667	.127	.648	.614	.515	.183
YOUCOST	.019	.859	1.000	.686	.118	.618	.673	.523	.203
YOUABLTY	.092	.667	.686	1.000	.120	.576	.585	.662	.179
OPPCOMP	.433	.127	.118	.120	1.000	-.025	-.014	.000	-.068
OPPTIME	.049	.648	.618	.576	-.025	1.000	.888	.760	.183
OPPCOST	.048	.614	.673	.585	-.014	.888	1.000	.772	.183
OPPABLTY	.070	.515	.523	.662	.000	.760	.772	1.000	.197
OUTCOME	-.058	.183	.203	.179	-.068	.183	.183	.197	1.000

Correlating the Nature of the Case, the Parties, and the Impact of the Rule

In analyzing the results of this study, it becomes important to consider whether and to what extent plaintiffs differ in their perceptions and their opinions from defendants. As we go through the responses to the questionnaire, it becomes clear that those on the side of plaintiffs react far more favorably to the rule than do those on the side of defendants. This is true with respect to the rule itself as well as with respect to certain positive outcomes that the rule might be said to produce.

It is not true, however, that plaintiffs' perceptions will differ from those of defendants with respect to every question. Thus, in responding to what extent there was compliance with the rule, there was no difference between the perceptions of plaintiffs and those of defendants, neither with respect to their own compliance nor with respect to compliance by their opponents.

However, in terms of the effects of opponents complying with the rule, i.e. reducing time, cost, and improving the ability of the lawyer to represent the client, plaintiffs were much more positive in finding favorable results than were defendants.

This is not to say that plaintiffs were positive in an absolute sense, simply that they were more positively inclined than were defendants. For example, with respect to self-executing disclosure saving time (in the last case), on a five-point scale with 3 representing a neutral position, plaintiffs' responses averaged 2.8, still below neutral, but defendants' averaged only 2.4, reflecting less positive (or more negative) perceptions than those of plaintiffs.

It has already been pointed out that lawyers representing defendants tended to be in the larger firms. By the same token, lawyers representing plaintiffs tended to be in the smaller firms.

Accordingly, just as the views of the larger firms tended to mirror those of the defense bar, so, too, the views of the smaller firms tended to mirror those of the plaintiffs bar. However, as already pointed out, this is not an additional finding; it is simply another way of stating the same thing.

Nothing really interesting resulted from an analysis of the data on when the case was terminated, i.e. on the stage at which it was terminated. What was statistically significant, however, was the correlation between compliance with the rule and settlement before self-executing disclosure afforded an opportunity for the rule to operate. To state this, however, is to state a tautology because there could hardly be compliance where the case was terminated at that early stage, and so it is fair to say that nothing helpful emerged from analysis of these responses.

How the case was terminated, i.e. whether by settlement or by trial, was another matter. Respondents were more positive in assessing the level of their opponent's compliance and in finding that the rule reduced costs when the case was settled.

The subject matter of the litigation yielded no significant correlations in terms of the impact of the rule. To some, this result appeared counter-intuitive. It had been thought that the reaction of the bar to the requirements of the rule in a relatively straightforward action for personal injuries would be quite different from what would be true in a complicated contract action, perhaps involving insurance coverage, in which there would ultimately be a flurry if not a blizzard of documents generating discovery disputes.[17]

[17] Indeed, statements to the same general effect are to be found among the general comments in a subsequent section of the questionnaire: the rule works better, some said, in simple cases and poses more problems in complex cases.

This was particularly true, it has been suggested, since there was at one time a culture in the Eastern District of plaintiffs gladly "turning over the file" in personal injury litigation to stimulate settlement. Indeed, a local rule has long provided for a form of self-executing disclosure with respect to medical examinations of plaintiffs in such actions.

The extent to which that culture has persevered and its significance in litigation today may well have been overestimated. More basically, it should be remembered that complex cases are assigned to the Special Management Track. They are not subject to the rule on self-executing disclosure, not because disclosure would necessarily be inappropriate in those cases, but rather because they are subject to special procedures for determining timing and other details of the discovery process, including disclosure.

Moreover, it is the parties themselves who, in the first instance, determine whether a case is "complex" enough to be assigned for special management. And, in theory, complex tort actions can also be assigned to the special management track and thus exempt from application of the standard rule governing self-executing disclosure.

Views of the Respondents Concerning the Rule Generally

Part II of the questionnaire moved from the individual case, the last case involving self-executing disclosure, to the rule more generally. However, before eliciting the respondents' views we sought to gain some background information relating to their experience with it and their understanding of it.

In how many of their cases since the institution of the rule did the rule apply? Slightly over 70% responded: from zero to five. (The detailed results are displayed in Table VII.) In what percentage of these cases was the rule followed to any extent by any party? Well over half of the respondents reported that the rule had been followed in at least 70% of those cases.

