ABA Section of Litigation Member Survey on Civil Practice: Detailed Report

December 11, 2009

INTRODUCTION

The ABA Section of Litigation, with more than 68,000 members, is committed to studying and promoting change on significant issues that touch the quality of the justice system. We are a diverse and non-partisan group with members from the plaintiffs', defense and many substantive bars.

The Section surveyed its members to assist the Civil Rules Advisory Committee of the United States Judicial Conference, which initiates changes to the Federal Rules of Civil Procedure. The Advisory Committee is gathering empirical evidence as part of a wholesale examination of how well our current system of civil litigation is meeting the stated goal of being "just, speedy and inexpensive." We appreciate the opportunity to participate in the rule-making process and are hopeful that the results of this and other similar surveys will help set the agenda for reform of the civil justice system for the coming years.

As Arthur Sulzberger, former publisher of the New York Times, said (at a time when the masculine form was required by that newspaper's style book), "A man's judgment cannot be better than the information on which he has based it." We in the Section of Litigation hope that the facts and information collected in this and other similar empirical studies will help inform our collective view of what problems must be solved and how that might be accomplished.

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KEY FACTS AND FINDINGS OF THE SURVEY

Survey Respondents

- 50% of the respondents represent defendants, about 25% are plaintiffs' lawyers, and about 25% represent defendants and plaintiffs equally. Respondents, on average, have practiced for 23 years, and 94% report practicing in a private law firm.
- 98% of defense lawyers bill by the hour.
- 74% of plaintiffs' lawyers work on a contingent fee basis.

The Federal Rules of Civil Procedure

- 63% of respondents believe that the Rules are conducive to meeting the goal of reaching a "just, speedy and inexpensive determination of every action," but a substantial number (37%) do not.
- 54% believe that the Rules need minor amendments to make them work, but 25% believe the Rules should be reviewed in their entirety and rewritten to address today's needs.
- More than 38% of respondents believe that one set of rules cannot accommodate every type of case. (The current Rules were drafted to address every kind of case.)

Costs

- 81% of survey respondents believe that litigation is too expensive.
- 82% answered that their firms turn away cases when it is not cost effective to handle them. Thus, smaller cases may not be litigated, and access is denied.
- 89% believe that litigation costs are not proportional to the value in a small case, and 40% believe that litigation costs are not proportional to the value in a large case.
- 82% agree that the longer a case goes on, the more it costs.
- 83% believe that the cost of litigation forces cases to settle that should not settle based on the merits.

Discovery

- Discovery is the reason most often picked by respondents as the primary cause of delay. 48% picked that reason, while the next most popular reason (delayed rulings on motions) garnered only 25%.
- 82% agree that discovery is too expensive, but within that group only 61% of plaintiffs' lawyers think it so.
- When asked about the average cost of discovery as a percentage of litigation cost in cases that are not tried, the median response was 70%. When asked what discovery costs ought to be, the median response was 50%.
- 51% believe that discovery is commonly abused, and 66% believe that electronic discovery is abused.

- Respondents are split about whether current discovery mechanisms work well; 45% think that they do, 52% think that they do not. (The remainder express no opinion).
- About 96% of defense lawyers believe that electronic discovery increases the cost of litigation, compared with 59% of plaintiffs' lawyers; 86% of defense lawyers believe that electronic discovery is overly burdensome, compared with 27% of plaintiffs' lawyers. However, 78% of all respondents believe that electronic discovery increases counsel's ability to discover all relevant information.

Judicial Role in Litigation

- 78% of respondents believe that early intervention by judges helps to narrow the issues, and 72% believe that early intervention helps to limit discovery.
- 73% of all respondents believe that when a judicial officer gets involved early and stays involved, the results are more satisfactory to their clients.
- Respondents believe that judges and lawyers could more often use existing means to set limits on discovery. Despite claims of discovery abuse and cost, 61% of respondents believe that counsel do not typically request limitations on discovery under available mechanisms; 76% do not believe judges invoke those protections on their own; and nearly 60% of respondents believe that judges do not enforce those mechanisms to limit discovery.

Collaboration and Professionalism

- 95% believe that collaboration and professionalism by attorneys can reduce client costs.
- 58% of respondents acknowledged the usefulness of the Rule 26(f) requirement to confer with opposing counsel to develop a discovery plan.
- 60% of lawyers believe that the duty to confer with opposing counsel before filing a discovery motion has an effect on the case (i.e., that it can narrow or eliminate the need for the motion).

Initial Disclosure

- Only 33% of respondents believe that initial disclosure under Rule 26(a)(1) reduces discovery, and fewer respondents (26%) believe that initial disclosure saves the client money, while more than half (52%) believe that it adds to the cost of litigation.
- Respondents report that over 95% of cases require discovery beyond initial disclosure.

Pleading

- Echoing the current dispute between Congress and the Supreme Court, respondents were sharply divided about whether the specificity required in a pleading has contributed to excessive discovery, or should be used to cut back on discovery, as follows:
    - 70% of defense lawyers, but only 21% of plaintiffs' lawyers, believe that notice pleading has become a problem because extensive discovery is required to narrow the claims and defenses.
    - 77% of defense lawyers, but only 32% of plaintiffs' lawyers, believe that fact pleading can narrow the scope of discovery.

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SUMMARY DISCUSSION OF RESULTS

1. The Survey Process

The Civil Rules Advisory Committee of the United States asked the ABA Section of Litigation (the "Section") to survey its members about their views of pre-trial practice in federal court using a survey that was a variation of one developed by the American College of Trial Lawyers and the IAALS. The Section reviewed the questions and proposed certain additions and clarifications. The Federal Judicial Center ("FJC") made these and other revisions and administered the survey. A copy of the survey questionnaire is appended to this report.

On July 21, 2009, the Section emailed an internet link to the survey to over 31,000 of its roughly 55,000 lawyer members for whom email addresses were available. The survey was available for six weeks until September 1, 2009. The FJC obtained and compiled the results, which they provided to the Section in raw form and in summary numerical tables.

The views expressed are the opinions of those who answered the questionnaire and are not the views of either the American Bar Association or Section of Litigation unless adopted pursuant to the By-Laws of the Association.

2. Survey Respondents

In response to the Section survey, approximately 3300 lawyers submitted responses to questions regarding their practice and their satisfaction with the federal civil litigation system, including the Federal Rules of Civil Procedure (the "Rules"). About half of the respondents represent primarily defendants, about a quarter represent primarily plaintiffs, and the remaining quarter represent plaintiffs and defendants about equally.

Respondents are highly experienced, with about 23 years of practice and an average hourly rate of about $375 for those lawyers (primarily defense lawyers) who bill by the hour. The overwhelming majority (94%) practice in a law firm. Of those, about 20% are in a firm with no more than 5 lawyers, and more than half are in a firm with no more than 50.

3. Overview

Below is a brief discussion of some of the highlights of the survey. This Part C provides a general overview. Part D discusses the respondents' overall level of satisfaction with the Rules and the federal civil litigation system as a whole. Part E identifies specific areas of common satisfaction among lawyers with the civil litigation system, while Part F identifies areas of common dissatisfaction. Part G describes the most significant areas of discrepancy between plaintiffs' lawyers and defense lawyers involving the civil litigation system.

Participants were offered four options in response to most statements in the survey: strongly agree, agree, disagree, and strongly disagree. For simplicity, in the descriptions that follow, only aggregate percentages of agreement and disagreement are expressed, unless in some instance an exceptional number of respondents strongly agreed or disagreed. Percentages are rounded to the nearest whole number.

- Although the matter has not reached the level of a crisis, there is dissatisfaction in the bar with litigating civil cases in federal court. Thirty-seven percent of respondents believe that the Rules that govern how civil cases proceed in federal court are not conducive to meeting the goal of a "just, speedy, and inexpensive determination of every action." A quarter of all respondents believe that the Rules must be reviewed in their entirety and rewritten to address the needs of today's litigation. However, 61% believe that the Rules are adequate as written.

- Litigation is expensive, so much so that it is not cost effective to litigate smaller cases. Plaintiffs with smaller cases must either find some way other than litigation to resolve their disputes, or leave them unresolved. What constitutes a smaller case is relative, ranging from an amount in dispute of $100,000 in the eyes of about 30% of respondents to much higher amounts for a smaller number of lawyers who are forced to turn away cases based on the amount at issue.

- Discovery, the process by which each side tries to discover the facts of the case from the other side in an adversarial setting, is seen as the primary cause for cost and delay. Lawyers, especially defense lawyers, believe that discovery is too expensive. Respondents were asked to estimate the cost of discovery as a percentage of litigation costs in cases that do not go to trial. The median response was 70%. When asked what discovery costs should be, the median response was 50%.

- Having identified discovery as a problem, the survey results do not present an easy cure-all solution. The foundation of a solution might be found in the following propositions, about which there was general agreement:

    - Early case management by judges helps to narrow the issues and limit discovery.

    - When all lawyers are collaborative and professional, the case costs less for clients. The Section has developed Guidelines for Conduct, also known as the Civility Standards. The 31 numbered paragraphs titled "Lawyers' Duties to Other Counsel" are available at http://www.abanet.org/litigation/conductguidelines/

    - Lawyers and judges could more often avail themselves of existing means to set limits on discovery that is unduly burdensome or costly.

    - Initial disclosure is not a cost effective measure that reduces discovery or overall costs. A majority of lawyers do not believe that Rule 26(a)(1) initial disclosure reduces discovery or saves their client money. In fact, over a third of plaintiffs' lawyers and over half of defense lawyers think that initial disclosure adds to their clients' cost of litigation.

    - Shortening the time to disposition reduces costs, and discovery is responsible for most of the delay in litigation. Although the respondents had mixed views about firm trial dates, half believe that trial dates should be set early in the case, and a slight majority believe that setting the trial date should not wait until discovery is completed.

- Special rules may be necessary for cases that present particular challenges. Over one-third of survey respondents believe that one set of rules cannot accommodate every case.

- More dramatic solutions to cut back on discovery (which in practice usually means cutting back on discovery by plaintiffs to determine whether and to what extent the defendant engaged in wrongdoing) are likely to increase the feeling of some plaintiffs' lawyers that state court is a better forum for their claims. The following survey findings support that conclusion:

  - Plaintiffs and defendants were sharply divided about notice pleading versus fact pleading – the level of specificity required to be alleged in order for a lawsuit to be commenced in federal court. Defense lawyers believe that notice pleading, which requires little specificity, has become a problem because extensive discovery is required to narrow issues. Furthermore, over 75% of defense lawyers believe that fact pleading, which requires more specificity, can narrow the scope of discovery, while 65% of plaintiffs' lawyers believe that it cannot. Although not surveyed on this issue, plaintiffs' lawyers would likely respond that a more specific pleading requirement would not only reduce discovery by narrowing the issues, but also by excluding their cases from court.

  - Solutions that would cut back on e-discovery are likely to be controversial. E-discovery (electronic discovery, often of email and other electronic documents or data) is another area of contention between plaintiffs' and defense lawyers. Respondents, especially plaintiffs' lawyers, agree that e-discovery has enhanced their ability to discover all relevant information. But respondents, especially defense lawyers, believe that e-discovery increases the costs of litigation, has contributed disproportionately to the increased cost of discovery, and is overly burdensome. Defense lawyers also strongly agree that the burdens of e-discovery are misunderstood by courts and allowed to go unchecked.

- Moreover, any dramatic cutback in discovery likely will affect the bottom line of law firms, particularly those on the defense side. On the other hand, defense counsel in the survey more often criticized discovery as being too costly, time consuming, burdensome and subject to abuse, as compared with plaintiffs' counsel. It remains to be seen how defense law firms will reconcile these disparate interests.

4. Overall Satisfaction with the Rules and the Civil Judicial System

i. Satisfaction with the Federal Rules of Civil Procedure

Survey respondents were more likely than not to express satisfaction with the Rules, but a substantial minority was dissatisfied with them. Sixty-three percent of respondents agree that the Rules, as written, are conducive to meeting the goal of a "just, speedy, and inexpensive determination of every action," and 61% agree that the Rules are adequate as written. But over a

third disagrees. Slightly more than half of all the respondents believe that the Rules need minor amendments, but a quarter would support a complete overhaul. This group believes that the Rules must be reviewed in their entirety and rewritten to address the needs of today's litigation. Moreover, there was some openness to abandoning or eroding one of the fundamental principles underlying the Rules – that they must be "transsubstantive," i.e., that one set of rules must apply to all cases. Although a slim majority believes that one set of rules can accommodate every case, over 35% of respondents disagree.

Questions about general areas of possible improvement to the Rules – number, complexity, consistency – showed satisfaction by two-thirds or more of the respondents and did not reveal any large discrepancies between plaintiff and defense lawyers. The noticeable exception was a question whether the Rules should be more flexible. Over 50% of plaintiffs' lawyers believe that the Rules should be more flexible, while only 35% of defense lawyers and 37% of mixed practice lawyers agree.

While the majority of respondents were generally satisfied with the operation of the Rules themselves, a common area of criticism is the consistency of their application. Only 54% of respondents believe that the rules are enforced as written, with defense lawyers somewhat more likely to agree than plaintiffs' lawyers. Forty-three percent of all respondents believe that the Rules are enforced inconsistently, even within a single district.

ii. Federal Court Compared to State Court

Some have suggested that the costs and delays of litigating in federal court have caused a flight to state court. The survey provides some indirect support for this conclusion. Plaintiffs' lawyers, who have the greatest ability to determine the forum, are about evenly split on whether they prefer state or federal court, and 13% have no preference. Put differently, 42% of plaintiffs' lawyers prefer to litigate in state court. In contrast, almost three-quarters of defendants' lawyers prefer federal court. The advantages of state court cited by all groups were convenience, cost, and ability to conduct voir dire. Some plaintiffs' lawyers, about 20%, perceive state courts to be more favorable for plaintiffs, but did not perceive much of an advantage for either plaintiffs or defendants in federal court.

The main advantages identified for federal court all relate to the federal judiciary. The quality of judges is the single most frequently cited reason for preferring federal court – 52% of plaintiffs' lawyers, 80% of defense lawyers, and 73% of mixed practice lawyers cite this reason. All lawyers also cite more careful consideration of dispositive motions, more substantive legal knowledge of judges, more experience with the type of case, and hands-on judicial case management as the benefits of federal practice. Plaintiffs' lawyers cite those advantages but to a lesser degree than defense or mixed practice lawyers. Also, plaintiffs' lawyers are more likely to say that there is no advantage to federal court (15%), while only 2% of defense lawyers and 5% of mixed practice lawyers agree.

As to whether the federal courts are viewed as more "just, speedy and inexpensive" than state court, there seems to be some agreement about speed and cost. About one-third of all respondents said that quicker time to disposition is an advantage in federal court, while lower cost is an advantage of state court. However, whether the quality of the outcome is better in state or federal court seems to depend on perspective. Only 1% of defense lawyers versus 17% of plaintiffs' lawyers found better substantive outcomes in state court. Conversely, only 7% of

plaintiffs' lawyers versus 29% of defense lawyers found better substantive outcomes in federal court.

iii. Litigation Costs

Although an area of greater concern for defense lawyers, survey respondents were very likely to agree that litigation is too expensive, and specifically, discovery and e-discovery are the biggest contributors to cost. Over 65% of plaintiffs' lawyers and 87% of defense and mixed practice lawyers believe litigation is too expensive.

Survey respondents also agree that litigation costs are not proportional to the value of a small case. Over 78% of plaintiffs' attorneys, 91% of defense attorneys, and 94% of mixed practice attorneys agree, with a large proportion of each group strongly agreeing. For large cases, the results were more varied. A substantial percentage but less than a majority of each group agrees that litigation costs are not proportional to the value of a large case. Plaintiffs' lawyers agree 33% of the time, while 44% of defense lawyers and 41% of mixed practice lawyers agree. So it seems that although costs are perceived to be more in line for large cases, there are still many for which the costs are perceived to be too high for the benefit received.

Respondents similarly agree that discovery in particular is too expensive – 61% of plaintiffs' lawyers, and roughly 90% of defense lawyers and mixed practice lawyers agree. However, a large majority found most individual discovery tools to be cost effective, the biggest exceptions being e-discovery and expert depositions. When asked about the average cost of discovery as a percentage of litigation cost in cases that are not tried, the median response was 70%. When asked what discovery costs ought to be, the median response was 50%.

Over 94% of plaintiffs' lawyers, 98% of defense lawyers and 99% of mixed practice lawyers believe that discovery costs are at least somewhat important to the decision on whether to settle, and of these over 50% in each group found discovery costs very important in the decision to settle.

Respondents also generally agree that shortening the time to final disposition reduces costs. Over 75% of respondents in all groups believe that the longer a case goes on, the more it costs. Respondents were fairly consistent in their thoughts on the primary causes of delay in the litigation process. All groups cited the time required to complete discovery as the biggest cause of delay. Plaintiffs' lawyers chose this option 38% of the time, defense lawyers chose it 55% of the time, and mixed practice lawyers chose discovery 46% of the time. Survey respondents were in strong agreement that discovery costs overall drive the decision to settle.

iv. Lawyers Turn Away Cases that Are Not Cost Effective

The value of a potential case seems to play a large role in whether it will be heard in court. More than 75% of respondents in every category stated that their firms are likely to turn away cases that are not cost effective, with almost 90% of plaintiffs' lawyers, 85% of mixed practice lawyers and 76% of defense lawyers agreeing. $100,000 was the amount mostly commonly cited by all groups (29%) as the threshold amount at issue for turning away a case, with declining percentages as the amount increases – $250,000 (10%), $500,000 (7%), $1 million (5%), and $5 million (4%).

Plaintiffs' lawyers often assume economic risk when they take on a case, because their fee arrangement is frequently in the form of a contingency fee in which payment of legal fees is based on success in the litigation. Almost 75% of plaintiffs' lawyers charge contingent fees. In contrast 98% of defense lawyers and 91% of mixed practice lawyers charge by the hour. Respondents billing by the hour were asked to select their usual hourly rate. Mixed practice lawyers had the highest average at $393 per hour, plaintiffs' lawyers the second highest at $388 per hour, and defense lawyers the least at $368 per hour.

v. Law Firm Economics

The survey suggests that defense lawyers, who most often shoulder the burden of discovery and who complain most about its being excessive and costly, also stand to gain the most economically from these circumstances. Among both plaintiffs and defendants there were mixed views (56% agreement) as to whether economic models in law firms encourage more discovery than necessary. On the defense side, virtually all of these litigators charge by the hour (98% compared to only 20% of plaintiffs' lawyers), and over three-quarters of them have billable hours requirements, with the required number on average being just over 1,800 hours. The litigation business in law firms seems to be growing; almost half of the respondents reported an increase in the number of litigators in their firms in the last 5 years.

vi. Federal Court Compared to Arbitration and Mediation

Commentators also have suggested that dissatisfaction with litigation in federal and state court has lead to increased popularity of arbitration, which is essentially litigation outside the court system. The survey results sharply contradict this assertion.[2] Although there were disagreements as to whether arbitration generally increases or decreases costs and time as compared with litigation, only 8% of plaintiffs' lawyers and 10% of defense and mixed practice lawyers believe that the outcomes of arbitration are more fair than the outcome of litigation, and 40% of defense lawyers, 46% of mixed practice lawyers, and 62% of plaintiffs' lawyers believe that the outcomes of arbitration are less fair than litigation.

Although arbitration and mediation both are considered forms of ADR, only arbitration is a mutually exclusive alternative to litigation. Mediation often is used in conjunction with litigation, either initiated by the parties or ordered by the court. Respondents from each category expressed broad support for mediation as a tool to decrease costs and attain fairer outcomes. Approximately 80% of all lawyers believe that mediation has either a positive effect (64%), or no effect (16%) on cost. Approximately 70% of all respondents agree that mediation shortens the time to disposition, and 49% of all respondents believe that mediation leads to fairer outcomes, while 37% believe there is no difference, and only 14% believe that the outcomes are less fair. Over 70% agree that court-ordered dispute resolution increases the number of cases that settle without trial, and over 60% believe that it results in earlier settlements, which is seen as a positive development across the board.

[2] It should be noted that the survey was offered only to members of the ABA Section of Litigation and not to members of the Section of Dispute Resolution and the Section of International Law, both of which may attract more proponents of arbitration and other forms of ADR than the Section of Litigation.

When asked whether litigation or one of the ADR processes results in the highest level of fairness, 48% of plaintiffs' lawyers and 41% of defense and mixed practice lawyers responded that they believe mediation provides the fairest outcomes. The second most popular choice was litigation, with 27% of plaintiffs' lawyers and 23% of defense and mixed practice lawyers choosing litigation as resulting in the fairest outcomes.

5. Areas of Common Satisfaction with the Federal Civil Litigation System

i. Judicial Role in Litigation

One area of substantial agreement was the positive effect that judges have on overall discovery expense and client satisfaction when they become involved early on in the discovery process. Over 70% of plaintiffs' lawyers and 80% of defense and mixed practice lawyers believe that intervention by judges or magistrate judges early in a case helps to narrow the issues. Sixty percent of plaintiffs' and over 75% of defense and mixed practice lawyers believe that early intervention helps to limit discovery. Seventy-three percent of lawyers overall agree that when a judicial officer gets involved early and stays involved, the results are more satisfactory to clients, and over 85% of all respondents believe that one judicial officer should handle a case from start to finish.

In another area where approximately 95% of each group agree, collaboration and professionalism among lawyers is seen as a cost-saver for clients.

ii. Rule 16(a) Pre-trial Conferences

These conferences, which essentially require some level of judicial management, are generally seen as providing modest benefits. Although respondents reported that the conferences have little effect on time to resolution, time management, costs, or encouraging settlement, about 71% believe that Rule 16(a) conferences inform the Court of the issues in the case, and over half of the respondents believe that the 16(a) conferences help to identify and narrow the issues in a case.

iii. Rule 16(e) Pre-trial Orders

Pre-trial orders require the parties to disclose information about their positions and approach to the trial. In effect, they require the parties to work together to avoid trial by ambush. The respondents generally agree that pre-trial orders are helpful in preparing for trial, especially if the conference is held and orders given after a final decision on dispositive motions. Over 83% of lawyers in each category agree that Rule 16(e) final pre-trial orders are at least somewhat helpful in preparing a case for trial. Over 58% of plaintiffs' lawyers and over 70% of defense and mixed practice lawyers believe that the conference is more effective after the court rules on a summary judgment motion.

6. Areas of Common Dissatisfaction with the Federal Civil Trial System

i. Rule 26(a)(1) Initial Disclosure

Initial disclosure is not seen by the respondents as a cost effective measure that reduces discovery. Approximately 53% of plaintiffs' lawyers and almost 70% of defense lawyers do not

believe that Rule 26(a)(1) initial disclosure reduces discovery overall. Similarly, 57% of plaintiffs' lawyers and 74% of defense lawyers do not believe that those disclosures save the client money. Over 35% of plaintiffs' lawyers and nearly 60% of defense lawyers think that initial disclosure adds to their client's cost of litigation. Lawyers with mixed practices were about half way between plaintiffs' lawyers and defense lawyers in their responses. All groups reported that in almost 100% of their cases, initial disclosure did not eliminate the need for discovery.

ii. Promptness of Decisions on Dispositive Motions

The respondents broadly agree that judges do not decide summary judgment motions promptly. Over 56% of plaintiffs' and over 60% of defense and mixed practice lawyers believe that judges routinely fail to rule on summary judgment motions promptly. Of those percentages, 18% of plaintiffs' lawyers, 17% of defense lawyers, and 18% of mixed practice lawyers strongly agree.

7. Areas of Most Significant Disagreement

i. Notice Pleading

One area of stark disagreement between plaintiffs' and defense lawyers is the effectiveness of notice pleading. Plaintiffs' lawyers generally support notice pleading and generally do not believe there is an advantage to fact pleading for the purpose of narrowing issues. Most defense lawyers disagree with the statement that notice pleading helps narrow the issues. Defense and mixed practice lawyers also believe that notice pleading has become a problem because extensive discovery is required to narrow issues. Furthermore, over 75% of defense lawyers and 64% of mixed practice lawyers believe that fact pleading can narrow the scope of discovery, while 65% of plaintiffs' lawyers believe that it cannot.

ii. E-Discovery

Defense and mixed practice lawyers are much more likely than plaintiffs' lawyers to view e-discovery as costly and burdensome. Almost 90% of plaintiffs' lawyers believe that e-discovery has enhanced the ability of counsel to discover all relevant information, whereas only 73% of defendants agree and 77% of mixed practice lawyers agree. Seventy-nine percent of defense lawyers and 67% of mixed practice lawyers believe that e-discovery is being abused by counsel, while only 35% of plaintiffs' lawyers agree.

Over 90% of defense and mixed practice lawyers agree that e-discovery increases the costs of litigation, while 59% of plaintiffs' lawyers agree. Of the defense lawyers that agree, 62% strongly agree. Over 82% of mixed practice lawyers and over 88% of defense lawyers believe that discovery costs as a total share of litigation costs have increased disproportionately due to the advent of e-discovery (the majority of them strongly agreeing), while only 42% of plaintiffs' lawyers agree. Seventy-four percent of mixed practice lawyers and 79% of defense lawyers agree that the costs of outside vendors have increased the cost of e-discovery without commensurate value to the client.

Finally, regarding court involvement in e-discovery, defense and mixed practice lawyers strongly agree that e-discovery is overly burdensome, courts do not understand the burdens of e-

discovery, and courts do not sufficiently protect parties against these burdens. Plaintiffs' showed much less concern with the burdens of e-discovery (only 27% agree that it is overly burdensome), but were more likely to agree with the statement that courts do not understand the difficulties of providing e-discovery (43%).

iii. Dispositive Motions

Plaintiffs' lawyers were much more likely than defense or mixed practice lawyers to see summary judgment motions as a tactical tool rather than a good faith effort to narrow the issues and to believe that judges grant summary judgment more frequently than appropriate. Seventy-three percent of plaintiffs' lawyers believe that it is a tactical tool, whereas only 22% of defense and 39% of mixed practice lawyers agree. Plaintiffs' lawyers also were more likely to see summary judgment practice as increasing cost and delay without proportionate benefit, as 62% of plaintiffs' lawyers agree, while only 11% of defense lawyers and 26% of mixed practice lawyers agree. Fifty-eight percent of plaintiffs' lawyers believe that judges grant summary judgment more frequently than appropriate, while only 3% of defense lawyers and 13% of mixed practice lawyers agree.

DETAILED RESULTS

The following section provides detailed information about responses to individual questions – first with a narrative description, then with a bar graph (which should be viewed in color for the clearest and quickest illustration of the results), and finally a numerical table with the data provided by the FJC.

1. About Your Practice

Survey respondents were asked preliminary questions about their practice areas, primarily to determine who they are, and the nature of their practice. Survey respondents came from diverse legal backgrounds, representing both plaintiffs and defendants, and working at small and large firms representing a variety of practice areas.

1.1 Practice Areas.

About half of the survey respondents reported a primarily defense oriented practice, and the remaining half were split evenly between plaintiffs' lawyers and mixed practice lawyers. Of the 3267 survey respondents who responded to this question, 1653 (50.6%) reported that they primarily represent defendants, 839 (or 25.7%) reported that they primarily represent plaintiffs, and 776 (23.7%) reported a mixed practice, representing both plaintiffs and defendants about equally.

Table 1.1

ALL RESPONDENTS

	N	%
Primarily plaintiffs	839	25.7
Primarily defendants	1653	50.6
Both about equally	776	23.7
Total	3267	100.0

1.2 Firm Characteristics.

The majority of respondents practice at private firms (94%), while the remainder are in – house counsel, government, non-profit, or other lawyers. More than half of all respondents practice at firms with less than 50 attorneys, and about 20% practice at firms with 5 or fewer attorneys. Defense lawyers were more likely than plaintiffs' lawyers to work at larger firms. Over 40% of plaintiffs' lawyers were from firms of 5 or less attorneys, and over 90% were from firms with less than 100 attorneys. Only 15% of defense lawyers were from firms of less than 10 attorneys and over 45% were from firms of 100+ attorneys. 30% of mixed practice lawyers reported practicing at firms with less than ten attorneys and approximately the same percentage reported practicing at firms with over 100 attorneys.

Table 1.2 (a)

Which best describes your practice?

	N	%
Law firm (including solo practice)	3090	94.0
In-house counsel	102	3.1
Government	53	1.6
Non-profit or advocacy group	29	0.9
Other	13	0.4
Total	3287	100.0

Table 1.2(b)

How many full-time and part-time attorneys currently practice in your law firm or practice?

ALL ATTORNEYS

	N	%
Between 1 and 5	675	20.5
Between 6 and 10	294	8.9
Between 11 and 20	393	11.9
Between 21 and 50	458	13.9
Between 51 and 100	388	11.8
Between 101 and 250	382	11.6
Between 251 and 500	307	9.3
More than 500	396	12.0
Total	3293	99.9

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
Between 1 and 5	353	42.1
Between 6 and 10	113	13.5
Between 11 and 20	112	13.4
Between 21 and 50	102	12.2
Between 51 and 100	90	10.7
Between 101 and 250	32	3.8
Between 251 and 500	18	2.1
More than 500	18	2.1
Total	838	100.0

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
Between 1 and 5	136	8.2
Between 6 and 10	113	6.9
Between 11 and 20	189	11.5
Between 21 and 50	232	14.1
Between 51 and 100	200	12.1
Between 101 and 250	265	16.1
Between 251 and 500	219	13.3
More than 500	295	17.9
Total	1649	100.0

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
Between 1 and 5	176	22.8
Between 6 and 10	66	8.5
Between 11 and 20	86	11.1
Between 21 and 50	120	15.5
Between 51 and 100	95	12.3
Between 101 and 250	84	10.9
Between 251 and 500	66	8.5

Table 1.2(c)

Does your firm have offices in multiple locations?

ALL RESPONDENTS

	N	%
Yes	1902	57.9
No	1381	42.1
Total	3283	100.0

Table 1.2(d)

How many full- and part-time attorneys practice at your office location?

ALL RESPONDENTS

	N	%
Between 1 and 5	179	9.3
Between 6 and 10	151	7.9
Between 11 and 15	151	7.9
Between 16 and 20	109	5.7
Between 21 and 50	109	22.7
Between 51 and 100	434	18.9
Between 101 and 250	363	20.1
Between 251 and 500	385	6.5
More than 500	20	1.0
Total	1916	100.0

1.3 Practice Experience.

Survey respondents in all categories were highly experienced with an average of over 20 years in practice.

Table 1.3(a)

	Mean	Median	N
How long have you practiced law?			
Primarily Plaintiffs	21.7	22.0	831
Primarily Defendants	22.7	23.0	1629
Both About Equally	24.6	26.0	768
All Respondents	22.9	23.0	3261

Table 1.3(b)

	Mean	Median	N
How many years have you practiced civil litigation?			
Primarily Plaintiffs	21.0	21.0	830
Primarily Defendants	22.0	23.0	1631
Both About Equally	23.8	25.0	769
All Respondents	22.2	23.0	3262

1.4 Trial Experience.

On average, when asked how many cases each attorney has had go to trial in the past 5 years, the median response was 3 for all groups. Plaintiffs' lawyers reported an average of 5.5 cases, defense lawyers reported an average of 3.9, and mixed practice lawyers reported an average of 4.3. When asked what percentage of those trials were jury trials, the median response was 50%. Plaintiffs' lawyers reported an average of 54.9% jury trials with a median of 60%, defense lawyers reported an average of 52.5% jury trials with a median of 50%, and mixed practice lawyers reported an average of 38.4% jury trials with a median of 25%.

Table 1.4(a)

	Mean	Median	N
How many of your civil cases have gone to trial in the last 5 years?			
Primarily Plaintiffs	5.5	3.0	833
Primarily Defendants	3.9	3.0	1631
Both About Equally	4.3	3.0	769
All Respondents	4.5	3.0	3265

Table 1.4(b)

	Mean	Median	N
Approximately how many trials were jury trials?			
Primarily Plaintiffs	54.9	60.0	636
Primarily Defendants	52.5	50.0	1312
Both About Equally	38.4	25.0	641
All Respondents	49.3	50.0	2614

1.5 Types of Cases Litigated.

Respondents were asked to identify up to three types of cases that they most frequently litigate. Over 42% of all respondents cited complex commercial disputes, with defense lawyers most often citing this type of case. Only 22.3% of plaintiffs' lawyers cited complex commercial disputes as an often-litigated type of case, compared with 46.6% of defense lawyers and 58.6% of mixed practice lawyers. For all respondents, contracts, torts, other, personal injury, employment discrimination, intellectual property, insurance, and products liability were each chosen over 10% of the time.

The three top categories cited by plaintiffs' lawyers were personal injury, complex commercial disputes and other, each with over 20%. Areas receiving more than 10% of their responses were torts, employment discrimination, securities, contracts, civil rights, and antitrust, in the order of ranking.

Defense lawyers chose complex commercial disputes and contracts most often, followed by torts, other, employment discrimination, products liability, insurance, personal injury, and professional malpractice, in that order.

Mixed practice lawyers chose contracts as their second most common type of case with 37.6%, and intellectual property as the third most common at 25.6%. Other common types of cases chosen were real property, other, construction and torts, in that order.

Table 1.5

What types of cases do you most often litigate? *Respondents could select up to three areas.*

ALL RESPONDENTS

	N	%
Complex commercial disputes	1428	42.7
Contracts	742	22.1
Torts (generally)	538	16.1
Other	491	14.7
Personal injury	487	14.5
Employment discrimination	466	13.9
Intellectual property	395	11.8
Insurance disputes	359	10.7
Products liability	351	10.5
Professional malpractice	296	8.8
Construction	267	8.0
Securities	265	7.9
Real property	222	6.6
Civil rights	213	6.4
Antitrust	195	5.8
Labor	161	4.8
Mass torts	154	4.6
Bankruptcy	133	4.0
ERISA	93	2.8
Administrative law	89	2.7
Domestic relations	50	1.5
Oil and gas	42	1.3
Maritime	38	1.1

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
Complex commercial disputes	187	22.3
Contracts	99	11.8
Torts (generally)	157	18.7
Other	176	21.0
Personal injury	217	25.9
Employment discrimination	131	15.6
Intellectual property	33	3.9
Insurance disputes	60	7.2
Products liability	70	8.3
Professional malpractice	73	8.7
Construction	22	2.6
Securities	111	13.2
Real property	24	2.9
Civil rights	93	11.1
Antitrust	88	10.5
Labor	32	3.8
Mass torts	40	4.8
Bankruptcy	26	3.1
ERISA	30	3.6
Administrative law	20	2.4
Domestic relations	23	2.7
Oil and gas	3	0.4
Maritime	9	1.1

Table 1.5, cont'd

What types of cases do you most often litigate? *Respondents could select up to three areas.*

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
Complex commercial disputes	771	46.6
Contracts	339	20.5
Torts (generally)	292	17.7
Other	204	12.3
Personal injury	232	14.0
Employment discrimination	292	17.7
Intellectual property	159	9.6
Insurance disputes	245	14.8
Products liability	250	15.1
Professional malpractice	191	11.6
Construction	138	8.3
Securities	116	7.0
Real property	79	4.8
Civil rights	96	5.8
Antitrust	78	4.7
Labor	114	6.9
Mass torts	104	6.3
Bankruptcy	46	2.8
ERISA	56	3.4
Administrative law	45	2.7
Domestic relations	13	0.8
Oil and gas	25	1.5
Maritime	26	1.6

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
Complex commercial disputes	455	58.6
Contracts	292	37.6
Torts (generally)	85	11.0
Other	106	13.7
Personal injury	34	4.4
Employment discrimination	38	4.9
Intellectual property	199	25.6
Insurance disputes	51	6.6
Products liability	29	3.7
Professional malpractice	30	3.9
Construction	107	13.8
Securities	38	4.9
Real property	114	14.7
Civil rights	23	3.0
Antitrust	28	3.6
Labor	14	1.8
Mass torts	9	1.2
Bankruptcy	56	7.2
ERISA	6	0.8
Administrative law	22	2.8
Domestic relations	12	1.5
Oil and gas	14	1.8
Maritime	3	0.4

2. Advantages of State and Federal Practice

Respondents were asked a series of questions involving state court civil practice and federal court civil practice. They were asked to identify the most significant advantages of each forum, including whether substantive outcomes were better in either forum. Overall, defense lawyers were more likely than plaintiffs' lawyers to show a preference for federal practice. Plaintiffs' lawyers were more likely to see advantages to practicing in state court.

2.1 General Forum of Practice.

When asked to select the forum in which most of the respondents' litigation practice takes place, respondents as a whole were roughly equally divided among state court, federal court, and roughly an equal split between state and federal court. About 6% of respondents identified other forums, such as arbitration panels and administrative agencies, as their primary forum of practice.

Table 2.1

In which forum does most of your litigation practice take place?

ALL RESPONDENTS

	N	%
State court	1059	32.1
Federal court	1031	31.2
Roughly equal split of state and federal courts	999	30.3
Roughly equal split of courts and arbitration panels	44	1.3
Arbitration panels	124	3.8
International tribunals	1	0.0
Administrative agencies	28	0.8
Other	14	0.4
Total	3300	99.9

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
State court	313	37.4
Federal court	328	39.1
Roughly equal split of state and federal courts	167	19.9
Roughly equal split of courts and arbitration panels	5	0.6
Arbitration panels	13	1.6
International tribunals	0	0.0
Administrative agencies	7	0.8
Other	5	0.6
Total	838	100.0

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
State court	506	30.6
Federal court	487	29.5
Roughly equal split of state and federal courts	566	34.3
Roughly equal split of courts and arbitration panels	18	1.1
Arbitration panels	58	3.5
International tribunals	0	0.0
Administrative agencies	12	0.7
Other	5	0.3
Total	1652	100.0

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
State court	228	29.4
Federal court	208	26.8
Roughly equal split of state and federal courts	254	32.7
Roughly equal split of courts and arbitration panels	20	2.6
Arbitration panels	53	6.8
International tribunals	1	0.1
Administrative agencies	8	1.0
Other	4	0.5
Total	776	99.9

2.2 Preferences for State or Federal Practice.

When asked whether they would prefer to litigate in state court or federal court, overall, 61.4% of attorneys chose federal court, 22.1% chose state court, and 13.2% identified no preference. However, plaintiffs' and defense lawyers expressed a significant difference in preference. Plaintiffs' lawyers were split in their preference, with 41.5% expressing a preference for state court and 42% for federal court. Defense lawyers, on the other hand, are much more likely to prefer federal court to state court, 73.9% to 12.9%. Mixed practice lawyers favored federal court to a greater extent than plaintiffs' lawyers, but not as much as defense lawyers. Mixed practice lawyers chose federal court 56.3% of the time and chose state court 20.6% of the time. They were also more likely to say they had no preference, at 17.3%.

Table 2.2

In your primary jurisdiction, when you have a choice, do you prefer to litigate in state court or federal court?

