

LEADING HORSES TO WATER: THE IMPACT OF AN ADR “CONFER AND REPORT” RULE*

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This study examines the effects of a rule requiring lawyers to confer with opposing counsel regarding settlement and ADR early in litigation and to report the results of that discussion to the court. A comparison of civil litigators' practices before and after the rule was adopted showed no apparent increase in early discussions or in early settlements, the rule's ultimate goal. Enforcing the requirement to report to the court did not seem to affect whether lawyers held early discussions, but did seem to increase the likelihood that lawyers filed that report. The article concludes by exploring what the findings of this and other studies suggest about the potential effectiveness of “confer and report” rules as well as other means of facilitating earlier discussions and settlements.

Rule 16(g) of the Arizona Rules of Civil Procedure was amended in December 2001 to promote the early consideration of settlement and the use of alternative dispute resolution (ADR) processes to facilitate earlier settlements. Rule 16(g)(2) now requires parties, within ninety days following the first appearance of the defendant, to confer about the possibilities for a prompt settlement and whether an ADR process might be helpful in resolving the case and to report the outcome of that discussion to the court within thirty days thereafter. In addition, courts are empowered to conduct conferences to discuss whether the parties might benefit from using ADR in cases where the parties failed to agree on the use of a specific ADR process.

The amendment was designed to address a perceived problem in case processing: although the vast majority of cases are resolved without a trial, many settle on the courthouse steps (Hyman et al., 1993; Galanter, 2004). The premise underlying the amendment was that forcing early consideration of settlement and ADR would resolve cases earlier. Thus, while the immediate objective of the amendment was to make parties consider ADR and settlement early in litigation, its ultimate goal was to advance the early settlement of lawsuits, thus saving both the litigants and the courts the expense of protracted litigation. Intermediate goals included enhancing lawyers' and judges' knowledge of ADR processes, encouraging early judicial intervention when the parties were unable to settle or to agree on an ADR process, and increasing voluntary use of ADR.

The present study examined whether the new Rule accomplished these goals. Although the Rule also applied to family and limited-jurisdiction court cases, the study focused on general civil cases. Inquiry was limited to the two most populous counties in Arizona—Maricopa (Phoenix metropolitan area) and Pima (Tucson met-

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ropolitan area); together they accounted for 85 percent of the civil, nonfamily cases filed in the state (Arizona Supreme Court, 2004). The effect of differences in these two courts' enforcement of the Rule's reporting requirement was also examined. The findings of the present study are potentially applicable to other jurisdictions, as several state courts require opposing counsel to confer about ADR and report to the court, and some federal district courts explicitly require attorneys to discuss ADR with opposing counsel at the Rule 26(f) conference and to report their decisions as part of the discovery management plan they must file with the court.¹

A comparison of the present findings with those of a similar study in Minnesota (McAdoo, 2002) suggests that mandatory "confer and report" rules do not achieve their goals of increasing early discussions of ADR and settlement. Accordingly, we conclude by exploring research findings regarding the potential effectiveness of other means of facilitating early discussions and settlements, including early conferences, other forms of active court management of the pretrial process, and referral to ADR.

IMPLEMENTATION OF THE RULE

The Rule requires opposing counsel, or unrepresented parties, to confer within ninety days of the answer and specifies what information they must report to the court about the results of their discussions. This includes whether the parties agreed to participate in an ADR process, agreed ADR was not appropriate, or were unable to agree on a specific process, and whether they requested a conference to discuss ADR. The Arizona Supreme Court prescribed a specific form, the Joint ADR Statement, for this reporting requirement.

We interviewed judges and court administrators in both Maricopa and Pima counties in the summer of 2003 to learn how the Rule had been implemented. In Maricopa County, the court did not monitor or enforce the reporting requirement. In Pima County, however, calendaring services staff reviewed each case at the time the Joint ADR Statement was due. If a Joint ADR Statement had not been filed, staff informed the judge, who subsequently issued a form minute entry threatening sanctions if the Statement was not filed within thirty days.² In neither court, however, did court staff or judges systematically review the filed Statements or take action based on the information contained in them, such as to refer cases to court-connected ADR. Initially, court staff in Pima County scheduled settlement conferences when parties had indicated on the Joint ADR Statement that they agreed to participate in that process, but this practice was discontinued because lawyers routinely sought to postpone or cancel the conference. And although the Rule provided a mechanism for judges to get involved in the discussion of ADR processes at an early stage if the parties had not agreed to use a specific process, they rarely did.

¹ See, e.g., Rule 26(f), Alaska R. Civ. Proc.; Local Rule 16.6(b), Northern District of Indiana; Local Rule 16.1(D)(3)(b), District of Massachusetts; Rule 114, Minnesota Gen. R. Prac.

² The court discontinued this practice at some point after this study was completed.

Instead, judges in both counties generally continued their usual pre-Rule practice of not meeting with the lawyers to discuss settlement and ADR until the comprehensive pretrial conference, which typically occurs late in the litigation, at or near the end of discovery. Some judges simply inquired whether ADR had been attempted and offered court services if it had not been. Other judges, however, told lawyers in advance that they were expected to have completed some type of ADR process, or to at least have one scheduled, by the time they appeared at the pretrial conference. Most judges in the latter category would not give the parties a trial date unless and until they had completed some form of ADR. Judges generally felt that early judicial intervention in the decision to participate in ADR was a good idea but that their caseloads could not handle that additional burden. There were two circumstances under which judges would discuss settlement and ADR with lawyers earlier in the case: if they met with the parties for some other purpose, such as to hear a motion or resolve a discovery dispute, or if the case was a type in which early scheduling conferences were routinely conducted, such as medical malpractice.

