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A Progress Report in Automatic Disclosure in the Federal Districts

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A PROGRESS REPORT ON AUTOMATIC DISCLOSURE IN THE FEDERAL DISTRICTS

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In December, 1993, I suggested to readers of Federal Rules Decisions that they might encounter difficulty finding certain new federal civil procedures which became effective on December 1, 1993, while I offered some suggestions for locating those procedural requirements. [1] The most controversial of the new amendments in the Federal Rules of Civil Procedure, providing for mandatory prediscovery, or automatic, disclosure, specifically permitted each of the ninety-four federal districts to prescribe local procedures which differ from the new Federal Rules revision or to eschew completely the new revision. [2]

This provision for local variation, commonly denominated opt-out, means that counsel must consult the local procedural requirements that apply in every federal district in which the attorneys practice. The local procedures which are applicable may appear in local rules, in general or standing orders, or in civil justice expense and delay reduction plans that all districts promulgated by December 1, 1993 under the Civil Justice Reform Act of 1990. It would be fair to assume that the Federal Rules amendment which took effect on that same date applies in those districts which have not provided for automatic disclosure in any of the sources mentioned above.

When my article went to press in early December, 1993, developments involving automatic disclosure in the federal districts were very much in flux. [3] For instance, I reported that a number of districts apparently had promulgated, were in the process of promulgating, or were considering promulgating, local rules or orders treating automatic disclosure. I also observed that, when Congress reconvened in late January, 1994, it might ***230** enact a statute which would modify the new Federal Rules revision governing automatic disclosure.

Some of that uncertainty which prevailed at the beginning of 1994 has now decreased. For example, it is presently clear that Congress will not alter the new Federal Rules amendment prescribing disclosure. As late as early spring, however, there continued to be discussion of that possibility, especially among plaintiffs' trial lawyers, civil rights organizations and certain defense counsel and interests. These individuals and entities were instrumental in preventing congressional passage of H.R. 2814, a bill which would have delayed the December 1, 1993 implementation of the Federal Rules amendment relating to disclosure. [4]

At this juncture, the status of automatic disclosure in the federal districts has also clarified somewhat. For instance, an April 1994 survey performed by the Washington, D.C. offices of the Kirkland and Ellis law firm indicated that thirty-eight districts have subscribed to the Federal Rules amendment in Rule 26(a)(1). [5] Fifty-three districts opted out, although thirty-two districts had varied the Federal Rules amendment with a local alternative and twenty-one districts rejected automatic disclosure altogether. [6] A March 1, 1994 summary compiled by the Federal Judicial Center, the research arm of the federal courts, yielded rather similar results. [7] It is important to remember that approximately half of the districts which initially chose to opt out had not finally decided whether to impose some form of automatic disclosure as of April, 1994.

Enhanced clarity regarding the above matters does not relieve attorneys of the responsibility to consult the provisions applicable to automatic disclosure in every district where they practice. Counsel must still find the procedures in local rules, civil justice plans, or orders, interpret what they require and comply with the relevant provisions.

A final area of uncertainty involves the question whether automatic disclosure is effective. Several factors complicate efforts to ascertain accurately the procedure's efficacy. First, the districts are applying a number of different disclosure mechanisms. Second, few districts have experimented with the disclosure technique for enough time to yield very conclusive evaluation of its effectiveness. Examples of these two factors are that most of the approximately twenty districts which have employed disclosure for the longest period have relied on procedures that conflict with the new Federal Rules revision. [8] Third, very little empirical information about disclosure's efficacy has been collected, analyzed and synthesized. ***231** These considerations may explain why annual assessments of the procedure's effectiveness in a few districts yielded inconclusive results. [9]

There is, however, some anecdotal evidence which indicates that disclosure is working comparatively well in certain circumstances. [10] The procedure seems to function most efficaciously in situations in which disclosure remains rather general and in cases that are relatively simple or routine, such as automobile accident litigation. Unfortunately, discovery poses the greatest problems and requires the most effective reform in complex cases, such as civil rights class actions and products liability lawsuits, and when litigants need comparatively specific information.

Additional anecdotal material suggests that attorneys are less opposed to automatic disclosure once they have acquired some familiarity with the procedure. [11] Numerous lawyers apparently have found that disclosure principally demands that attorneys and their clients participate in certain activities, especially document retrieval and labelling, at an earlier juncture in lawsuits.

Other anecdotal information indicates that disclosure adds an additional layer of discovery to litigation. A number of counsel have also contended that disclosure can create ethical difficulties with their clients. Finally, Federal Rule 26(a)(1)'s language, which requires the disclosure of information “relevant to disputed facts alleged with particularity in the pleadings” could conflict with the notice pleading system of the Federal Rules. [12]

In sum, several specific aspects of automatic disclosure's application in the federal district courts have become clearer in the last nine months, although attorneys must still consult and conform to local procedural provisions governing disclosure in all districts in which they practice. The effectiveness of disclosure presently remains uncertain but will probably clarify as judges, lawyers and litigants acquire experience with the procedure and as it receives rigorous evaluation.

The views expressed are those of the author and do not necessarily reflect the views of the publisher.

Footnotes

a Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Third Branch personnel, particularly in the Administrative Office of the U.S. Courts and the Federal Judicial Center, for their tireless willingness to answer my civil justice reform inquiries, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Much included in this essay is premised on conversations with numerous individuals who are familiar with civil justice reform. Errors that remain are mine.

1 *See* Carl Tobias, *Finding the New Federal Civil Procedures*, 151 F.R.D. 177 (1993).

2 *See* FED. R. CIV. P. 26(a)(1). *See generally* Griffen B. Bell et al., *Automatic Disclosure in Discovery-The Rush to Reform*, 27 GA. L. REV. 1 (1993). Carl Tobias, *In Defense of Experimentation with Automatic Disclosure*, 27 GA. L. REV. 665 (1993).

3 I rely in this paragraph on Tobias, *supra* note 1.

4 *See* John Flynn Rooney, *Discovery Rule Lacks Uniformity, is "Source of Confusion": Critics*, CHICAGO DAILY L. BULL., Apr. 23, 1994, at 17; Carl Tobias, *Automatic Disclosure: Let It Be*, LEGAL TIMES, Jan. 31, 1994, at 25. *See also* Randall Samborn, *New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 3.

5 *See* Rooney, *supra* note 4.

6 *See id.*

7 *See* Donna Stienstra, Implementation of Disclosure in Federal District Courts, with Specific Attention to Selected Amendments to Federal Rule of Civil Procedure 26 5-6 (Mar. 1, 1994), *reprinted in* 154 F.R.D. at LVII.

8 *See* Tobias, *supra* note 1, at 178.

9 *See, e.g.*, Annual Report of the Civil Justice Reform Act Advisory Group of the Eastern District of New York 3, 5-8 (Jan. 25, 1994); Report on the Impact of the Cost and Delay Reduction Plan Adopted by the United States District Court for the Southern District of Texas 13-15 (Apr. 6, 1993). *But cf.* Rooney, *supra* note 4 (automatic disclosure apparently working well in Southern District of Illinois).

10 The assessment in the next three paragraphs is primarily premised on conversations with individuals who are familiar with automatic disclosure in the Districts of Arizona, Massachusetts and Montana and in the Arizona state courts. *See also* Robert D. Myers, *Mad Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11, 16-17, 20-26 (1993).

11 This proposition is based on the conversations *supra* note 10.

12 *See* FED. R. CIV. P. 26(a). *See also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). *See generally* Carl Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS. L. REV. 357 (1994); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 296-301 (1989).

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