ALL RESPONDENTS

	N	%
State court	728	22.1
Federal court	2023	61.4
No preference	434	13.2
Other	109	3.3
Total	3294	100.0

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
State court	346	41.5
Federal court	350	42.0
No preference	113	13.5
Other	25	3.0
Total	834	100.0

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
State court	213	12.9
Federal court	1220	73.9
No preference	179	10.8
Other	38	2.3
Total	1650	100.0

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
State court	160	20.6
Federal court	437	56.3
No preference	134	17.3
Other	45	5.8
Total	776	100.0

Advantages of State Court Litigation.

Respondents were asked to identify the advantages of litigating in state court, as compared to federal court. Respondents were presented with a list, and could select as many responses as they wished. Overall, cost, convenience, and ability to conduct voir dire were the most frequently selected advantages of state court. However, 25% of respondents said there are no advantages to litigating in state court, and defense lawyers were almost twice as likely to select that statement as were plaintiffs' lawyers – 32.2% of defense lawyers, 17.2% of plaintiffs' lawyers and 21.8% of mixed practice lawyers.

In an interesting area of contrast between plaintiffs' lawyers and defense lawyers, plaintiffs' lawyers selected better substantive outcomes in state court 16.9% of the time, while defense lawyers identified better substantive outcomes only 1.3% of the time. Mixed practice lawyers were more apt to agree with defense lawyers, selecting this as an advantage only 3.5% of the time. Plaintiffs' lawyers cited state court as "more favorable to plaintiffs" 19.7% of the time, while defense lawyers selected "more favorable to defendants" only 1.4% of the time. Mixed practice lawyers cited favorability to plaintiffs 10.7% of the time, and favorability to defendants only .3% of the time.

Plaintiffs' lawyers overall were more likely to identify advantages of state court than defense lawyers were. For plaintiffs' lawyers, few categories received only single digit support. The most important factors for plaintiffs' lawyers are cost, convenience, ability to conduct voir dire, quicker time to disposition, and the applicable rules of procedure. Defense lawyers generally agree that the biggest advantages to state court practice are cost, convenience, and voir dire, but they were much less likely to favor the rules of procedure in state court. Mixed practice lawyers also cited cost, convenience, and voir dire as the principal advantage of state court.

Table 2.3

In your primary state court, what are the advantages of litigating in state court, as compared to federal court?

ALL RESPONDENTS

	N	%
Less expensive	1023	30.6
No advantages to state court	852	25.4
Convenience	838	25.0
Ability to conduct voir dire	802	24.0
Less hands-on judicial case management	630	18.8
Quicker time to disposition	529	15.8
The applicable rules of civil procedure	471	14.1
Judicial officers more available to resolve disputes	399	11.9
Judicial temperament	360	10.8
Geographical area from which jury is drawn	347	10.4
More favorable to plaintiffs	345	10.3
The court's experience with the type of case	339	10.1
Other	263	7.9
Non-unanimous verdicts	260	7.8
More substantive legal knowledge/judges	206	6.2
Availability of interlocutory appeals	204	6.1
Better substantive outcomes	191	5.7
The applicable rules of evidence	179	5.3
Quality of judges	139	4.2
More hands-on judicial case management	128	3.8
More careful consideration of dispositive motions	106	3.2
More favorable to defendants	27	0.8

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
Less expensive	285	34.0
No advantages to state court	144	17.2
Convenience	230	27.4
Ability to conduct voir dire	248	29.6
Less hands-on judicial case management	160	19.1
Quicker time to disposition	197	23.5
The applicable rules of civil procedure	192	22.9
Judicial officers more available to resolve disputes	136	16.2
Judicial temperament	167	19.9
Geographical area from which jury is drawn	151	18.0
More favorable to plaintiffs	165	19.7
The court's experience with the type of case	125	14.9
Other	83	9.9
Non-unanimous verdicts	110	13.1
More substantive legal knowledge/judges	91	10.8
Availability of interlocutory appeals	33	3.9
Better substantive outcomes	142	16.9
The applicable rules of evidence	86	10.3
Quality of judges	69	8.2
More hands-on judicial case management	48	5.7
More careful consideration of dispositive motions	66	7.9
More favorable to defendants	2	0.2

Table 2.3, cont'd

In your primary state court, what are the advantages of litigating in state court, as compared to federal court?

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
Less expensive	439	26.6
No advantages to state court	533	32.2
Convenience	374	22.6
Ability to conduct voir dire	373	22.6
Less hands-on judicial case management	307	18.6
Quicker time to disposition	208	12.6
The applicable rules of civil procedure	173	10.5
Judicial officers more available to resolve disputes	152	9.2
Judicial temperament	121	7.3
Geographical area from which jury is drawn	107	6.5
More favorable to plaintiffs	95	5.7
The court's experience with the type of case	132	8.0
Other	112	6.8
Non-unanimous verdicts	88	5.3
More substantive legal knowledge/judges	62	3.8
Availability of interlocutory appeals	126	7.6
Better substantive outcomes	22	1.3
The applicable rules of evidence	57	3.4
Quality of judges	39	2.4
More hands-on judicial case management	49	3.0
More careful consideration of dispositive motions	25	1.5
More favorable to defendants	23	1.4

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
Less expensive	286	36.9
No advantages to state court	169	21.8
Convenience	223	28.7
Ability to conduct voir dire	177	22.8
Less hands-on judicial case management	155	20.0
Quicker time to disposition	121	15.6
The applicable rules of civil procedure	99	12.8
Judicial officers more available to resolve disputes	107	13.8
Judicial temperament	68	8.8
Geographical area from which jury is drawn	88	11.3
More favorable to plaintiffs	83	10.7
The court's experience with the type of case	80	10.3
Other	64	8.3
Non-unanimous verdicts	60	7.7
More substantive legal knowledge/judges	51	6.6
Availability of interlocutory appeals	45	5.8
Better substantive outcomes	27	3.5
The applicable rules of evidence	33	4.3
Quality of judges	14	1.8
More hands-on judicial case management	30	3.9
More careful consideration of dispositive motions	14	1.8
More favorable to defendants	2	0.3

Advantages of Federal Court Litigation

Respondents were asked what, if any, are the main advantages of litigating in federal court as opposed to state court. Overall, respondents were much more likely to select advantages in federal court as compared to state court. Over 70% of respondents selected quality of judges as an advantage. More careful consideration of dispositive motions and more substantive legal knowledge on the part of judges were also selected in more than half of the surveys. Hands-on judicial case management, the court's experience in handling the type of case, quicker time to disposition, having a single judge assigned to the case, and the applicable rules of civil procedure were all chosen more frequently than the single most popular response for state court litigation, which was cost.

Notably, 20.6% of plaintiffs' attorneys selected the rules of civil procedure as an advantage, while 37.4% of defense lawyers and 29.3% of mixed practice attorneys selected it as an advantage.

Plaintiffs' lawyers identified quality of judges (51.5%), substantive legal knowledge of judges (38.5%), judicial experience with the type of case (29%), more careful consideration of dispositive motions (28.7%), and having a single judge assigned to the case (26%) as advantages of federal court litigation.

Defense attorneys cited quality of judges (80.2%), more careful consideration of dispositive motions (69.8%), more substantive legal knowledge of judges (57.3%) and more hands-on judicial case management (48.3%) as major advantages. Large numbers also cited as advantages quicker time to disposition, the court's experience with the type of case, judicial temperament, and having one judge assigned to the case.

Like defense lawyers, mixed practice lawyers cited quality of judges (72.6%), more careful consideration of dispositive motions (54.9%), more substantive legal knowledge of judges (51.3%) and more hands-on judicial case management (44.6%) as advantages of federal court as compared to state court. They also commonly cited quicker disposition, the court's experience, judicial temperament, and having a single judge assigned to the case as advantages.

Defense lawyers were much more likely than plaintiffs' lawyers to cite better substantive outcomes as an advantage to litigating in federal court. Plaintiffs' lawyers cited that as an advantage only 6.7% of the time, while defense lawyers cited better substantive outcomes 28.9% of the time, and mixed practice lawyers identified it as an advantage 19.3% of the time. Only 1.5% of plaintiffs' lawyers and 0.3% of mixed practice lawyers agree that federal court is more favorable to plaintiffs, whereas 14.5% of defense lawyers agree that federal court is more favorable to defendants.

Table 2.4

In your primary federal court, what are the advantages of litigating in federal court, as compared to state court?

ALL RESPONDENTS

	N	%
Quality of judges	2347	70.1
More careful consideration of dispositive motions	1836	54.8
More substantive legal knowledge/judges	1688	50.4
More hands-on judicial case management	1419	42.4
The court's experience with the type of case	1115	33.3
Quicker time to disposition	1082	32.3
Single judge assigned to case	1038	31.0
The applicable rules of civil procedure	1032	30.8
Judicial temperament	730	21.8
Judicial officers are available to resolve disputes	720	21.5
Better substantive outcomes	694	20.7
The applicable rules of evidence	673	20.1
Geographical area from which jury is drawn	555	16.6
More favorable to defendants	325	9.7
Convenience	266	7.9
No advantages to federal court	203	6.1
Other	145	4.3
Unanimous verdicts	144	4.3
Less expensive	139	4.2
Less hands-on judicial case management	32	1.0
More favorable to plaintiffs	17	0.5

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
Quality of judges	432	51.5
More careful consideration of dispositive motions	241	28.7
More substantive legal knowledge/judges	323	38.5
More hands-on judicial case management	258	30.8
The court's experience with the type of case	243	29.0
Quicker time to disposition	206	24.6
Single judge assigned to case	218	26.0
The applicable rules of civil procedure	173	20.6
Judicial temperament	107	12.8
Judicial officers are available to resolve disputes	127	15.1
Better substantive outcomes	56	6.7
The applicable rules of evidence	94	11.2
Geographical area from which jury is drawn	62	7.4
More favorable to defendants	30	3.6
Convenience	69	8.2
No advantages to federal court	123	14.7
Other	49	5.8
Unanimous verdicts	7	0.8
Less expensive	37	4.4
Less hands-on judicial case management	7	0.8
More favorable to plaintiffs	13	1.5

Table 2.4, cont'd

In your primary federal court, what are the advantages of litigating in federal court, as compared to state court?

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
Quality of judges	1326	80.2
More careful consideration of dispositive motions	1154	69.8
More substantive legal knowledge/judges	947	57.3
More hands-on judicial case management	799	48.3
The court's experience with the type of case	601	36.4
Quicker time to disposition	602	36.4
Single judge assigned to case	545	33.0
The applicable rules of civil procedure	619	37.4
Judicial temperament	454	27.5
Judicial officers are available to resolve disputes	402	24.3
Better substantive outcomes	478	28.9
The applicable rules of evidence	418	25.3
Geographical area from which jury is drawn	408	24.7
More favorable to defendants	239	14.5
Convenience	141	8.5
No advantages to federal court	37	2.2
Other	56	3.4
Unanimous verdicts	124	7.5
Less expensive	77	4.7
Less hands-on judicial case management	19	1.1
More favorable to plaintiffs	2	0.1

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
Quality of judges	563	72.6
More careful consideration of dispositive motions	426	54.9
More substantive legal knowledge/judges	398	51.3
More hands-on judicial case management	346	44.6
The court's experience with the type of case	259	33.4
Quicker time to disposition	262	33.8
Single judge assigned to case	267	34.4
The applicable rules of civil procedure	227	29.3
Judicial temperament	163	21.0
Judicial officers are available to resolve disputes	184	23.7
Better substantive outcomes	150	19.3
The applicable rules of evidence	157	20.2
Geographical area from which jury is drawn	83	10.7
More favorable to defendants	55	7.1
Convenience	54	7.0
No advantages to federal court	40	5.2
Other	40	5.2
Unanimous verdicts	12	1.5
Less expensive	25	3.2
Less hands-on judicial case management	5	0.6
More favorable to plaintiffs	2	0.3

3. Federal Rules of Civil Procedure

Respondents were asked a series of questions involving the Federal Rules of Civil Procedure ("the Rules"). Rule 1 provides that the Rules shall be construed and administered to secure the "just, speedy, and inexpensive determination of every action." The survey respondents were asked whether the Rules, as written, are conducive to this goal. Only 62.8% of the lawyers responded affirmatively. Plaintiffs' lawyers were slightly less likely to respond affirmatively than were defense lawyers or mixed practice lawyers. Plaintiffs' lawyers responded "yes" 61% of the time, defense lawyers 64.2% of the time, and mixed practice lawyers 62.3% of the time.

Figure 3.0: The Rules are conducive to meeting the goal of "just, speedy, and inexpensive determination of every action"

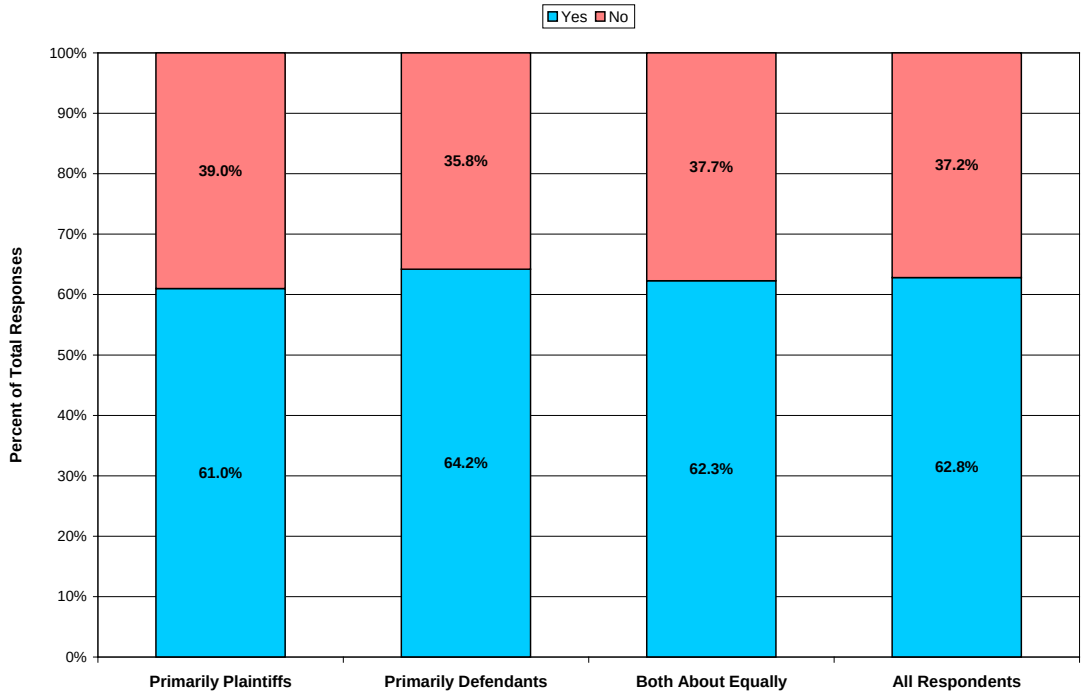

Table 3.0

	Yes	No	N
The Rules are conducive to meeting the goal of "just, speedy, and inexpensive determination of every action."			
Primarily Plaintiffs	61.0	39.0	782
Primarily Defendants	64.2	35.8	1558
Both About Equally	62.3	37.7	725
All Respondents	62.8	37.2	3092

Respondents were then presented with a series of statements, to which they were able to "strongly agree," "agree," "disagree," "strongly disagree," or express no opinion.

3.1 There are too many Rules.

A majority of respondents in each group – including 63.6% of plaintiffs' lawyers, 69% of defense lawyers, and 68.1% of mixed practice lawyers – disagree with the statement that there are too many rules. Plaintiffs' lawyers were more likely than defense lawyers and mixed practice lawyers to agree that there are too many rules. Overall, 23.2% of respondents agree or strongly agree that there are too many rules, including 26.3% of plaintiffs' lawyers, 21.5% of defense lawyers, and 23.3% of mixed practice lawyers.

Figure 3.1: There are too many Rules

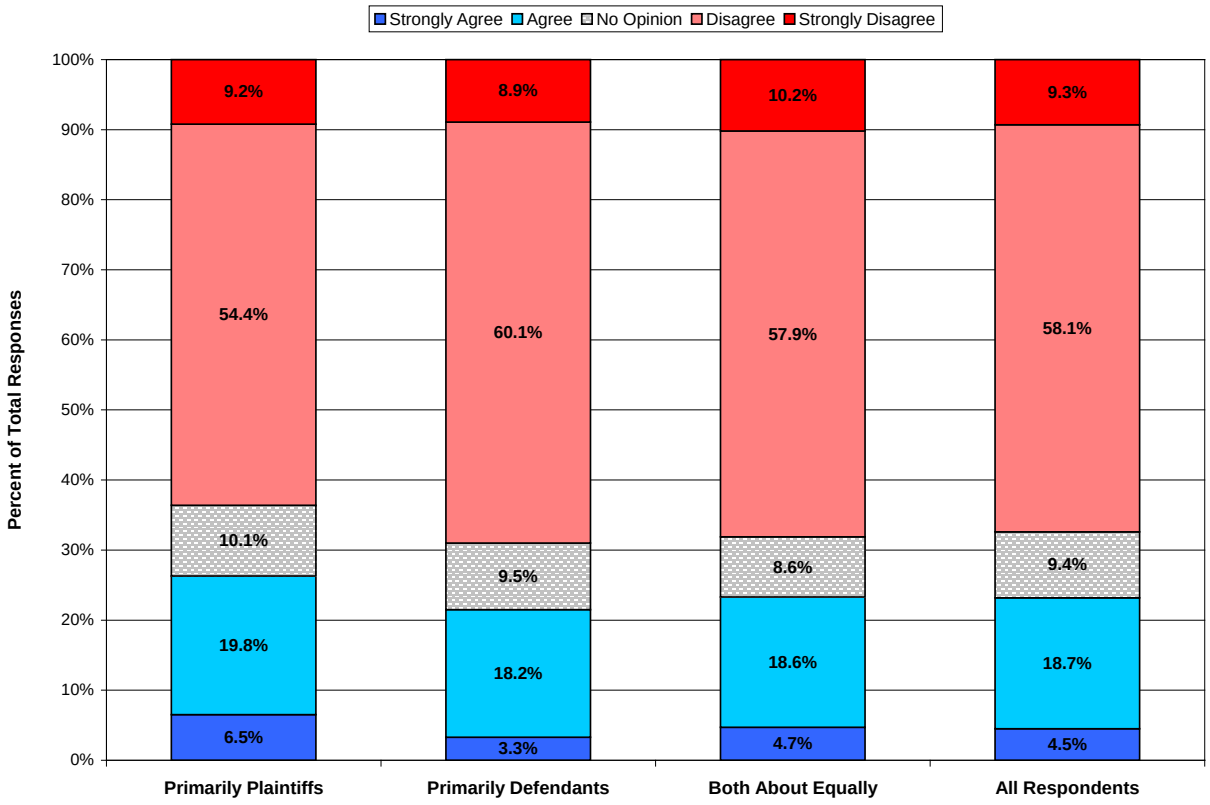

Table 3.1

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
There are too many Rules.						
Primarily Plaintiffs	6.5	19.8	54.4	9.2	10.1	833
Primarily Defendants	3.3	18.2	60.1	8.9	9.5	1637
Both About Equally	4.7	18.6	57.9	10.2	8.6	764
All Respondents	4.5	18.7	58.1	9.3	9.4	3268

3.2 The Rules are too complex.

Again, plaintiffs' lawyers were somewhat more likely than defense and mixed practice lawyers to agree that the Rules are too complex. Plaintiffs' lawyers agree with that statement 31.6% of the time, while defense lawyers agree 24.5% of the time, and mixed practice lawyers agree 28% of the time. A majority of each group disagree with the statement, including 63.2% of plaintiffs' lawyers, 71.7% of defense lawyers, and 68.7% of mixed practice lawyers.

Figure 3.2: The Rules are too complex

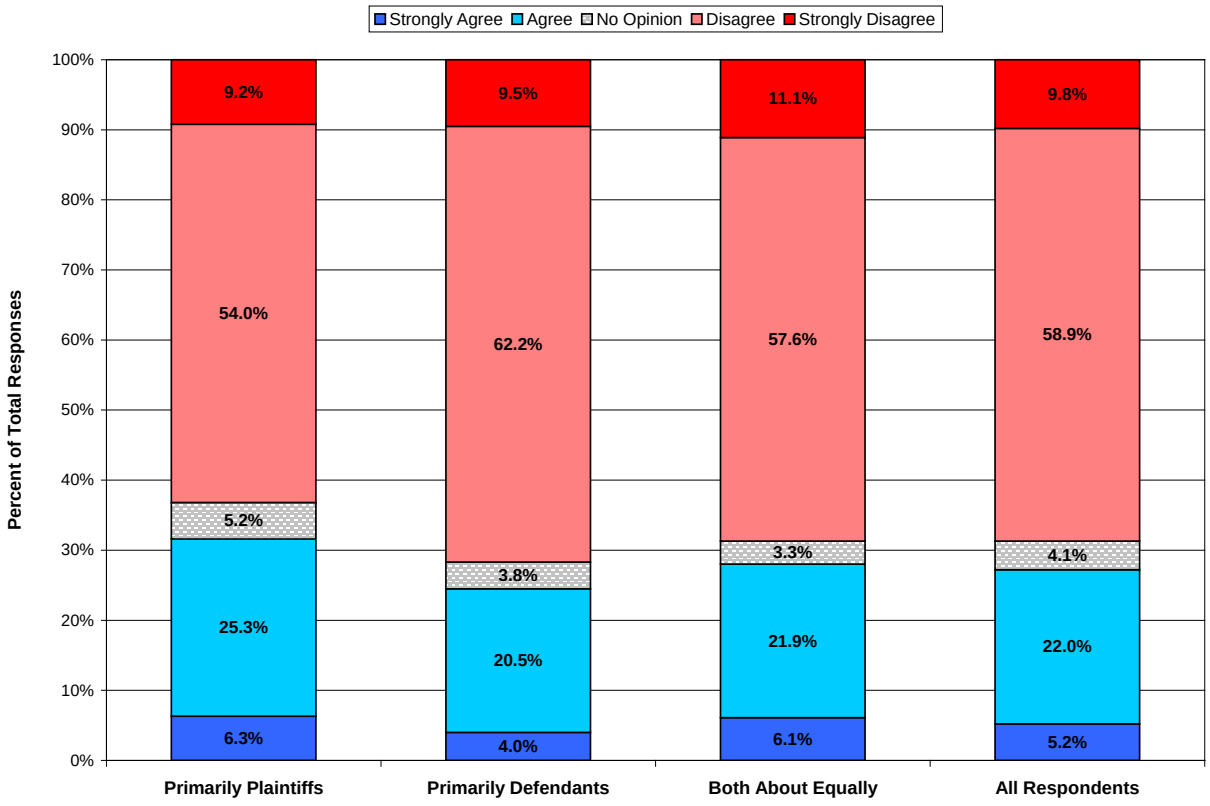

Table 3.2

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The Rules are too complex.						
Primarily Plaintiffs	6.3	25.3	54.0	9.2	5.2	826
Primarily Defendants	4.0	20.5	62.2	9.5	3.8	1632
Both About Equally	6.1	21.9	57.6	11.1	3.3	754
All Respondents	5.2	22.0	58.9	9.8	4.1	3244

3.3 The Rules, as a whole, are internally inconsistent.

Across the board, attorneys were fairly satisfied with the internal consistency of the Rules, although plaintiffs somewhat less so. Over 75% of all respondents disagree or strongly disagree with the statement that the Rules are internally inconsistent, and over 10% expressed no opinion. There was little difference in the percentage of those agreeing in each group of lawyers. Plaintiffs' lawyers were more likely to express no opinion than the other groups.

Figure 3.3: The Rules, as a whole, are internally inconsistent

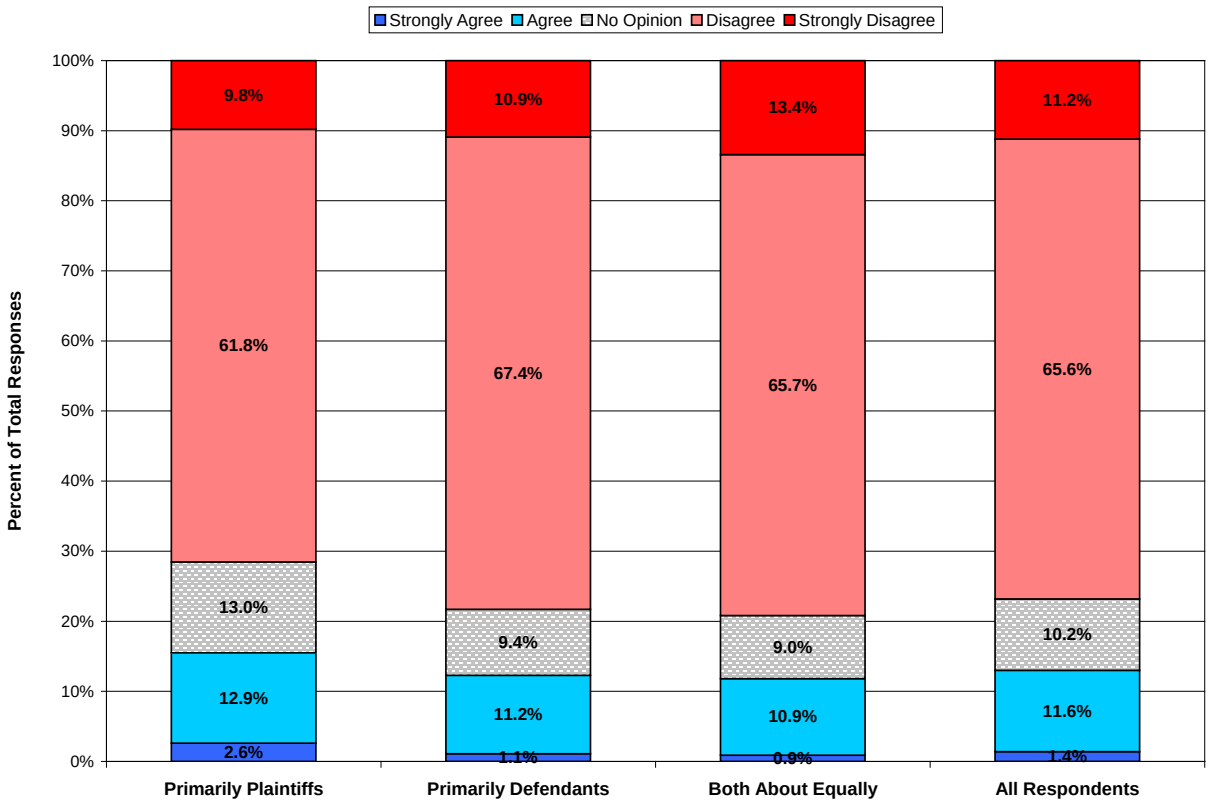

Table 3.3

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The Rules, as a whole, are internally inconsistent.						
Primarily Plaintiffs	2.6	12.9	61.8	9.8	13.0	809
Primarily Defendants	1.1	11.2	67.4	10.9	9.4	1621
Both About Equally	0.9	10.9	65.7	13.4	9.0	752
All Respondents	1.4	11.6	65.6	11.2	10.2	3215

3.4 The Rules are adequate as written.

Only 60.6% of lawyers believe that the Rules are adequate as written, with less than 4% in each category strongly agreeing. Once again, there was little difference among the different groups of lawyers, although defense lawyers were slightly more likely to agree than plaintiffs' lawyers. Mixed practice lawyers responded at rates mid-way between the two other groups.

Figure 3.4: The Rules are adequate as written

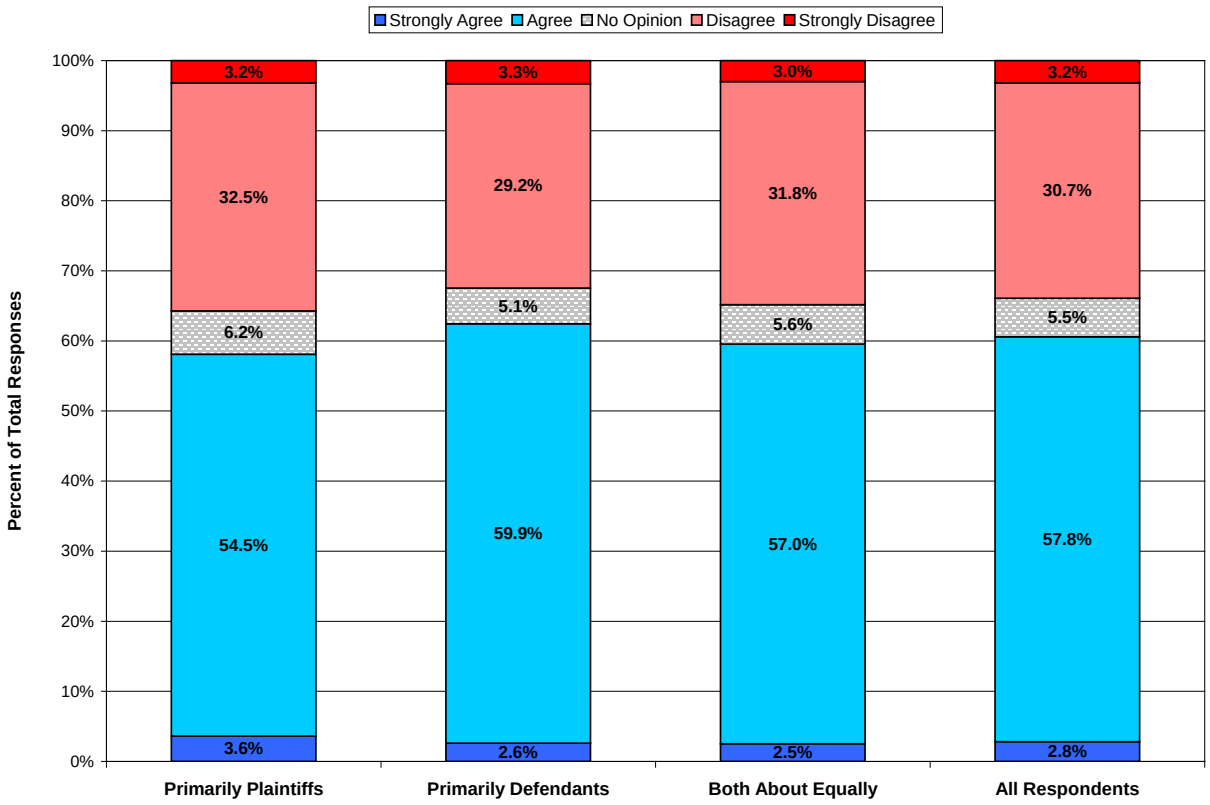

Table 3.4

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The Rules are adequate as written.						
Primarily Plaintiffs	3.6	54.5	32.5	3.2	6.2	809
Primarily Defendants	2.6	59.9	29.2	3.3	5.1	1632
Both About Equally	2.5	57.0	31.8	3.0	5.6	763
All Respondents	2.8	57.8	30.7	3.2	5.5	3236

3.5 The Rules are enforced as written.

When asked whether the Rules were enforced as written, over 10% of plaintiffs' lawyers and mixed practice lawyers expressed strong opinions that the Rules are not enforced as written. About half the respondents (54.2%) believe that the Rules are enforced as written, and about 40.4% believe that they are not. Plaintiffs' lawyers were somewhat more critical of enforcement than defense or mixed practice lawyers.

Figure 3.5: The Rules are enforced as written

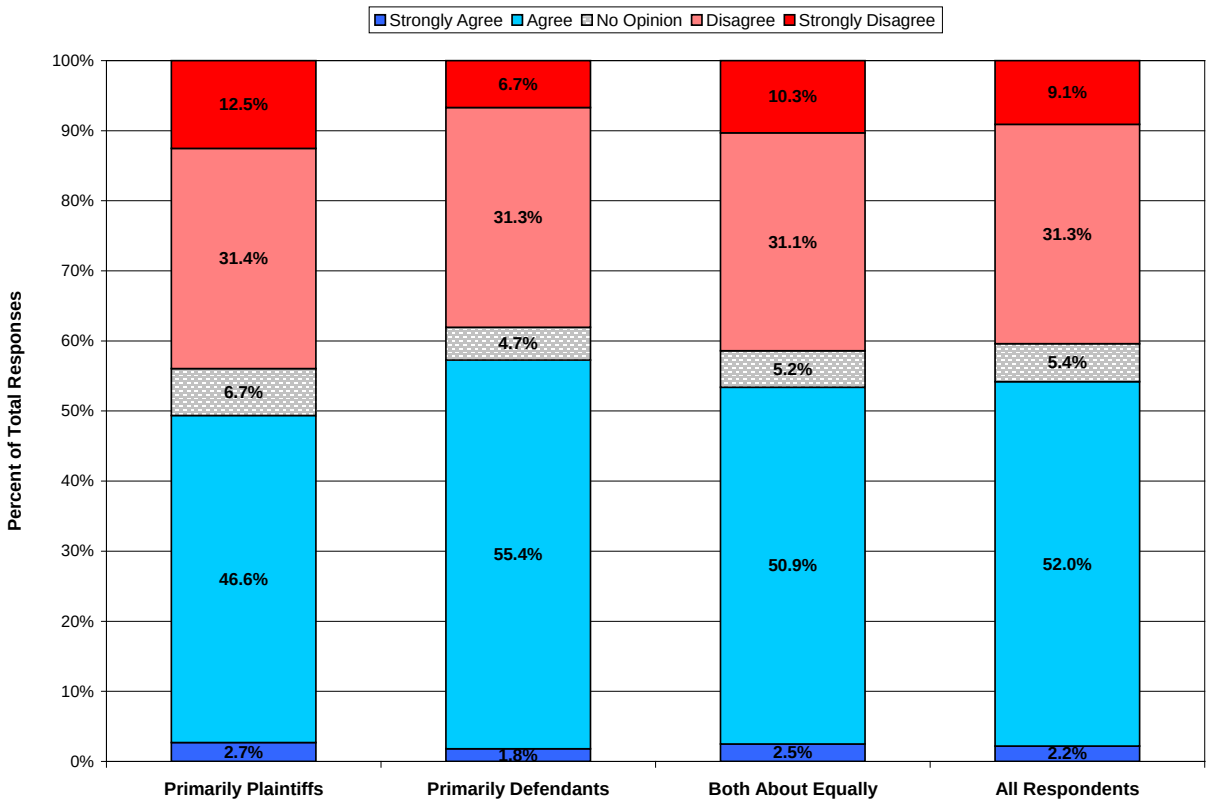

Table 3.5

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The Rules are enforced as written.						
Primarily Plaintiffs	2.7	46.6	31.4	12.5	6.7	802
Primarily Defendants	1.8	55.4	31.3	6.7	4.7	1607
Both About Equally	2.5	50.9	31.1	10.3	5.2	755
All Respondents	2.2	52.0	31.3	9.1	5.4	3198

3.6 The Rules are enforced in an inconsistent manner, even within a single district.

A substantial number of survey respondents agree that the Rules are enforced inconsistently, even within a single district. Almost 43% of respondents agree with that statement, with over 46% of plaintiffs' lawyers and approximately 42% of defense and mixed practice lawyers in agreement. Plaintiffs' lawyers were more likely to express no opinion than the other groups, so that more defense lawyers and mixed practice lawyers than plaintiffs' lawyers disagree with the assertion of inconsistent enforcement.

Figure 3.6: The Rules are enforced in an inconsistent manner, even within a single district

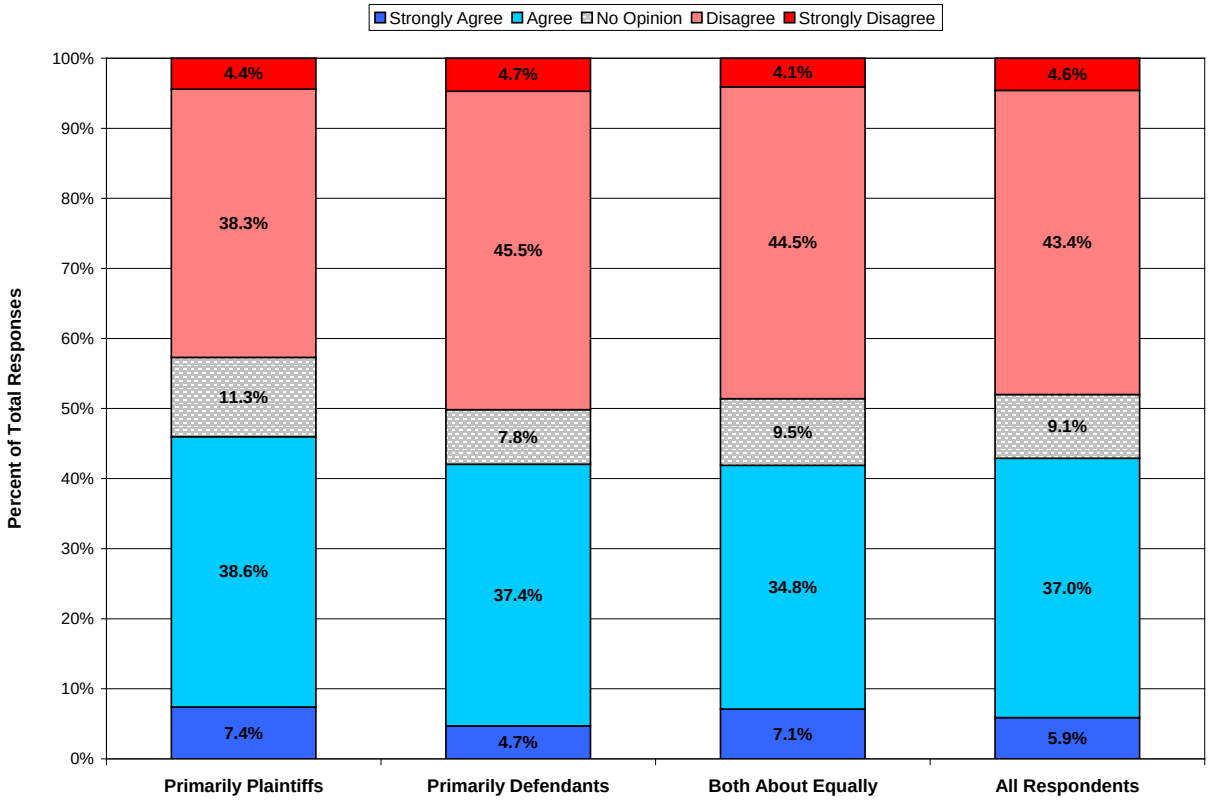

Table 3.6

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The Rules are enforced in an inconsistent manner, even within a single district.						
Primarily Plaintiffs	7.4	38.6	38.3	4.4	11.3	823
Primarily Defendants	4.7	37.4	45.5	4.7	7.8	1633
Both About Equally	7.1	34.8	44.5	4.1	9.5	761
All Respondents	5.9	37.0	43.4	4.6	9.1	3250

3.7 The Rules should be more flexible.

Nearly 40% of survey respondents believe that the Rules should be more flexible. This is an area where plaintiffs' lawyers were clearly more in favor of reform than defense or mixed practice lawyers. Over 50% of plaintiffs' lawyers agree (including 9.2% who strongly agree) that the Rules should allow for more flexibility. Over a third of defense and mixed practice lawyers also agree that the rules should be more flexible – 35.4% of defense lawyers and 36.7% of mixed practice lawyers.