In both counties, court-connected ADR is dominated by two processes: compulsory, nonbinding arbitration for cases below \$50,000 (Rules 72-76, Ariz. R. Civ. P.) and voluntary settlement conferences. Although some (e.g., Brazil, 2000) argue that a settlement conference should not be considered an "alternative" because it is part of the traditional litigation process, most Arizona judges consider it a form of ADR, and it is listed as an ADR process on the Joint ADR Statement. Parties may request a settlement conference after they have filed a motion to set the case for trial; when one party makes such a request, the court requires both parties to participate. The court may also schedule a settlement conference on its own motion. Maricopa County's settlement conference program is administered by its ADR Programs Office, and the conferences are conducted primarily by volunteer lawyers serving as judges pro tem or by court commissioners. In Pima County, by contrast, judges conduct over half of the settlement conferences, and judges pro tem conduct the rest. The courts also offer voluntary "shorttrials" or summary jury trials,³ but those processes are used in only a few cases each year. Judges in both counties report that attorneys regularly use private mediators; although encouraged by some judges, this practice is conducted without judicial oversight or court regulation.

SURVEY PROCEDURE AND RESPONDENT CHARACTERISTICS

The primary source of data for this article consisted of questionnaires mailed to all members of the Trial Practice Section of the State Bar of Arizona; additional data sources are described below. We selected the Trial Practice Section because we assumed this group of lawyers would devote a substantial portion of their practice to

3. "Shorttrial" differs from summary jury trial in that the former involves a four-person jury that renders a binding verdict (Skelly, 1999), while the latter involves a six-person jury that renders a nonbinding verdict (Lambros, 1986). In practice, however, these terms are often used interchangeably by judges, court staff, and lawyers.

civil litigation and, thus, would be the group for whom questions about settlement and ADR use in civil cases would be most relevant. Information on these civil litigators' practices and views regarding settlement and ADR was collected in June 2001, during the comment period for the proposed amendment to Rule 16(g) ("pre-Rule"), and again in November 2003, after the amendment to Rule 16(g) had been in effect for almost two years ("post-Rule").

The response rates for the two surveys were 45 percent and 35 percent, respectively. A small number of respondents who spent less than half of their time on civil litigation were subsequently excluded on the assumption that they would provide less informed judgments than lawyers whose practice involved a greater proportion of civil litigation. The findings for Maricopa County were based on 348 lawyers in the pre-Rule survey and 288 in the post-Rule survey. The findings for Pima County were based on 64 lawyers in the pre-Rule survey and 45 in the post-Rule survey. The lawyers devoted, on average, 93 percent of their practice to civil litigation. Fifty-four percent said the majority of their civil litigation practice was in the tort or personal injury area, with those lawyers approximately evenly divided between plaintiff and defense representation; 43 percent practiced primarily in business or commercial litigation; and 4 percent practiced in other areas. The lawyers who responded to the pre- and post-Rule surveys did not differ in terms of their area of practice or the percentage of their practice devoted to civil litigation. Unless otherwise noted in the text, there were no differences in the responses of lawyers in the two counties.

Although the questionnaire was sent to the same population of lawyers in both the pre- and post-Rule surveys, we could not compare any individual lawyer's responses to the two surveys. Accordingly, we report here whether there was a change from pre-Rule to post-Rule for the lawyers as a group. Of course, any differences observed between the pre- and post-Rule surveys are not necessarily a result of the Rule but could instead be a product of other changes in legal practice that occurred during that time period. Because there were pre-Rule differences between the two counties in lawyers' practices and views, we could not examine the impact of differences between the counties in their enforcement of the reporting requirement by simply comparing the post-Rule responses of lawyers in the two counties. Instead, we conducted statistical analyses that permitted us to examine whether the observed pre- to post-Rule patterns—an increase, a decrease, or no change over time—differed between the counties. Thus, we examined the joint effect of the two factors—time period and county—as well as their independent effects. In all of the analyses conducted in the present study, the two counties had a similar pattern of change, or lack of change, from pre- to post-Rule.

COMPLIANCE WITH THE RULE: CONFERRING AND REPORTING

We examined compliance with the Rule by assessing how often lawyers filed the Joint ADR Statement with the court and how often they conferred with opposing counsel about settlement and ADR within the time period prescribed by the Rule. We also

Table 1
How Often Lawyers Reported Filing Joint ADR Statements, by County

Percentage of cases	Maricopa	Pima
none of their cases	23 %	9 %
less than 50% of cases	41	21
50% to 74% of cases	15	20
75% to 99% of cases	10	14
all of their cases	11	36
County: $p < .001$		

examined whether Pima County’s enforcement of the Rule’s reporting requirement produced greater compliance.

Lawyers did not routinely file the Joint ADR Statement (see Table 1). Only half of the lawyers in Pima County and 21 percent in Maricopa County filed the Statement in three-fourths or more of their cases. Consistent with the differences between the two counties in their practice regarding enforcement of the reporting requirement, lawyers in Pima County filed the Joint ADR Statement in a larger proportion of their cases (62 percent, on average) than did lawyers in Maricopa County (34 percent, on average).⁴ Thus, enforcement of the reporting requirement appeared to increase the frequency with which lawyers filed the Joint ADR Statement.