Table VII

II-1. Frequency of Cases

0-5	765	70.2%
6-10	207	19.0%
11-19	62	5.7%
≥20	56	5.1%

At the time it became relevant in those cases, to what extent did you have knowledge of the rule? Almost 85% of the respondents said that they had a general or working knowledge of the rule. Only 11% of the respondents reported that they were unaware of the rule. Some find the relatively low number of practitioners who reported that they were unaware of the rule to be quite surprising. This reaction to the data underscores, of course, that during the relevant period the rule was still quite new, some might say in its infancy. However, we learn from the judges' comments that many made it a practice of routinely mentioning the obligation to disclose at a status conference or in the course of a conference to discuss discovery problems. This should certainly be expected to reduce substantially the number of lawyers who could claim to be totally unaware of the rule.

The respondents were offered four possible reasons for not following the rule and asked, as to each, whether or not it would generally apply to them. In none of these did a majority of the respondents say that it would generally apply to them. However, over one-third (33.9%) did say that the belief that their opponents would not comply was a reason for their own non-compliance, a perfectly understandable reaction. This was the reason selected which drew the greatest affirmative response. Next came the belief that the judge would not enforce the rule, with almost exactly one-fifth of the respondents responding affirmatively. (The detailed results are displayed in Table VIII.)

Table VIII: Description of Background Variables for Views Generally

	Hurt Case		Don't Believe Opponent		Don't Believe Judge		Didn't Know Rule	
Yes	110	10.1%	370	33.9%	226	20.7%	152	13.9%
No	980	89.9%	720	66.2%	864	79.3%	938	86.1%

One of the alternatives was that the respondent did not know the rule. Here 13.9% responded affirmatively. This is slightly more than the percentage who reported in response to the previous question that they were unaware of the rule, hardly a shocking discrepancy. Yet, even here there may be an explanation. Failure to comply because of lack of knowledge may speak to the details of the provisions, of precisely what a litigant was required to disclose, rather than to awareness of the existence of the rule.

Motions for sanctions did not loom large in the picture of how the rule is operating. Only 87 of 1090 responding lawyers (8%) reported that a motion for sanctions had even been made in any

case in which they participated. The number reporting that such a motion had been granted was, of course, much lower: 34 out of 1090 or 3.1%. This, it should be stressed, is not the percentage of cases in which a motion for sanctions is made or one granted. It is the percentage of lawyers who reported such a motion in any case in which they had participated.

The questionnaire asked for the lawyers' perception of the judges' attitudes to the rule. Judicial hostility to the rule was rare, reported by fewer than one percent of the respondents. The largest number reported neutrality (38.4%), with 29.5% perceiving the judges' attitudes as favorable. Almost a quarter of the respondents reported that judges' attitudes varied. Seventy-six lawyers (7%) reported that the "Court seemed unaware of" the rule.

Much debated has been the relationship of the requirement of disclosure with work product protection and attorney client privilege. We asked whether any of the respondents had encountered any difficulty with either. Close to one half (47.9%) of the respondents had not encountered any difficulty and another 33% reported that they had encountered some difficulty, but the difficulty was easy to resolve. The remainder, 19.1% had encountered difficulties which they found difficult to resolve.

To some extent these results are mirrored by the responses to another question: Has the obligation to disclose caused any problem with your clients? Eighty percent (81.2%, to be exact) responded in the negative and 18.8% responded in the affirmative.

Advice for the Future

We sought the views of the respondents concerning four proposed modifications of the present rule, asking them to assume that some type of self-executing disclosure rule would remain in effect. The first proposed change would permit a party to institute discovery without awaiting any developments regarding self-executing disclosure. Thirty-five percent of the respondents expressed strong agreement, an additional 19.7% expressed mild agreement and 11.2% were neutral. The remainder, roughly one-third, disagreed. (The results are set forth in Table IX.)

Table IX: Description of Result Variables for Views Generally

	DISCOVERY Before		DISCOVERY After		Define		Expand	
Strongly Disagree	201	18.4%	87	8.0%	45	4.1%	309	28.3%
Mildly Disagree	170	15.6%	81	7.4%	34	3.1%	176	16.1%
Neutral	122	11.2%	118	10.8%	160	14.7%	228	20.9%
Mildly Agree	215	19.7%	280	25.7%	317	29.1%	160	14.7%
Strongly Agree	382	35.0%	524	48.1%	534	49.0%	217	19.9%

The second proposed modification drew greater support. It would permit a party to institute discovery once that party had made its self-executing disclosures without necessarily waiting for the opposing party's self-executing disclosure. Over two-thirds of the respondents were in favor (48.1% expressing strong agreement and 25.7% expressing mild agreement) with 10.8% neutral and the remainder opposed.

A third proposal would "define more specifically to what the obligation of disclosure applies." Over three-fourths of the respondents reacted favorably to this proposal (49.0%

agreeing strongly, 29.1% expressing mild agreement) with 14.7% neutral and only 7.2% opposed. Finally, a proposal to expand to what the obligation of disclosure applies was rejected, 44.4% opposed compared to 34.6% in favor with the remainder neutral. As we shall see, the judges were even more against expanding the rule so that expansion of the obligation does not appear to be a realistic prospect.