Figure 3.7: The Rules should be more flexible

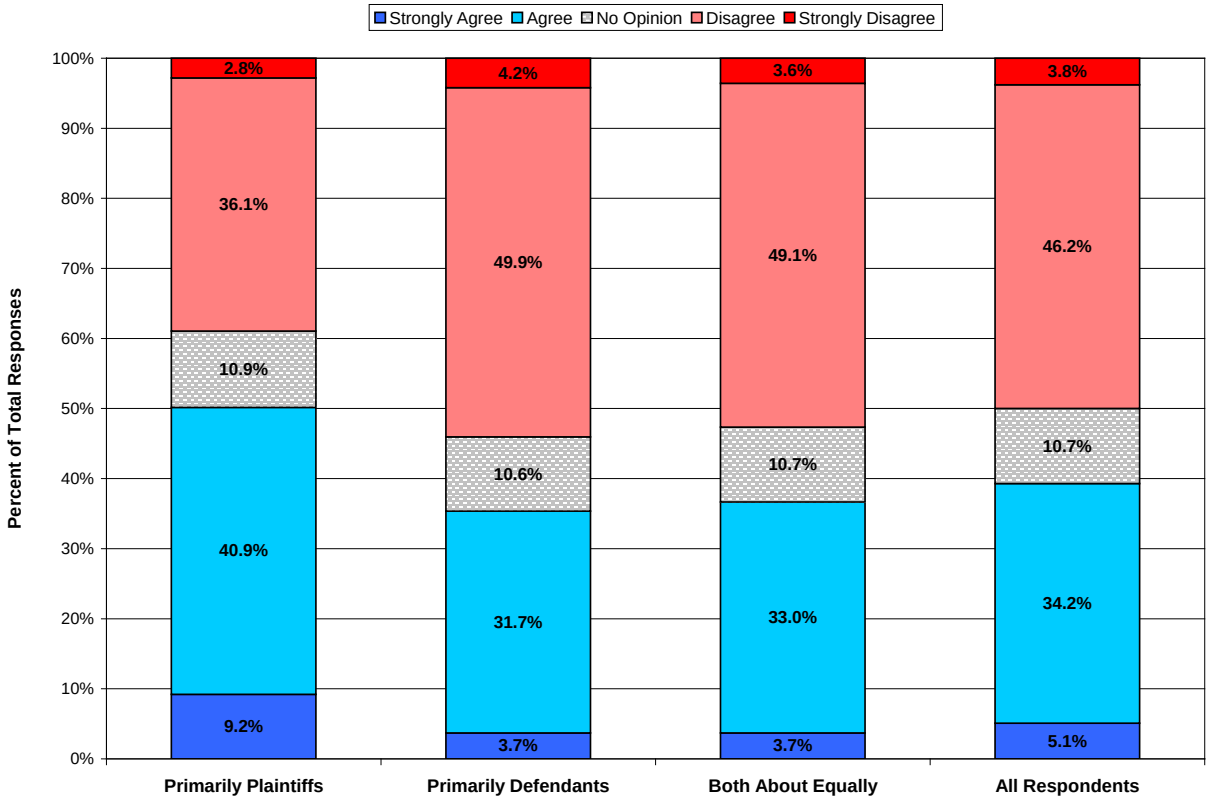

Table 3.7

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The Rules should be more flexible.						
Primarily Plaintiffs	9.2	40.9	36.1	2.8	10.9	822
Primarily Defendants	3.7	31.7	49.9	4.2	10.6	1630
Both About Equally	3.7	33.0	49.1	3.6	10.7	758
All Respondents	5.1	34.2	46.2	3.8	10.7	3242

3.8 The Rules should be more rigid.

Not surprisingly, since so many lawyers responded affirmatively to the question of whether the Rules should be more flexible, very few agree that the Rules should be more rigid. Only 10.5% of plaintiffs' lawyers agree, 16.1% of defense lawyers agree, and 14.4% of mixed practice lawyers agree. Of those groups, less than 2% strongly agree. Notably, 19.2% of plaintiffs' lawyers strongly disagree with the statement, while the other groups were more likely simply to disagree.

Figure 3.8: The Rules should be more rigid

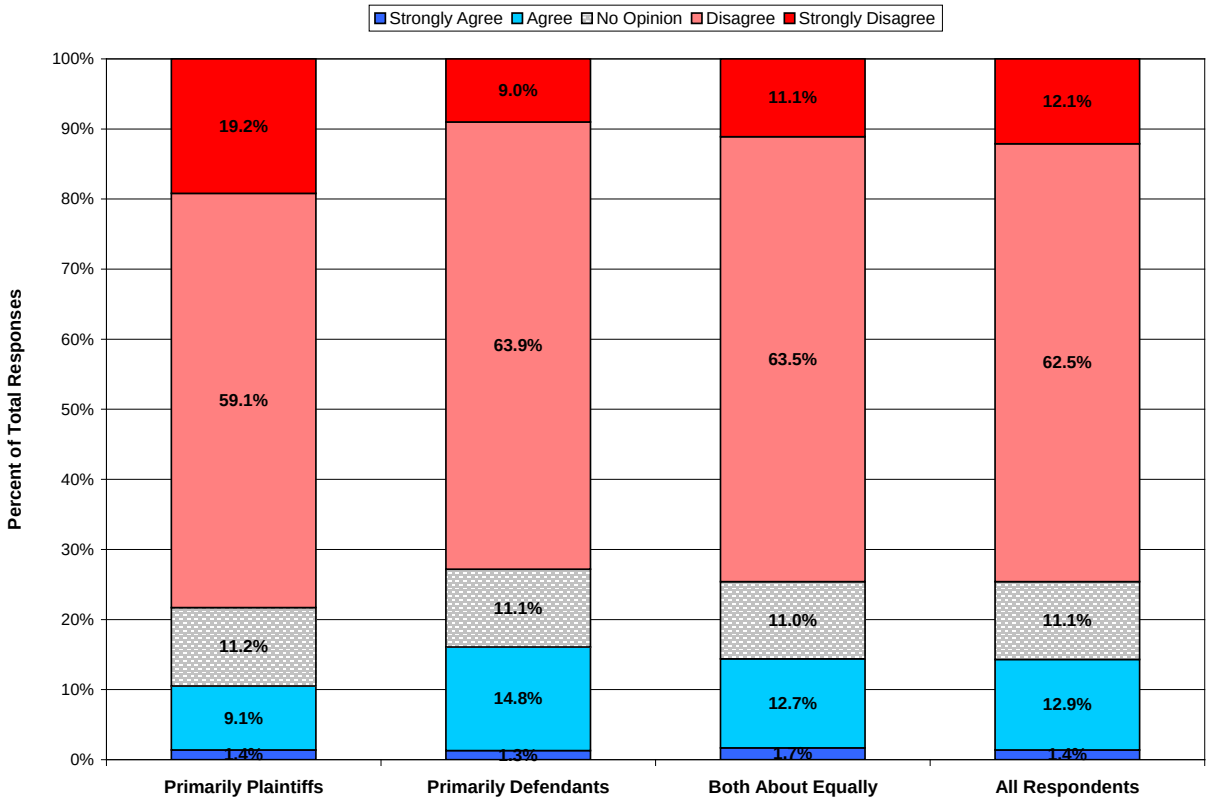

Table 3.8

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The Rules should be more rigid.						
Primarily Plaintiffs	1.4	9.1	59.1	19.2	11.2	792
Primarily Defendants	1.3	14.8	63.9	9.0	11.1	1600
Both About Equally	1.7	12.7	63.5	11.1	11.0	748
All Respondents	1.4	12.9	62.5	12.1	11.1	3172

3.9 The Rules need minor amendments in order to make them work.

The responses of each group were fairly consistent about the need for minor change to the Rules. Between 50 and 56% of the respondents from each category agree that the rules need minor amendments to make them work. About a third of the respondents expressed disagreement (with plaintiffs' lawyers somewhat more likely to do so), and 14.5% expressed no opinion.

Figure 3.9: The Rules need minor amendments in order to make them work

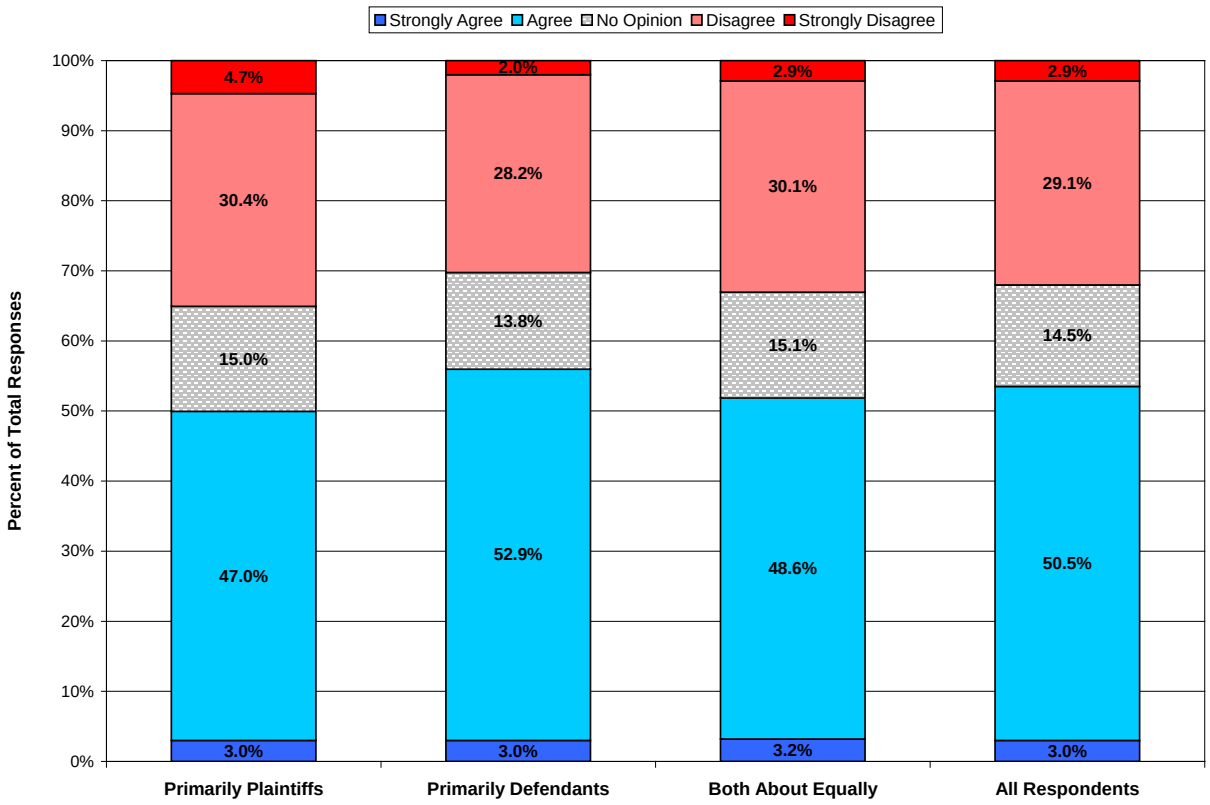

Table 3.9

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The Rules need minor amendments in order to make them work.						
Primarily Plaintiffs	3.0	47.0	30.4	4.7	15.0	813
Primarily Defendants	3.0	52.9	28.2	2.0	13.8	1625
Both About Equally	3.2	48.6	30.1	2.9	15.1	753
All Respondents	3.0	50.5	29.1	2.9	14.5	3224

3.10 The Rules must be reviewed in their entirety and rewritten to address the needs of today's litigants.

Approximately 25% of all respondents agree that the Rules require a substantial overhaul. Interestingly, of the three groups, the mixed practice group was most likely to agree with that statement, with over 27% of lawyers in that group agreeing. About 67% of all lawyers disagree that the Rules need a major overhaul, and notably, 20.2% of plaintiffs' lawyers expressed strong disagreement that major change is needed.

Figure 3.10: The Rules must be reviewed in their entirety and rewritten to address the needs of today's litigants

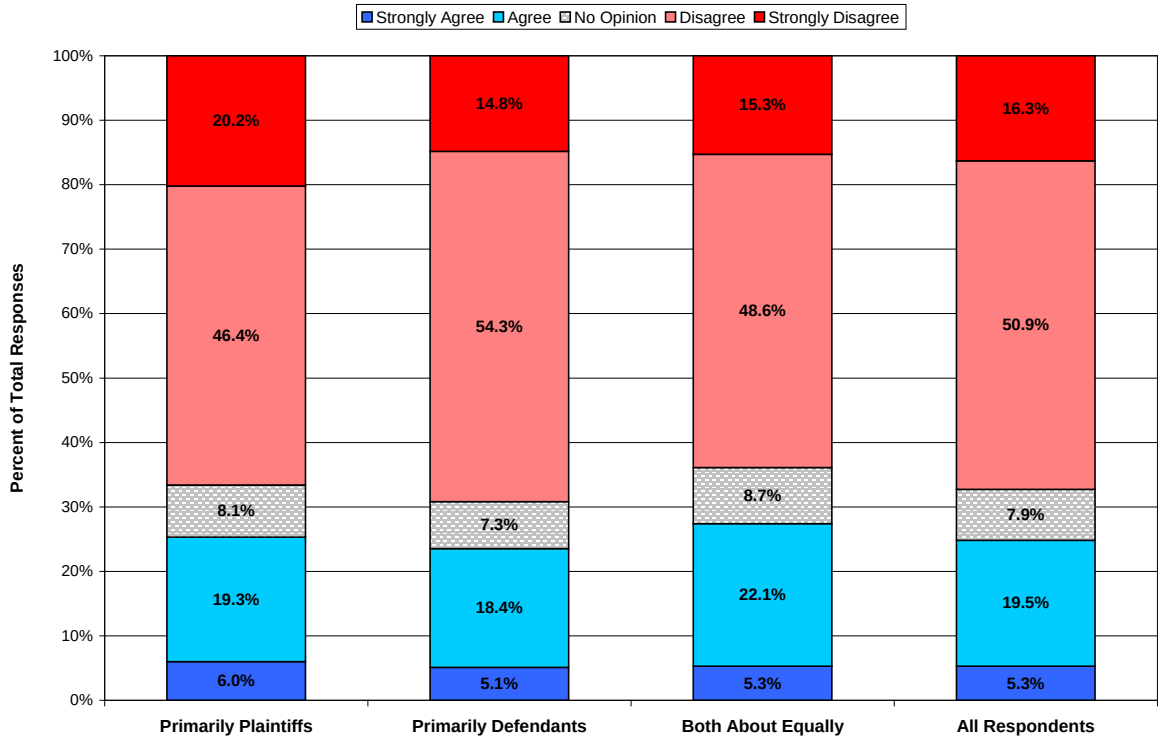

Table 3.10

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The Rules must be reviewed in their entirety and rewritten to address the needs of today's litigants.						
Primarily Plaintiffs	6.0	19.3	46.4	20.2	8.1	817
Primarily Defendants	5.1	18.4	54.3	14.8	7.3	1623
Both About Equally	5.3	22.1	48.6	15.3	8.7	757
All Respondents	5.3	19.5	50.9	16.3	7.9	3230

3.11 The Rules promote unnecessary conflict between counsel.

Once again, while a majority of lawyers disagree with this statement, a fair number of the respondents agree that the Rules promote unnecessary conflict between counsel. Over 27% of plaintiffs' lawyers, 26% of mixed practice lawyers and 23% of defense lawyers agree that the Rules promote unnecessary conflict.

Figure 3.11: The Rules promote unnecessary conflict between counsel

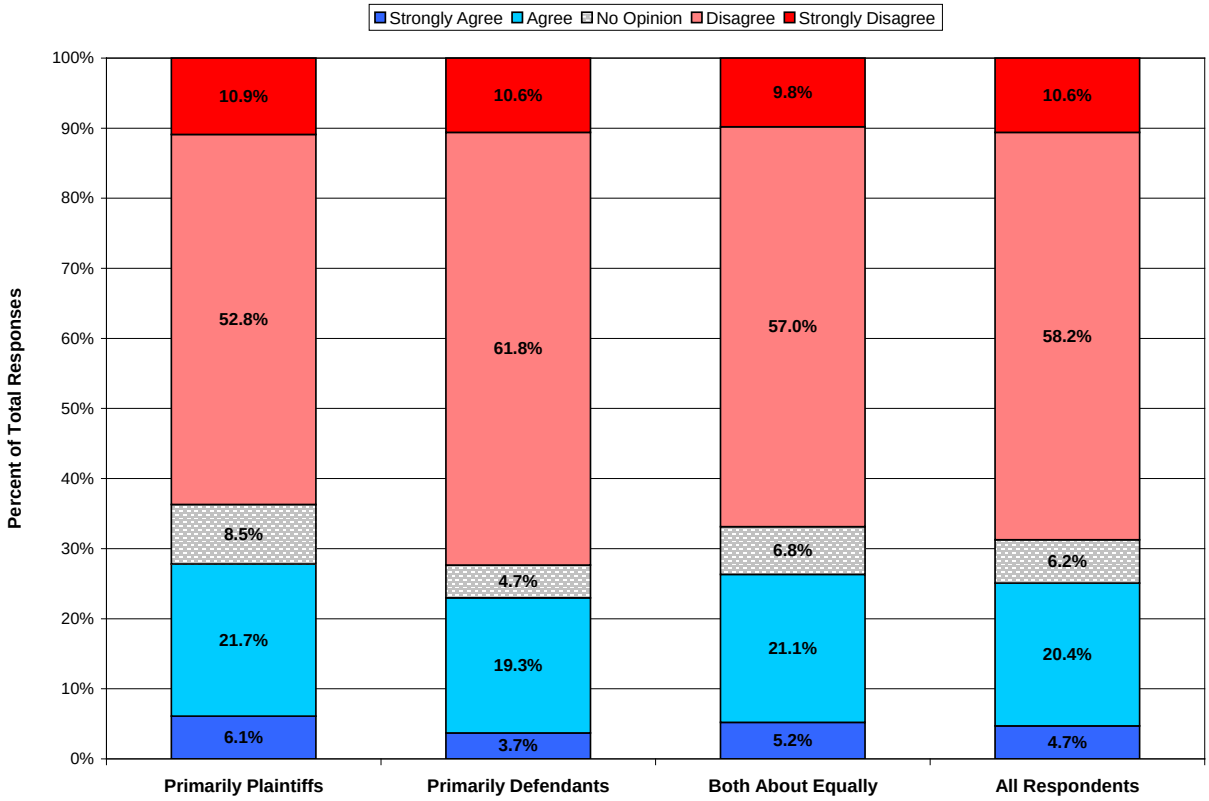

Table 3.11

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The Rules promote unnecessary conflict between counsel.						
Primarily Plaintiffs	6.1	21.7	52.8	10.9	8.5	824
Primarily Defendants	3.7	19.3	61.8	10.6	4.7	1629
Both About Equally	5.2	21.1	57.0	9.8	6.8	762
All Respondents	4.7	20.4	58.2	10.6	6.2	3247

3.12 One set of Rules cannot accommodate every case type.

Although a slim majority of lawyers believe that one set of Rules is sufficient to accommodate every type of case, over 35% of plaintiffs' lawyers and nearly 40% of defense and mixed practice lawyers agree that one set of Rules cannot sufficiently accommodate every case.

Figure 3.12: One set of Rules cannot accommodate every case type

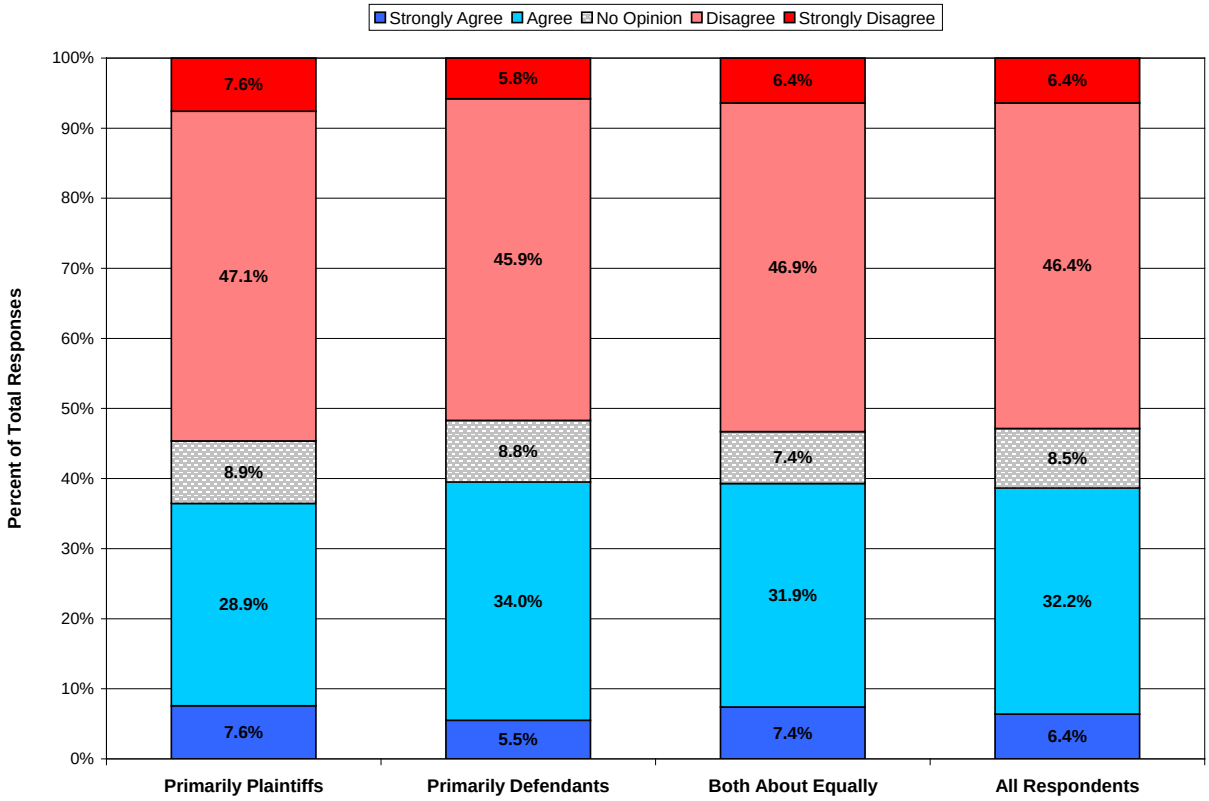

Table 3.12

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
One set of Rules cannot accommodate every case type.						
Primarily Plaintiffs	7.6	28.9	47.1	7.6	8.9	821
Primarily Defendants	5.5	34.0	45.9	5.8	8.8	1631
Both About Equally	7.4	31.9	46.9	6.4	7.4	761
All Respondents	6.4	32.2	46.4	6.4	8.5	3246

3.13 Local Rules promote inconsistency and unpredictability.

In response to the question of whether Local Rules promote inconsistency and unpredictability, no answer received a clear majority. A significant number of respondents agree with the statement (45.6% overall), and although plaintiffs' lawyers (48.7%) and mixed practice lawyers (46.9%) were somewhat more likely to agree than defense lawyers (43.3%), the three groups did not differ significantly. Over 10% of respondents in each group strongly agree with the statement, while less than 5% in each group strongly disagree.

Figure 3.13: Local Rules promote inconsistency and unpredictability

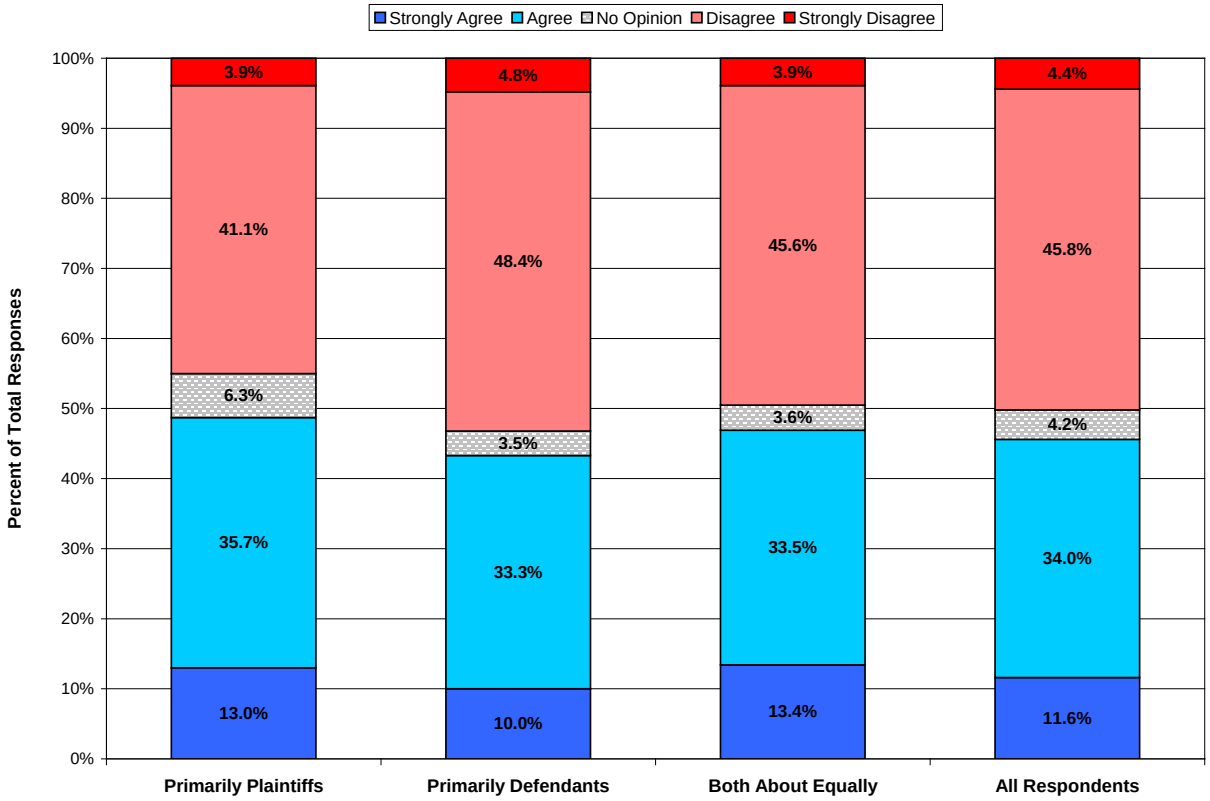

Table 3.13

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Local Rules promote inconsistency and unpredictability.						
Primarily Plaintiffs	13.0	35.7	41.1	3.9	6.3	828
Primarily Defendants	10.0	33.3	48.4	4.8	3.5	1642
Both About Equally	13.4	33.5	45.6	3.9	3.6	770
All Respondents	11.6	34.0	45.8	4.4	4.2	3240

3.14 Local Rules provide necessary flexibility from one jurisdiction to the next.

The respondents were also split as to whether Local Rules promote sufficient flexibility from one jurisdiction to the next. Plaintiffs' lawyers agree 43.4% of the time, while defense lawyers agree 52.4% of the time, and mixed practice lawyers agree 48.5% of the time. Very few lawyers strongly agree with the statement (2.4% overall), and more strongly disagree (6.7% overall).

Figure 3.14: Local Rules provide necessary flexibility from one jurisdiction to the next

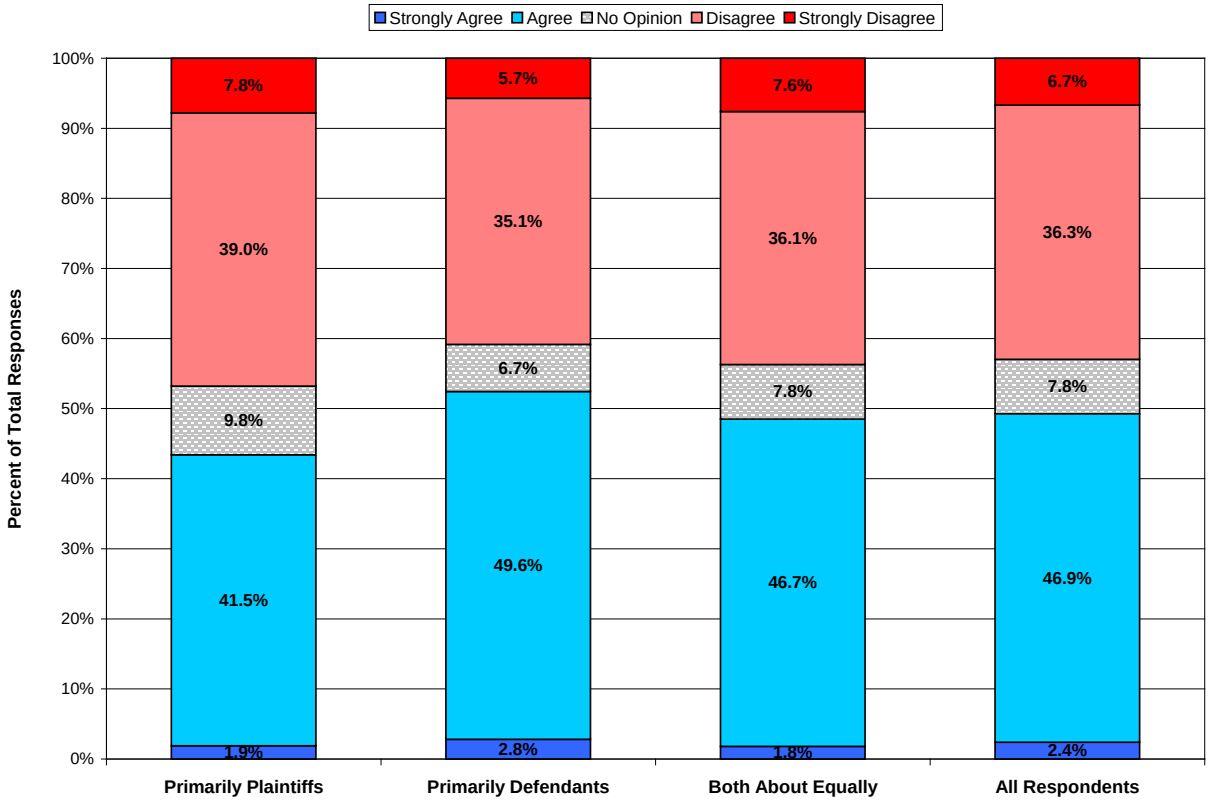

Table 3.14

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Local Rules provide necessary flexibility from one jurisdiction to the next.						
Primarily Plaintiffs	1.9	41.5	39.0	7.8	9.8	824
Primarily Defendants	2.8	49.6	35.1	5.7	6.7	1636
Both About Equally	1.8	46.7	36.1	7.6	7.8	760
All Respondents	2.4	46.9	36.3	6.7	7.8	3220

3.15 Local Rules are uniformly applied within the district to which they pertain.

Approximately 50% of lawyers disagree with the statement that Local Rules are uniformly applied within the district to which they pertain. About the same percentage of plaintiffs' lawyers as defense lawyers disagreed with the statement, but more plaintiffs' lawyers (16.8%) expressed no opinion than defense lawyers (9.9%), leaving a smaller percentage of plaintiffs' lawyers who agree that Local Rules are uniformly applied.

Figure 3.15: Local Rules are uniformly applied within the district to which they pertain

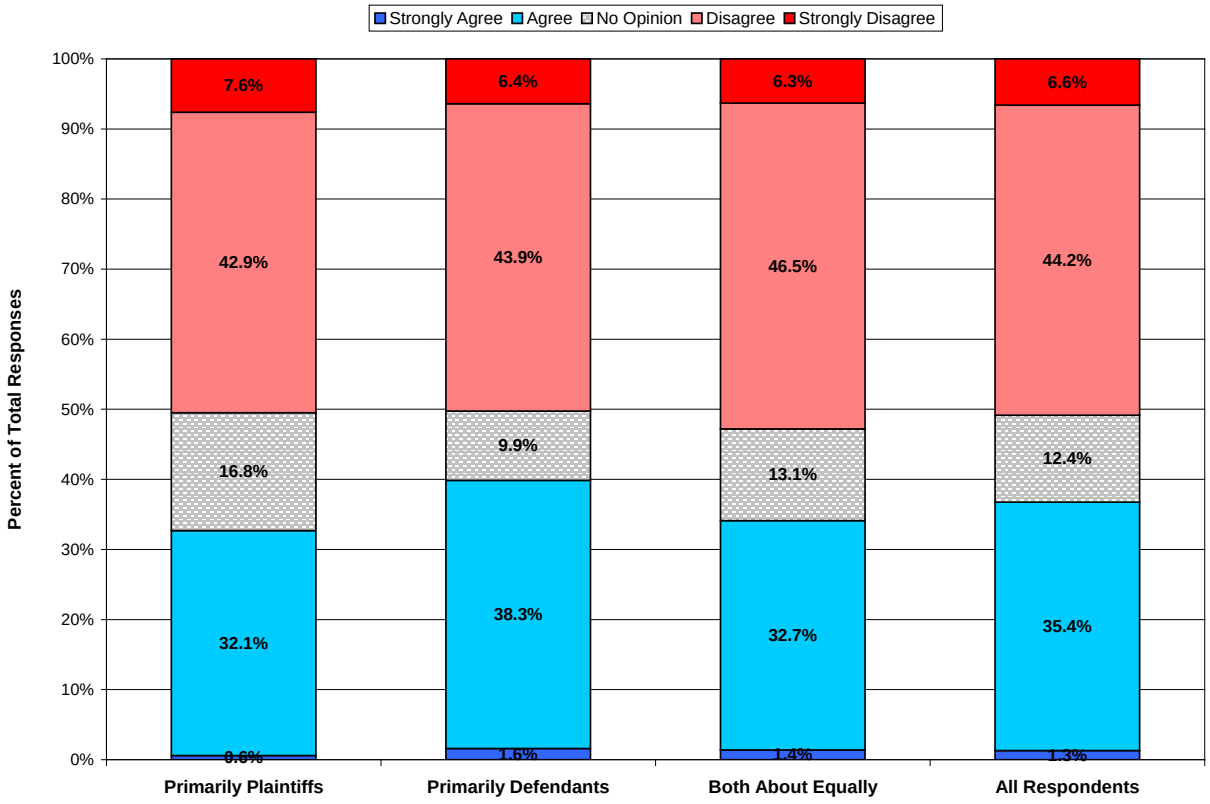

Table 3.15

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Local Rules are uniformly applied within the district to which they pertain.						
Primarily Plaintiffs	0.6	32.1	42.9	7.6	16.8	820
Primarily Defendants	1.6	38.3	43.9	6.4	9.9	1637
Both About Equally	1.4	32.7	46.5	6.3	13.1	762
All Respondents	1.3	35.4	44.2	6.6	12.4	3219

3.16 Local Rules are always consistent with the FRCP.

A clear majority of respondents – over 63% of plaintiffs' lawyers and over 66% of defense and mixed practice lawyers – disagree that Local Rules are always consistent with the FRCP. While a fair percentage of each group expressed no opinion, there appears to be a consensus among the groups that Local Rules sometimes are inconsistent with the FRCP. Also less than 1% of each group strongly agrees that Local Rules were always consistent with the FRCP.

Figure 3.16: Local Rules are always consistent with the FRCP

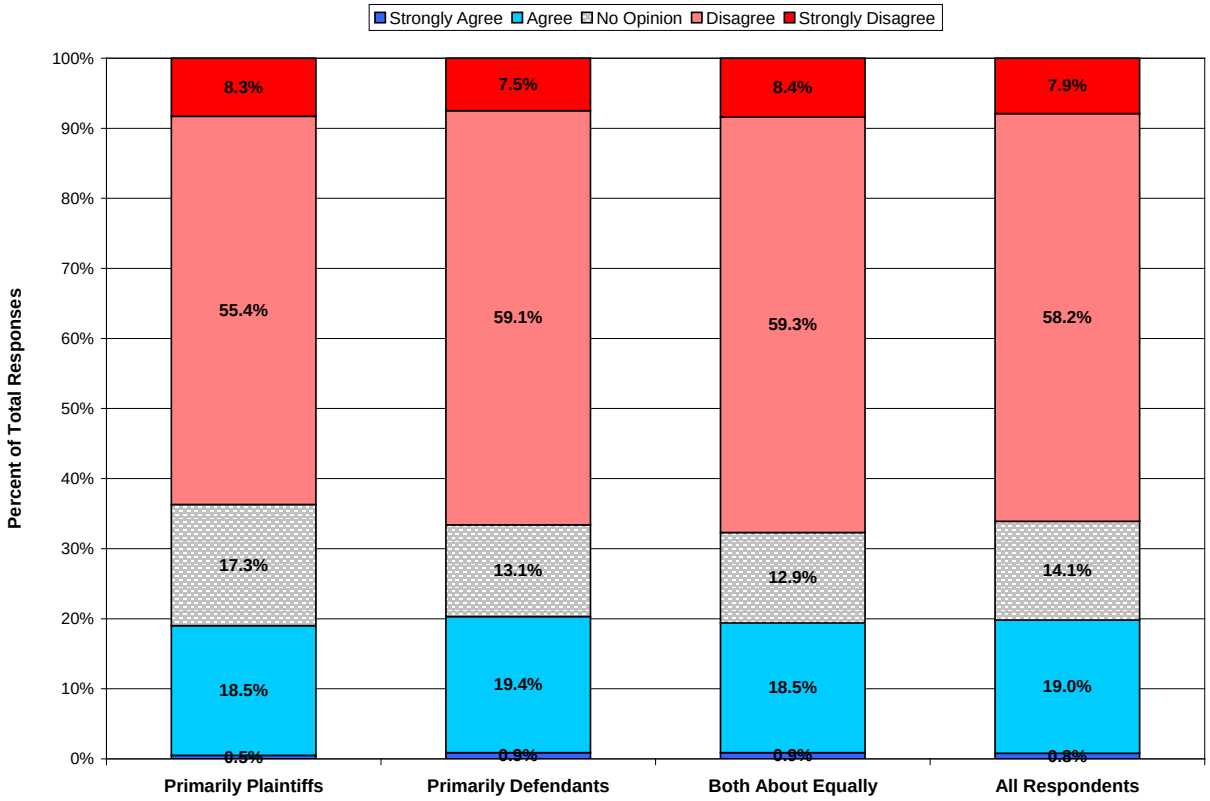

Table 3.16

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Local Rules are always consistent with the FRCP.						
Primarily Plaintiffs	0.5	18.5	55.4	8.3	17.3	821
Primarily Defendants	0.9	19.4	59.1	7.5	13.1	1637
Both About Equally	0.9	18.5	59.3	8.4	12.9	766
All Respondents	0.8	19.0	58.2	7.9	14.1	3224

4. Pleadings

Plaintiffs' lawyers and defense lawyers expressed significant disagreement about pleadings. Not surprisingly, plaintiffs' lawyers are more likely to see the benefits of notice pleading, while defense and mixed practice lawyers appear to be less satisfied with the ability of notice pleading to narrow the issues and discovery.

4.1 In notice pleading, the answer to a complaint shapes and narrows the issues.

The majority of survey respondents disagree with the statement that the answer shapes and narrows the issue in notice pleading. However, plaintiffs' lawyers were much more likely than defense lawyers to say that the answer does shape and narrow the issues in current practice. In fact, 40% of plaintiffs' lawyers agree, while less than 20% of defense lawyers and less than 22% of mixed practice lawyers agree. In all groups, over 15% of survey respondents strongly disagree that the answer shapes and narrows issues.