A review of the computerized case files of all tort and contract cases filed in Pima County in January 2003 showed a degree of compliance with the reporting requirement similar to that in the post-Rule survey. Our examination was limited to tort and contract cases because in other case types, primarily nonclassified civil cases, the case usually concluded before the parties would have been required to file a report under the Rule. In Pima County, the Joint ADR Statement was filed in 59 percent of the 170 applicable cases, that is, cases in which there was an answer to the complaint and the case was still pending 120 days thereafter. There were no differences among the major case types in terms of the proportion of cases in which the Statement was filed. Compliance in Maricopa County could not be examined because, at the time of the study, the court did not have a unique docket code to indicate that the Joint ADR Statement had been filed.

Lawyers were divided as to whether they thought the court should enforce the requirement that they file the Joint ADR Statement: 40 percent thought the reporting requirement should be enforced, 34 percent thought it should not be enforced,

⁴ Only the p values for those analyses that achieved statistical significance are presented. Full information on all statistical analyses conducted is available from the authors.

Table 2
Reported Frequency of Early Settlement Discussions, by County and Time

Frequency	Maricopa		Pima	
	Pre-Rule	Post-Rule	Pre-Rule	Post-Rule
never or hardly ever	6 %	8 %	3 %	7 %
sometimes	41	40	49	53
often	35	35	33	20
always or almost always	18	17	14	20

and 26 percent were neutral.⁵ Lawyers in Maricopa and Pima counties did not differ in their views of whether the reporting requirement should be enforced, even though the counties differed in their actual enforcement.

The Rule specified that opposing counsel were to confer about settlement and ADR within ninety days after the defendant's first appearance, such as filing an answer or motion to dismiss. Lawyers did not routinely confer within the prescribed time frame (see Tables 2 and 3). Subsequent to the Rule amendment, about half of the lawyers often or always discussed settlement and about one-third often or always discussed ADR during this time frame. Thus, as many or more lawyers never or sometimes held early discussions as did so often or always.

Importantly, there was no apparent increase in the frequency of early discussions of settlement or ADR following the Rule amendment. And although the counties differed in their enforcement of the reporting requirement, they did not have different pre- versus post-Rule patterns of early discussions. It is possible, however, that no differences were found because the scale used for both measures of the frequency of early discussions consisted of broad categories, such as "sometimes" and "often," that might not have been sufficiently sensitive to detect differences. That is, a lawyer who said she or he "often" held early discussions both before and after the Rule amendment might nonetheless have had in mind a somewhat different proportion of cases during the two time periods.

The lack of frequent early ADR discussions did not reflect lawyers' views regarding the usefulness of discussing ADR options early in litigation. Over half of the lawyers in the post-Rule survey (56 percent) felt it generally was worthwhile to discuss ADR with opposing counsel before discovery was completed. Twenty percent, however, did not think it was worthwhile, and 24 percent were neutral. In addition, 56 percent of lawyers felt they *should* be required to discuss ADR early in litigation.

⁵ Survey questions that asked lawyers for their views, like this one, consisted of a 5-point scale with the end-points labeled "strongly disagree" and "strongly agree." In this article, we refer to lawyers who chose the mid-point, "3," as being "neutral" on that question.

Table 3
Reported Frequency of Early ADR Discussions, by County and Time

Frequency	Maricopa		Pima	
	Pre-Rule	Post-Rule	Pre-Rule	Post-Rule
never or hardly ever	16 %	15 %	18 %	21 %
sometimes	47	48	64	46
often	30	30	13	16
always or almost always	6	6	6	16

In contrast, 28 percent of lawyers felt that early ADR discussions should not be required, and 16 percent were neutral. Lawyers' views regarding this policy did not differ over time or between the counties.

To explore the outcomes of these early conferences between opposing counsel, we reviewed all Joint ADR Statements filed in civil cases initiated in Pima County during the first two months of 2003. Of the 189 cases in which Joint ADR Statements were filed, 49 percent were subject to compulsory court-connected arbitration and 51 percent were not. We report the findings separately for these two groups of cases, as their standard route of case processing differs. We were unable to examine the Statements in Maricopa County because they could not be systematically retrieved by the court. Accordingly, these findings apply only to cases in which Pima County lawyers conferred and reported as prescribed by the Rule.

In 57 percent of the cases not subject to compulsory arbitration, the parties agreed to use a specific ADR process. In most of these cases (74 percent), the parties agreed to use mediation; they selected each of the other ADR processes listed on the Joint ADR Statement—shorttrial, summary jury trial, judge pro tem, binding arbitration, or early neutral evaluation—in less than 5 percent of cases. However, because many Arizona judges and lawyers use the terms “mediation” and “settlement conference” interchangeably, some of the respondents who specified “mediation” might actually have had a settlement conference in mind. In 14 percent of cases, one party wanted to use ADR and the other did not. In 29 percent of cases, both parties agreed that ADR was not appropriate. The most common reason lawyers gave for why ADR was not appropriate (in 47 percent of cases) was that discovery or disclosure was not yet completed. Other reasons counsel gave for why ADR was not appropriate included that they thought they could settle the case without a third party, a motion was pending, mediation had already been tried without success, liability was disputed, one side was waiting for a reply from the other side, or the issues or damages sought did not lend themselves to ADR. Lawyers in a few cases said that ADR would be reconsidered at a later time.