Two general questions of very significant import remain. The first asks for the lawyers' opinion of the present rule, the second asks whether some rule requiring self-executing disclosure should remain in effect. The respondents gave a very mild endorsement to the present rule: slightly over 50% in favor compared to 34.6% opposed with the remainder neutral. (The data are displayed in Table X.)

Table X

II-8. Opinion of Current Rule

Strongly Against	182	16.7%
Mildly Against	195	17.9%
Indifferent	166	15.2%
Mildly in Favor	382	35.0%
Strongly in Favor	165	15.1%

II-9. Same Rule Remain in Effect

Yes	667	61.2%
No	423	38.8%

On the question of whether some rule requiring self-executing disclosure should remain in effect, the responses were unequivocally affirmative: 61.2% said yes compared to 38.8% who said no. In evaluating the response to this question it is helpful to remember that plaintiffs are much more positive on the rule than defendants. Plaintiffs alone would be much more positive than that, defendants would be much more negative. However, our sample has more defendants than plaintiffs. There are only 40%, roughly, on plaintiffs side in the sample.

General Comments

In an open-ended question we invited general comments. Only about half of the respondents (523 out of 1090) offered comments and these tended to be negative. Of those commenting, about one third (175 or 33%) found the rule not effective: it is not followed (61), it is not enforced (44), no sanctions are imposed if it is not followed (33), it is not enforced uniformly (18), and it does not aid discovery (13).

About one-fourth of those commenting (129 - 25%) asserted that the rule had undesirable consequences: it slows down the process (40), it adds work (39), it adds expense (37), it compromises attorney-client relationships (16).

Some (84) found the rule unnecessary, others (82) complained that it was unclear. Some (59) identified features that they disliked: not enough time given (23), too narrow (18), too broad (16). Some (41) complained that the rule aids the undeserving: it helps lazy attorneys (22), it aids litigants unfairly (20), e.g., it requires a defendant to assume plaintiff's theory.

There were positive comments (91), which tended to be fairly generic: it is a good policy (38), saves time (20), aids in discovery (15), and reduces costs (7). Some comments (72) were neutral: all parties should participate (27), it is too soon to know (15).

Finally, there were comments to the effect that the self-executing disclosure rule works better in simple cases and poses more problems in complex cases.

Relationships Among the General Results

Correlations between the various responses yield a number of results, some obvious and some not so obvious. (See Table XI for display of the full data.) As might be expected, those who have a high opinion of the present rule want the rule kept. Furthermore, they are positively inclined not only to the present rule but to a rule, i.e., they favor keeping some rule requiring disclosure. Similarly, those who want the rule expanded obviously have a higher opinion of the rule.

Examining the correlations with knowledge of the rule yields some results which may be surprising. It suggests that the greater one's knowledge of the rule, the lower one's opinion of it. This is not an assertion of causality, i.e. learn more about it and you will like it less. It may be associated with a number of factors. Is it because big firms, which tend to be opposed to the rule, are more effective in educating their lawyers concerning such recent developments? Would the correlation be the same if we excluded personal injury litigation? Are there some other factors at work? These are questions which, at this juncture, we are not in a position to answer.

Table XI: Correlations

	Q7PERMIT	Q7AFTER	Q7DEFINE	Q7EXPAND	OPINION	Q9	Q10	KNOWLEDGE
Q7PERMIT	1.000	.276	.080	-.049	-.254	-.236	-.010	-.070
Q7AFTER	.276	1.000	.096	-.041	-.055	-.050	-.079	.151
Q7DEFINE	.080	.096	1.000	.227	-.022	.011	.060	.010
Q7EXPAND	-.049	-.041	.227	1.000	.449	.390	-.227	-.163
OPINION	-.254	-.022	.011	.449	1.000	.808	.341	-.119
Q9	-.236	-.050	.060	.390	.808	1.000	-.301	-.082
Q10	-.010	-.079	.010	-.227	-.341	-.301	1.000	.082
KNOWLEDGE	-.070	.151	.523	-.163	-.119	-.082	.082	1.000

There are some further correlations worth noting and it may be appropriate to repeat one or two of those already described so that they appear in a new context.

Among the general result variables: Those who want to keep some rule are less in favor of instituting discovery before self-executing disclosure has been completed. However, they are more in favor of expanding the rule and more favorable in their opinion of the current rule.

Relationship with general background variables: Those who have been exposed to the rule more tend: (1) to be more in favor of allowing discovery after a party has made its own disclosure without awaiting completion of the disclosure process; (2) not to need a more precise definition of the rule; (3) not to be in favor of expanding the rule; and (4) to have a lower opinion of the present rule, to prefer that no rule remain in effect, and have had problems with their clients.

Once again, it is important to note that these are not asserted as causal effects, nor do we know what factors contribute to these correlations. Is being associated with the rule more frequently a result of practice in a large firm? Is the nature of the practice reflected in the nature of the case and of the clients?