Figure 4.1: In notice pleading, the answer to a complaint shapes and narrows the issues

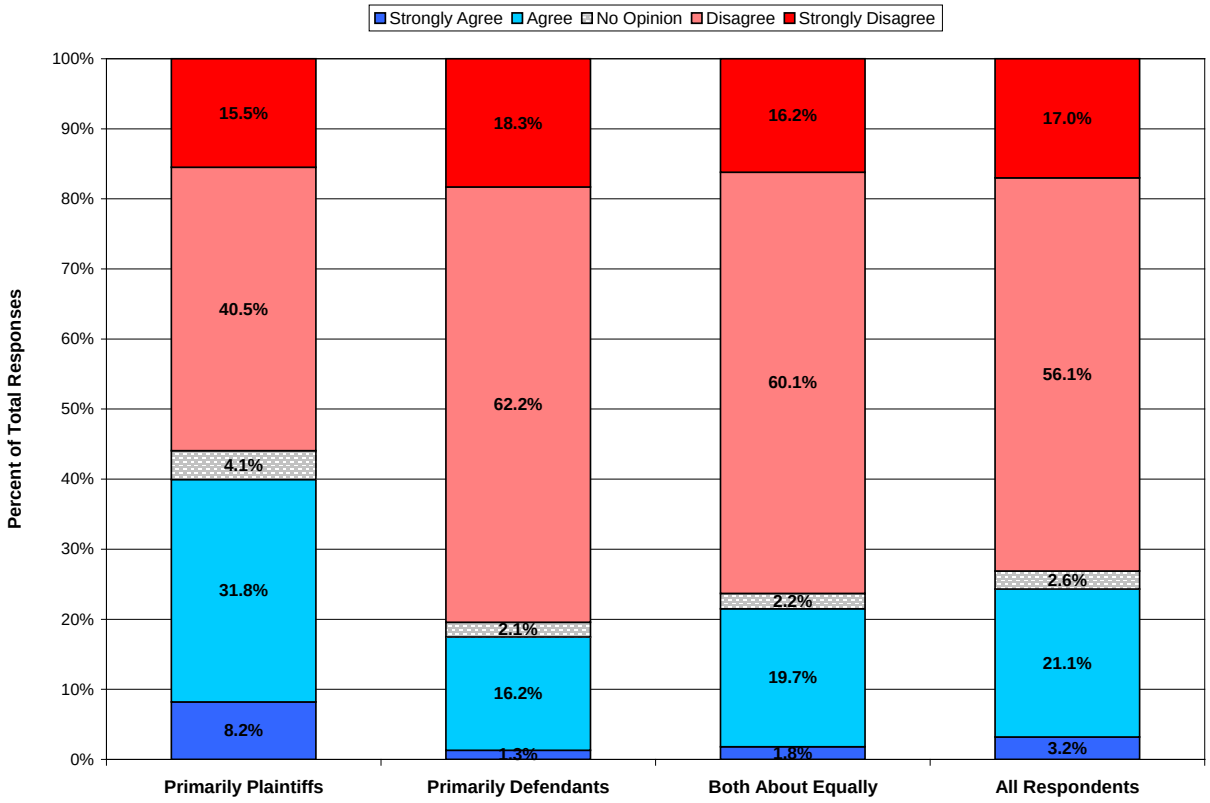

Table 4.1

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
In notice pleading, the answer to a complaint shapes and narrows the issues.						
Primarily Plaintiffs	8.2	31.8	40.5	15.5	4.1	833
Primarily Defendants	1.3	16.2	62.2	18.3	2.1	1645
Both About Equally	1.8	19.7	60.1	16.2	2.2	771
All Respondents	3.2	21.1	56.1	17.0	2.6	3249

4.2 Notice pleading has become a problem, because extensive discovery is required to narrow the claims and defenses.

This question produced almost parallel but inverse responses from plaintiffs and defendants. Less than 21% of plaintiffs' lawyers agree that notice pleading is a problem because extensive discovery is required to narrow claims and defenses. 76.9% of plaintiffs' lawyers disagree, with nearly 40% expressing strong disagreement. On the other hand, nearly 70% of defense lawyers agree that notice pleading is a problem, and of those with a mixed practice, 57% agree.

Figure 4.2: Notice pleading has become a problem, because extensive discovery is required to narrow the claims and defenses

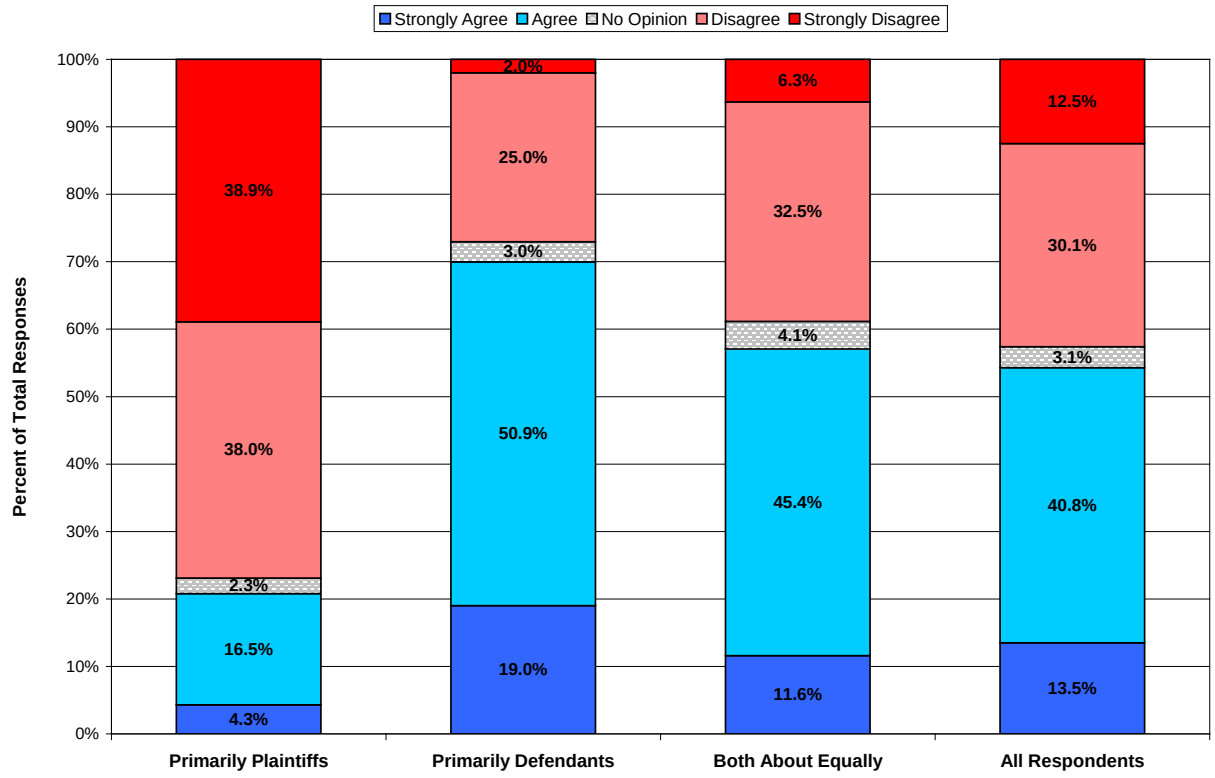

Table 4.2

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Notice pleading has become a problem, because extensive discovery is required to narrow the claims and defenses.						
Primarily Plaintiffs	4.3	16.5	38.0	38.9	2.3	830
Primarily Defendants	19.0	50.9	25.0	2.0	3.0	1645
Both About Equally	11.6	45.4	32.5	6.3	4.1	773
All Respondents	13.5	40.8	30.1	12.5	3.1	3248

4.3 Fact pleading can narrow the scope of discovery.

This question also caused very disparate responses between plaintiffs' lawyers and defense lawyers. While only 32.2% of plaintiffs' lawyers agree that fact pleading can narrow the scope of discovery, 76.7% of defense lawyers and 64.6% of mixed practice lawyers agree that fact pleading can help to narrow the scope of discovery. Almost one-third of plaintiffs' lawyers strongly disagree that fact pleading can narrow the scope of discovery.

Figure 4.3: Fact pleading can narrow the scope of discovery

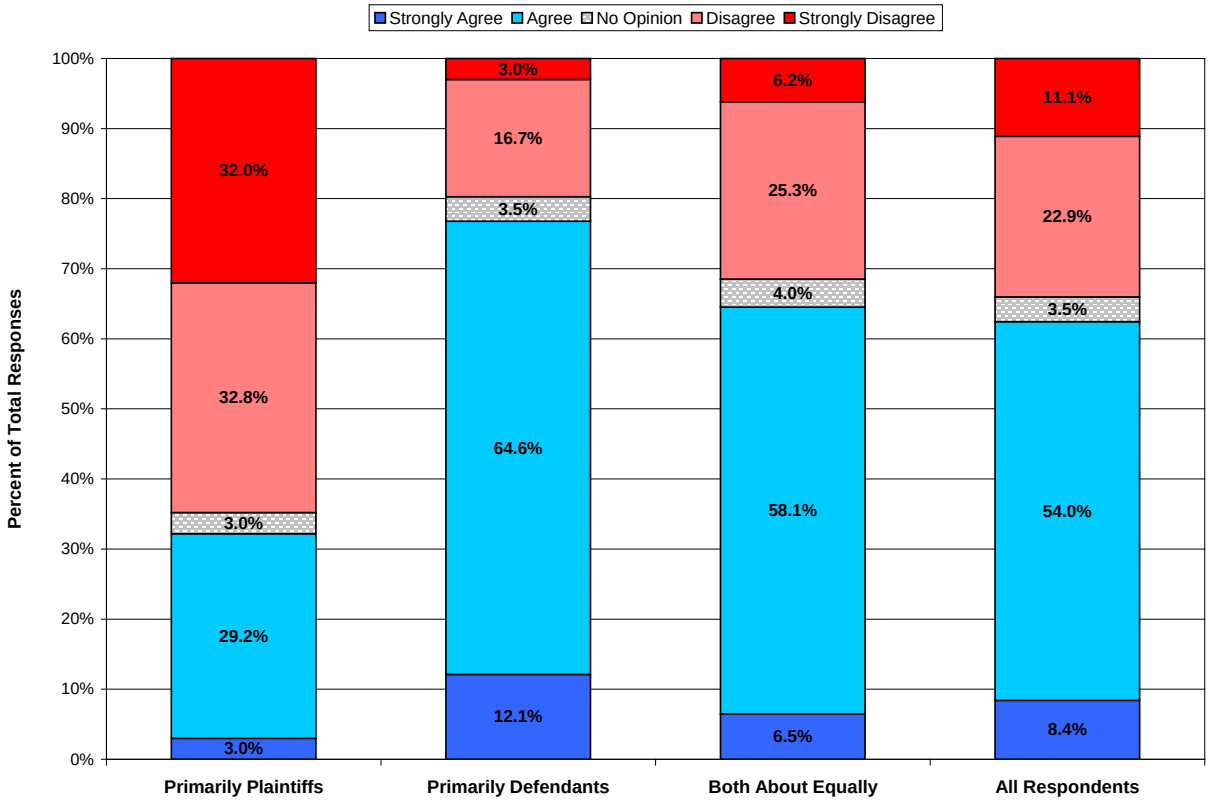

Table 4.3

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Fact pleading . . . can narrow the scope of discovery.						
Primarily Plaintiffs	3.0	29.2	32.8	32.0	3.0	829
Primarily Defendants	12.1	64.6	16.7	3.0	3.5	1643
Both About Equally	6.5	58.1	25.3	6.2	4.0	775
All Respondents	8.4	54.0	22.9	11.1	3.5	3247

4.4 Frivolous claims and defenses are asserted more frequently than they were five years ago.

Most plaintiffs' lawyers, over 70%, disagree that frivolous claims and defenses are more common now than five years ago. Defense and mixed practice lawyers were more likely to have mixed opinions about the statement. Of defense lawyers, 39.1% agree with the statement, and 44% disagree. Similarly, for mixed practice lawyers, 32.7% agree, and 50.3% disagree. An unusually large percentage of defense and mixed practice lawyers (about 17%) had no opinion.

Figure 4.4: Frivolous claims and defenses are asserted more frequently than they were five years ago

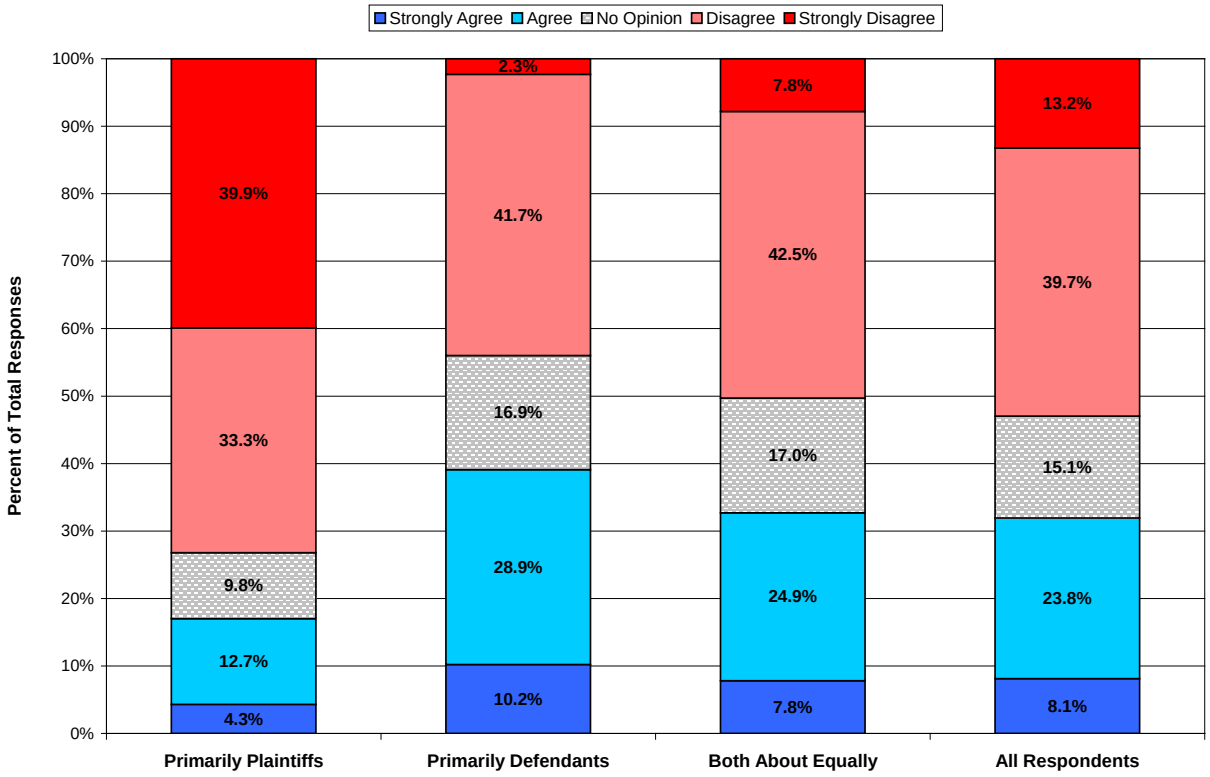

Table 4.4

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Frivolous claims and defenses are asserted more frequently than they were five years ago.						
Primarily Plaintiffs	4.3	12.7	33.3	39.9	9.8	833
Primarily Defendants	10.2	28.9	41.7	2.3	16.9	1643
Both About Equally	7.8	24.9	42.5	7.8	17.0	771
All Respondents	8.1	23.8	39.7	13.2	15.1	3247

4.5 Motions to dismiss for failure to state a claim in notice pleading are not effective tools to limit claims and narrow litigation.

Defense lawyers were much more likely than plaintiffs' lawyers to agree that a motion to dismiss for failure to state a claim is NOT an effective tool to limit claims and narrow litigation. 46.8% of plaintiffs' lawyers, 61.8% of defense lawyers, and 55.5% of mixed practice lawyers agree or strongly agree that these motions are not effective tools to narrow discovery.

Figure 4.5: Motions to dismiss for failure to state a claim in notice pleading are not effective tools to limit claims and narrow litigation

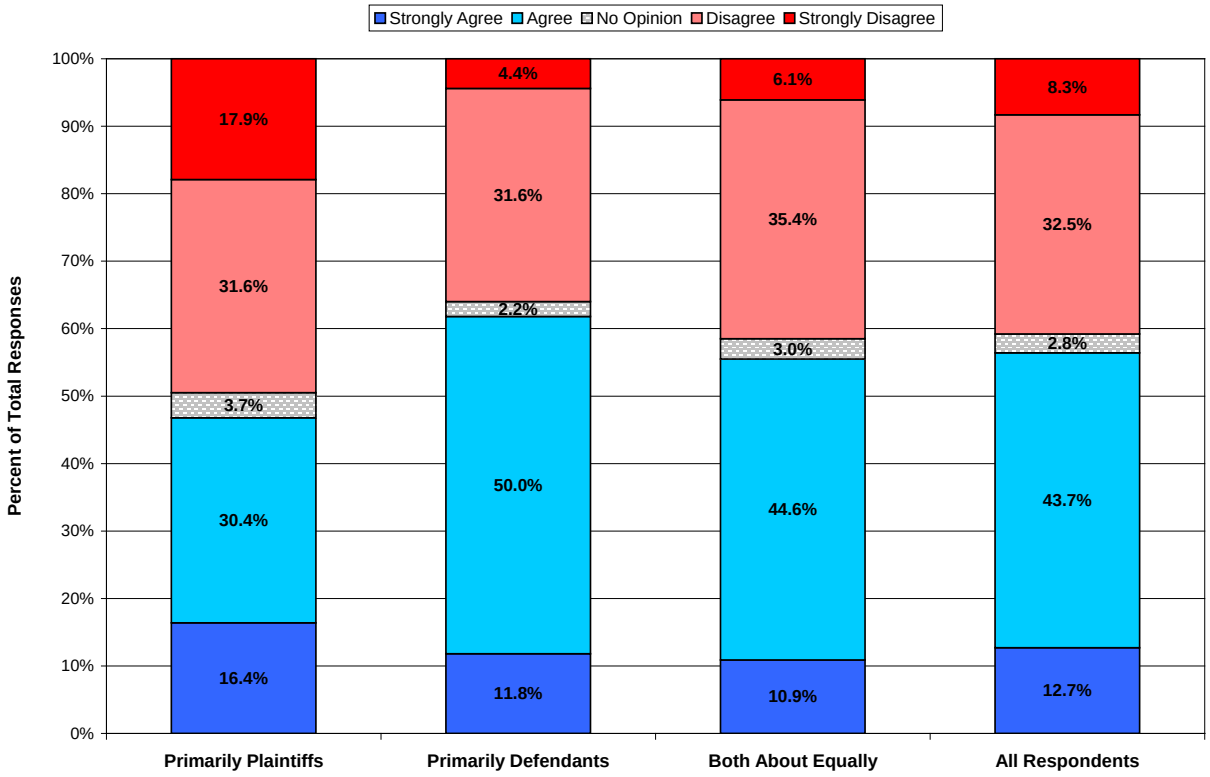

Table 4.5

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Motions to dismiss for failure to state a claim in notice pleading are not effective tools to limit claims and narrow litigation.						
Primarily Plaintiffs	16.4	30.4	31.6	17.9	3.7	833
Primarily Defendants	11.8	50.0	31.6	4.4	2.2	1650
Both About Equally	10.9	44.6	35.4	6.1	3.0	773
All Respondents	12.7	43.7	32.5	8.3	2.8	3256

5. Initial Disclosure

Rule 26(a)(1) provides a list of required disclosures without requiring a discovery request. Generally, these are basic inquiries into the identification of witnesses, basic documents supporting a party's claim, insurance documents, and computation of damages. A majority of respondents in all groups believe that initial disclosure results does not result in cost savings, does not reduce discovery, and certainly does not eliminate the need for discovery

5.1 Rule 26(a)(1) initial disclosure reduces discovery.

Over 53% of plaintiffs' lawyers, over 60% of mixed practice lawyers, and nearly 70% of defense lawyers disagree that initial disclosure reduces discovery. Of those percentages, 14%, 13.7%, and 15.3%, respectively, strongly disagree with that statement.

Figure 5.1: Rule 26(a)(1) initial disclosure reduces discovery

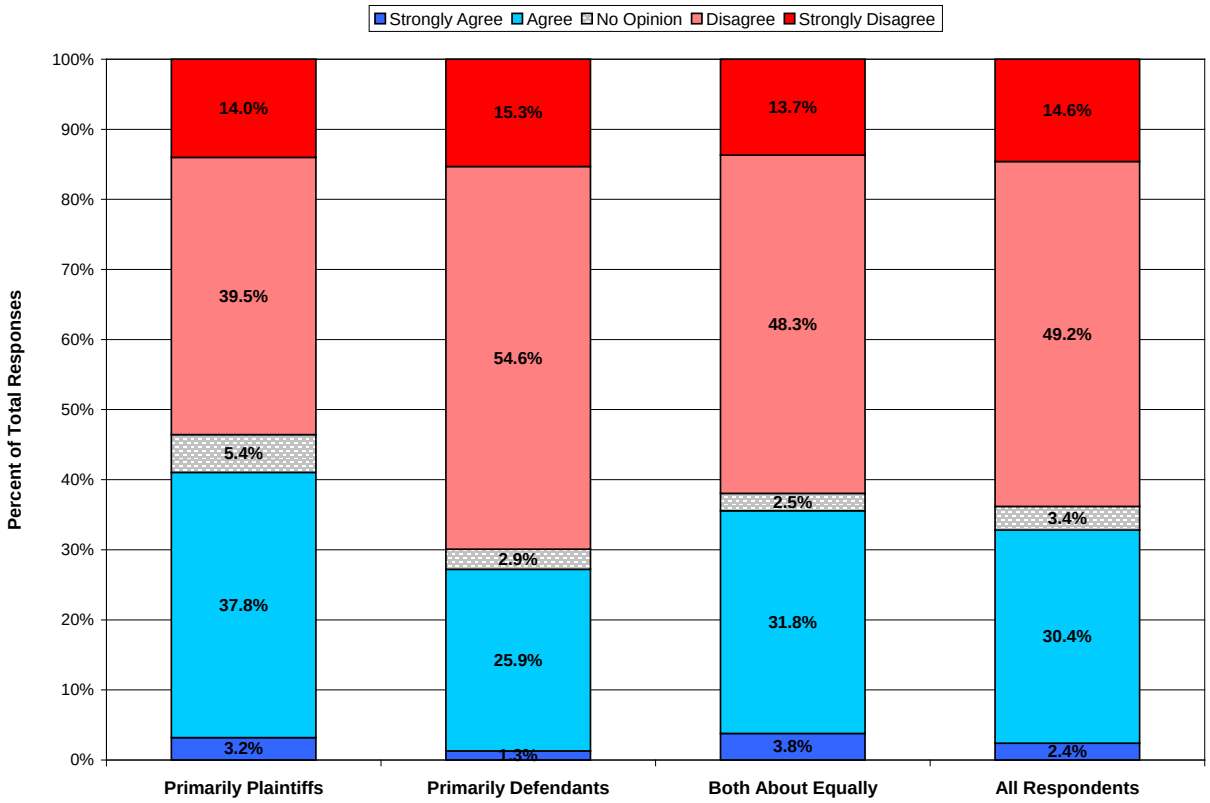

Figure 5.1

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Rule 26(a)(1) initial disclosures reduce discovery.						
Primarily Plaintiffs	3.2	37.8	39.5	14.0	5.4	835
Primarily Defendants	1.3	25.9	54.6	15.3	2.9	1650
Both About Equally	3.8	31.8	48.3	13.7	2.5	773
All Respondents	2.4	30.4	49.2	14.6	3.4	3258

5.2 Rule 26(a)(1) initial disclosure saves the client money.

68% of all lawyers disagree that initial disclosure saves the client money. Of that percentage, a majority of each group disagree, with over 14% in each group expressing strong disagreement. While 33.5% of plaintiffs' lawyers and 28.9% of mixed practice lawyers believe that initial disclosures help to save money, only 21% of defense lawyers agree.

Figure 5.2: Rule 26(a)(1) initial disclosure saves the client money

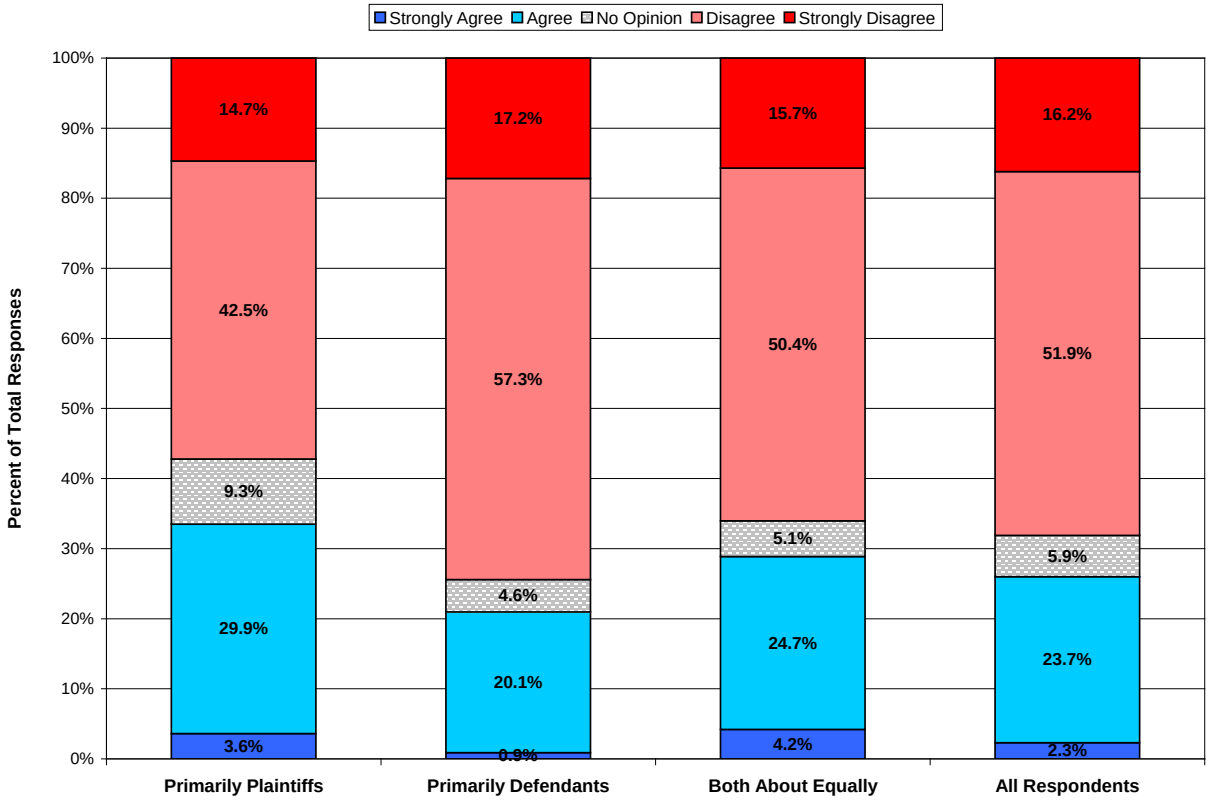

Table 5.2

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Rule 26(a)(1) initial disclosures save the client money.						
Primarily Plaintiffs	3.6	29.9	42.5	14.7	9.3	829
Primarily Defendants	0.9	20.1	57.3	17.2	4.6	1644
Both About Equally	4.2	24.7	50.4	15.7	5.1	766
All Respondents	2.3	23.7	51.9	16.2	5.9	3239

5.3 Rule 26(a)(1) initial disclosure adds to the client's cost of litigation.

While a majority of survey respondents agree in the preceding question that initial disclosure does not save the client money, there is a disagreement as to whether initial disclosure ***adds*** to the cost of litigation. Nearly 60% of defense lawyers and over a third of plaintiffs' lawyers agree that initial disclosure adds to the cost of litigation. Conversely, about half of plaintiffs' lawyers and about a third of defense lawyers disagree with the statement. Over 12% of plaintiffs' lawyers expressed no opinion.

Figure 5.3: Rule 26(a)(1) initial disclosure adds to the client's costs of litigation

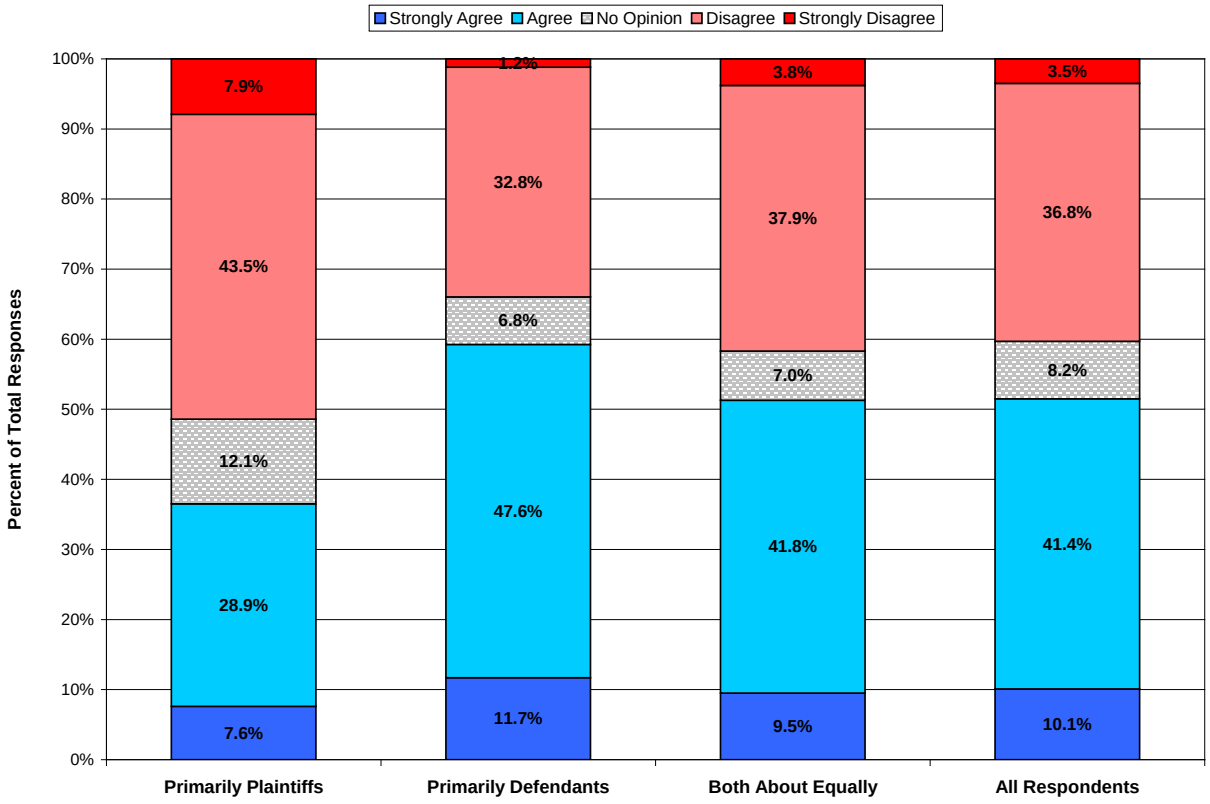

Table 5.3

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Rule 26(a)(1) initial disclosures add to the client's costs of litigation.						
Primarily Plaintiffs	7.6	28.9	43.5	7.9	12.1	827
Primarily Defendants	11.7	47.6	32.8	1.2	6.8	1638
Both About Equally	9.5	41.8	37.9	3.8	7.0	770
All Respondents	10.1	41.4	36.8	3.5	8.2	3235

5.4 Percentage of cases that require further discovery after initial disclosure.

Respondents reported that nearly all cases require additional discovery after initial disclosure. The average response for all lawyers was 96% of cases, but the median response was 100%.

Table 5.4

	Mean	Median	N
What percentage of your cases require further discovery, after initial disclosures			
Primarily Plaintiffs	96.0	100.0	665
Primarily Defendants	97.5	100.0	1328
Both About Equally	96.0	100.0	626
All Respondents	96.7	100.0	2646

6. Discovery

For the majority of discovery related questions, respondents in all categories tended to show similar degrees of agreement or disagreement. Attorneys appear to have mixed feelings about the adequacy of current discovery mechanisms, but for most categories of discovery, the survey respondents found them to be fairly cost-effective for their purpose. One area, however, where a significant disagreement exists is the category of e-discovery, with defense and mixed practice lawyers much more likely to see the burdens and expenses than plaintiffs' lawyers.

6.1 Current discovery mechanisms work well.

While a small majority of plaintiffs' lawyers agree that current discovery mechanisms work well, a small majority of defense and mixed practice lawyers disagree.

Figure 6.1: Current discovery mechanisms work well

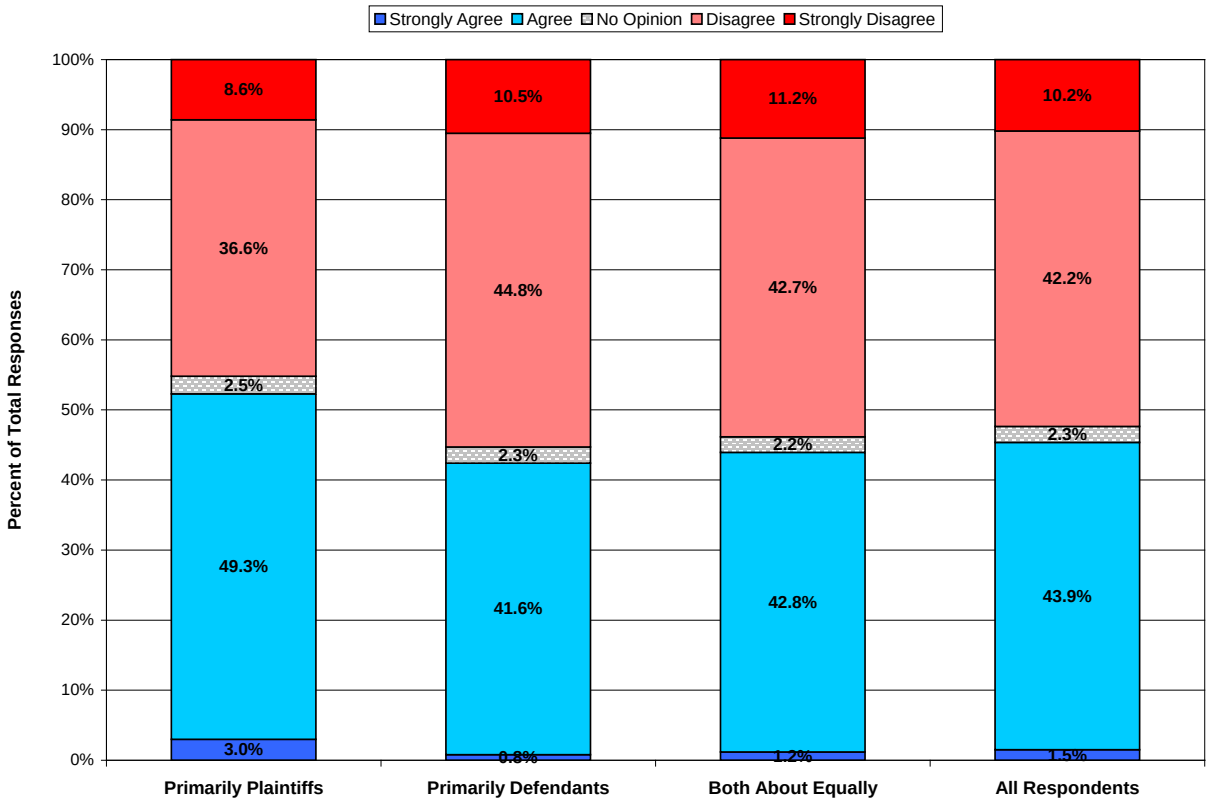

Table 6.1

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Current discovery mechanisms work well.						
Primarily Plaintiffs	3.0	49.3	36.6	8.6	2.5	826
Primarily Defendants	0.8	41.6	44.8	10.5	2.3	1640
Both About Equally	1.2	42.8	42.7	11.2	2.2	771
All Respondents	1.5	43.9	42.2	10.2	2.3	3237

6.2 Discovery is abused in almost every case.

While defense and mixed practice lawyers were somewhat more likely to agree that discovery is commonly abused, plaintiffs' lawyers were slightly more likely to disagree. Once again, the survey respondents were not overwhelmingly likely to agree or disagree, although within the number of survey respondents who agree, over 9% in each category strongly agree.

Figure 6.2: Discovery is abused in almost every case

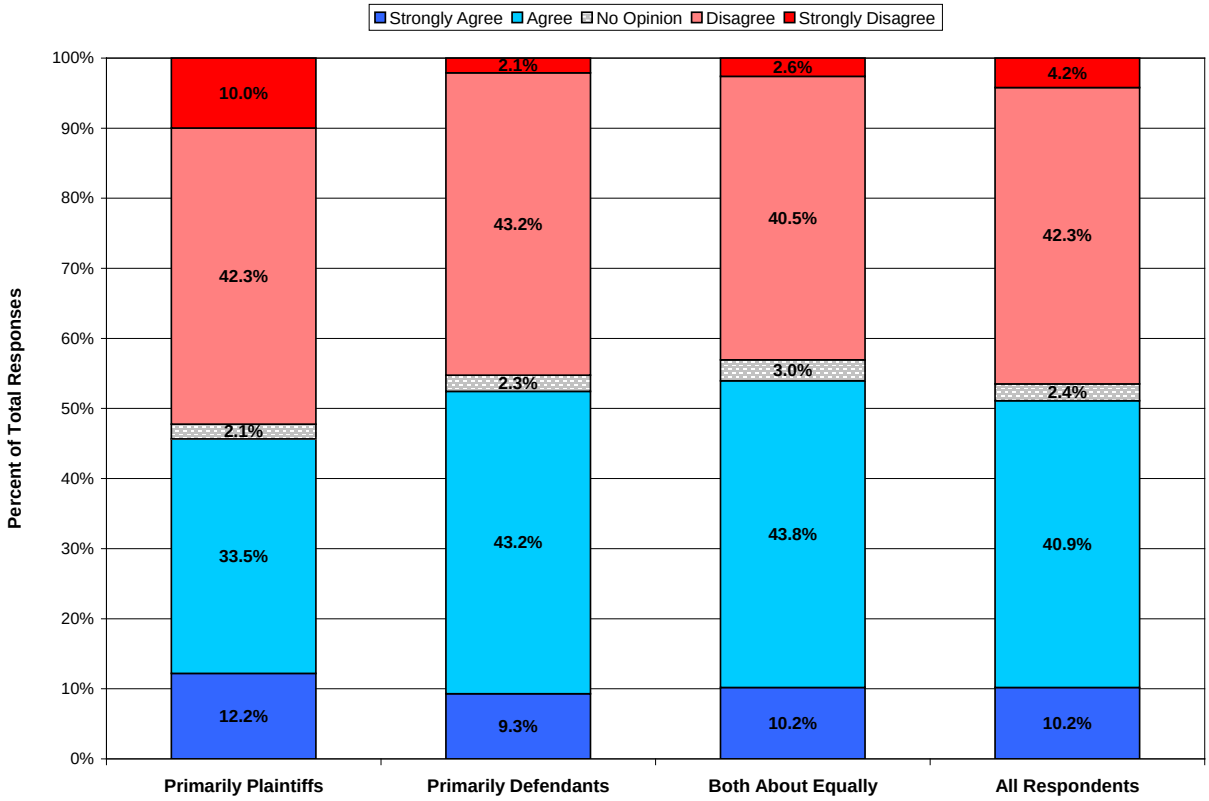

Table 6.2

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Discovery is abused in almost every case.						
Primarily Plaintiffs	12.2	33.5	42.3	10.0	2.1	822
Primarily Defendants	9.3	43.2	43.2	2.1	2.3	1641
Both About Equally	10.2	43.8	40.5	2.6	3.0	768
All Respondents	10.2	40.9	42.3	4.2	2.4	3231

6.3 District Judges are available to resolve discovery disputes on a timely basis.

Over 59% of all groups believe that District Judges are not available to resolve discovery disputes on a timely basis. Mixed practice lawyers were slightly more likely to say so than the other groups, but for the most part, survey respondents were fairly consistent in their responses.