In only 16 percent of the cases subject to compulsory arbitration, the parties agreed to use an ADR process other than court-connected arbitration; in most of

these cases (73 percent), the parties chose mediation.⁶ In 75 percent of cases, the parties agreed that an ADR process other than arbitration was not appropriate. In 9 percent of cases, one party wanted to use an ADR process other than arbitration and the other party did not. The reason lawyers gave most frequently for not selecting another ADR process (52 percent) was that they felt court-connected arbitration was the most appropriate process for their case. Thus, when their cases already were subject to court-connected arbitration, few parties were willing to commit, early in the litigation, to using a different ADR process.

Consistent with the fact that in a majority of cases not subject to compulsory arbitration there was agreement to use ADR, a majority of lawyers (56 percent) felt it was worthwhile to discuss ADR with opposing counsel before discovery was completed, as noted earlier. Even though a prominent reason lawyers gave for not agreeing to use ADR was that discovery or disclosure had not been completed, they should have had basic information about their case when they conferred. Parties are required to disclose the factual and legal bases of their claims and defenses and to exchange witness lists and relevant documents within forty days after the defendant files an answer, which is eighty days *before* they are required to report their discussions to the court under the Rule. Even at this late date, lawyers in the post-Rule survey indicated that the required initial exchange of disclosure statements had occurred in only 70 percent of their cases, on average. Lawyers in the post-Rule survey indicated that the required initial exchange of disclosure statements had occurred within 120 days of the answer in 70 percent of their cases, on average. Thus, although it appears that the disclosure exchange does not occur when it should in all cases, lawyers were likely to have basic information about the majority of their cases before they discussed settlement possibilities and ADR options.

Counsel in only 5 of the 189 cases (3 percent) in Pima County in which the Joint ADR Statement was filed requested a conference to discuss ADR. Interestingly, almost half of the lawyers (46 percent) in the post-Rule survey felt that the court should *require* lawyers to attend a pretrial conference to discuss ADR when they cannot agree on an ADR process. Thirty-four percent of lawyers, however, felt that such a conference should not be required, and 20 percent were neutral on this issue. Lawyers' views regarding this policy did not differ over time or between the counties.

WERE THE RULE'S GOALS ACHIEVED?

In the first two years it was in effect, the Rule's primary goal of increasing early settlements was not achieved. There was no apparent increase in the frequency of early

⁶ One year before Rule 16(g) was amended, the rules governing compulsory arbitration of civil cases were modified to require counsel to "confer regarding the feasibility of resolving their dispute through another form of alternative dispute resolution" (Rule 72(d), Ariz. R. Civ. P.). The amended Rule 72(d) also provided that "[t]he court shall waive the arbitration requirement if the parties file a written stipulation to participate in good faith in an alternative dispute resolution proceeding, and the court approves the method selected by the parties." The Joint ADR Statement filed under Rule 16(g)(2) certainly could serve as the stipulation required to waive arbitration, but neither the courts nor the parties appeared to treat it as such.

Table 4
Reported Rate of Settlement Before Discovery Was Completed,
by County and Time

Frequency	Maricopa		Pima	
	Pre-Rule	Post-Rule	Pre-Rule	Post-Rule
never or hardly ever	9 %	12 %	12 %	11 %
sometimes	47	43	50	52
often	39	38	33	32
always or almost always	5	7	5	4

settlements following the Rule amendment, and no difference between the counties in pre- versus post-Rule patterns of early settlements (see Table 4). It is possible, however, that no differences were found because the scale used for the frequency of settlements might not have been sufficiently sensitive to detect differences. Fewer than half of the lawyers in the post-Rule survey reported that their cases often or always settled before discovery was completed.

We next examined whether several intermediate goals of the Rule were achieved. There was no improvement following the Rule amendment in lawyers' perceived ability to explain ADR processes to clients, and no difference between the counties in pre- versus post-Rule patterns of familiarity with ADR. Virtually all lawyers (94 percent to 99 percent) in the post-Rule survey said they could explain mediation, arbitration, or judge pro tem settlement conference well or very well, and 52 percent to 68 percent said they could explain early neutral evaluation, shorttrial, or summary jury trial well or very well. A majority of lawyers (61 percent) said they had enough information on ADR providers or programs to make an informed selection, whereas 15 percent felt they did not have enough information, and 24 percent were neutral.

When the amended Rule went into effect, a number of continuing legal education (CLE) seminars were conducted about the Rule and about ADR generally. Arizona lawyers are required to complete fifteen hours of CLE each year. Lawyers who responded to the survey reported that, in the two years after the Rule was amended, they attended CLE courses related to ADR for four hours, on average. Fifteen percent of lawyers attended over six hours of ADR-related CLE courses during that time period, 25 percent attended four to six hours, and 24 percent attended one to three hours. Over one-third of lawyers (36 percent) did not attend an ADR CLE course in the two years following the Rule amendment. Because there were no data regarding CLE attendance before the Rule amendment, however, we do not know whether this ADR-related CLE attendance is similar to the rate of pre-Rule attendance or represents a post-Rule increase.