Those who follow the rule more tend to be against permitting discovery before disclosure has been completed, to have a higher opinion of the present rule and prefer that a rule governing self-executing disclosure remain in effect. Again, the caveats are applicable, but need not be repeated.

Those with greater knowledge of the rule tend to be in favor of allowing discovery after a party has made its own disclosure, not want to see the rule expanded, to have a lower opinion of

THE VIEWS OF THE COURT'S JUDICIAL OFFICERS

We sought the views of each of the court's judicial officers, district judges and magistrate judges, but did not think it appropriate to utilize the same procedure as was followed in case of the lawyers. Instead, each judge was interviewed by a member of the Advisory Group. Altogether there were 34 interviews.

To insure uniformity in the questions and comparability in the responses, we fashioned a written instrument based on the questionnaire sent to the lawyers. Indeed, the questions were changed only slightly, the changes dictated by the very different role played by the judges. In addition, responses were written down during the interviews and the results tabulated thereafter. General comments were invited and these, too, were recorded.

What experience had the judges had with self-executing disclosure? Thirty-three of the 34 judges surveyed had more than 20 cases to which the rule applied; the remaining judge had six. To what extent did the judges feel that the rule was being followed in these cases? Nine thought there was compliance in over 90% of the cases, five additional judges placed compliance between 70 and 90%, three estimated compliance at between 10 and 30% Sixteen judges did not respond to the question, meaning of course, that they felt they had insufficient personal knowledge for a meaningful response, an understandable position in many cases, particularly where no problems have arisen.

Crucial to the success of a requirement of disclosure is the smooth operation of the rule. Were it to engender a satellite motion practice, preliminary to further skirmishes in the course of traditional discovery, the requirement would be self-defeating. Accordingly, we asked the judges

Shaping A Rule for the Future: The Judges' Views

We put the major-premise question to the judges directly: should some self-executing discovery rule remain in effect or not? An impressive 85% of the judges responded in the affirmative: 29 said yes, 4 said no and one did not respond.

This, however, should not be read as uncritical enthusiasm for the rule that is currently in effect, as the responses to a series of questions demonstrated. First, when asked their opinion of the current rule, only 12 were strongly in favor, 14 were mildly in favor, 3 were indifferent, 2 were mildly against, and 3 were strongly against.[21]

We were, of course, interested in the judges' views concerning the desirability of specific changes that have been proposed. As was done in soliciting the views of the lawyers with respect to specific changes, we asked the judges to assume, in answering these questions, that a "rule requiring some kind of self-executing disclosure will remain in effect."

Should a party be permitted to institute discovery without awaiting any developments concerning self-executing disclosure? Fourteen of the judges were in favor, 13 opposed and 7 were neutral. However, on the question of whether a party should be permitted to institute discovery once that party has made its self-executing disclosures without necessarily waiting for the opposing party's self-executing disclosure, 25 judges were in favor with only 4 against. Four were neutral and one did not respond.

---

[21] These responses are, of course, entirely consistent with the strong endorsement of having some rule requiring disclosure. Moreover, 26 judges, or 76% of the respondents, were in favor of the present rule.

Should the rule define more specifically to what the obligation of self-executing disclosure applies? Only 10 were in favor, 13 were neutral and 11 were against. On the question of whether the rule should be amended to expand "to what the obligation of disclosure applies, only 4 were in favor, 17 were against, 11 were neutral and 2 did not answer.

A series of questions attempted to gain the judges' views as to how the present rule was working, addressed in terms both of costs and benefits. Does the present rule cause the lawyer problems with clients? Ten responded in the affirmative, 11 in the negative and, understandably, 13 said "maybe."

Does it raise questions of confidentiality? Sixteen said yes, 12 said no and 6 said maybe. Does it result in reducing the cost of litigation? Seventeen judges, the largest number responding to any of this series of questions, responded in the affirmative, 9 in the negative and 11 "maybe."

Does the rule reduce delay? 14 judges said yes, 9 said no, and 11 were in the "maybe" column. Some of the "maybe" responses emphasized that it depended on the case, and some judges noted the possibility that in some cases the rule may increase delay.

Is the rule frequently not complied with, we asked the judges, "because each side expects no compliance or minimal compliance from the other side?" The judges thought not. Sixteen said no compared to 6 who said yes, although 12 said maybe.

Finally, is the rule frequently not complied with "because individual judges are considered unsympathetic to the rule?" As might be expected, there was a decisive vote in the negative. Twenty-five judges said no as against only 2 who said yes with only 7 responding "maybe."

CONCLUSIONS

Bench and bar with experience with the rule requiring self-executing disclosure clearly want some type of requirement to remain in effect. An impressive 85% of the judges are of this view and so are over 60% of the attorneys surveyed.