Figure 6.3: District Judges are available to resolve discovery disputes on a timely basis

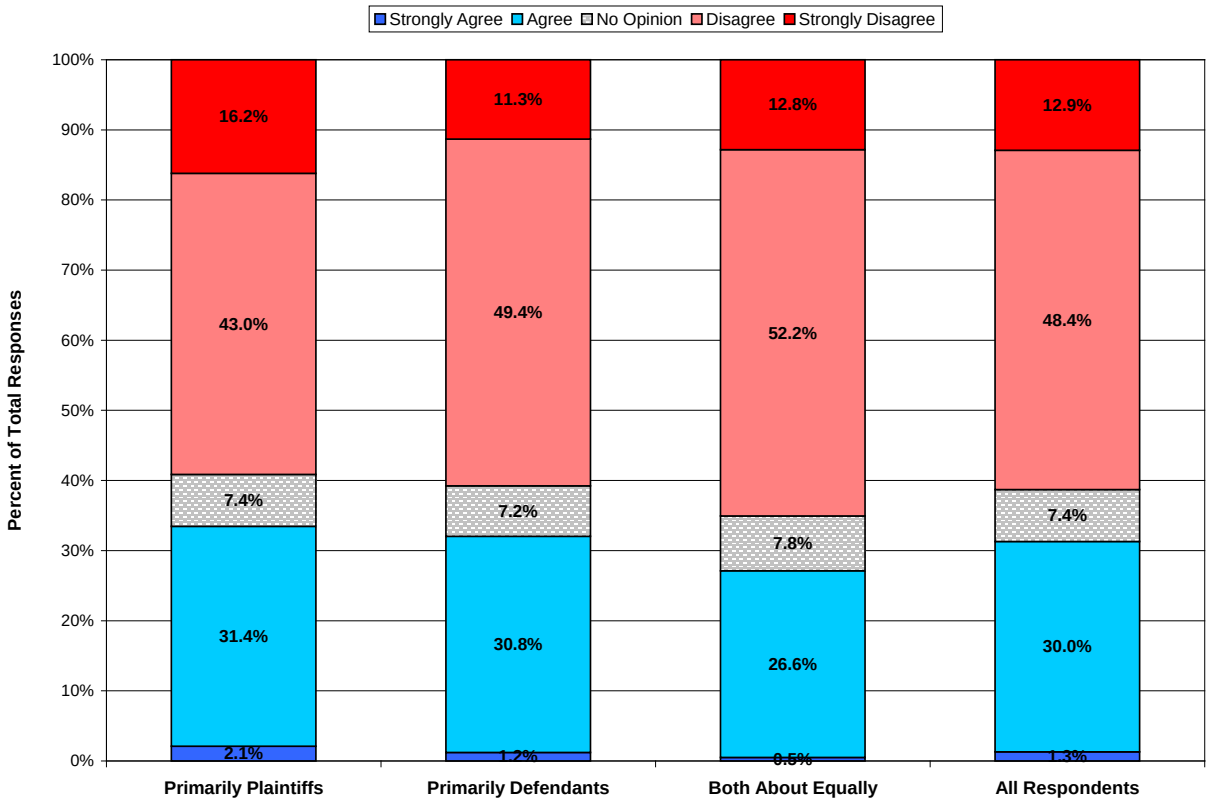

Table 6.3

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
District Judges are available to resolve discovery disputes on a timely basis.						
Primarily Plaintiffs	2.1	31.4	43.0	16.2	7.4	826
Primarily Defendants	1.2	30.8	49.4	11.3	7.2	1634
Both About Equally	0.5	26.6	52.2	12.8	7.8	766
All Respondents	1.3	30.0	48.4	12.9	7.4	3226

6.4 Magistrate judges are available to resolve discovery disputes on a timely basis.

66% of plaintiffs' lawyers, 66.8% of mixed practice lawyers, and 72% of defense lawyers agree that magistrate judges are available to resolve discovery disputes on a timely basis.

Figure 6.4: Magistrate judges are available to resolve discovery disputes on a timely basis

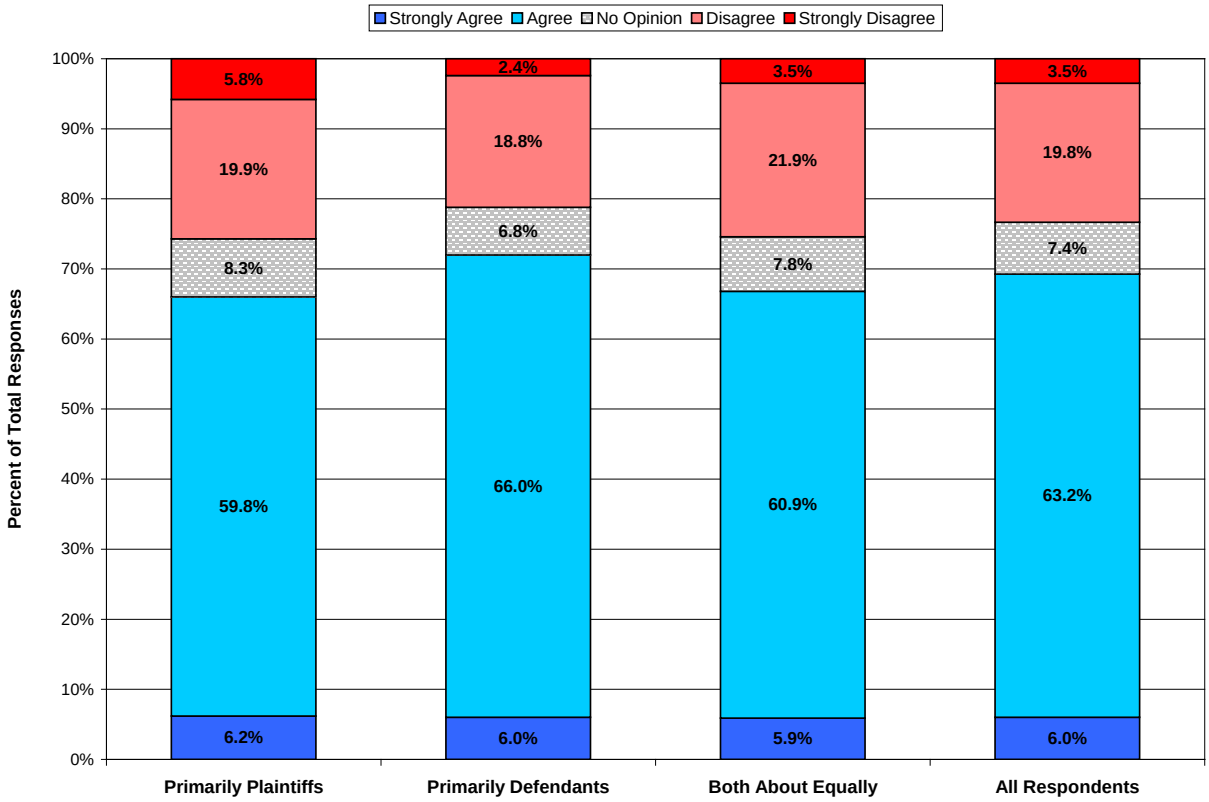

Table 6.4

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Magistrate judges are available to resolve discovery disputes on a timely basis.						
Primarily Plaintiffs	6.2	59.8	19.9	5.8	8.3	824
Primarily Defendants	6.0	66.0	18.8	2.4	6.8	1637
Both About Equally	5.9	60.9	21.9	3.5	7.8	767
All Respondents	6.0	63.2	19.8	3.5	7.4	3228

6.5 Most discovery in my cases occurs informally.

Survey respondents were fairly consistent in their responses that most discovery does not occur informally. While more defense lawyers disagree with the statement that most discovery occurs informally, plaintiffs' lawyers were more likely than the other groups to strongly disagree. Approximately 80% of each group disagrees that discovery in their cases occurs informally.

Figure 6.5: Most discovery in my cases occurs informally

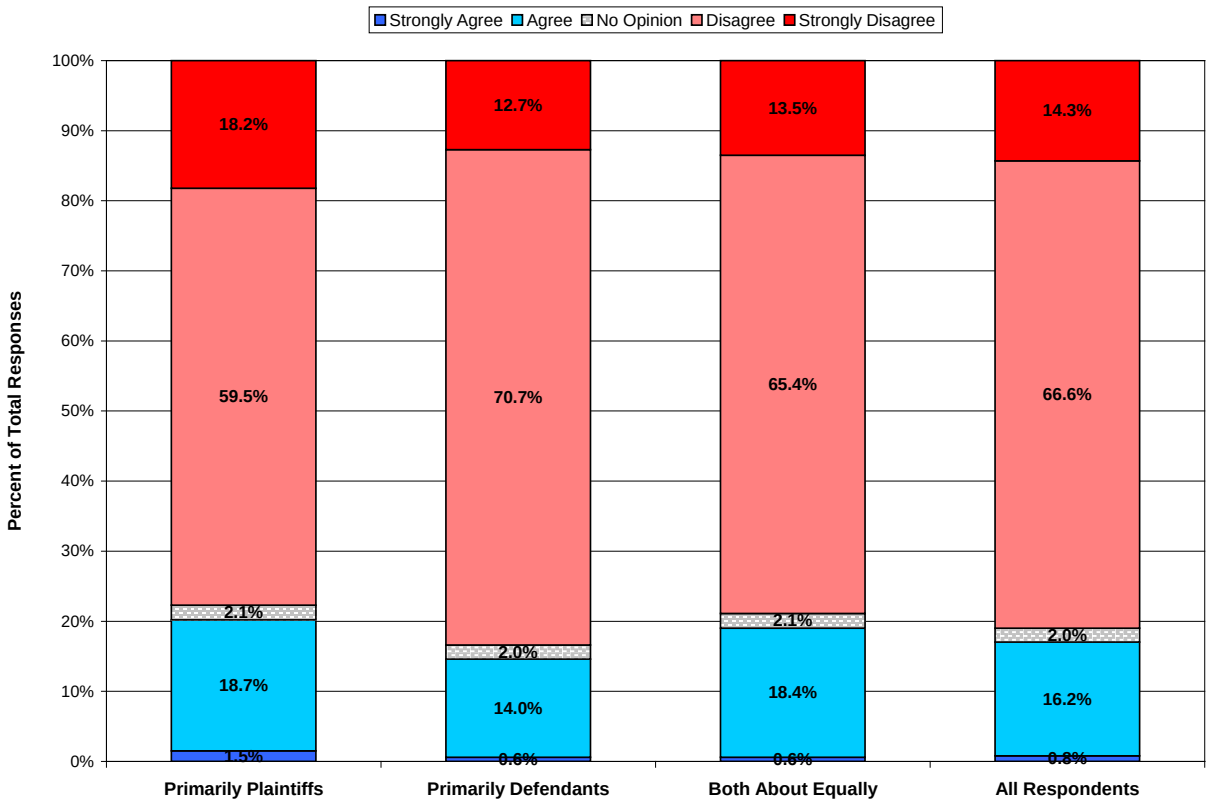

Table 6.5

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Most discovery in my cases occurs informally.						
Primarily Plaintiffs	1.5	18.7	59.5	18.2	2.1	823
Primarily Defendants	0.6	14.0	70.7	12.7	2.0	1639
Both About Equally	0.6	18.4	65.4	13.5	2.1	771
All Respondents	0.8	16.2	66.6	14.3	2.0	3223

6.6 Cases involving informal discovery are less expensive.

64% of all respondents agree that cases involving informal discovery are less expensive, and approximately 15% of each group expressed no opinion. Only 22.5% of defense lawyers and less than 20% of plaintiffs' and mixed practice lawyers disagree about the cost benefit of informal discovery.

Figure 6.6: Cases involving informal discovery are less expensive

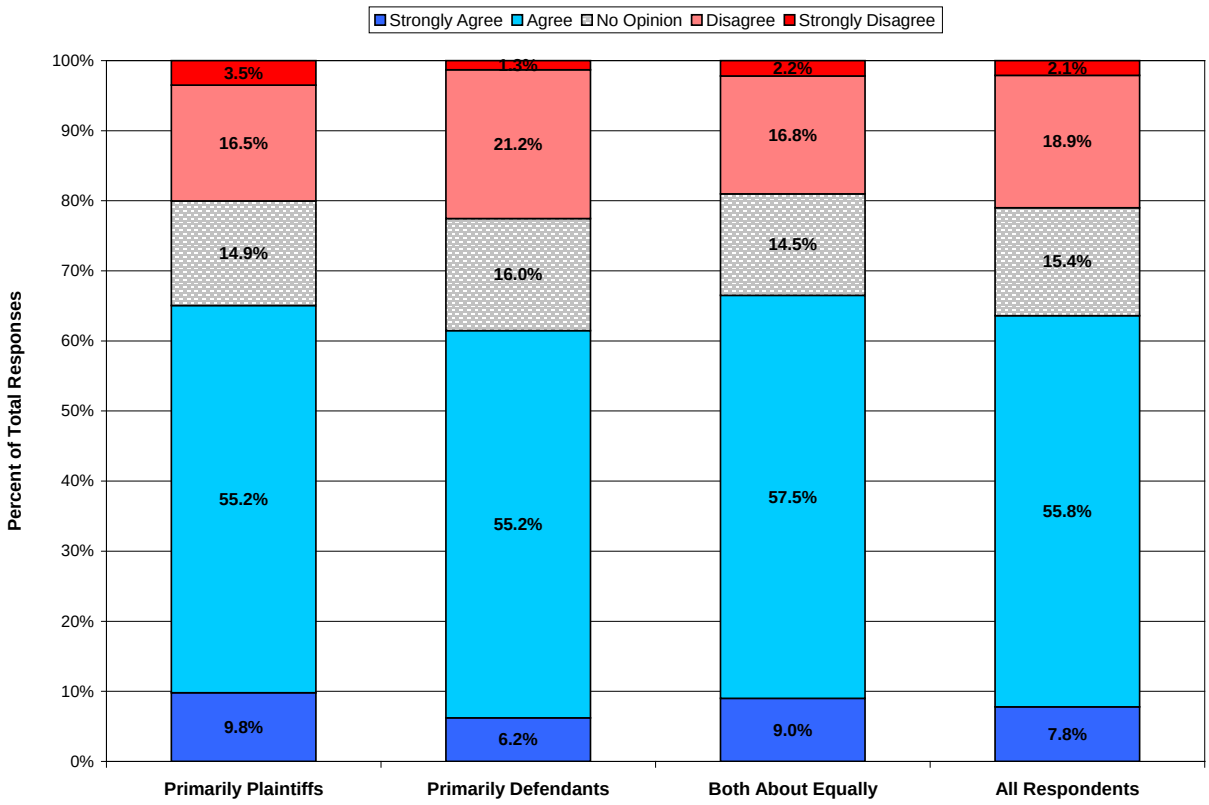

Table 6.6

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Cases involving informal discovery are less expensive.						
Primarily Plaintiffs	9.8	55.2	16.5	3.5	14.9	823
Primarily Defendants	6.2	55.2	21.2	1.3	16.0	1633
Both About Equally	9.0	57.5	16.8	2.2	14.5	770
All Respondents	7.8	55.8	18.9	2.1	15.4	3226

6.7 Sanctions allowed by the discovery rules are seldom imposed.

In an area of overwhelming agreement among the three groups of respondents, 86.5% of all lawyers agree (with defense and mixed practice lawyers slightly more likely to agree) that sanctions allowed by the discovery rules are seldom imposed. Of those that agree, over 20% strongly agree in each category of respondents, including almost 27% of mixed practice lawyers.

Figure 6.7: Sanctions allowed by the discovery rules are seldom imposed

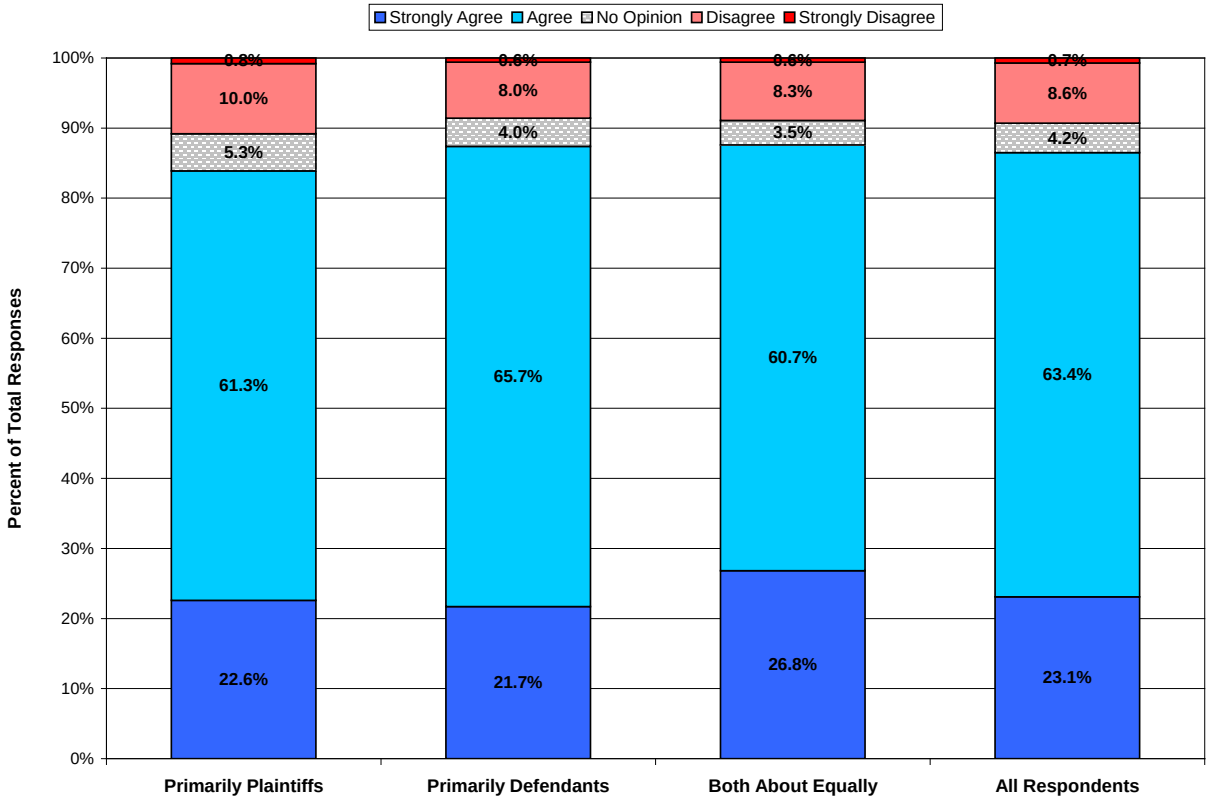

Table 6.7

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Sanctions allowed by the discovery rules are seldom imposed.						
Primarily Plaintiffs	22.6	61.3	10.0	0.8	5.3	824
Primarily Defendants	21.7	65.7	8.0	0.6	4.0	1637
Both About Equally	26.8	60.7	8.3	0.6	3.5	771
All Respondents	23.1	63.4	8.6	0.7	4.2	3232

6.8 Counsel use discovery as a tool to force settlement.

While plaintiffs' lawyers were split in their agreement with this statement, almost 80% of defense lawyers and about 75% of mixed practice lawyers believe that discovery is commonly used as a tool to force settlement. Of those who were more likely to agree, 19% of defense lawyers and 16.4% of mixed practice lawyers strongly agree.

Figure 6.8: Counsel use discovery as a tool to force settlement

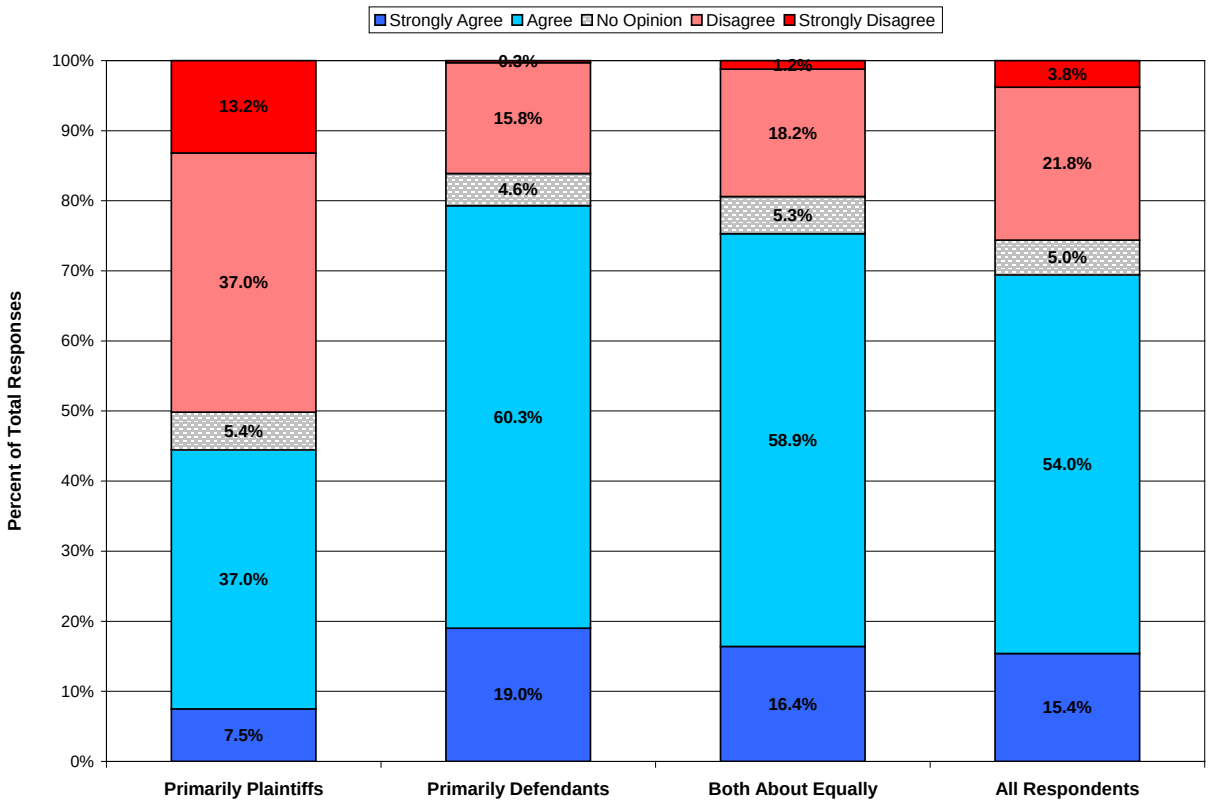

Table 6.8

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Counsel use discovery as a tool to force settlement.						
Primarily Plaintiffs	7.5	37.0	37.0	13.2	5.4	828
Primarily Defendants	19.0	60.3	15.8	0.3	4.6	1643
Both About Equally	16.4	58.9	18.2	1.2	5.3	769
All Respondents	15.4	54.0	21.8	3.8	5.0	3240

6.9 Clients, not attorneys, drive excessive discovery.

In all categories, lawyers were very likely to disagree with the notion that clients are the primary drivers of excessive discovery. Nearly 80% of survey respondents disagree, with over 15% expressing strong disagreement.

Figure 6.9: Clients, not attorneys, drive excessive discovery

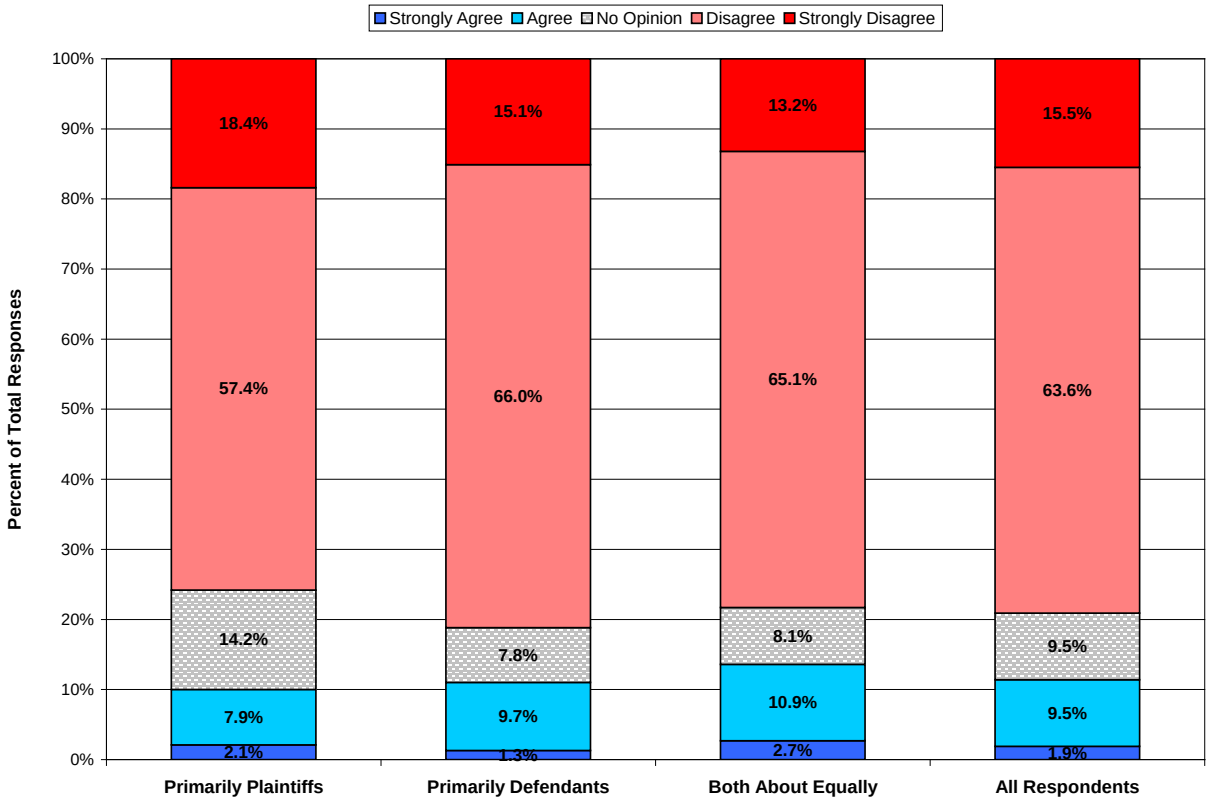

Table 6.9

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Clients, not attorneys, drive excessive discovery.						
Primarily Plaintiffs	2.1	7.9	57.4	18.4	14.2	824
Primarily Defendants	1.3	9.7	66.0	15.1	7.8	1637
Both About Equally	2.7	10.9	65.1	13.2	8.1	770
All Respondents	1.9	9.5	63.6	15.5	9.5	3231

6.10 Fear of malpractice claims forces attorneys to conduct more discovery than necessary.

Although from the previous questions, attorneys appear to be the ones driving discovery, a majority of survey respondents do not believe that fear of malpractice is a major contributing factor. Defense and mixed practice lawyers were somewhat more concerned about malpractice claims in handling discovery than plaintiffs' lawyers were. However, over 73% of plaintiffs' lawyers disagree (with over 20% expressing strong disagreement), while 54.5% of defense lawyers and 52.3% of mixed practice lawyers disagree that the fear of malpractice causes unnecessary discovery.

Figure 6.10: Fear of malpractice claims forces attorneys to conduct more discovery than necessary

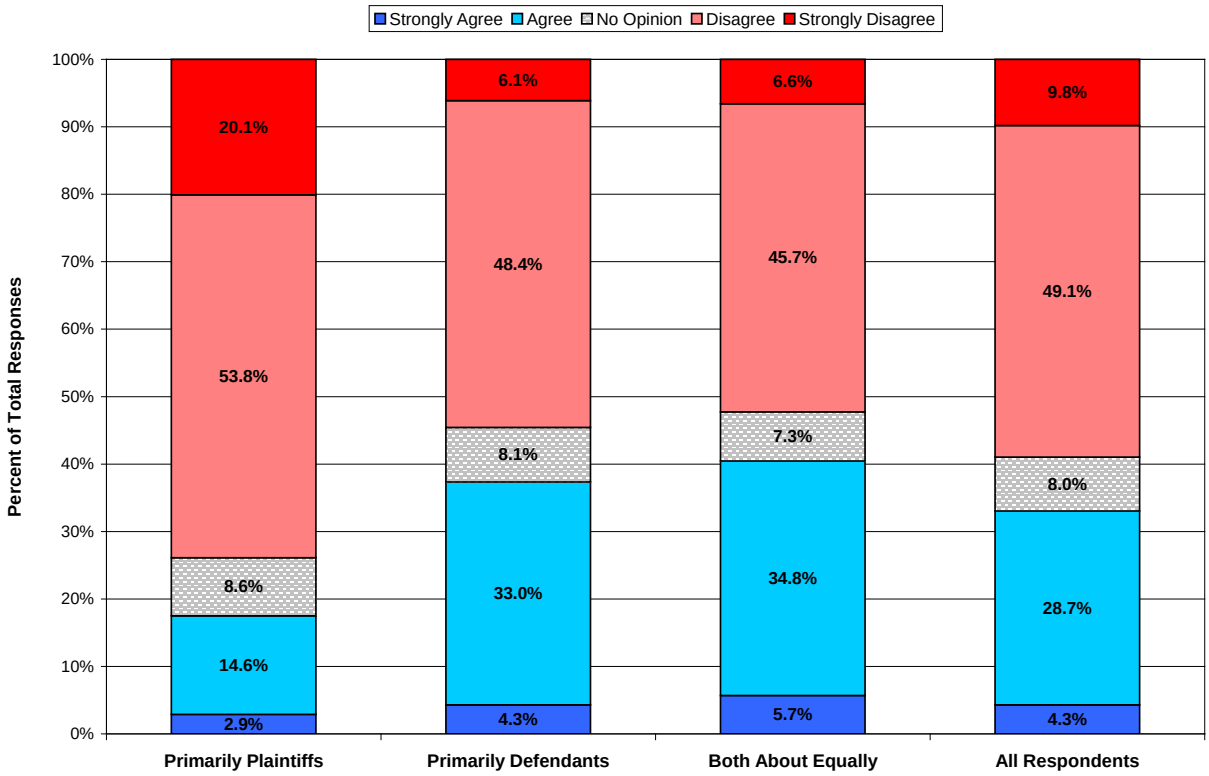

Table 6.10

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Fear of malpractice claims forces attorneys to conduct more discovery than necessary.						
Primarily Plaintiffs	2.9	14.6	53.8	20.1	8.6	827
Primarily Defendants	4.3	33.0	48.4	6.1	8.1	1637
Both About Equally	5.7	34.8	45.7	6.6	7.3	771
All Respondents	4.3	28.7	49.1	9.8	8.0	3235

6.11 Discovery is used more to develop evidence for summary judgment than to understand the other party's claims and defenses for trial.

Survey respondents were almost evenly split as to whether discovery is used more to develop evidence for summary judgment than to understand the other party's claims and defenses for trial. Almost 50% of plaintiffs' lawyers agree, 47.3% of defense lawyers and 44.4% and mixed practice lawyers agree.

Figure 6.11: Discovery is used more to develop evidence for summary judgment than to understand the other party's claims and defenses for trial

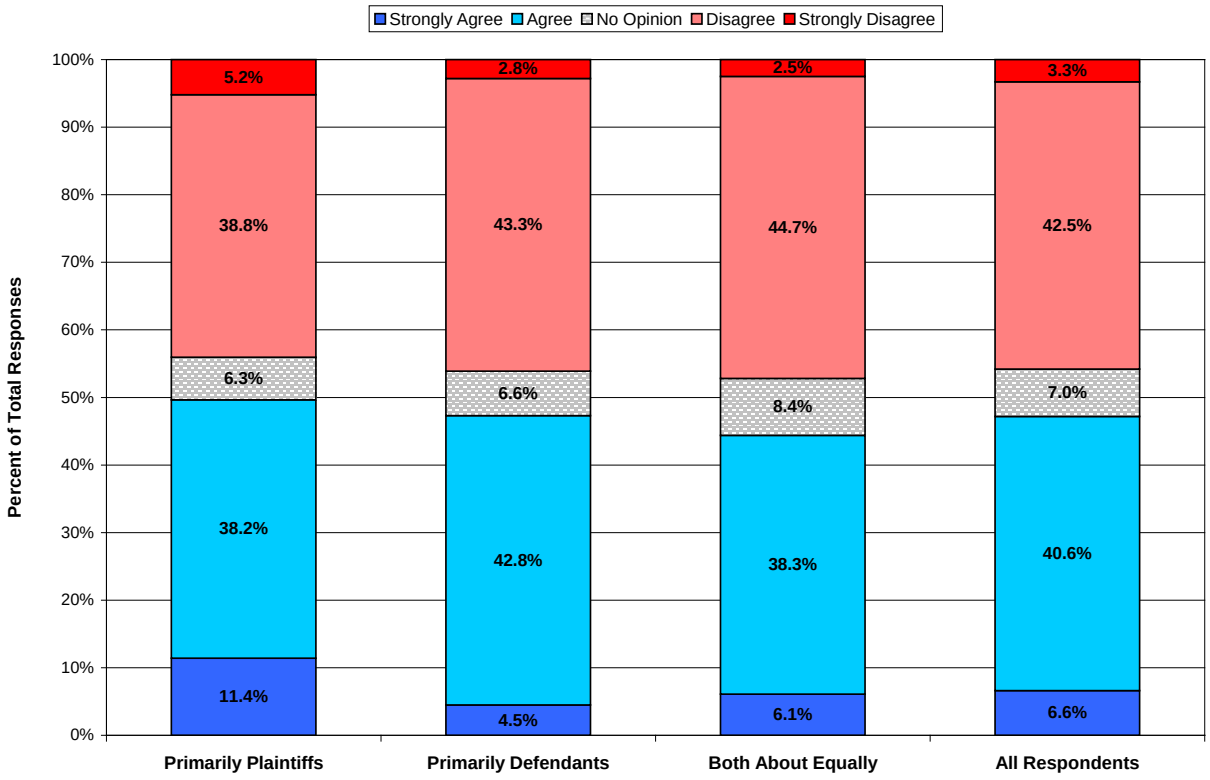

Table 6.11

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Discovery is used more to develop evidence for summary judgment than to understand the other party's claims and defenses for trial.						
Primarily Plaintiffs	11.4	38.2	38.8	5.2	6.3	824
Primarily Defendants	4.5	42.8	43.3	2.8	6.6	1641
Both About Equally	6.1	38.3	44.7	2.5	8.4	770
All Respondents	6.6	40.6	42.5	3.3	7.0	3235

6.12 Discovery is used more to determine the value of the case for settlement than it is used to understand the other party's claims and defenses.

Defense lawyers were somewhat more likely than plaintiffs' and mixed practice lawyers to agree that the discovery is used more to determine the value of a case for settlement than to understand the other party's claims and defenses. Almost 45% of defense attorneys agree, while only 36.6% of plaintiffs' attorneys and mixed practice attorneys agree.

Figure 6.12: Discovery is used more to determine the value of the case for settlement than it is used to understand the other party's claims and defenses for trial

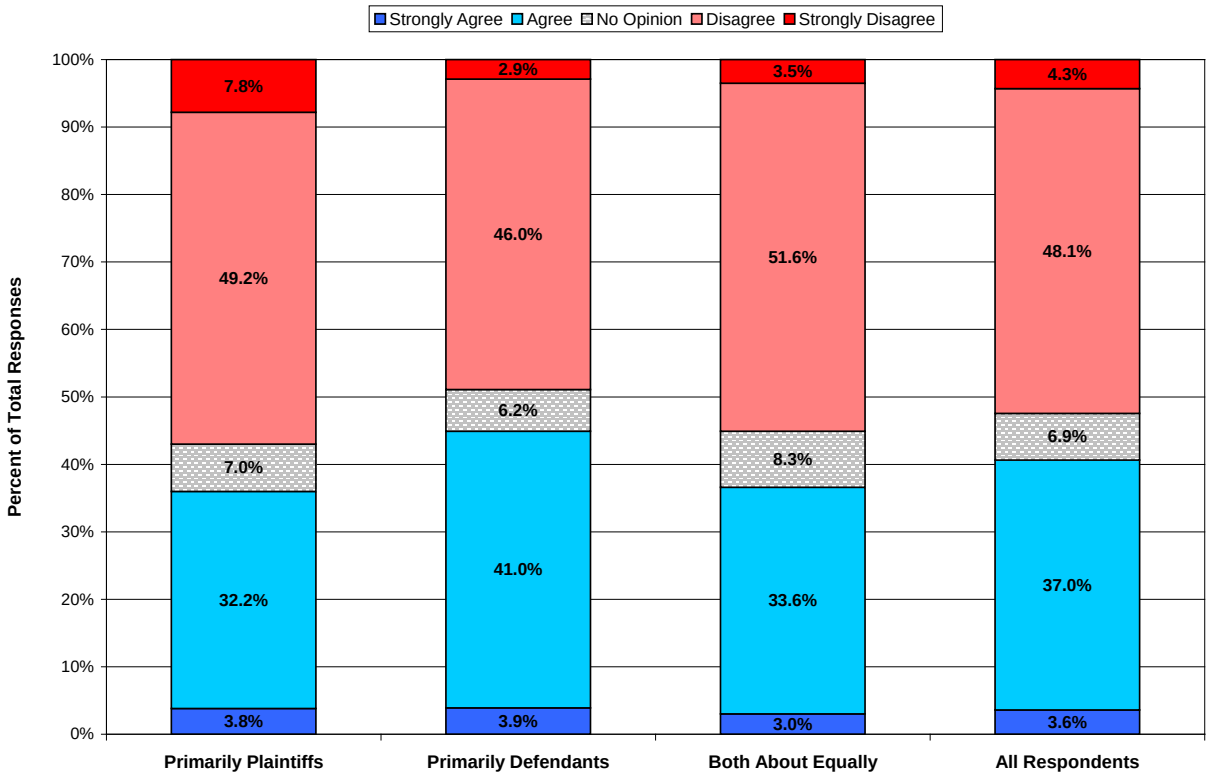

Table 6.12

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Discovery is used more to determine the value of the case for settlement than it is used to understand the other party's claims and defenses for trial.						
Primarily Plaintiffs	3.8	32.2	49.2	7.8	7.0	825
Primarily Defendants	3.9	41.0	46.0	2.9	6.2	1636
Both About Equally	3.0	33.6	51.6	3.5	8.3	773
All Respondents	3.6	37.0	48.1	4.3	6.9	3234

6.13 The duty to confer with opposing counsel before filing a discovery motion serves little purpose.

Survey respondents were more likely than not to disagree that discovery conferences serve little purpose. Approximately 60% of respondents overall disagree with the statement. However, very few respondents expressed no opinion, which leaves nearly 40% of respondents who agree that the duty to confer about discovery motions serves little purpose. Each group of respondents agreed or disagreed in very similar percentages.