One might expect that the Rule would reduce lawyers' concerns that proposing ADR would be viewed as a “sign of weakness” because they would be able to attrib-

Table 5
Lawyers' Reports of How Often Judges Suggested Using Voluntary ADR,
by County and Time

Percentage of cases	Maricopa		Pima	
	Pre-Rule	Post-Rule	Pre-Rule	Post-Rule
less than 1/4 of cases	36 %	21 %	55 %	39 %
1/4 to less than half of cases	17	11	9	11
half to less than 3/4 of cases	19	23	9	11
3/4 to all of cases	29	45	27	39

Time: $p < .001$; County: $p < .05$.

ute their discussions to the Rule rather than to client interests. However, there was no change following the Rule amendment in lawyers' views of whether other lawyers thought suggesting ADR signaled weakness. And despite the difference between the counties in their enforcement of the reporting requirement and, thus, the extent to which ADR discussions could be attributed to court enforcement, there was no difference between the counties in pre- versus post-Rule patterns of sign-of-weakness concerns. In the post-Rule survey, over half of the lawyers (55 percent) did not think other lawyers viewed proposing ADR as a sign of weakness, while 14 percent did and 31 percent were neutral.

A majority of lawyers in the post-Rule survey in both counties (60 percent in Maricopa County and 71 percent in Pima County) thought the benefits of using ADR processes outweighed the costs. Surprisingly, however, lawyers were *less* likely post-Rule than pre-Rule to say the benefits of ADR outweighed the costs. Views of ADR declined over time to a similar degree, by 10 to 15 percent, in both counties; overall, lawyers in Pima County had more favorable views than did lawyers in Maricopa County.⁷ In addition, a majority of lawyers (56 percent) in the post-Rule survey felt that mediation is productive in cases where the parties have significant disagreements concerning the value of the case. In contrast, 26 percent of lawyers thought mediation is not productive in these cases, and 18 percent were neutral on this question.

As noted earlier, judges did not take advantage of the provision in the Rule that permitted them to order an ADR conference, and few lawyers requested a conference. Nor did judges seem to change their practice of discussing settlement and ADR with parties late in litigation. However, according to lawyers' reports, judges were more likely to suggest the use of an ADR process post-Rule than pre-Rule; the frequency of suggesting ADR increased over time to a similar degree in both counties (see Table 5). Overall, judges in Maricopa County were more likely to suggest ADR to lawyers than

⁷ Time: $p < .05$; county: $p < .01$.

Table 6
Reported Frequency of ADR Discussions with Opposing Counsel,
by County and Time

Percentage of cases	Maricopa		Pima	
	Pre-Rule	Post-Rule	Pre-Rule	Post-Rule
less than half of their cases	28 %	17 %	17 %	14 %
half to less than 3/4 of cases	26	17	28	19
3/4 to 99% of cases	33	41	38	26
all of their cases	13	25	17	42
Time: $p < .01$; County: $p < .05$.				

were judges in Pima County. Subsequent to the Rule amendment, 68 percent of lawyers in Maricopa County and 50 percent in Pima County said judges suggested ADR in half or more of their cases.

Although lawyers did not appear more likely post-Rule than pre-Rule to confer with opposing counsel *early* in litigation, the frequency of their ADR discussions at *some time* did increase in both counties. Subsequent to the Rule amendment, approximately two-thirds of lawyers discussed ADR with opposing counsel in three-fourths or more of their cases (see Table 6). The frequency of ADR discussions increased over time to a similar degree in both counties. Overall, lawyers in Pima County were more likely to discuss ADR with opposing counsel than were lawyers in Maricopa County.

There are two possible explanations for the seemingly paradoxical findings that the frequency of ADR discussions at some point during litigation increased following the Rule amendment while the frequency of early discussions did not. One is simply that the measures might have differed in their ability to detect differences: the frequency of early ADR discussions was tracked using a small number of broad categories, whereas the frequency of any ADR discussions was tracked using a scale from zero to 100 percent. The second explanation is related to the frequency and timing of judicial suggestions regarding voluntary ADR use. As noted above, lawyers reported that judges were more likely to suggest ADR post-Rule than pre-Rule (see Table 5). However, because judges typically did not get involved in the early consideration of ADR and settlement, their encouragement could not affect *early* discussions.

Lawyers also were more likely post-Rule than pre-Rule to discuss the possible use of a voluntary ADR process with their clients. The frequency of ADR discussions increased over time to a similar degree in both counties and did not differ overall between the counties. Subsequent to the Rule amendment, approximately 85 percent of lawyers discussed ADR with clients in three-fourths or more of their cases, and just over half of the lawyers discussed ADR with clients in all of their cases (see Table 7). Post-Rule, almost half of the lawyers (46 percent) reported that when they dis-

Table 7
Reported Frequency of ADR Discussions with Clients, by County and Time

Percentage of cases	Maricopa		Pima	
	Pre-Rule	Post-Rule	Pre-Rule	Post-Rule
less than half of their cases	14 %	10 %	11 %	7 %
half to less than 3/4 of cases	12	7	11	7
3/4 to 99% of cases	33	28	39	32
all of their cases	41	56	39	54
Time: $p < .05$.				

cussed ADR with their clients, most wanted to use ADR. Nineteen percent of lawyers, however, said that most of their clients did not want to use ADR, while 36 percent were neutral.