Reaction to the rule is not uniform among all types of litigators. Plaintiffs tend to favor the rule far more than defendants and, associated with this phenomenon is the fact that lawyers in large firms tend to favor the rule less than sole practitioners and those in smaller firms.[22]

It is true that a majority of the lawyers responding to our survey[23] and three-fourths of the judges are in favor of the present rule, but an even greater number are of the view that it can be improved and ought to be changed. The strongest support is for an amendment that would facilitate speedier disposition of litigation, i.e. allowing a litigant to proceed with traditional

---

[22] We have no evidence that this bias has skewed our results, but if it has, the result is to understate approval of the rule. We asked the respondents whether they were on the side of the plaintiff or the defendant in the last case to which self-executing disclosure applied. Only 43.1% were on the side of the plaintiff compared to 56.9% on the side of the defendant, a differential of almost 14%

The percentage representing plaintiff is almost identical to the percentage who, in response to an earlier question, reported that they typically were on the side of plaintiffs: 42.1%

One may speculate concerning the reason for the discrepancy. While it is true that we think of the prototypical case as being between one plaintiff and one defendant, it is a familiar phenomenon that plaintiffs have reason to join additional defendants virtually whenever the opportunity presents itself.

It may also be that a greater proportion of defense lawyers, who view the requirement of disclosure as depriving them of a tactical advantage previously enjoyed and giving plaintiffs an undeserved "bonus," and who give evidence of feeling more intensely about the rule than do plaintiffs, may have responded to the questionnaire than did the plaintiffs.

[23] Adding those mildly in favor of the rule to those strongly in favor yields 50.1% of the respondents. Eliminating those who are indifferent (15.2%), raises the percentage approving to 55%.

discovery as soon as its own disclosure obligations had been discharged, without awaiting disclosure by the opponent.

The purpose of this survey has been to provide data for the consideration of the Advisory Group as it attempts to formulate its recommendations to the Court concerning whether this rule requiring disclosure, some other rule, or no rule should be adopted by the Court. We would, of course, like to hope that the opinions reflected and the facts reported in this account will also be of assistance to the Court as it determines whether to continue, to amend or to repeal the present provisions.

The precise contents of the recommendations to be made by the Advisory Group and the appropriate time for change, if change is to be recommended, are beyond the proper scope of this report. Moreover, we recognize that there are decisions to be made with respect to the short term and there are likely to be decisions to be made thereafter for the long term.

The Judicial Conference of the United States will in due course receive and examine the report of the Rand Institute for Civil Justice and, thereafter, formulate its own report to the Congress and its recommendations concerning the efficient operation of the federal judicial system.[24] The experience of other districts, possible changes in other rules that may impact on the desirability of self-executing disclosure and the specific provisions that should govern it, will all be relevant. This report is submitted in the hope that it, too, will be useful in the enterprise.

[24] See P.L. 101-650, Dec. 1, 1990, §105 (c)(1) and (c)(2), as amended.

CHAPTER IV. DUTY OF SELF-EXECUTING DISCLOSURE[20]

Section 4:01 - Discovery – Duty of Self-Executing Disclosure

(a) Required Disclosures

(1) Unless otherwise directed by the court, each party shall, without awaiting a discovery request, disclose to all other parties:

(A) the name and last known address of each person reasonably likely to have information that bears significantly on the claims and defenses, identifying the subjects of the information;

(B) a general description, including location, of all documents, data, compilations, and tangible things in the possession, custody, or control of that party that are likely to bear significantly on the claims and defenses;

(C) the existence and contents of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of the judgment that may be entered in the action, or indemnify or reimburse for payments made to satisfy the judgment, making available such agreement for inspection and copying as under Local Civil Rule 24;

(D) unless the court otherwise directs, these disclosures shall be made (i) by each plaintiff within thirty (30) days after service of an answer to its complaint; (ii) by each defendant within thirty (30) days after serving its answer to the complaint; and, in any event (iii) by any party that has appeared in the case within thirty

---

20. See 28 U.S.C. §473(a)(4), reprinted in Appendix II, and Report of the Advisory Group (pages 78-80), reprinted in Appendix III of this Plan (pages 64-66).

(30) days after receiving from another party a written demand for early disclosure accompanied by the demanding party's disclosures. A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosure, or, except with respect to the obligation under clause (iii), because another party has not made its disclosures.

(b) Timing and Sequence of Discovery -- Except by leave of the court or upon agreement of the parties, a party may not seek discovery from any source before making the disclosures under subdivision (a)(1), and may not seek discovery from another party before the date such disclosures have been made by, or are due from, such other party.

(c) Supplementation of Disclosures -- A party who has made a disclosure under subdivision (a) is under a duty to reasonably supplement or correct its disclosures if the party obtains information on the basis of which it knows that the information disclosed was either incomplete or incorrect when made, or is no longer complete or true.

(d) Signing of Disclosures -- Every disclosure or supplement made pursuant to subdivision (a) or (c) by a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney shall sign the disclosure. The signature of the attorney or party constitutes the certification under, and is consequently governed by, the provisions of the Federal Rules of Civil Procedure, and, in addition, constitutes a certification that the signer has read the disclosure, and to the best of signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete as of the time it was made.