Figure 6.13: The duty to confer with opposing counsel before filing a discovery motion serves little purpose

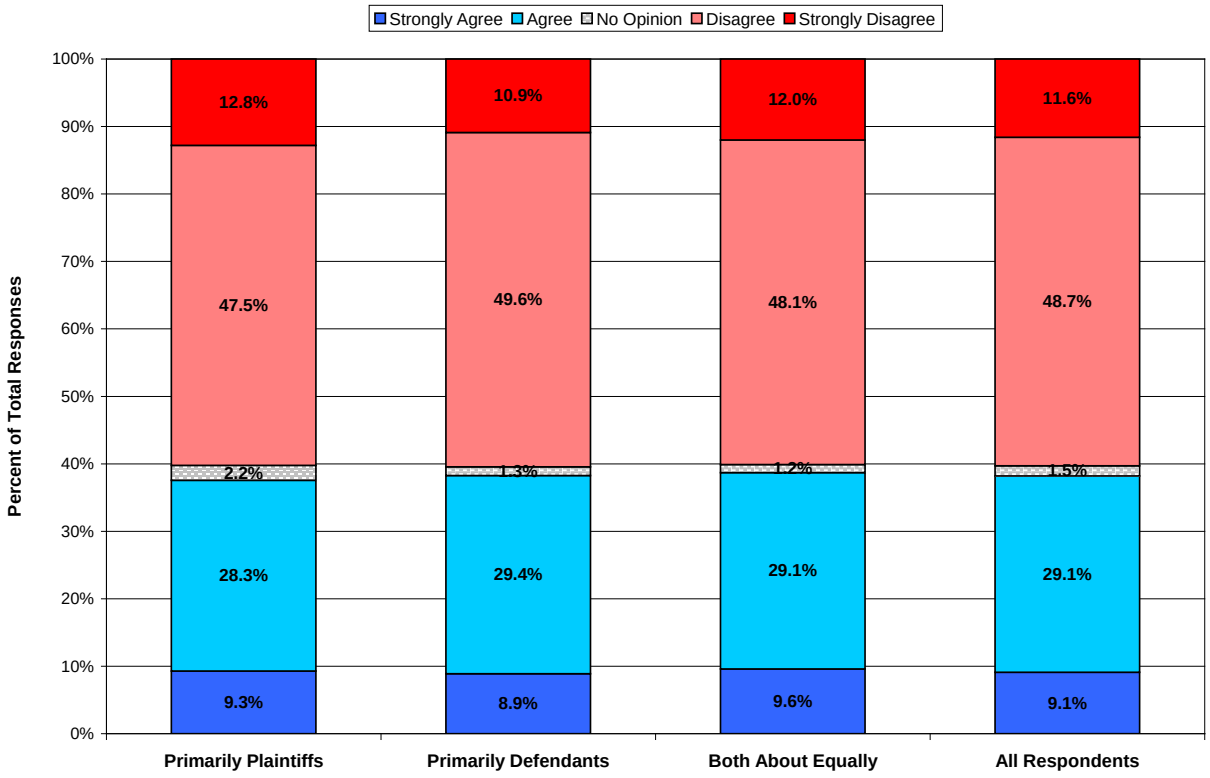

Table 6.13

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The duty to confer with opposing counsel before filing a discovery motion serves little purpose.						
Primarily Plaintiffs	9.3	28.3	47.5	12.8	2.2	828
Primarily Defendants	8.9	29.4	49.6	10.9	1.3	1638
Both About Equally	9.6	29.1	48.1	12.0	1.2	773
All Respondents	9.1	29.1	48.7	11.6	1.5	3239

6.14 Requiring clients to sign all requests for extensions or continuances limits the number of those requests.

Survey respondents in all groups were fairly consistent in their response to the statement that requiring clients to sign requests for extensions or continuances limits the number of those requests. Only about 22% of all respondents agree that client involvement limits the number of requests for extension or continuance. Nearly 60% of respondents disagree, over 14% of respondents strongly disagree, and over 18% express no opinion.

Figure 6.14: Requiring clients to sign all requests for extensions or continuances limits the number of those requests

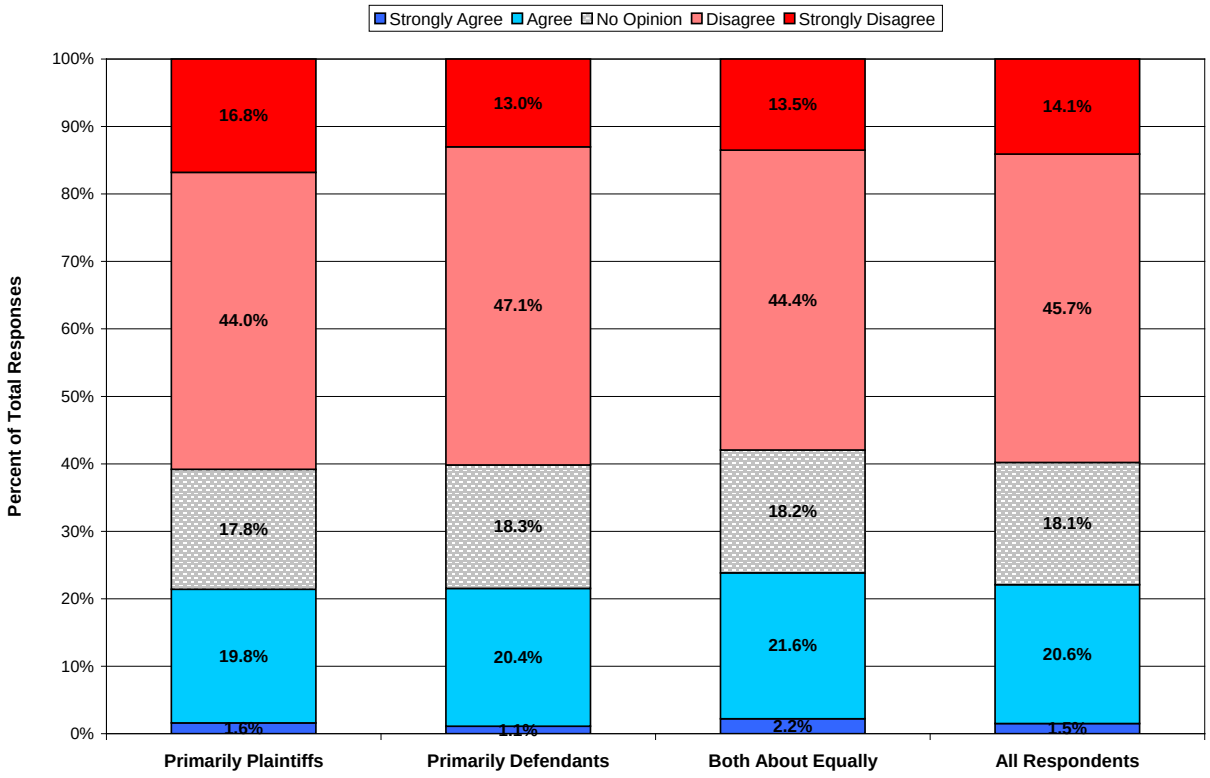

Table 6.14

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Requiring clients to sign all requests for extensions or continuances limits the number of those requests.						
Primarily Plaintiffs	1.6	19.8	44.0	16.8	17.8	822
Primarily Defendants	1.1	20.4	47.1	13.0	18.3	1634
Both About Equally	2.2	21.6	44.4	13.5	18.2	768
All Respondents	1.5	20.6	45.7	14.1	18.1	3224

6.15 In the majority of cases, counsel agree on the scope and timing of discovery.

Approximately 60% of plaintiffs' lawyers, 66% of mixed practice lawyers, and 68% of defense lawyers believe that counsel agree on the scope and timing of discovery in a majority of cases. Plaintiffs' lawyers were more likely to strongly disagree (10.6%) than other groups (less than 5%).

Figure 6.15: In the majority of cases, counsel agree on the scope and timing of discovery

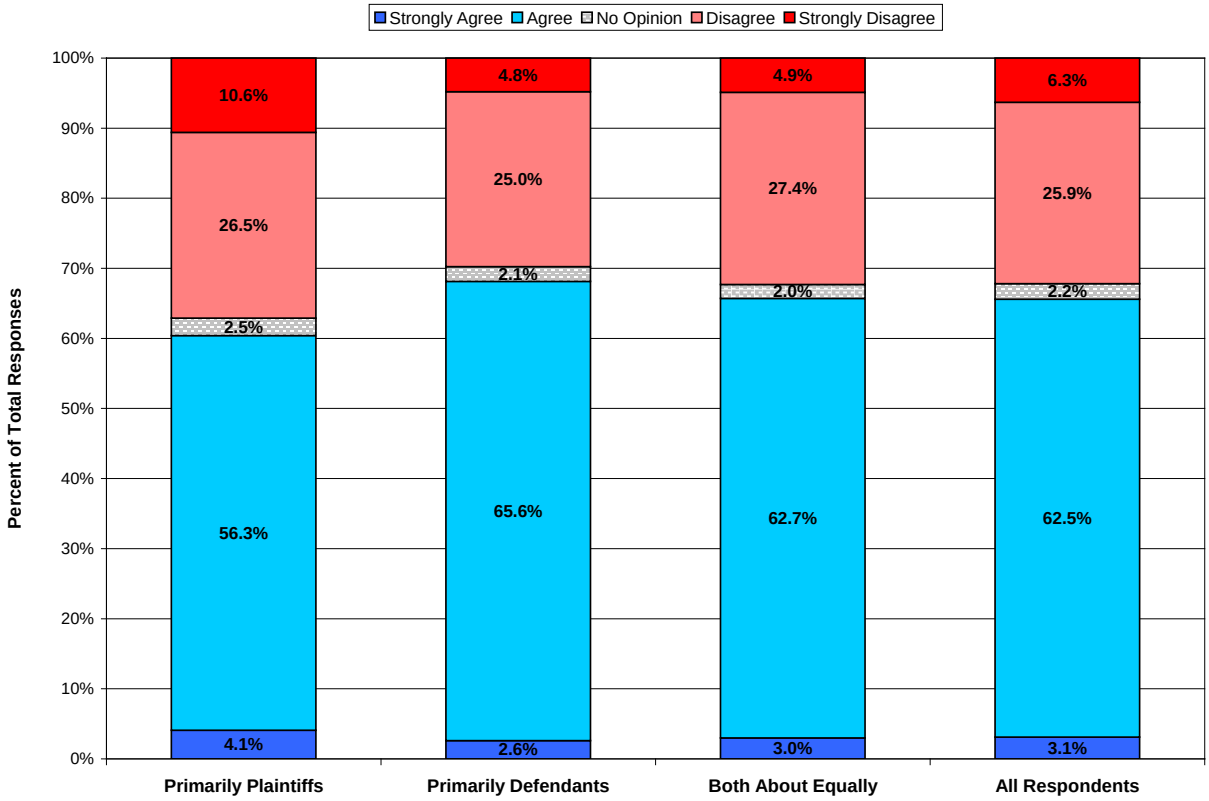

Table 6.15

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
In the majority of cases, counsel agree on the scope and timing of discovery.						
Primarily Plaintiffs	4.1	56.3	26.5	10.6	2.5	824
Primarily Defendants	2.6	65.6	25.0	4.8	2.1	1632
Both About Equally	3.0	62.7	27.4	4.9	2.0	762
All Respondents	3.1	62.5	25.9	6.3	2.2	3218

6.16 Counsel do not typically request limitations on discovery under Rule 26(b)(2)(C).

Rule 26(b)(2)(C) allows the court to limit discovery if the burden or expense outweighs the likely benefit. A majority of all groups agree that counsel do not typically request such limitations, although mixed practice lawyers and defense lawyers were more likely to agree than plaintiffs' lawyers. However, over 10% of plaintiffs' lawyers strongly disagree with the statement.

Figure 6.16: Counsel do not typically request limitations on discovery under Rule 26(b)(2)(C) (burden or expense outweighs the likely benefit, etc.)

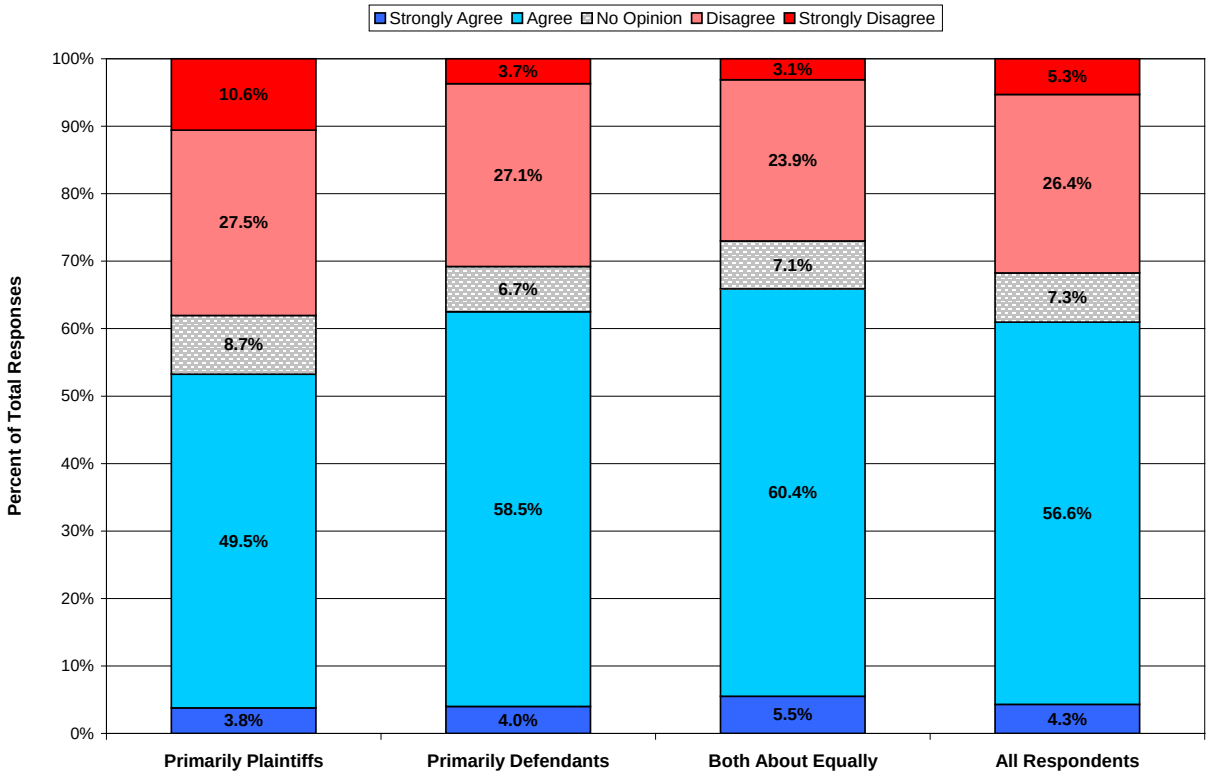

Table 6.16

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Counsel do not typically request limitations on discovery under Rule 26(b)(2)(C) (burden or expense outweighs the likely benefit, etc.).						
Primarily Plaintiffs	3.8	49.5	27.5	10.6	8.7	823
Primarily Defendants	4.0	58.5	27.1	3.7	6.7	1630
Both About Equally	5.5	60.4	23.9	3.1	7.1	770
All Respondents	4.3	56.6	26.4	5.3	7.3	3223

6.17 Judges do not invoke Rule 26(b)(2)(C) on their own initiative.

Rule 26(b)(2)(C) states that on motion or on its own, the court must limit the frequency or extent of discovery otherwise allowable by the Rules or a Local Rule if it determines that additional discovery is unreasonably cumulative or duplicative, can be obtained from a more convenient source, if the party seeking discovery has had ample opportunity to obtain information by discovery, or if the burden or expense outweighs the likely benefit. Survey respondents were generally likely to agree that judges do not invoke this rule on their own initiative. Plaintiffs' lawyers agree 62.6% of the time, while mixed practice lawyers agree 79.1% of the time and defense lawyers agree 81.2% of the time. Notably, all categories of the respondents were more likely to express no opinion than to express disagreement.

Figure 6.17: Judges do not invoke Rule 26(b)(2)(C) on their own initiative

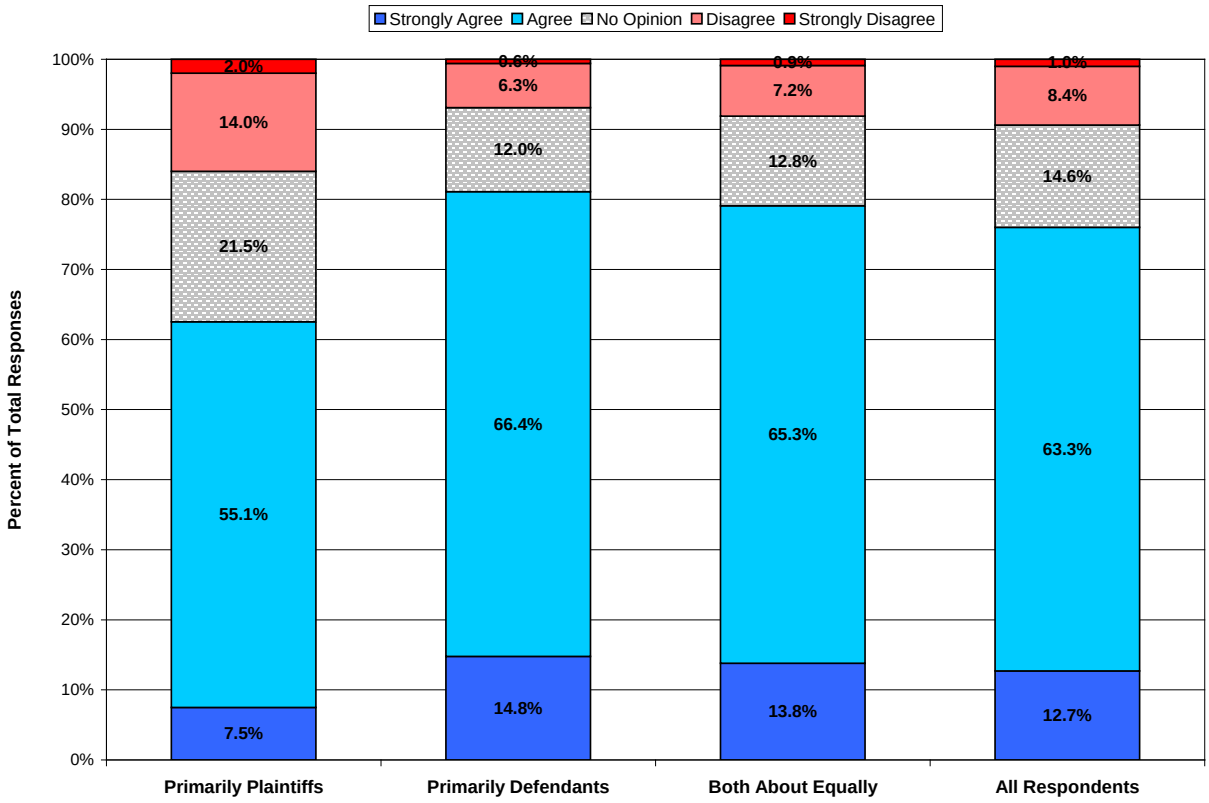

Table 6.17

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Judges do not invoke Rule 26(b)(2)(C) on their own initiative.						
Primarily Plaintiffs	7.5	55.1	14.0	2.0	21.5	815
Primarily Defendants	14.8	66.4	6.3	0.6	12.0	1630
Both About Equally	13.8	65.3	7.2	0.9	12.8	767
All Respondents	12.7	63.3	8.4	1.0	14.6	3212

6.18 Judges do not enforce Rule 26(b)(2)(C) to limit discovery.

In response to this statement, plaintiffs' lawyers expressed a very different opinion than defense or mixed practice lawyers. While 67.3% of defense lawyers and 62.6% of mixed practice lawyers agree that judges do not enforce the Rule, only 38.2% of plaintiffs' lawyers agree. Plaintiffs' lawyers disagree 37.1% of the time, and almost one in four expressed no opinion.

Figure 6.18: Judges do not enforce Rule 26(b)(2)(C) to limit discovery

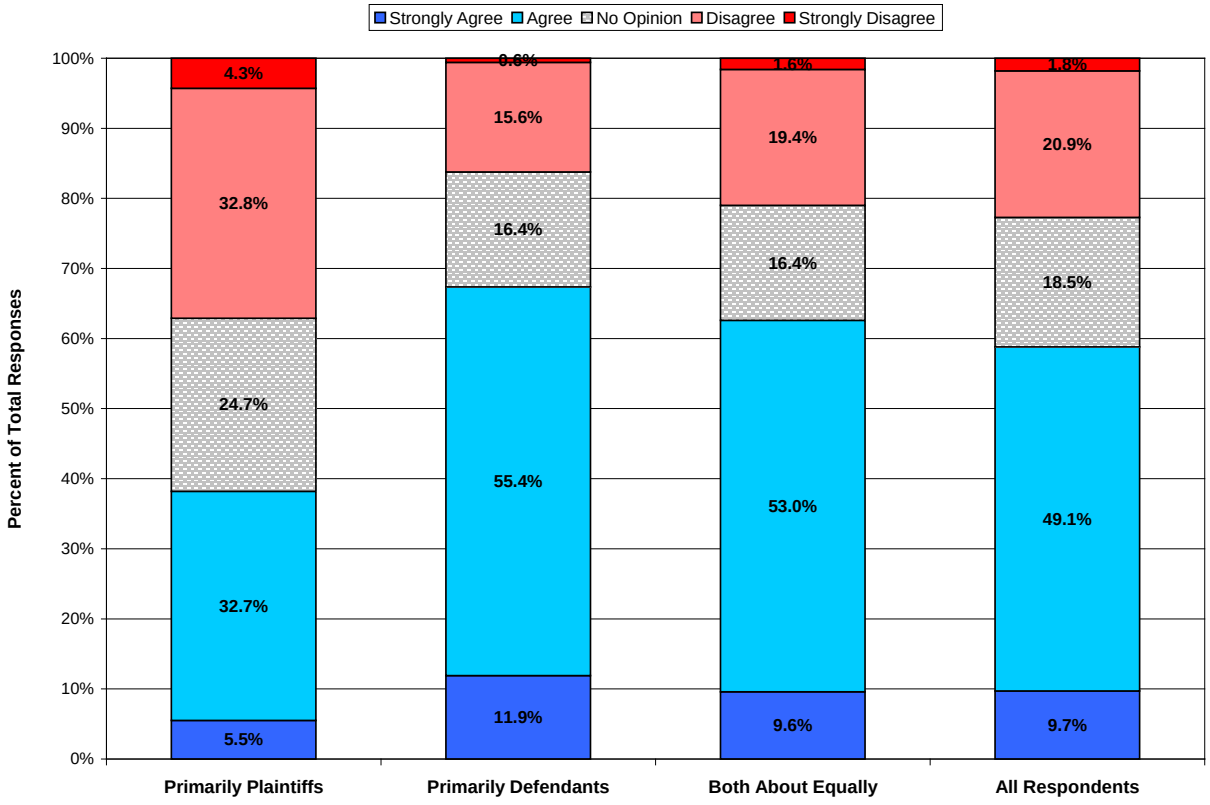

Table 6.18

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Judges do not enforce Rule 26(b)(2)(C) to limit discovery.						
Primarily Plaintiffs	5.5	32.7	32.8	4.3	24.7	817
Primarily Defendants	11.9	55.4	15.6	0.6	16.4	1627
Both About Equally	9.6	53.0	19.4	1.6	16.4	768
All Respondents	9.7	49.1	20.9	1.8	18.5	3212

6.19 Counsel with limited trial experience use discovery more than experienced trial lawyers.

Defense and mixed practice lawyers were somewhat more inclined to agree that counsel with limited trial experience use discovery more than experienced trial lawyers. However, the only group to reach a majority was the group of plaintiffs' lawyers, 52.4% of whom disagree with the statement. Defense lawyers agree with the statement 45.3% of the time, and mixed practice lawyers agree 43.8% of the time. Over 10% of mixed practice lawyers, over 12% of defense lawyers, and over 15% of mixed practice lawyers expressed no opinion.

Figure 6.19: Counsel with limited trial experience use discovery more than experienced trial lawyers

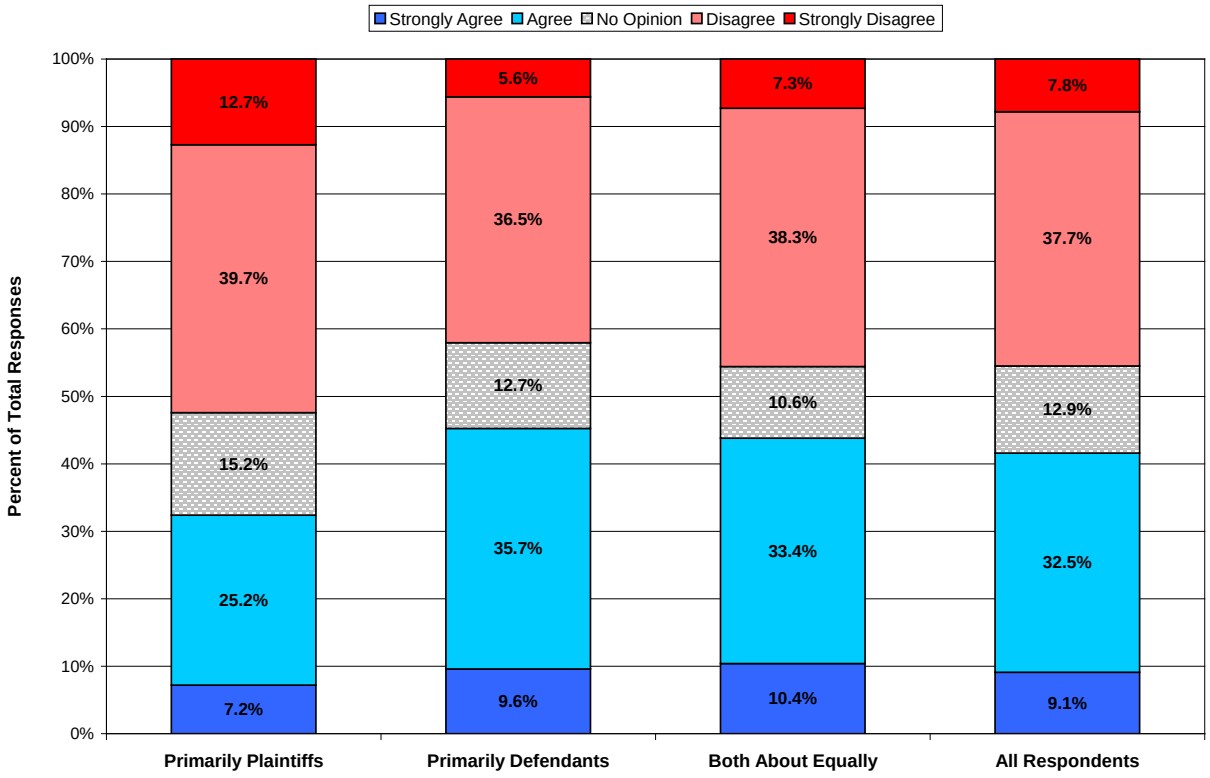

Table 6.19

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Counsel with limited trial experience use discovery more than experienced trial lawyers.						
Primarily Plaintiffs	7.2	25.2	39.7	12.7	15.2	824
Primarily Defendants	9.6	35.7	36.5	5.6	12.7	1632
Both About Equally	10.4	33.4	38.3	7.3	10.6	770
All Respondents	9.1	32.5	37.7	7.8	12.9	3226

6.20 Discovery about the adequacy of e-discovery responses is used as a tool to force settlement.

In an area of significant disagreement among the three respondent groups, plaintiffs' lawyers were very likely to disagree or express no opinion, while defense and mixed practice lawyers were more likely to agree and strongly agree that discovery about e-discovery responses is used as a tool to force settlement. Only 24.8% of plaintiffs' lawyers agree with the statement. Defense lawyers agree 66.9% of the time, with 24.5% who strongly agree, and 58.9% of mixed practice lawyers agree, including 17.5% who strongly agree.

Figure 6.20: Discovery about the adequacy of e-discovery responses is used as a tool to force settlement

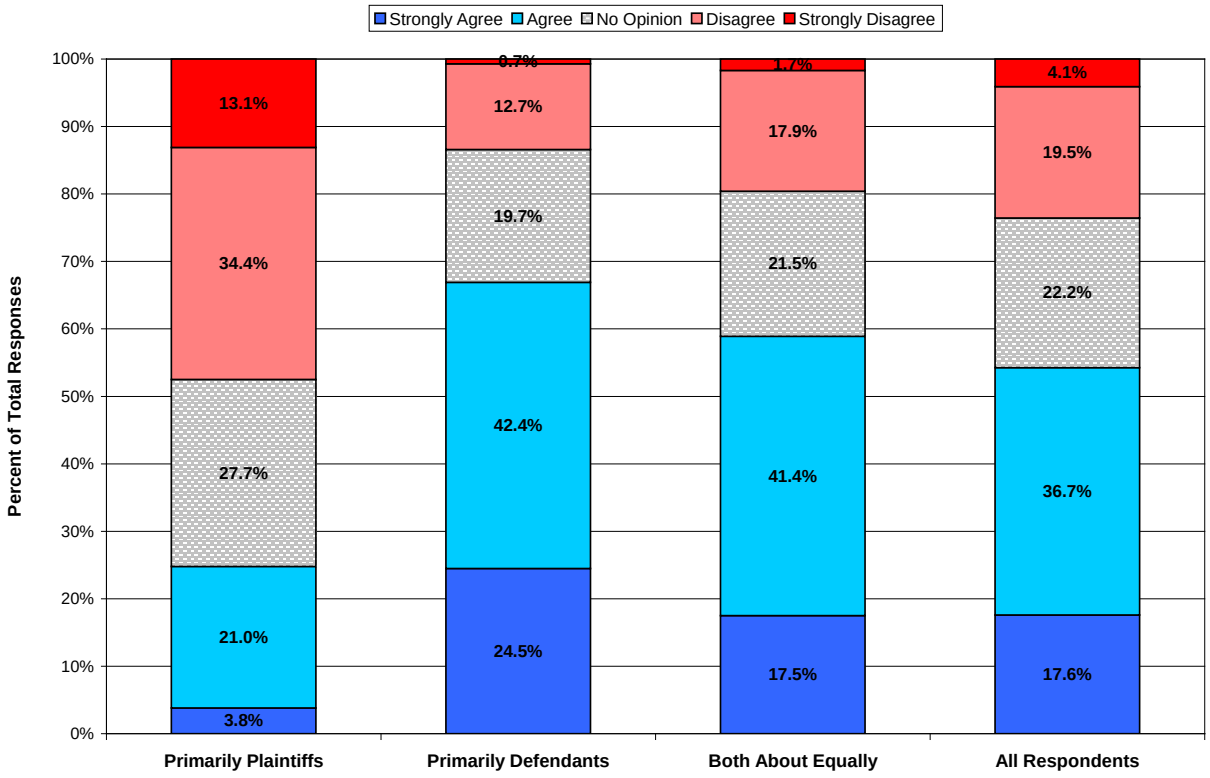

Table 6.20

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Discovery about the adequacy of e-discovery responses is used as a tool to force settlement.						
Primarily Plaintiffs	3.8	21.0	34.4	13.1	27.7	823
Primarily Defendants	24.5	42.4	12.7	0.7	19.7	1638
Both About Equally	17.5	41.4	17.9	1.7	21.5	771
All Respondents	17.6	36.7	19.5	4.1	22.2	3232

Importance of Discovery Tools.

For the following questions, respondents were asked, "to what extent is each of the following an important discovery tool," to which they were able to respond "very important," "somewhat important," or "not important." Respondents were also offered "no opinion." In the next set of questions, respondents were asked how cost-effective each of the discovery tools were, and were able to respond "very cost-effective," "somewhat cost-effective," "not cost-effective" or "no opinion." The discovery tools, in order of importance, were:

	Very Important	Somewhat or Very Important
Deposition of fact witnesses	90.5	99.8
Request for production of hard copy documents	79.8	97.5
Depositions of expert witnesses not limited to report	72.4	91.4
Requests for production of electronically stored documents	70.2	97.1
Depositions of expert witnesses testimony limited to expert report	48.1	90.0
Interrogatories	39.9	87.8
Requests for Admission	27.8	79.1

6.21 Requests for admission.

Of all respondents, 79.1% stated that requests for admission were somewhat important or very important, with defense lawyers slightly less likely to agree than plaintiffs and mixed practice lawyers. Approximately 81% of plaintiffs' and mixed practice lawyers stated that requests for admission are at least somewhat important. Defense lawyers agree nearly 77% of the time, and very few respondents expressed no opinion.

Figure 6.21(a): Requests for admission

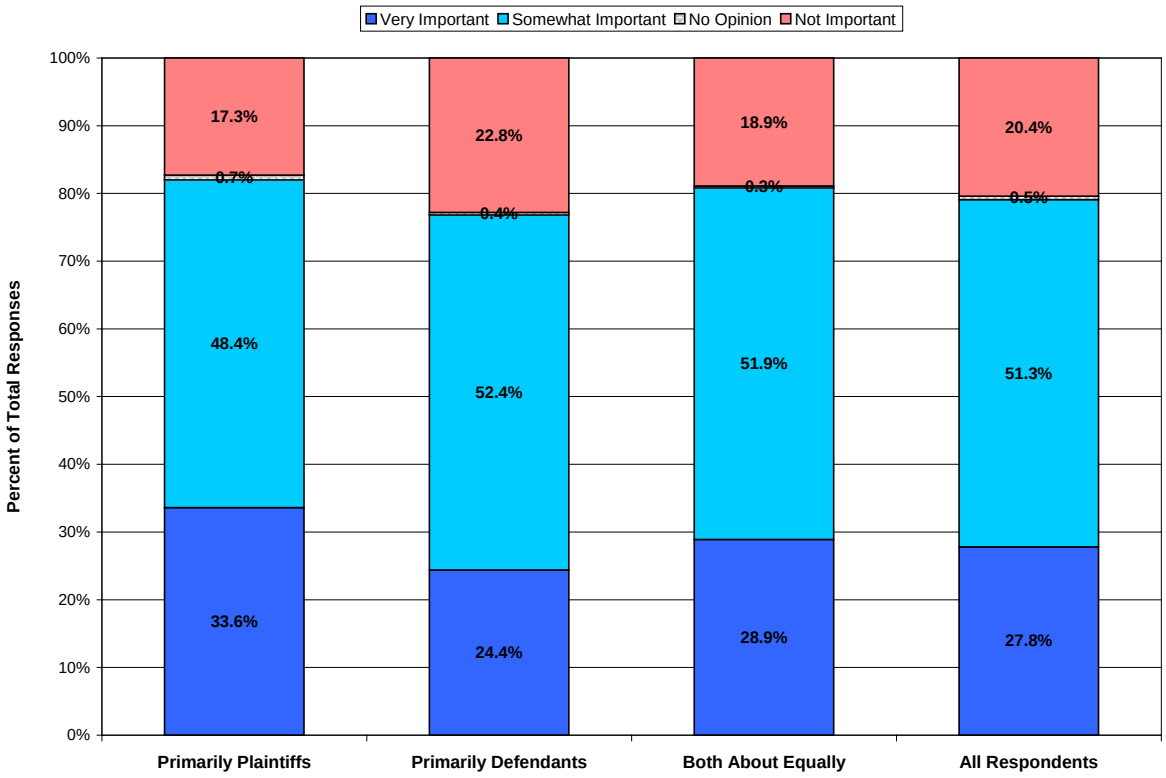

Table 6.21(a)

	Very Important	Somewhat Important	Not Important	No Opinion	N
Requests for admission.					
Primarily Plaintiffs	33.6	48.4	17.3	0.7	834
Primarily Defendants	24.4	52.4	22.8	0.4	1642
Both About Equally	28.9	51.9	18.9	0.3	771
All Respondents	27.8	51.3	20.4	0.5	3247

As for cost-effectiveness, plaintiffs' lawyers were more likely to find requests for admission to be cost-effective or very cost-effective than were defense or mixed practice lawyers. 81% of plaintiffs' lawyers responded that requests for admission are at least somewhat cost-effective, while 74.4% of defense lawyers and 77.6% of mixed practice lawyers agree. Notably, over 45% of plaintiffs' lawyers believe that requests for admission are very cost-effective, while only 30.9% of defense lawyers and 35.8% of mixed practice lawyers agree.