Lawyers reported greater use of voluntary ADR processes post-Rule than pre-Rule; the frequency of ADR use increased over time to a similar degree in both counties. Overall, lawyers in Pima County were more likely to use ADR than were lawyers in Maricopa County. Following the Rule amendment, almost half (48 percent) of lawyers in Pima County and 37 percent of lawyers in Maricopa County used voluntary ADR in three-fourths or more of their cases (see Table 8). Almost two-thirds of the lawyers in both counties used voluntary ADR in half or more of their cases.

FACTORS RELATED TO EARLY SETTLEMENTS AND DISCUSSIONS

We explored the relationship between the Rule's intermediate objectives and early settlement using data from the post-Rule survey to examine whether the findings were consistent with the premises underlying the Rule. Although the relationships were small, lawyers who discussed settlement and ADR early in litigation in a larger proportion of their cases also said their cases were more likely to settle early (respectively, $p < .05$, $p < .001$). However, judicial encouragement of ADR use, lawyers' familiarity with ADR, and lawyers' use of voluntary ADR were not related to early settlements.

As noted in the prior section, the frequency of early ADR discussions did not appear to increase following the Rule amendment, while the frequency of ADR discussions at some point during litigation did increase. Using data from the post-Rule survey, we explored the extent to which a set of eight factors was related to how often lawyers discussed ADR early, as well as to how often they discussed ADR at any time in litigation. The factors were how often judges suggested ADR; how knowledgeable the lawyers were about ADR processes and providers; how often their cases that had used ADR settled; whether their clients were willing to use ADR; and their views on whether it was worthwhile to discuss ADR before discovery was completed, whether

Table 8
How Often Lawyers Reported Using Voluntary ADR Processes,
by County and Time

Percentage of cases	Maricopa		Pima	
	Pre-Rule	Post-Rule	Pre-Rule	Post-Rule
less than 1/4 of cases	34 %	16 %	25 %	20 %
1/4 to less than half of cases	23	20	17	16
half to less than 3/4 of cases	24	28	30	16
3/4 to all of their cases	20	37	28	48
Time: $p < .001$; County: $p < .05$.				

proposing ADR was seen as a sign of weakness, and whether ADR's benefits outweighed its costs.

It is interesting to note that the only factor that reflected timing considerations, namely, whether the lawyers felt it was worthwhile to discuss ADR with opposing counsel before discovery was completed, was the factor most strongly related to how often lawyers discussed ADR early in litigation ($p < .001$) and was more strongly related to early ADR discussions than to ADR discussions at any time ($p < .05$). And the factor most strongly related to how often lawyers discussed ADR with opposing counsel at some time during litigation, namely, that judges suggested ADR more often ($p < .001$), was not related to how often lawyers held early ADR discussions. The differential impact of judicial encouragement most likely can be explained by the fact that judges' involvement almost always occurred late in litigation and, thus, could affect whether lawyers discussed ADR but could not produce early discussions. Taken together as a group, the entire set of factors was less strongly related to how often lawyers discussed ADR with opposing counsel early in litigation than to how often they discussed ADR at some time, explaining 12 percent and 32 percent, respectively, of the variation in these measures. A similar pattern was observed in a prior analysis of the pre-Rule survey using a somewhat different set of factors (Wissler, 2004a). Thus, judges' encouragement and lawyers' familiarity with and views of ADR were more strongly related to how often lawyers discussed ADR with opposing counsel at some time during litigation than to how often they discussed ADR early in litigation. These findings would also suggest that other factors, possibly those that affect the timing of negotiations more generally, played a larger role in the timing of ADR discussions.

CONCLUSIONS AND IMPLICATIONS

The findings of the present study suggested that, two years after Arizona's adoption of its “confer and report” requirement, the ultimate goal of increasing the frequency of early settlements had not been achieved. This is not surprising, given that there was

no apparent change in the actions underlying the Rule's more immediate objectives: lawyers in civil litigation practice were no more likely post-Rule than pre-Rule to confer with opposing counsel about settlement and ADR within ninety days of the defendant's first appearance. Following the Rule amendment, only approximately one-third of lawyers often or always conferred about ADR, and approximately half often or always conferred about settlement, within that time period. This was the case, even though a majority of lawyers thought early ADR discussions were worthwhile and should be required. Half of the lawyers in Pima County and 21 percent of the lawyers in Maricopa County filed the required report of the outcome of their discussions in three-fourths or more of their cases.

We can compare the outcomes of the present study to those of a study of a "confer and report" rule in Minnesota, which involved a survey of lawyers about their civil practice two years after the rule was adopted (McAdoo, 2002). A provision of Minnesota's General Rules of Practice (Rule 114) required lawyers to give clients court-provided information on available ADR processes and qualified neutrals, to discuss ADR and other case management issues with opposing counsel, and to report the outcome of those discussions to the court within sixty days after the case was filed. That study did not examine whether Rule 114 was effective in achieving its ultimate goals of earlier and better settlements. However, the level of compliance with the rule's "confer" requirement was similar to that observed in the present study: 40 percent of lawyers usually or always conferred with opposing counsel about ADR within the prescribed time period, 33 percent sometimes did, and 26 percent never or rarely did.