(e) Duplicative Disclosure -- At the time the duty to disclose arises it may cover matters already fully disclosed in the same civil action pursuant to an order of the court, to a requirement of law or otherwise.[21] In that event duplicative disclosure is not required and a statement that disclosure has already been made discharges the obligation imposed under this section.

---

21. Cf. Local Civil Rule 26, Mandatory Exchange of Medical Reports in Personal Injury Claims.

Questionnaire on the Self-Executing Disclosure Rule

I. As a reminder, the rule for self-executing disclosure is as follows.

> The term "self-executing disclosure" as used in this questionnaire refers to the obligation imposed by Section 4.01 of the Plan promulgated by the United States District Court for the Eastern District of Pennsylvania under the Civil Justice Reform Act of 1990.
>
> That section imposes the obligation on each party to turn over to all other parties, without any formal request having been made, the following: (1) the name and last known address of each person likely to have information relevant to the claims and defenses in the lawsuit; (2) a description of all relevant documents, data compilations and tangible things; and (3) insurance policies that may satisfy any resultant judgment, including making the documents available for inspection and copying.
>
> The provisions of this section do not apply to any cases assigned to the Special Management Track (special procedures govern those cases). For that reason, this questionnaire does not cover what is generally known as "complex litigation."
>
> The terminology has been anything but uniform. What we have termed "self-executing disclosure" is sometimes referred to simply as "disclosure" or "voluntary exchange of information among litigants and their attorneys." It is to be distinguished from "discovery," the process of using interrogatories, depositions, requests for admission, and other formal mechanisms for gaining information from one's adversary.

In thinking about your **last case** that was concluded at the district court level and to which the promulgated rule governing self-executing disclosure applied:

1. Were you on the side of a defendant?

   ___ Yes ___ No

2. In which of the following categories was this case (check one)?

   ___ Contract-Insurance
   ___ Other contract
   ___ Personal injury
   ___ Tort-Personal property
   ___ Prisoner petitions
   ___ Other civil rights
   ___ Labor
   ___ Social Security
   ___ Other

3. When was the case terminated?

   ___ Before self-executing disclosure
   ___ After self-executing disclosure but before full discovery
   ___ After full discovery but prior to trial
   ___ During the trial
   ___ After the trial concluded

4. How was the case terminated?

___ By settlement or other voluntary dismissal
___ By verdict or judicial action

5. How would you characterize your level of compliance with the self-executing disclosure rule?

___ Fully
___ Partially
___ Minimally
___ Not at all

6. Whether or not you complied with the rule on self-executing disclosure, indicate to what extent you agree or disagree with the following statements: Substantial compliance by you did/would have

	Strongly Disagree	Mildly Disagree	Neutral	Mildly Agree	Strongly Agree
• decrease(d) the time spent on the case.	___	___	___	___	___
• decrease(d) the cost of litigation to your client.	___	___	___	___	___
• improve(d) your ability to represent your client.	___	___	___	___	___

7. How would you characterize your opponent's level of compliance with the self-executing disclosure rule?

___ Fully
___ Partially
___ Minimally
___ Not at all

8. Whether or not your opponent complied with the rule on self-executing disclosure, indicate to what extent you agree or disagree with the following statements: Substantial compliance by your opponent did/would have

	Strongly Disagree	Mildly Disagree	Neutral	Mildly Agree	Strongly Agree
• decrease(d) the time spent on the case.	___	___	___	___	___
• decrease(d) the cost of litigation to your client.	___	___	___	___	___
• improve(d) your ability to represent your client.	___	___	___	___	___

9. Whether or not full self-executing disclosure occurred in this case, if the rule had been followed by both sides, compared to no self-executing disclosure by either side, the outcome of this case would likely have been:

___ Greatly different
___ Somewhat different
___ The same

II. Now think about the self-executing disclosure rule more generally:

1. In how many of your cases that were instituted since the beginning of 1992 did this rule apply?

___ 0–5 ___ 6–10 ___ 11–19 ___ More than 20

2. Of these cases, in what percentage was the self-executing disclosure rule followed to any extent by any party?

___ Less than 10%
___ 10% up to 30%
___ 30% up to 70%
___ 70% up to 90%
___ More than 90%

3. At the time it became relevant in these cases, what was your knowledge about the self-executing disclosure rule?

___ Was unaware of the rule
___ Had general knowledge of the existence of the rule
___ Had working knowledge of the rule
___ Knowledge of the rule varied from case to case

4. Which of the following reasons for not following the self-executing disclosure rule would generally apply to you (please check yes or no).

• Would hurt my case	___ Yes	___ No
• Did not believe my opponent would comply	___ Yes	___ No
• Did not believe the judge would enforce it	___ Yes	___ No
• Did not know the rule	___ Yes	___ No

5. (a) In any case in which you participated, was there a motion for sanctions relating to self-executing disclosure?

___ Yes ___ No

(b) Was any such motion granted?

___ Yes ___ No

(c) In general, what is your perception of the judges' attitude to the self-executing disclosure rule?