Figure 6.21(b): Requests for admission

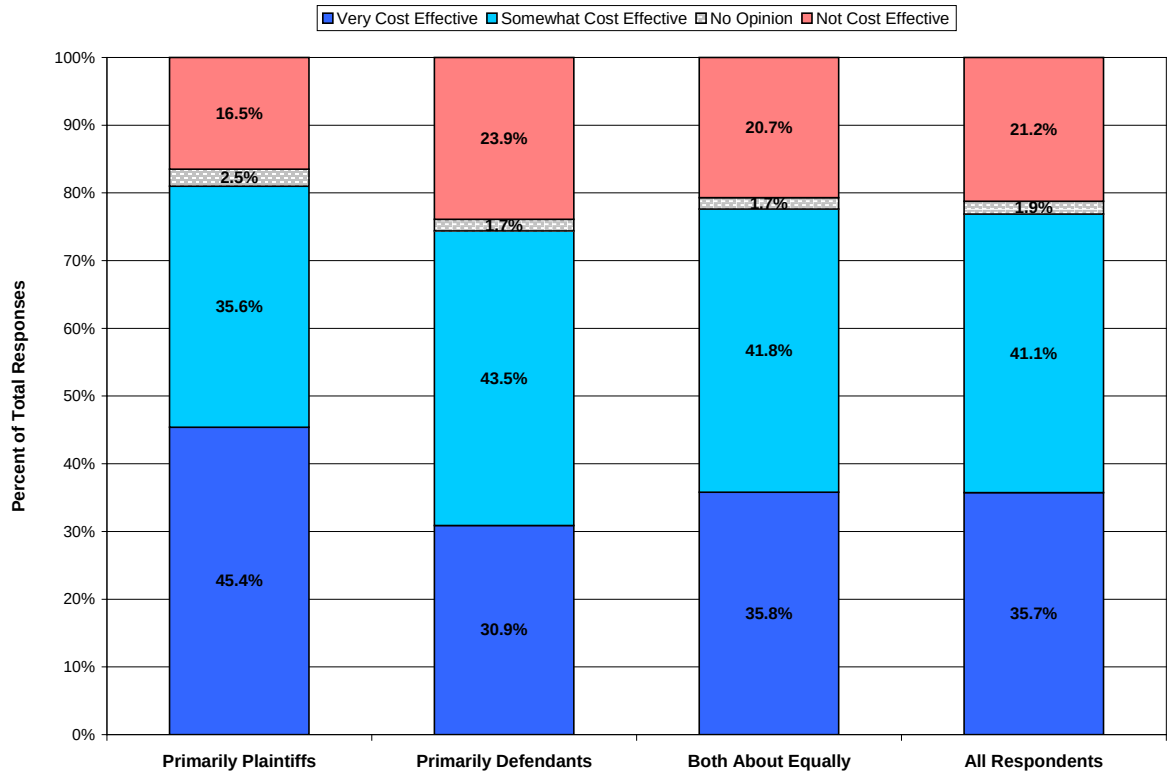

Table 6.21(b)

	Very Cost-Effective	Somewhat Cost-Effective	Not Cost-Effective	No Opinion	N
Requests for admission.					
Primarily Plaintiffs	45.4	35.6	16.5	2.5	826
Primarily Defendants	30.9	43.5	23.9	1.7	1640
Both About Equally	35.8	41.8	20.7	1.7	768
All Respondents	35.7	41.1	21.2	1.9	3234

6.22 Interrogatories.

Interrogatories were commonly endorsed as at least somewhat important by nearly 88% of all respondents – 46.5% of plaintiffs' lawyers believe they are very important, as do 40.5% of defense lawyers, and 31.4% of mixed practice lawyers. In the past tables, mixed practice lawyers have been somewhere between plaintiffs' and defense lawyers.

Figure 6.22(a): Interrogatories

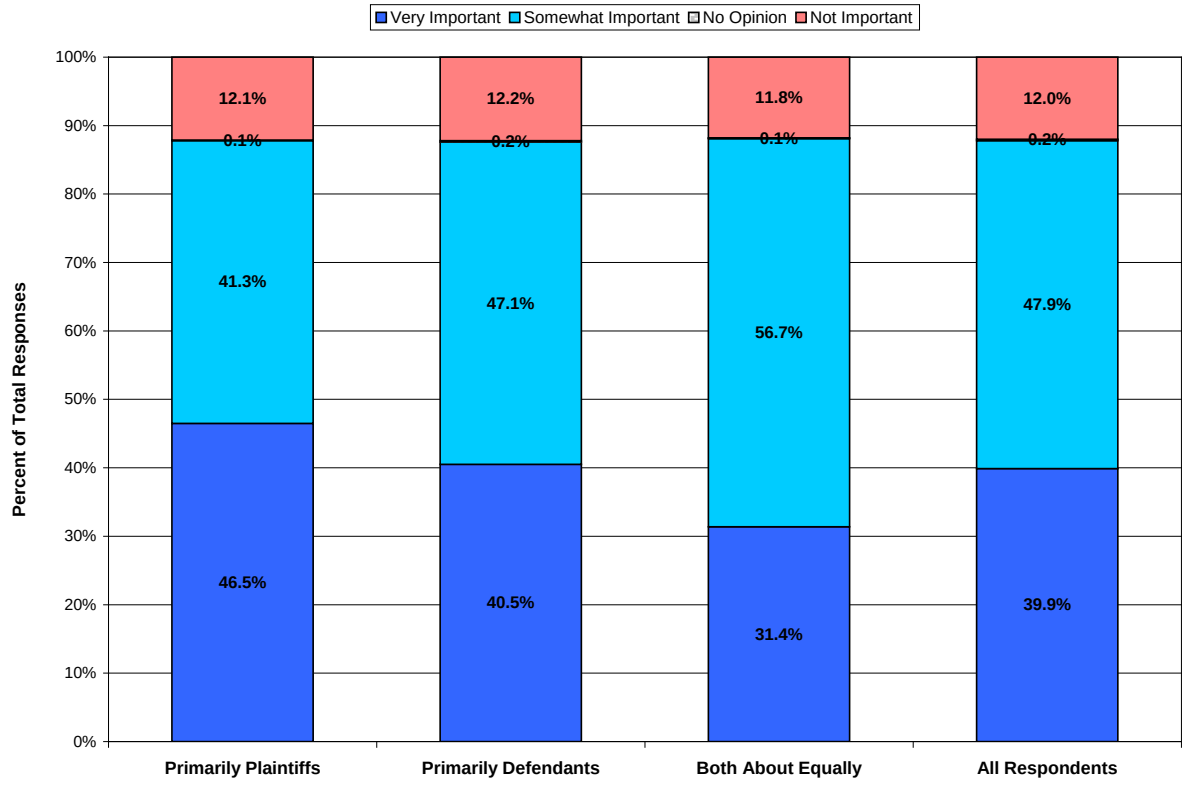

Table 6.22(a)

	Very Important	Somewhat Important	Not Important	No Opinion	N
Interrogatories					
Primarily Plaintiffs	46.5	41.3	12.1	0.1	818
Primarily Defendants	40.5	47.1	12.2	0.2	1621
Both About Equally	31.4	56.7	11.8	0.1	757
All Respondents	39.9	47.9	12.0	0.2	3196

Plaintiffs' lawyers were more likely to believe that interrogatories are at least somewhat cost-effective, with 77.5% of that group responding that way, including 32.6% who agree that interrogatories are very cost-effective. A smaller but still substantial percentage – 71.3% of defense lawyers and 66.2% of mixed practice lawyers – believes that interrogatories are somewhat or very cost-effective.

Figure 6.22(b): Interrogatories

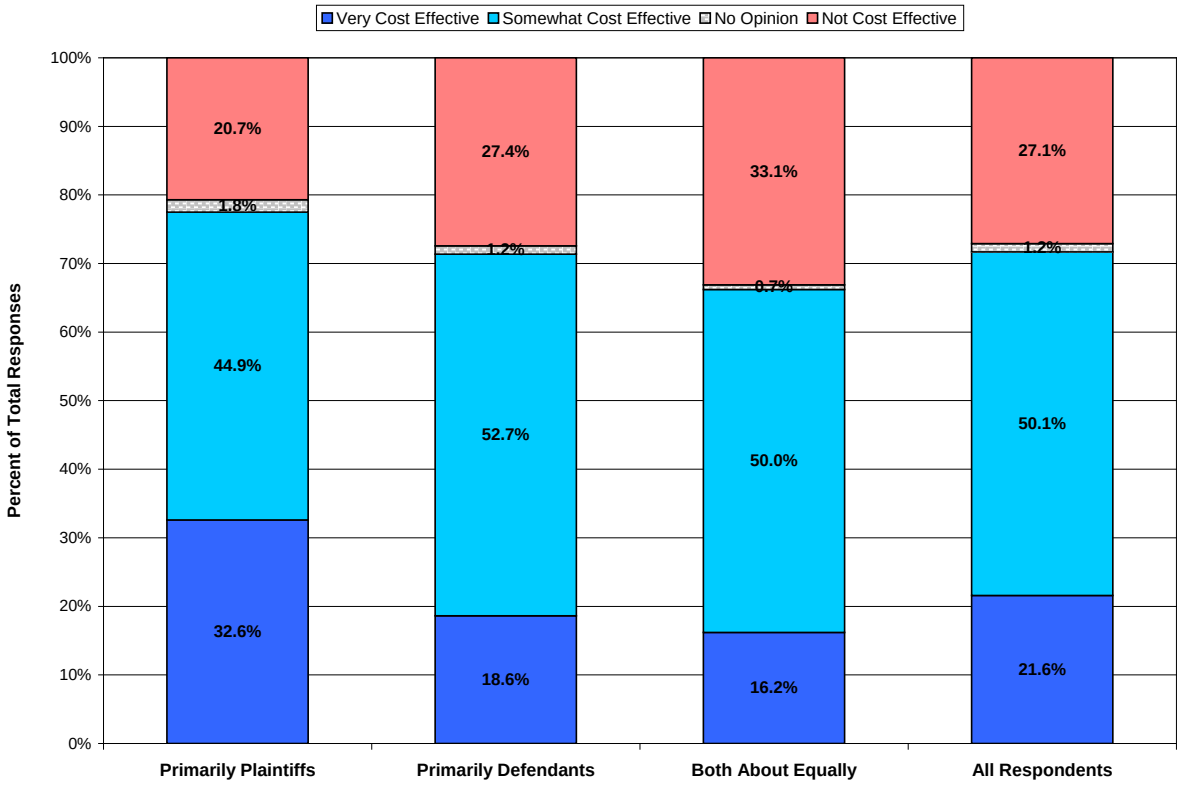

Table 6.22(b)

	Very Cost-Effective	Somewhat Cost-Effective	Not Cost-Effective	No Opinion	N
Interrogatories					
Primarily Plaintiffs	32.6	44.9	20.7	1.8	818
Primarily Defendants	18.6	52.7	27.4	1.2	1625
Both About Equally	16.2	50.0	33.1	0.7	758
All Respondents	21.6	50.1	27.1	1.2	3201

6.23 Requests for production of hard copy documents.

This is a question about which the survey respondents consistently and overwhelmingly agree. Over 96% of each group agrees that production of hard copy documents is at least somewhat important, with nearly 80% of all respondents agreeing that these requests are very important.

Figure 6.23(a): Requests for production of hard copy documents

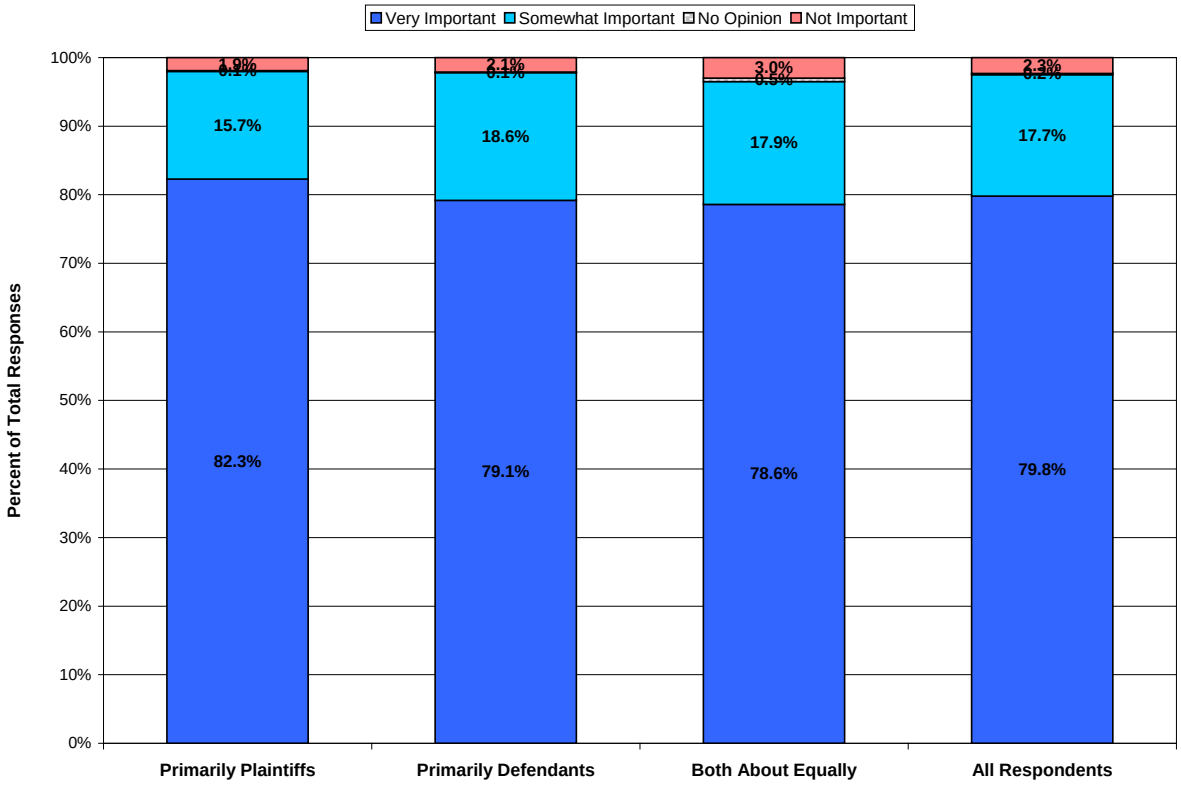

Table 6.23(a)

	Very Important	Somewhat Important	Not Important	No Opinion	N
Requests for production of hard copy documents.					
Primarily Plaintiffs	82.3	15.7	1.9	0.1	829
Primarily Defendants	79.1	18.6	2.1	0.1	1631
Both About Equally	78.6	17.9	3.0	0.5	765
All Respondents	79.8	17.7	2.3	0.2	3225

Although overwhelmingly supportive of their importance, respondents were somewhat tempered in their response to whether requests for production of hard copy documents are cost-effective. Over 82% of lawyers overall agree that these requests are at least somewhat cost-effective, with plaintiffs' lawyers slightly more likely to agree (83.3%) than defense or mixed practice lawyers (81.7% and 81.9%, respectively). Across the board, survey respondents were more likely to say that requests for hard copy documents are somewhat cost-effective rather than very cost-effective.

Figure 6.23(b): Requests for production of hard copy documents

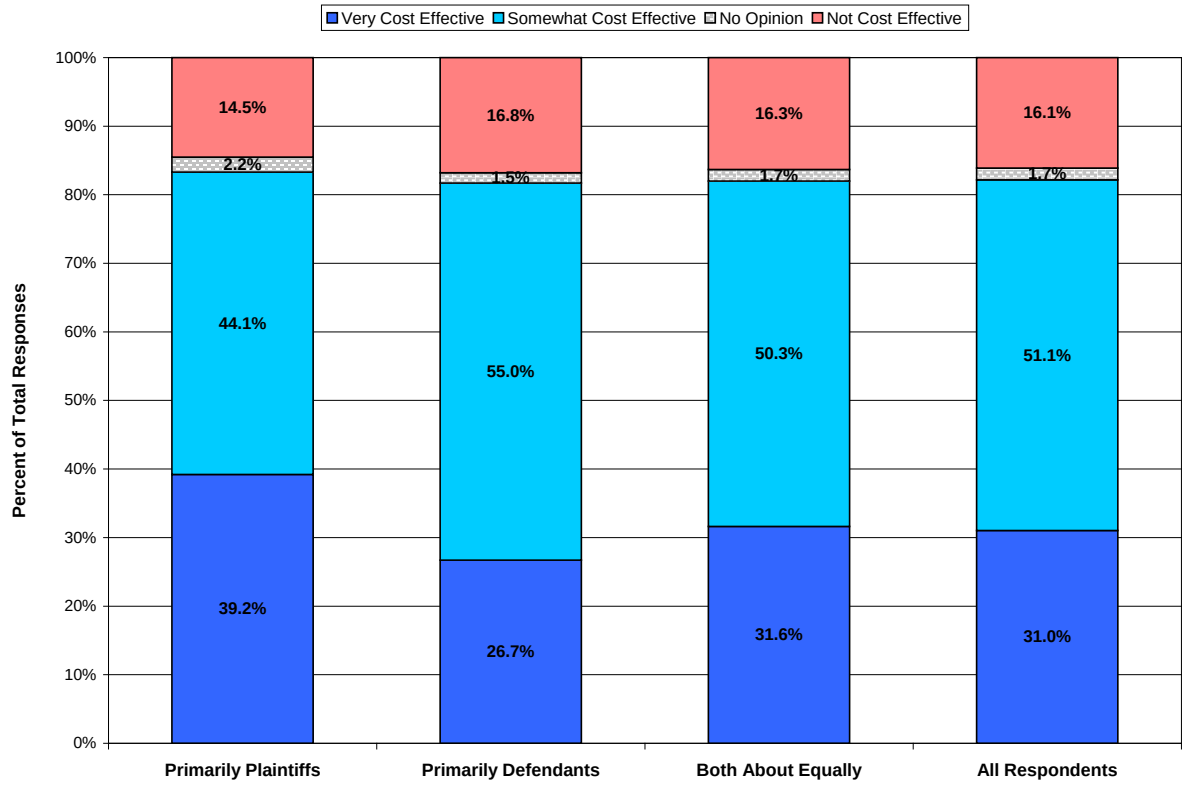

Table 6.23(b)

	Very Cost-Effective	Somewhat Cost-Effective	Not Cost-Effective	No Opinion	N
Requests for production of hard copy documents.					
Primarily Plaintiffs	39.2	44.1	14.5	2.2	814
Primarily Defendants	26.7	55.0	16.8	1.5	1634
Both About Equally	31.6	50.3	16.3	1.7	759
All Respondents	31.0	51.1	16.1	1.7	3207

6.24 Requests for production of electronically stored documents.

Survey respondents were in agreement that requests for production of electronically stored documents are at least somewhat important, with support of over 97% of survey participants. Plaintiffs' lawyers were more likely to call these requests very important (78.4%) than were defense lawyers (65.3%) or mixed practice lawyers (71.7%).

Figure 6.24(a): Requests for production of electronically stored documents

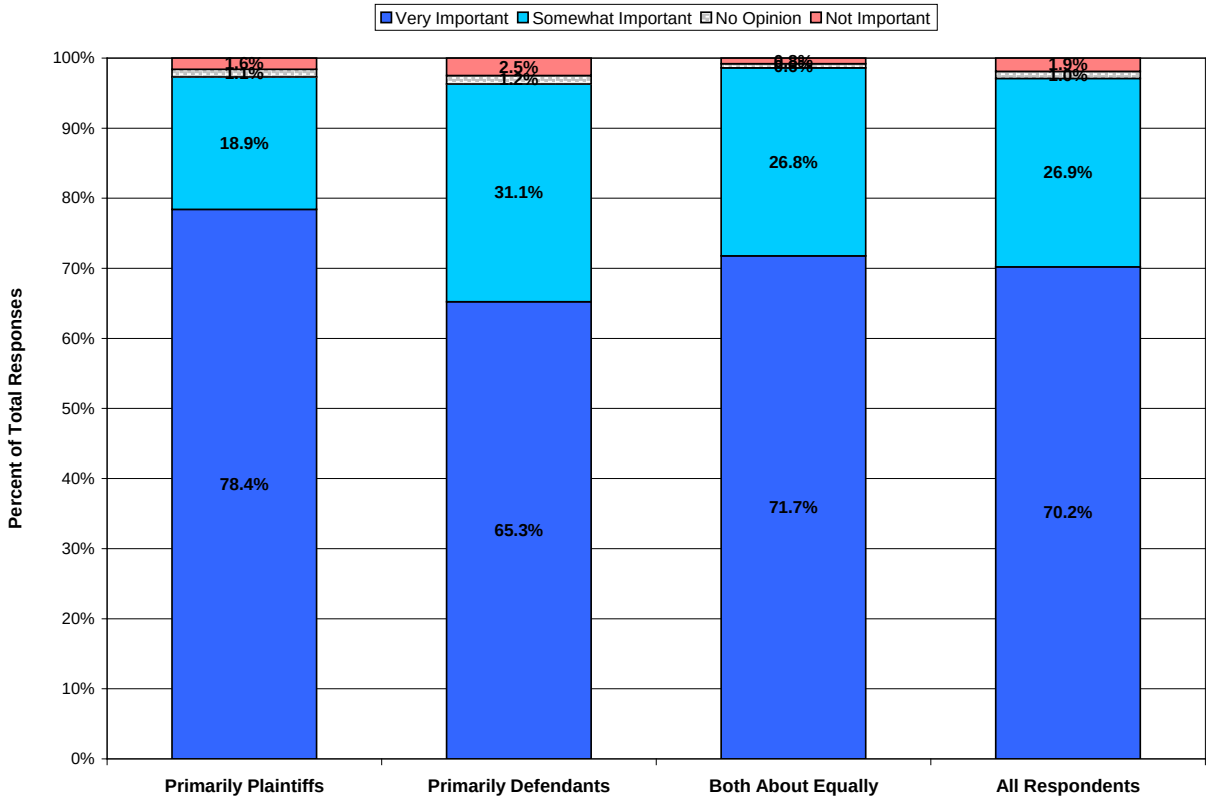

Table 6.24(a)

	Very Important	Somewhat Important	Not Important	No Opinion	N
Requests for production of electronically stored documents.					
Primarily Plaintiffs	78.4	18.9	1.6	1.1	830
Primarily Defendants	65.3	31.1	2.5	1.2	1639
Both About Equally	71.7	26.8	0.8	0.6	771
All Respondents	70.2	26.9	1.9	1.0	3240

Although there is fairly consistent agreement on importance, there is less agreement on the cost-effectiveness of requests for electronic discovery. While 77.5% of plaintiffs' lawyers agree that these requests are cost-effective, including 35.9% who agree that they are very cost-effective, only 57.1% of defense lawyers agree that requests for e-discovery are cost-effective, and only 14.6% respond that they are very cost-effective. Similarly, 64.1% of mixed practice lawyers believe that they are cost-effective, with only 20.8% believing that they are very cost-effective.

Figure 6.24(b): Requests for production of electronically stored documents

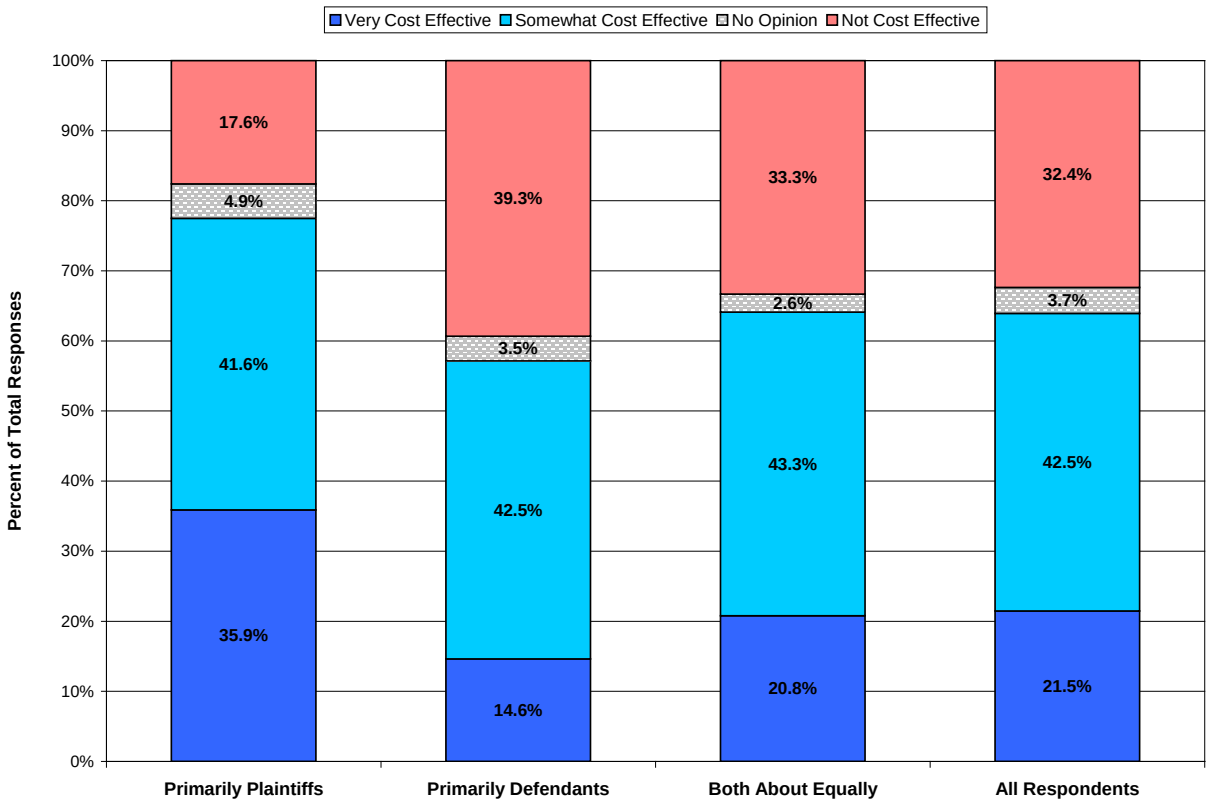

Table 6.24(b)

	Very Cost-Effective	Somewhat Cost-Effective	Not Cost-Effective	No Opinion	N
Requests for production of electronically stored documents.					
Primarily Plaintiffs	35.9	41.6	17.6	4.9	822
Primarily Defendants	14.6	42.5	39.3	3.5	1636
Both About Equally	20.8	43.3	33.3	2.6	763
All Respondents	21.5	42.5	32.4	3.7	3221

6.25 Depositions of fact witnesses.

Depositions of fact witnesses are seen by over 99% of all respondents as being at least somewhat important, including 88.6% of plaintiffs' lawyers, 92.6% of defense lawyers, and 87.8% of mixed practice lawyers who call depositions of fact witnesses very important.

Figure 6.25(a): Depositions of fact witnesses

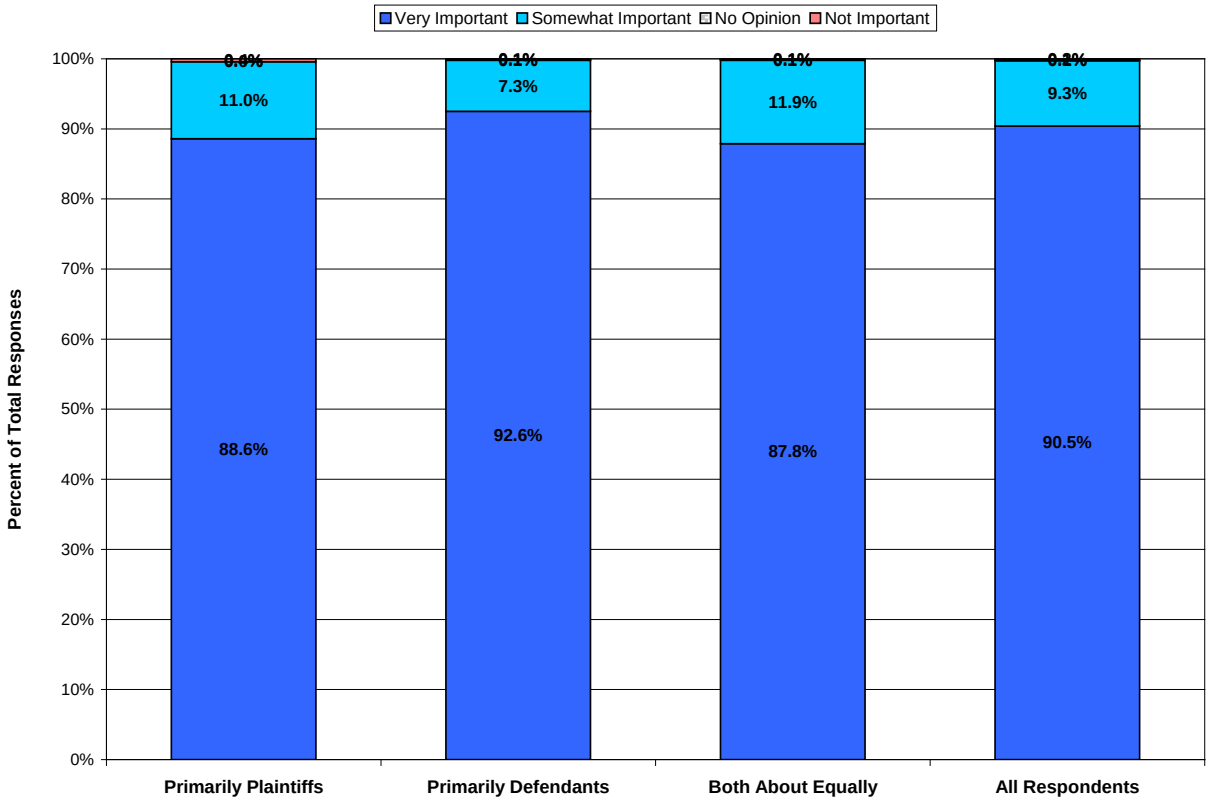

Table 6.25(a)

	Very Important	Somewhat Important	Not Important	No Opinion	N
Depositions of fact witnesses.					
Primarily Plaintiffs	88.6	11.0	0.4	0.0	825
Primarily Defendants	92.6	7.3	0.1	0.1	1640
Both About Equally	87.8	11.9	0.1	0.1	771
All Respondents	90.5	9.3	0.2	0.1	3236

Survey respondents were much less unanimous in their opinion of cost-effectiveness of depositions of fact witnesses. While between 31% and 35% of each group believe that these depositions are very cost-effective, over 52% of each group believes that they are only somewhat cost-effective. Plaintiffs' lawyers were most likely to say that there depositions are not cost-effective, at 14.4%.

Figure 6.25(b): Depositions of fact witnesses

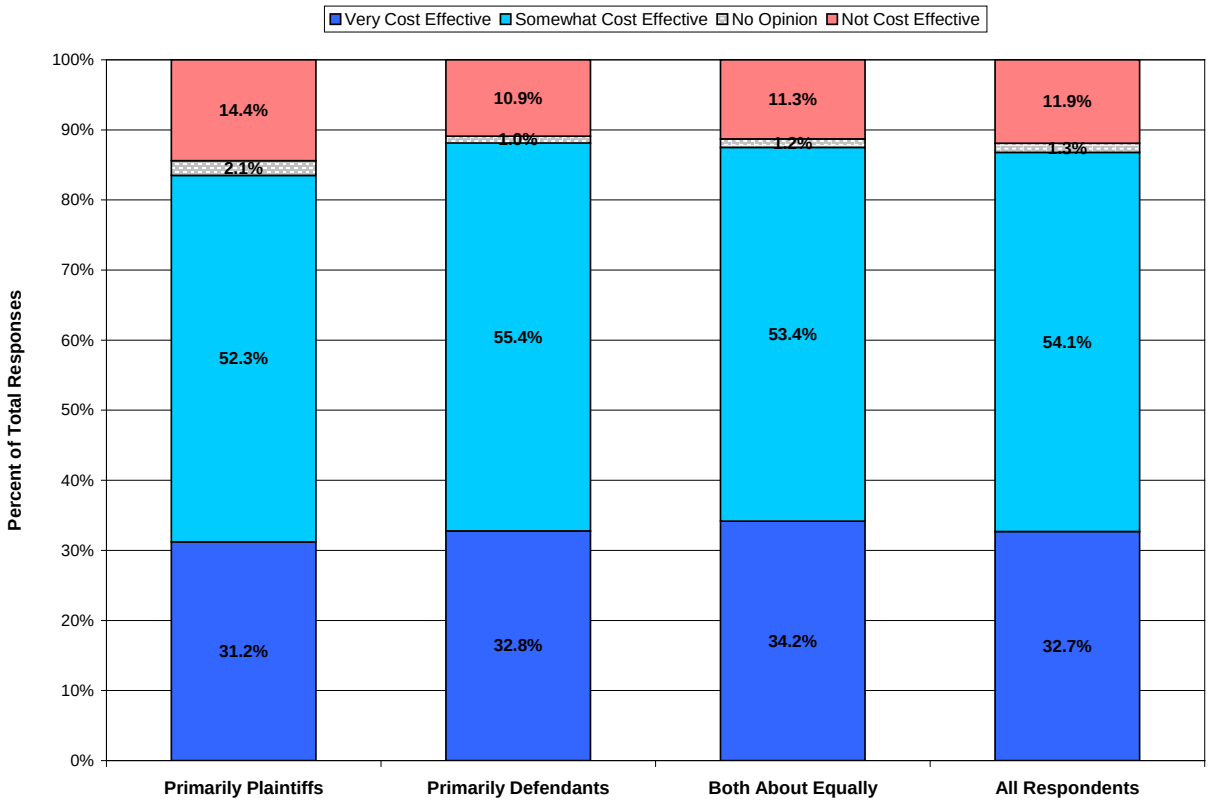

Table 6.25(b)

	Very Cost-Effective	Somewhat Cost-Effective	Not Cost-Effective	No Opinion	N
Depositions of fact witnesses.					
Primarily Plaintiffs	31.2	52.3	14.4	2.1	824
Primarily Defendants	32.8	55.4	10.9	1.0	1638
Both About Equally	34.2	53.4	11.3	1.2	761
All Respondents	32.7	54.1	11.9	1.3	3223

6.26 Depositions of expert witnesses testimony limited to expert report.

90% of survey respondents agree that depositions of expert witnesses limited to the expert report is at least somewhat important, with defense and mixed practice lawyers slightly more inclined to agree than plaintiffs' lawyers (91.4% for defense, 90.9% for mixed practice, and 86.4% for plaintiffs). Almost half of each group believes that these depositions are very important.

Figure 6.26(a): Depositions of expert witnesses testimony limited to expert report

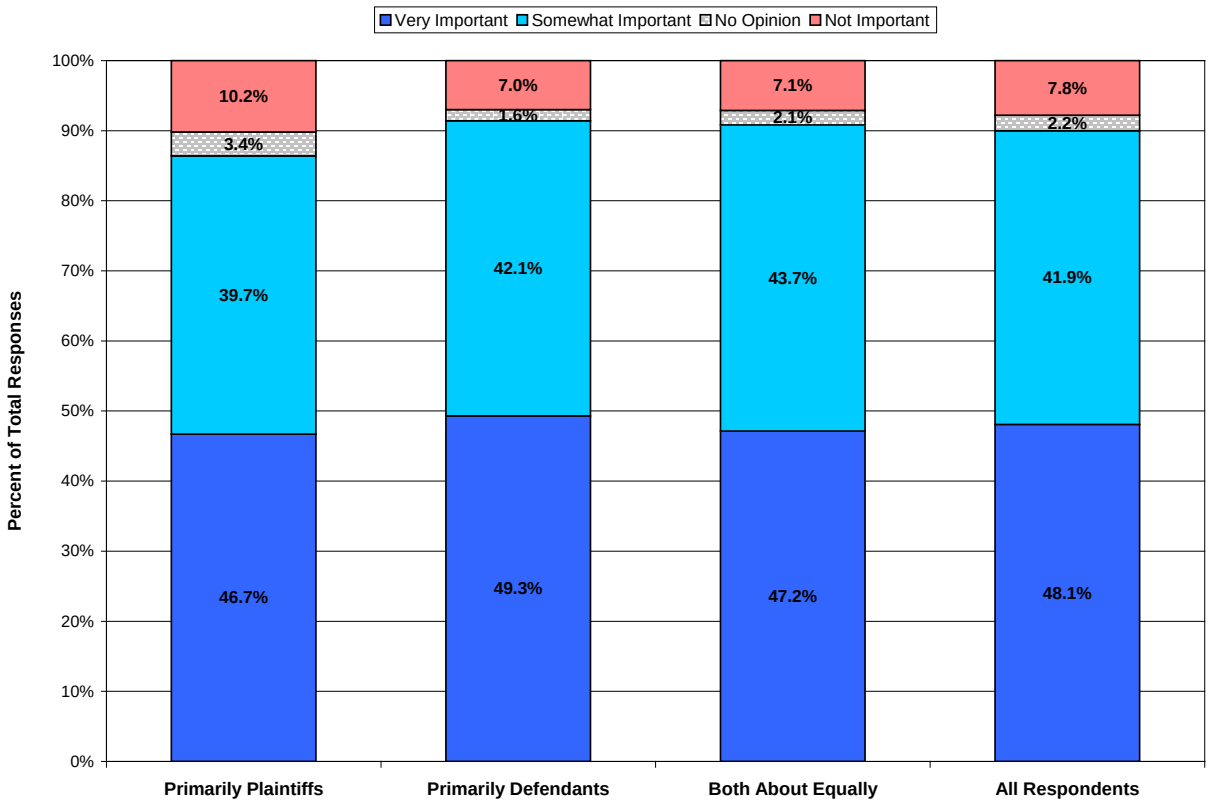

Table 6.26(a)

	Very Important	Somewhat Important	Not Important	No Opinion	N
Depositions of expert witnesses testimony limited to expert report.					
Primarily Plaintiffs	46.7	39.7	10.2	3.4	833
Primarily Defendants	49.3	42.1	7.0	1.6	1647
Both About Equally	47.2	43.7	7.1	2.1	772
All Respondents	48.1	41.9	7.8	2.2	3252

Although important, depositions of experts limited to the contents of the expert report were less likely to be seen as very cost-effective. Plaintiffs' lawyers agree 59.7% of the time that these depositions are at least somewhat cost-effective, and only 14.1% called them very cost-effective. 70% of defense lawyers agree that they are at least somewhat cost-effective, with 17.1% of those believing that these depositions are very cost-effective. 70.4% of mixed practice lawyers believe that are at least somewhat cost-effective, with 20.3% of those calling them very cost-effective.

Table 6.26(b)

	Very Cost-Effective	Somewhat Cost-Effective	Not Cost-Effective	No Opinion	N
Depositions of expert witnesses testimony limited to expert report.					
Primarily Plaintiffs	14.1	45.6	33.7	6.6	824
Primarily Defendants	17.1	52.9	26.3	3.8	1636
Both About Equally	20.3	50.1	25.3	4.3	763
All Respondents	17.1	50.4	28.0	4.6	3223

6.27 Depositions of expert witnesses not limited to report.

Survey respondents agree that depositions of experts not limited to the report are very important. Responding this way were 69.1% of plaintiffs' lawyers, 74.8% of defense lawyers and 70.9% of mixed practice lawyers. Over 90% overall agree that this type of deposition is at least somewhat important, and less than 5% of each group responded that these types of depositions are not important.