Based on the findings of these two studies, "confer and report" rules do not seem to be effective, at least within two years of their enactment, in getting lawyers to routinely discuss settlement or ADR early in litigation. In the present study, Pima County's enforcement of the reporting requirement did not seem to affect whether lawyers held early discussions but did seem to increase the likelihood that lawyers filed that report. In McAdoo's (2002) study, lawyers in a county that devoted substantial resources to enforcement were more likely to discuss ADR within the prescribed time period. Without baseline data, however, it is impossible to determine whether this pattern was the result of differential enforcement of Rule 114 or differential pre-Rule practices in discussing ADR. And even in that county, just over half of the lawyers usually or always did so. Thus, enforcement of the reporting requirement did not seem to be effective in getting most lawyers to hold early discussions of settlement or ADR in most of their cases. Apparently "confer and report" rules, even when enforced, do not adequately address barriers to early discussions.

These findings require us to consider what the present study and other research suggest about the effectiveness of other means of increasing early discussions and settlements. Early court involvement might be more effective than the mere enforcement of "confer and report" rules. The present study found that judicial encouragement of ADR was related to more frequent ADR discussions but, because it usually came late in litigation, was not related to early discussions or early settlement.

McAdoo's (2002) study suggested that active judicial involvement, such as holding an early conference to discuss ADR or ordering the parties to select a process when they had not agreed on one, was related to increased ADR use.

A study found early mandatory "dispute resolution conferences" conducted by trained, volunteer lawyer neutrals rather than by judges to be effective (Maiman, Karraker, and Leighton, 1999). The purpose of the conference was to discuss ADR options and explore settlement possibilities; the line between this type of early conference and early neutral evaluation or early mediation sessions is not always clear. A majority of the neutrals reported spending some or a great deal of time during the conference discussing ADR options, sharpening or settling issues in dispute, and arranging the exchange of information. Although improvements were not seen on all measures in all counties, the conferences tended to produce slightly more and earlier settlements; to reduce the number of discovery events, motions, and pretrial hearings per case; and, based on limited data, to increase ADR use (Maiman, Karraker, and Leighton, 1999).

There are several reasons why an early conference to discuss settlement and ADR with a judge, magistrate judge, or other neutral third party might facilitate the early resolution of cases more effectively than a "confer and report" rule. First, the presence of a third party might further reduce strategic sign-of-weakness concerns that make it difficult for parties to initiate discussions about settlement and ADR (see, e.g., Folberg, Rosenberg, and Barrett, 1992; McEwen, Mather, and Maiman, 1994). Second, the conference could serve an educational function by providing attorneys with more information about different ADR processes and how they could contribute to resolving the case (McEwen, Mather, and Maiman, 1994; Maiman, Karraker, and Leighton, 1999; Brazil, 2001). McAdoo (2002) reported, for instance, that lawyers were more satisfied when judges assisted them in finding the "right" ADR process than when judges assigned them to a process without regard for the specifics of the case.

Third, the neutral could help lay the groundwork for more productive negotiations by helping parties overcome cognitive barriers to agreement, including the tendency to overestimate the likelihood of favorable outcomes, to be suspicious of proposals made by the other side, and to focus on losses rather than gains (Kahneman and Tversky, 1995; Sternlight, 1999; Ross, 1995). This applies not only to negotiating a settlement but also to negotiating the details of using ADR—whether to use it, which process or provider to use, and when—which can be difficult to agree upon even when both sides are willing to consider ADR (Wissler et al., 1992; McAdoo, 2002). By holding the conference early, it might also be possible to prevent or reduce the escalation of commitment and the contentious, strategic moves that often occur during the negotiation process and make it difficult to successfully discuss settlement or ADR (McEwen and Milburn, 1993; Mnookin and Ross, 1995; Lande, 1998). Several studies found that lawyers welcomed active judicial involvement in settlement discussions (Brazil, 1985; Hyman et al., 1993). And in the present study, almost half of the lawyers felt that a pretrial conference to discuss ADR should be required when they cannot agree on a specific process.

Fourth, merely having a court event with a deadline could help lawyers overcome logistical barriers associated with the routines of negotiation and litigation practice that make it difficult to start and to maintain negotiations. This feature of conferences may be the most critical to facilitating earlier settlements, given the pattern of findings in the present study that most lawyers eventually discussed ADR, and presumably settlement, with opposing counsel, although they did not do so early in litigation. In studies of settlement negotiations, a sizable minority of lawyers reported no exchange of offers and counteroffers, or no exchange of meaningful offers, until late in the case (Kritzer, 1991; Hyman et al., 1993). Lawyers' negotiation practices seemed to reflect inertia and the repetition of habitual patterns rather than planning and active management (Lande, 1998; McEwen, 1998; Macfarlane, 2002). As a result, lawyers in civil practice reported a large gap between their aspirations for quick settlements and their actual achievement of that goal (Hyman et al., 1993). Thus, an early conference that becomes part of the routine litigation and case management processes, such as under Rule 26(f) of the Federal Rules of Civil Procedure, might help get busy lawyers to assess the settlement and ADR potential of their cases earlier and, consequently, might facilitate earlier resolutions (McEwen, Mather, and Maiman, 1994; McEwen, 1998; Macfarlane, 2002).