___ Favorable
___ Neutral
___ Hostile
___ Court seemed unaware of rule
___ Varies

6. In applying the self-executing disclosure rule, have you faced any issue of attorney-client privilege or of work product protection?

___ Yes, but easy to resolve
___ Yes, but difficult to resolve
___ No

7. Assuming some kind of self-executing disclosure will remain, what are your feelings about the following?

	Strongly Disagree	Mildly Disagree	Neutral	Mildly Agree	Strongly Agree
• Permit a party to institute discovery without awaiting any developments with respect to self-executing disclosure.	___	___	___	___	___
• Permit a party to institute discovery once the party has made its self-executing disclosures without necessarily waiting for the opposing party's self-executing disclosure.	___	___	___	___	___
• Define more specifically to what the obligation of disclosure applies.	___	___	___	___	___
• Expand to what the obligation of disclosure applies.	___	___	___	___	___

8. What is your opinion of the current self-executing disclosure rule?

___ Strongly in favor
___ Mildly in favor
___ Indifferent
___ Mildly against
___ Strongly against

9. Do you think a self-executing disclosure rule should remain in effect?

___ Yes ___ No

10. Has the obligation to disclose under the self-executing disclosure rule caused any problem with your clients?

___ Yes ___ No

11. Please indicate any general comments you might have about the self-executing disclosure rule:

_____

_____

_____

III. At this point we would like to obtain a little background information about you. Please be assured that this information is for survey purposes only, and all such data will be amalgamated across respondents to ensure confidentiality.

1. In what percentage of your cases that were instituted since the beginning of 1992 were you

____ on the side of a plaintiff?
____ on the side of a defendant?

2. Of the cases you handled in which suit was filed in the Eastern District of Pennsylvania since the beginning of 1992, what were the percentages (to add up to 100%) in the following categories:

___ Contract-Insurance
___ Other contract
___ Personal injury
___ Tort-Personal property
___ Prisoner petitions
___ Other civil rights
___ Labor
___ Social Security
___ Other
___ Total (must equal 100%)

3. In which category does your age fall?

___ Under 30 years ___ 30–39 years ___ 40–49 years ___ 50–59 years ___ 60 years or over

4. What is your gender?

___ Female ___ Male

5. How many years have you been in practice?

___ Less than 5 years
___ 5–9 years
___ 10–14 years
___ 15–19 years
___ 20–29 years
___ 30 years or over

6. What is the number of lawyers in the firm in which you practice (at all offices)?

___ Fewer than 5 ___ 5–9 ___ 10–29 ___ 30–49 ___ 50–99 ___ 100 or more

Thank you for completing this questionnaire.

11. Please indicate any general comments you might have about the self-executing disclosure rule:

_____

_____

_____

III. At this point we would like to obtain a little background information about you. Please be assured that this information is for survey purposes only, and all such data will be amalgamated across respondents to ensure confidentiality.

1. In what percentage of your cases that were instituted since the beginning of 1992 were you

____ on the side of a plaintiff?
____ on the side of a defendant?

2. Of the cases you handled in which suit was filed in the Eastern District of Pennsylvania since the beginning of 1992, what were the percentages (to add up to 100%) in the following categories:

___ Contract-Insurance
___ Other contract
___ Personal injury
___ Tort-Personal property
___ Prisoner petitions
___ Other civil rights
___ Labor
___ Social Security
___ Other
___ Total (must equal 100%)

3. In which category does your age fall?

___ Under 30 years ___ 30–39 years ___ 40–49 years ___ 50–59 years ___ 60 years or over

4. What is your gender?

___ Female ___ Male

5. How many years have you been in practice?

___ Less than 5 years
___ 5–9 years
___ 10–14 years
___ 15–19 years
___ 20–29 years
___ 30 years or over

6. What is the number of lawyers in the firm in which you practice (at all offices)?

___ Fewer than 5 ___ 5–9 ___ 10–29 ___ 30–49 ___ 50–99 ___ 100 or more

Thank you for completing this questionnaire.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PROCEDURES FOR THE RANDOM SELECTION OF ATTORNEYS
TO RECEIVE THE CJRA SELF-EXECUTING DISCLOSURE QUESTIONNAIRE

The first step was selecting all counsel of record in all civil cases filed from January 1, 1992 to January 1, 1994, excluding Special Management Track Cases, Pro Se Cases, Habeas Corpus Cases, Bankruptcy Appeals and Social Security Cases. Counsel was selected on pending and terminated cases. This selection criteria produced a file of approximately 78,000 names sorted alphabetically.

The next step was removing all duplicate attorney names. If an attorney represented more than one party in a case, his/her name appeared for each party represented. The next step was to verify addresses for attorneys listed with more than one address. After removing all duplicate names and verifying addresses a total of 8,703 names remained.

A starting countdown number of "two" was selected randomly. Therefore, starting with the second name on the list every other name was selected until a total 4,300 names were selected.