Currently, courts that have early pretrial conferences to discuss settlement, ADR, and other case management issues typically hold the initial conference within 60 to 180 days after the complaint is filed, or within 35 to 90 days after the defendant's first appearance; opposing counsel typically are required to confer several weeks before the conference.⁸ In studies of judicial case management, courts were deemed to have exercised "early control" if they took some action within 180 days of case filing (Goerd, 1991; Kakalik et al., 1996). The optimal timing of early conferences to maximize their effectiveness is not clear. In the McAdoo (2002) study, some lawyers felt the 60-day post-complaint deadline by which they had to report their decision on ADR to the court was too early to choose an appropriate ADR process. In the present study, a majority of lawyers who conferred and reported to the court within 120 days of the answer reached an agreement to use a voluntary ADR process; among those who did not, however, almost half said it was because they had not yet completed disclosure or discovery.

The study by Maiman and colleagues (1999) permitted a comparison of the effectiveness of conferences held 180 days versus 90 days after the complaint was filed. The later conferences appeared to be more effective in increasing the rate of settlement and ADR use, but the earlier conferences appeared to be more effective in producing earlier settlements and reducing discovery events. The timing of the conference did not seem to affect lawyers' or parties' views of its usefulness in clarifying

⁸ See, e.g., Rule 16.1, District of Idaho Civil Rules; Rule 218(a), Illinois Supreme Court Rules; Local Rule 16.1(d)(1)(J), Southern District of Indiana; §60-216(b)(2), Kansas Court Rules and Procedures, Code of Civil Procedure.

and resolving issues, scheduling litigation events, and providing information about ADR, although some lawyers and neutrals thought the later conferences were more effective. Lawyers in another study thought that early judicial conferences helped initiate and streamline negotiations and discovery, but that traditional "settlement conferences" were more productive after discovery was substantially completed (Brazil, 1985). Several studies suggested that lawyers in cases involving contract or business litigation might be ready for a preliminary conference earlier than lawyers in personal injury or other tort cases (Goerdt, 1991; Macfarlane, 2002; Wissler, 2004a), as might lawyers in smaller cases (Brazil, 1985).

Early conferences, however, could delay or reduce the likelihood of resolution in cases that might otherwise be resolved early. The study by Maiman and colleagues (1999) found that the introduction of dispute resolution conferences seemed to slightly reduce the number of cases that settled during the time period before the conference was scheduled to take place. The introduction of mandatory court-connected arbitration also seemed to delay settlement discussions (Hanson and Keilitz, 1991). Several studies of mandatory mediation, however, suggested that the forthcoming mediation session stimulated earlier settlement discussions (McEwen, Mather, and Maiman, 1994; Macfarlane, 2002). These mixed findings raise the possibility that an early conference could be counterproductive for case types that typically are not contested or are settled or dismissed early.

Several studies found that the early and active court management of the pretrial process, especially the early and firm scheduling of case events and trial, played a major role in reducing time to disposition (Mahoney, 1988; Goerdt, 1991; Bufford, 1996) without increasing judge time spent on cases (Kakalik et al., 1996). In addition, ongoing court control (Mahoney, 1988; Goerdt, 1991), requiring a discovery plan (Kakalik et al., 1998), and setting a discovery cutoff date (Kakalik et al., 1996) reduced case disposition times. Pretrial conferences alone, when not accompanied by these other case management techniques, however, did not reduce the time to disposition (Kakalik et al., 1996).

Several studies suggested that early case management was more effective than referral to ADR in reducing the time to disposition (Kakalik et al., 1996; Mahoney, 1988; Dywan, 2003). In the present study, there was no increase in early settlement despite increased ADR use. Empirical studies of mediation, early neutral evaluation, and arbitration in general civil cases are mixed with regard to whether ADR does or does not resolve cases faster than litigation (Keilitz, 1994; Wissler, 2004b). ADR's impact on the timing of settlements depended in part on aspects of program design, such as the scheduling of ADR referrals and sessions (Keilitz, 1994; Wissler, 2004b).

An additional explanation for the limited impact of mediation on settlement timing is that lawyers tended to not reduce the amount of discovery conducted, the number of motions filed, or the amount of trial preparation conducted when they participated in mediation (McAdoo, 2002; McAdoo and Hinshaw, 2002; Wissler, 2004b). Interestingly, when court management practices reduced the time to disposi-

tion, lawyers seemed to work about the same number of hours per case, just in a more compressed period of time (Kakalik et al., 1996). As seen in the present study as well as others, lawyers often felt they needed to substantially complete discovery before they could adequately discuss settlement possibilities or ADR options (Brazil, 1985; McAdoo, 2002). One study found, however, that lawyers who had experience with mediation and early discussions came to realize that they could have meaningful discussions before completing discovery and started to schedule mediation and negotiation sessions earlier (Rogers and McEwen, 1998).

Thus, if the primary goal is to achieve early settlement, as it was in the case of Rule 16(g)(2), courts might want to consider, instead of a "confer and report" requirement, an early pretrial conference to discuss settlement and ADR, as well as the scheduling of case events and a discovery management plan. The conference might help initiate settlement negotiations or ADR use earlier, the scheduling of case events and discovery might help keep the process moving, and the use of ADR might assist the parties in settling. None of these efforts are likely, however, to address the economic and strategic incentives that limit attorneys' or litigants' interest in early settlement or ADR use (Kritzer, 1991; Wissler et al., 1992; Davis, 1994; Rogers and McEwen, 1998; Macfarlane, 2002). Depending on the ultimate objective the court is trying to achieve, different approaches, or combinations of approaches, might be effective. In sum, if a court expects lawyers to discuss their cases and resolve them sooner, more steps than simply mandating early discussions may be needed to get these "horses" to "drink." jsj

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