PROTOCOL FOR INTERVIEWS OF JUDGES
January 1995

Name of judge_____ Name of interviewer_____

Date of interview_____

Time interview commenced _____ Concluded_____

NOTE TO INTERVIEWER: Except when the instructions specify otherwise, this Protocol is intended as a text that you can use verbatim. Having the questions posed to the judges in substantially the same form is designed to assure uniformity.

I. INTRODUCTION AND PRELIMINARIES

1. Thank the judge in your own words for his or her willingness to be interviewed.

2. I am asked to begin with a statement of how we are using certain terms: the terminology has been anything but uniform. What we have termed "self-executing disclosure" is sometimes referred to simply as "disclosure" or "voluntary exchange of information among litigants and their attorneys." It is to be distinguished from "discovery," the process of using interrogatories, depositions, requests for admission, and other formal mechanisms for gaining information from one's adversary.

3. I am also asked to mention that the term "self-executing disclosure" as used in this interview refers to the obligation imposed by Section 4.01 of the Plan promulgated by the United States District Court for the Eastern District of Pennsylvania under the Civil Justice Reform Act of 1990.

4. This means, of course, that this interview does not apply to any cases assigned to the Special Management Track, because special procedures govern those cases. However, if at any point in the interview you think it would be helpful to mention your experience with such cases, please do so, simply indicating that you are drawing on experience with a Special Management Track case or one involving what we call "complex litigation."

II. MOTIONS RELATING TO SELF-EXECUTING DISCLOSURE

1. Has any party made any motion in a case before you addressed to any aspect of the rule governing "self-executing disclosure"?

(If more than one motion, elicit the relevant information concerning each such motion, unless too numerous. In that event, elicit the information for three such motions, preferably the most recent three, and also inquire as to total number of motions made. If more than one motion was made in any one case, please so indicate.)

2. If so, which party made the motion? What relief did the movant seek?

3. What was the ruling on the motion? (If it was withdrawn, so specify.)

4. In which of the following categories was that case?

___ Contract-Insurance
___ Other contract
___ Personal injury
___ Tort-Personal Property
___ Prisoner petitions
___ Other civil rights
___ Labor
___ Social Security
___ Other

5. When was the case terminated?

___ Before self-executing disclosure
___ After self-executing disclosure but before full discovery
___ After full discovery but before trial
___ During the trial
___ After the trial

6. How was the case terminated?

___ By settlement or other voluntary dismissal
___ By verdict or judicial action

7. How would you characterize the level of compliance of the party against whom the motion was directed?

___ Full
___ Partial
___ Minimal
___ None
___ Not applicable

8. How would you characterize the movant's level of compliance with the self-executing disclosure rule?

___ Full
___ Partial
___ Minimal
___ None
___ Not applicable

2. Of these cases, in what percentage was the self-executing disclosure rule followed to any extent by any party?

___ Less than 10%
___ 10% up to 30%
___ 30% up to 70%
___ 70% up to 90%
___ More than 90%
___ This is just a rough estimate
___ I have no basis for making any estimate

3. Assuming a rule requiring some kind of self-executing disclosure will remain, what are your feelings about the following

	Strongly Favor	Mildly Favor	Neutral	Mildly Oppose	Strongly Oppose
• Permit a party to institute discovery without awaiting any developments with respect to self-executing disclosure	___	___	___	___	___
• Permit a party to institute discovery once the party has made its self-executing disclosures without necessarily waiting for the opposing party's self-executing disclosure.	___	___	___	___	___
• Define more specifically to what the obligation of disclosure applies.	___	___	___	___	___
• Expand to what the obligation of disclosure applies.	___	___	___	___	___

4. What is your opinion of the current self-executing disclosure?

___ Strongly in favor
___ Mildly in favor
___ Indifferent
___ Mildly against
___ Strongly against

5. Do you think a self-executing disclosure rule should remain in effect in this court?

___ Yes ___ No

6. In general, I believe that the average member of the bar's knowledge of the self-executing disclosure rule is best characterized as follows:

___ Is unaware of the rule
___ Has general knowledge of the existence of the rule
___ Has working knowledge of the rule
___ Knowledge of the rule varies from case to case
___ Knowledge of the rule varies too much to make any generalization useful

7. Do you think that the obligation to disclose under the self-executing disclosure rule

(a) causes problems with clients?
___ Yes ___ No

(b) raises questions of confidentiality?
___ Yes ___ No

(c) results in reducing the cost of litigation?
___ Yes ___ No

(d) results in reducing delay?
___ Yes ___ No

(e) results in increasing delay?
___ Yes ___ No

(f) is frequently not complied with because each side expects no compliance or minimal compliance from the other side?
___ Yes ___ No

(g) is frequently not complied with because individual judges are viewed as unsympathetic to the rule?
___ Yes ___ No

8. (a) Do you have any additional comments concerning self-executing disclosure?

(b) Do you have any suggestions for modification of the rule, if the rule is to remain in effect?

Thank the judge in your own words for helping the Advisory Group.