Figure 6.27(a): Depositions of expert witnesses testimony not limited to report

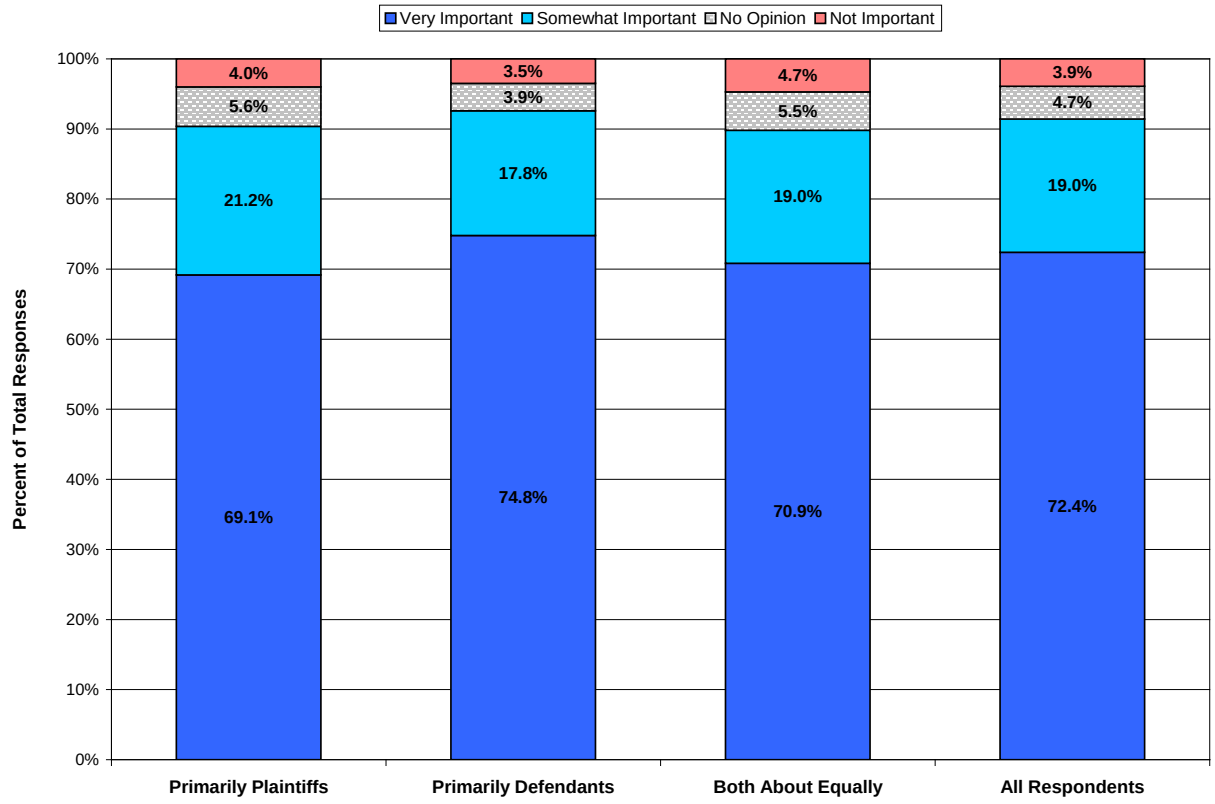

Table 6.27(a)

	Very Important	Somewhat Important	Not Important	No Opinion	N
Depositions of expert witnesses testimony not limited to report.					
Primarily Plaintiffs	69.1	21.2	4.0	5.6	833
Primarily Defendants	74.8	17.8	3.5	3.9	1643
Both About Equally	70.9	19.0	4.7	5.5	769
All Respondents	72.4	19.0	3.9	4.7	3245

Again, while respondents agree that these depositions are important, they were less likely to see them as very cost-effective. Only 24% of plaintiffs' lawyers, 28.1% of defense lawyers, and 32% of mixed practice lawyers believe these depositions are very cost-effective. However, on average over 70% of respondents responded that the depositions are at least somewhat cost-effective.

Figure 6.27(b): Depositions of expert witnesses testimony not limited to report

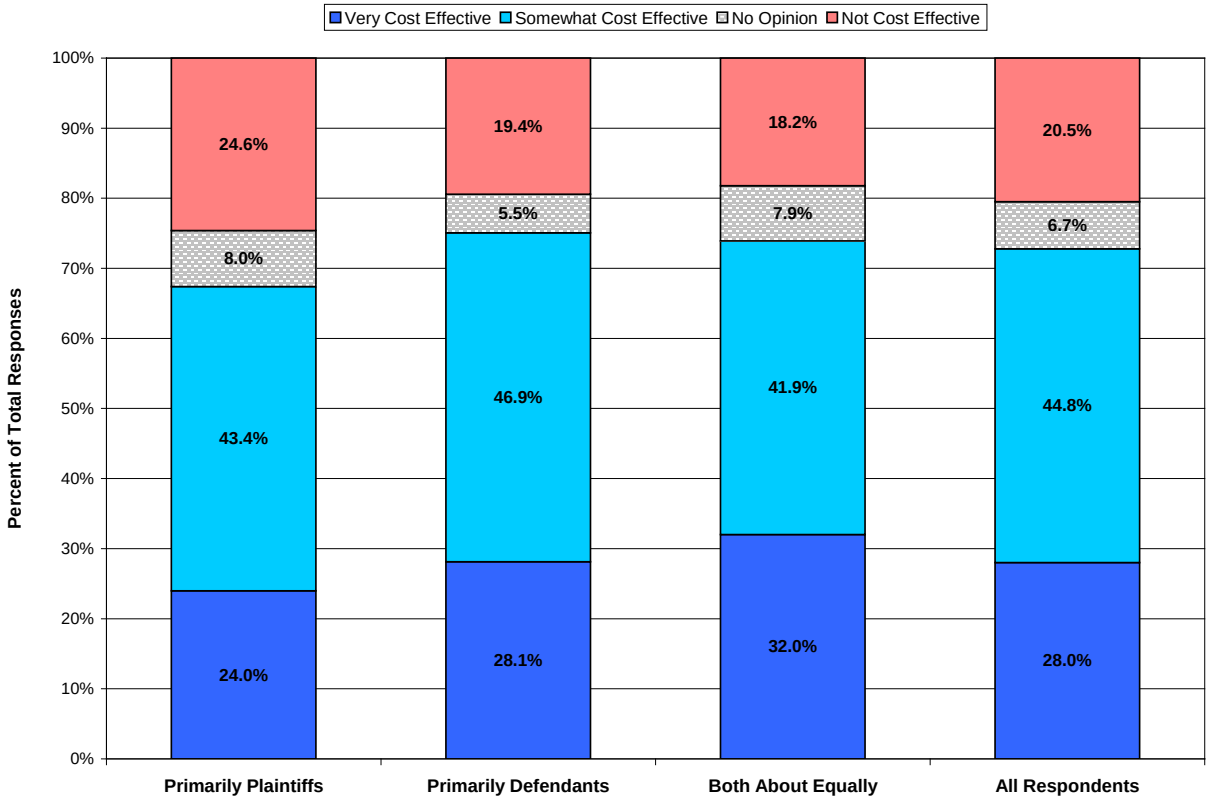

Table 6.27(b)

	Very Cost-Effective	Somewhat Cost-Effective	Not Cost-Effective	No Opinion	N
Depositions of expert witnesses testimony not limited to report.					
Primarily Plaintiffs	24.0	43.4	24.6	8.0	822
Primarily Defendants	28.1	46.9	19.4	5.5	1635
Both About Equally	32.0	41.9	18.2	7.9	763
All Respondents	28.0	44.8	20.5	6.7	3220

6.28 Rule 26(f) Party Conferences.

Respondents were asked whether Rule 26(f) discovery planning conferences frequently occur. Nearly 70% of all respondents agree that they do, and there is little difference among the categories of respondents.

Table 6.28(a)

	Yes	No	N
Do Rule 26(f) party conferences frequently occur?			
Primarily Plaintiffs	68.4	31.6	810
Primarily Defendants	70.4	29.6	1619
Both About Equally	68.9	31.1	763
All Respondents	69.5	30.5	3223

Respondents were also in agreement about whether Rule 26(f) conferences are helpful in managing discovery. Of the responses received, 58.2% believe that the conferences are helpful, 32.8% believe that they are not helpful, and 9% overall report no experience with Rule 26(f) conferences. There was little variation in the percentages among groups.

Table 6.28 (b)

When Rule 26(f) party conferences occur, are they helpful in managing the discovery process?

ALL RESPONDENTS

	N	%
Yes	1898	58.2
No	1071	32.8
No experience with 26(f)	294	9.0

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
Yes	480	58.3
No	246	29.9
No experience with 26(f)	97	11.8

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
Yes	930	56.7
No	586	35.7
No experience with 26(f)	125	7.6

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
Yes	467	60.9
No	233	30.4
No experience with 26(f)	67	8.7

6.29 The effect of recent amendments to the Rules on discovery abuse.

Beginning with the concern about abuse of discovery that was identified by the Pound Conference in 1976 and continuing through 2007, there have been numerous changes in the discovery provisions of the Rules. The survey asked respondents whether the changes have reduced discovery abuse. While 50.2% of plaintiffs' lawyers agree that the changes have reduced discovery abuse, only 41.1% of defense lawyers, and 44.2% of mixed practice lawyers agree. Across the board, just under 10% strongly disagree with the statement.

Figure 6.29: The cumulative effect of the changes has significantly reduced discovery abuse

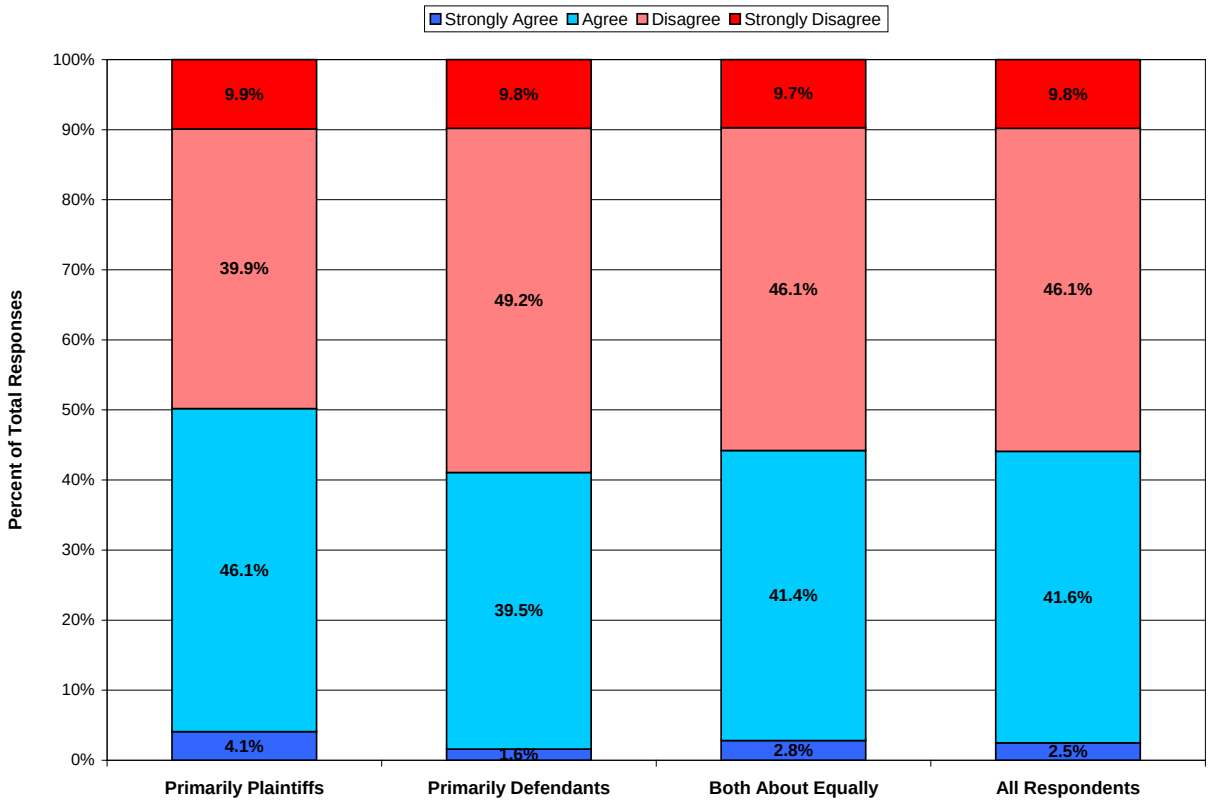

Table 6.29

	Strongly Agree	Agree	Disagree	Strongly Disagree	N
The cumulative effect of the changes has significantly reduced discovery abuse.					
Primarily Plaintiffs	4.1	46.1	39.9	9.9	802
Primarily Defendants	1.6	39.5	49.2	9.8	1602
Both About Equally	2.8	41.4	46.1	9.7	759
All Respondents	2.5	41.6	46.1	9.8	3163

6.30 Discovery costs of cases that do not go to trial.

Survey respondents were asked to think about the costs associated with cases that do not go to trial and that are not dismissed on an initial 12(b)(6) motion. Average responses reflected that between 62% and 68% of costs are incurred in discovery, while the median response was 70% for plaintiffs' and mixed practice lawyers and 75% for defense lawyers.

Table 6.30(a)

	Mean	Median	N
What percentage of costs are incurred in connection with discovery for cases that do not go to trial but survive a 12(b)(6) motion?			
Primarily Plaintiffs	62.4	70.0	769
Primarily Defendants	67.7	75.0	1571
Both About Equally	64.8	70.0	735
All Respondents	65.6	70.0	3106

When the respondents were asked what percentage of costs should be incurred in connection with discovery, the mean and median responses were all in the neighborhood of 50%.

Table 6.30(b)

	Mean	Median	N
What percentage of the total cost should be incurred in connection with discovery on such cases?			
Primarily Plaintiffs	52.8	50.0	769
Primarily Defendants	48.6	50.0	1571
Both About Equally	46.7	50.0	735
All Respondents	49.6	50.0	3106

6.31 Revenues attributable to discovery.

Respondents were asked what percentage of firm revenues in civil litigation practice are attributable to discovery costs. Defense lawyers and mixed practice lawyers both responded that discovery accounts for 50% or more revenue in their practice, while only an average of 29.3% of revenue was reported as attributable to discovery in the practices of plaintiffs' lawyers.

Table 6.31

	Mean	Median	N
Of the revenue attributable to civil litigation practice in your firm, what percentage is attributable to discovery?			
Primarily Plaintiffs	29.3	25.0	597
Primarily Defendants	53.8	50.0	1143
Both About Equally	50.0	50.0	604
All Respondents	46.6	50.0	2370

6.32 Staying discovery pending resolution of threshold motions to dismiss.

Respondents were asked whether an automatic stay of discovery should be put in place pending the court's determination of threshold motions to dismiss. Here, there was a stark difference in opinion between plaintiffs' lawyers and defense lawyers. Over 82% of plaintiffs' lawyers believe that discovery should not be stayed, while over 77% of defense lawyers believe that it should be stayed. Interestingly, mixed practice lawyers are almost exactly 50/50 in their response.

Table 6.32

	Yes	No	N
Should there be an automatic stay of discovery in all cases, pending determination of a threshold motion to dismiss?			
Primarily Plaintiffs	17.4	82.6	826
Primarily Defendants	77.3	22.7	1627
Both About Equally	50.1	49.9	763
All Respondents	55.4	44.6	3249

7. Electronic Discovery

Electronic discovery is an area in which plaintiffs' lawyers and defense lawyers diverge in their opinions. While plaintiffs' lawyers are more likely to see benefits rather than burdens, to a large extent, defense and mixed practice lawyers appear to see the costs of e-discovery outweighing the benefits.

As a threshold matter, 72% of all respondents reported having been involved in cases that involve e-discovery, which includes 63.8% of plaintiffs' lawyers, 74.9% of defense lawyers, and 75.3% of mixed practice lawyers.

Table 7.0

	Yes	No	N
Have you had cases that raise e-discovery issues?			
Primarily Plaintiffs	63.8	36.2	834
Primarily Defendants	74.9	25.1	1651
Both About Equally	75.3	24.7	773
All Respondents	72.0	28.0	3292

7.1 E-discovery has enhanced the ability of counsel to discover all relevant information.

Respondents were in general agreement that e-discovery has enhanced the ability to obtain all relevant information, although plaintiffs' lawyers were more likely to agree and much more likely to strongly agree than other groups. Of plaintiffs' lawyers, 89.4% agree with the statement, and of those, 43% strongly agree. Although 73.2% of defense lawyers agree, only 15.1% of them strongly agree. Of the 76.7% of mixed practice lawyers who agree, only 20.2% agree strongly. Very few respondents had no opinion on the subject.

Figure 7.1: E-discovery has enhanced the ability of counsel to discover all relevant information

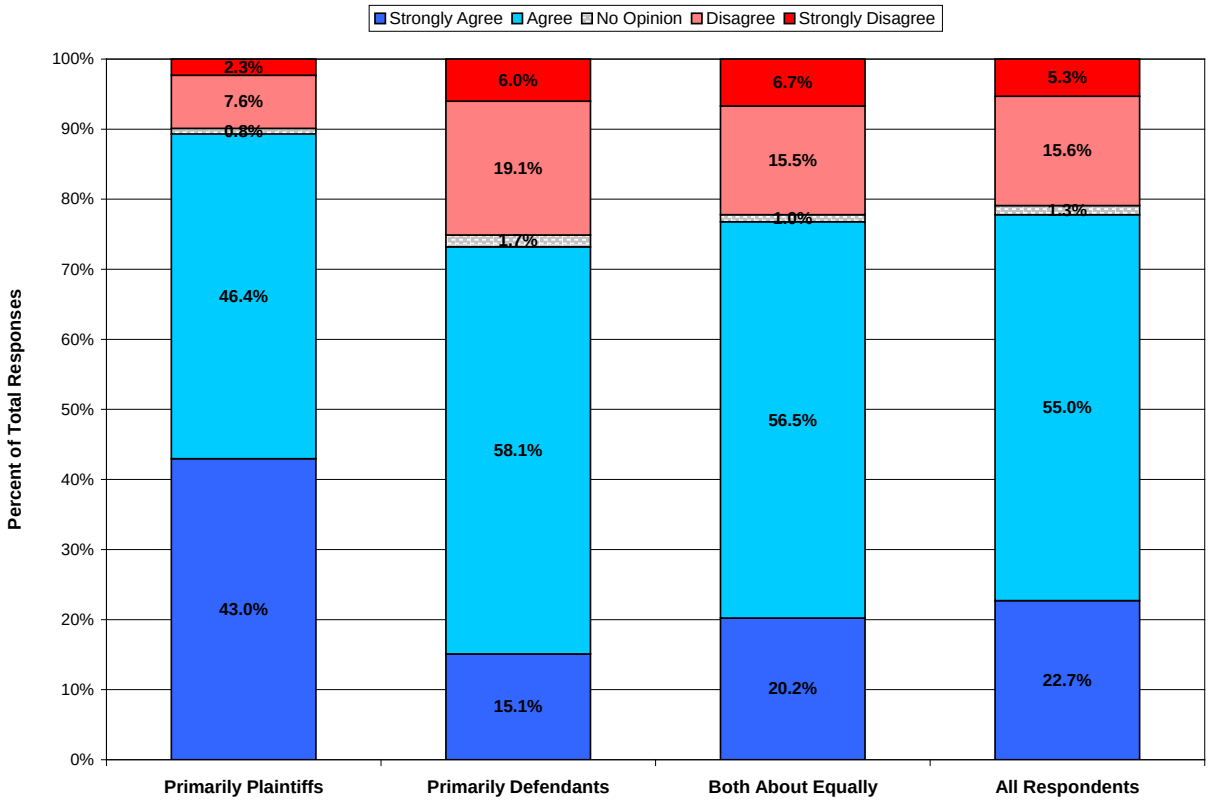

Table 7.1

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
E-discovery has enhanced the ability of counsel to discover all relevant information.						
Primarily Plaintiffs	43.0	46.4	7.6	2.3	0.8	526
Primarily Defendants	15.1	58.1	19.1	6.0	1.7	1223
Both About Equally	20.2	56.5	15.5	6.7	1.0	579
All Respondents	22.7	55.0	15.6	5.3	1.3	2328

7.2 When properly managed, discovery of electronic records can reduce the costs of discovery.

Again, plaintiffs' lawyers and defense lawyers diverged in their responses. Plaintiffs' lawyers were much more likely to agree that proper management of electronic records can reduce the cost of discovery – 64.5% agree, and 28.4% strongly agree. Only 8.3% of plaintiffs' lawyers strongly disagree. Of defense lawyers, only 25.4% agree , 4% strongly agree, and 26.4% strongly disagree. Lawyers with mixed practices tended to fall closer to the defense lawyers in their responses, with only 34.7% agreeing, with 7.1% of those strongly agreeing, and 21.7% strongly disagreeing.

Figure 7.2: When properly managed, discovery of electronic records can reduce the costs of discovery

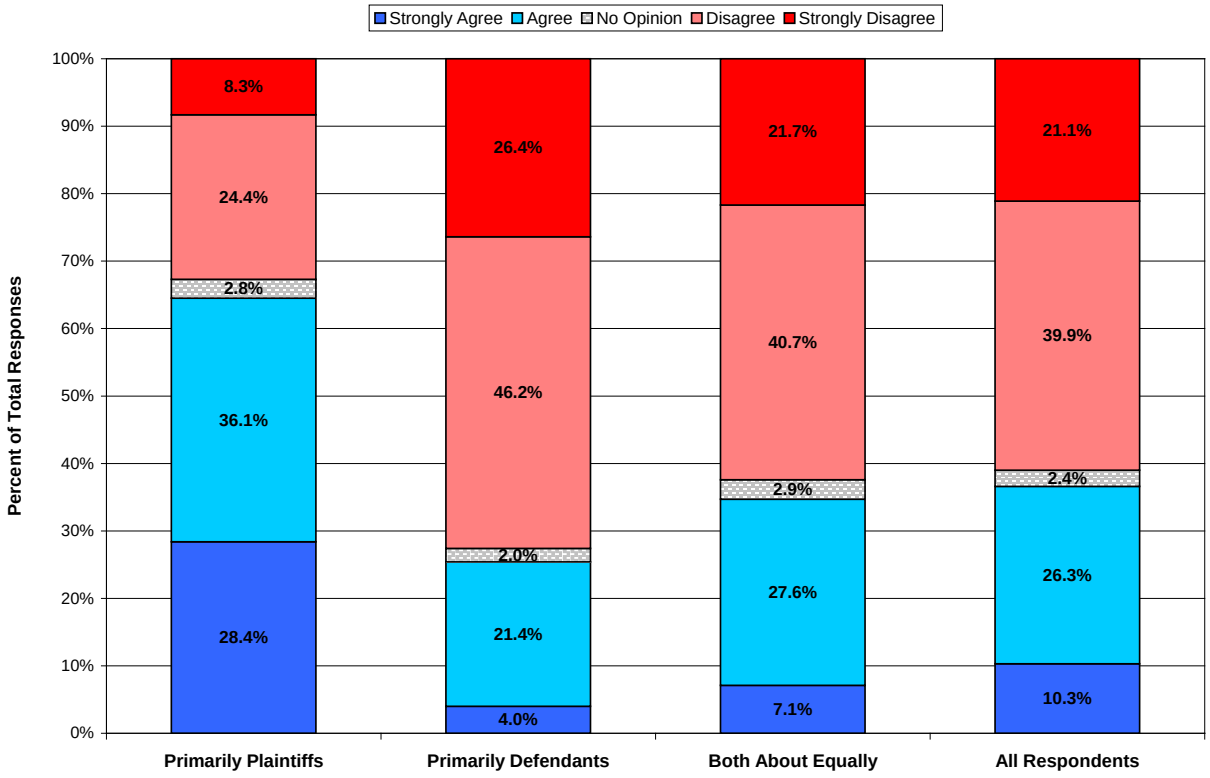

Table 7.2

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
When properly managed, discovery of electronic records can reduce the costs of discovery.						
Primarily Plaintiffs	28.4	36.1	24.4	8.3	2.8	529
Primarily Defendants	4.0	21.4	46.2	26.4	2.0	1223
Both About Equally	7.1	27.6	40.7	21.7	2.9	577
All Respondents	10.3	26.3	39.9	21.1	2.4	2329

7.3 E-discovery increases the cost of litigation.

Over 90% of defense and mixed practice lawyers agree that e-discovery increases the cost of litigation. Only 59.2% of plaintiffs' lawyers agree. Both defense and mixed practice lawyers were likely to see increased costs, with over 50% of mixed practice lawyers and over 60% of defense lawyers strongly agreeing with the statement.

Figure 7.3: E-discovery increases the costs of litigation

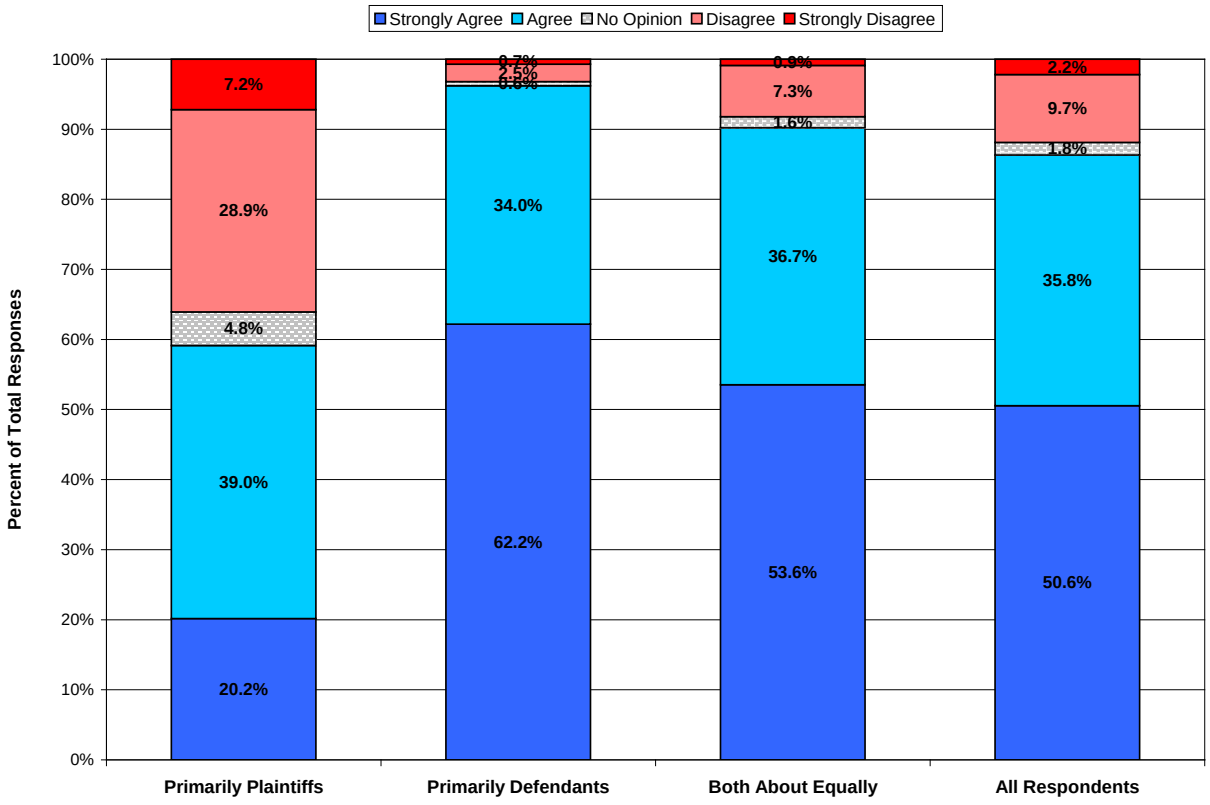

Table 7.3

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
E-discovery increases the costs of litigation.						
Primarily Plaintiffs	20.2	39.0	28.9	7.2	4.8	526
Primarily Defendants	62.2	34.0	2.5	0.7	0.6	1226
Both About Equally	53.6	36.7	7.3	0.9	1.6	578
All Respondents	50.6	35.8	9.7	2.2	1.8	2330

7.4 Discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery.

Once again, defense and mixed practice lawyers were much more likely to show sensitivity to the costs of e-discovery. Only 41.8% of plaintiffs' lawyers agree or strongly agree that discovery costs have increased disproportionately because of the advent of e-discovery, while over 88% of defense lawyers and over 82% of mixed practice lawyers agree or strongly agree. Within those percentages, 52.2% of defense lawyers strongly agree and 45.8% of mixed practice lawyers strongly agree. Nearly 10% of plaintiffs' lawyers strongly disagree.

Figure 7.4: Discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery

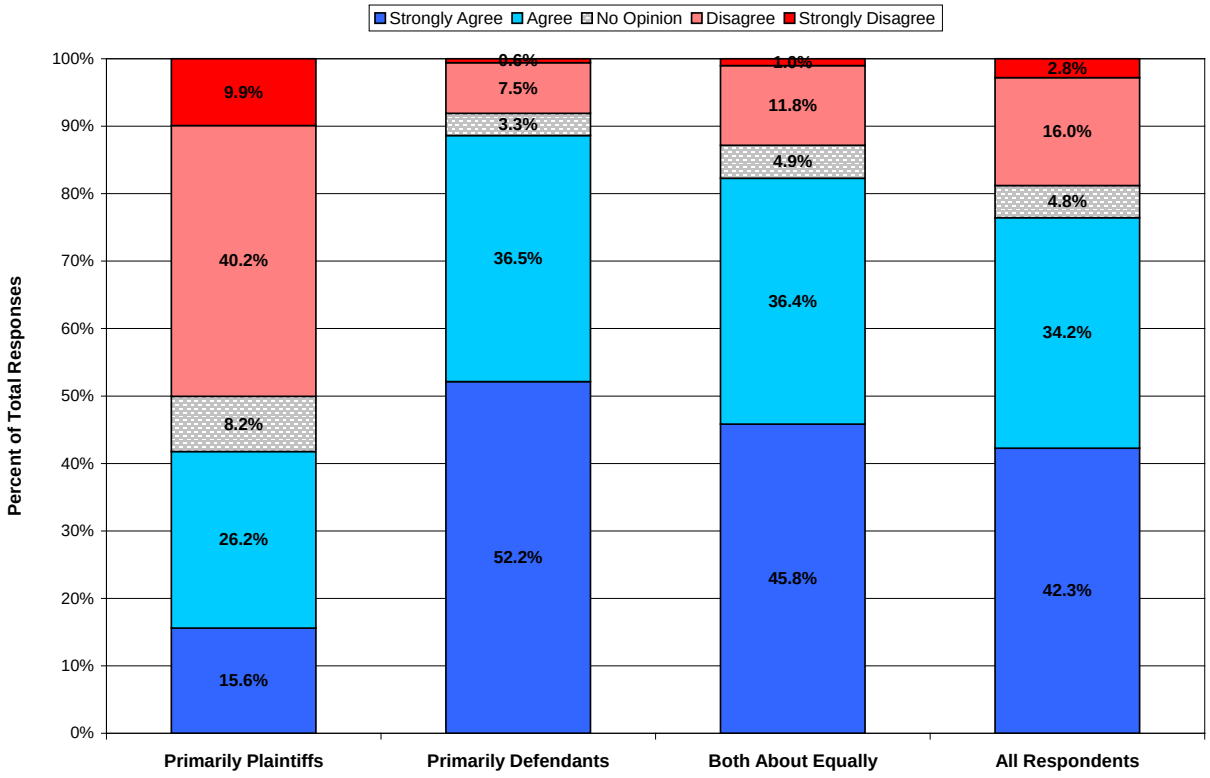

Table 7.4

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery.						
Primarily Plaintiffs	15.6	26.2	40.2	9.9	8.2	527
Primarily Defendants	52.2	36.5	7.5	0.6	3.3	1229
Both About Equally	45.8	36.4	11.8	1.0	4.9	574
All Respondents	42.3	34.2	16.0	2.8	4.8	2330

7.5 The costs of outside vendors have increased the cost of e-discovery without commensurate value to the client.

As before, defense lawyers and mixed practice lawyers were much more likely to agree with this statement than plaintiffs' lawyers. For defense lawyers, 79.1% agree overall, including 42.3% who strongly agree. For mixed practice lawyers, 73.8% agree with the statement, and 38.2% of those agree strongly. Only 44% of plaintiffs' lawyers agree with the statement, and of those, only 12.8% strongly agree. Over 15% of plaintiffs' lawyers expressed no opinion.

Figure 7.5: The costs of outside vendors have increased the cost of e-discovery without commensurate value to the client

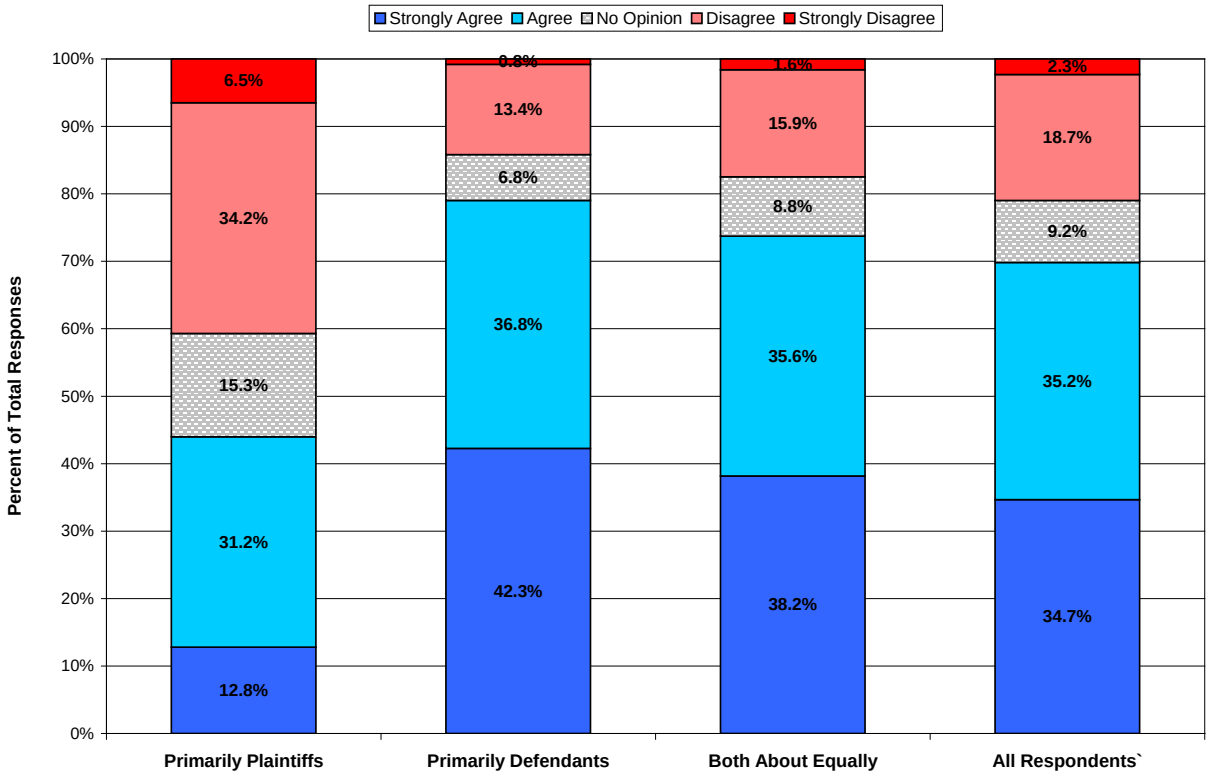

Table 7.5

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The costs of outside vendors have increased the cost of e-discovery without commensurate value to the client.						
Primarily Plaintiffs	12.8	31.2	34.2	6.5	15.3	523
Primarily Defendants	42.3	36.8	13.4	0.8	6.8	1227
Both About Equally	38.2	35.6	15.9	1.6	8.8	579
All Respondents`	34.7	35.2	18.7	2.3	9.2	2329

7.6 E-discovery is being abused by counsel.

Defense and mixed practice lawyers tend to agree that e-discovery is being abused by counsel, while plaintiffs' lawyers do not. Almost 80% of defense lawyers and 67% of mixed practice lawyers agree with the statement. Of those, 39.4% and 30.7%, respectively, agree strongly. Only 35% of plaintiffs' lawyers agree that e-discovery is being abused by counsel, and 14.4% strongly disagree.

Figure 7.6: E-discovery is being abused by counsel

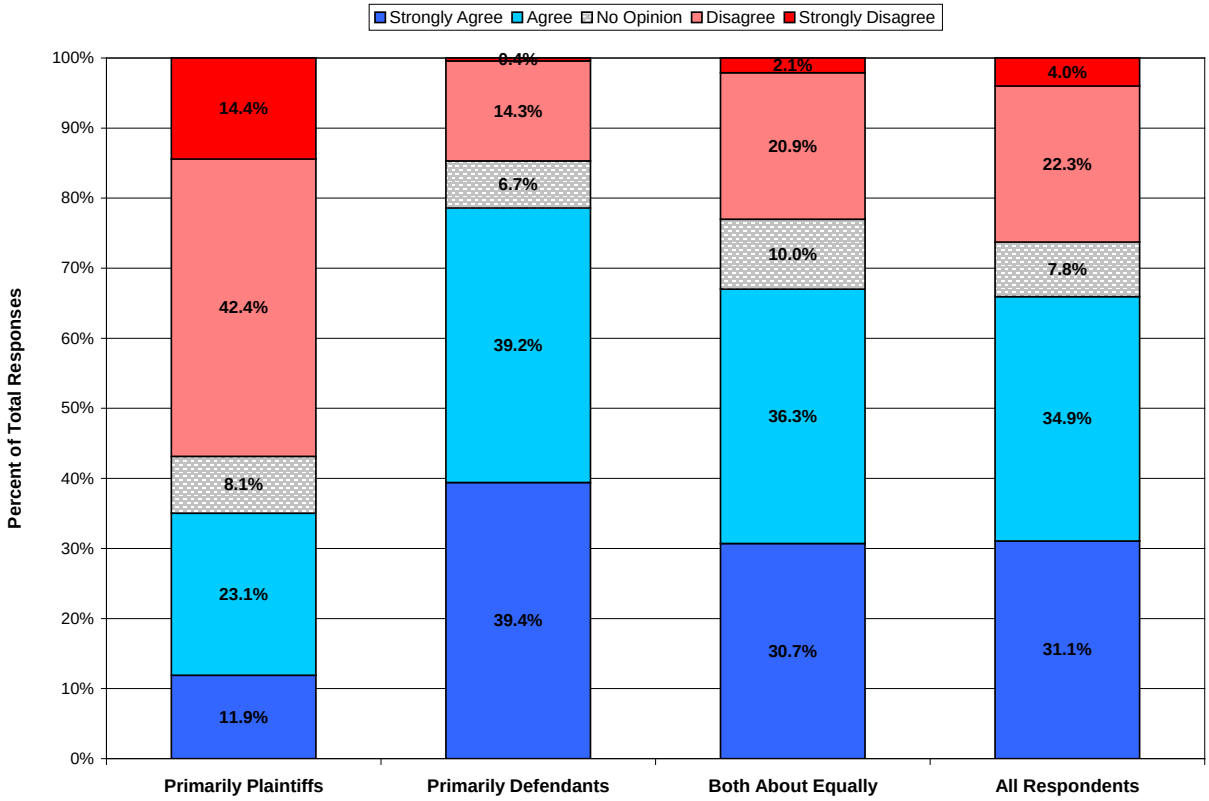

Table 7.6

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
E-discovery is being abused by counsel.						
Primarily Plaintiffs	11.9	23.1	42.4	14.4	8.1	528
Primarily Defendants	39.4	39.2	14.3	0.4	6.7	1231
Both About Equally	30.7	36.3	20.9	2.1	10.0	579
All Respondents	31.1	34.9	22.3	4.0	7.8	2338

7.7 Courts do not understand the difficulties in providing e-discovery.

Although defense and mixed practice attorneys were much more likely than plaintiffs' lawyers to agree that courts do not understand the difficulties in providing e-discovery, over 43% of plaintiffs' attorneys acknowledge this statement as true. 87.5% of defense lawyers and 78.4% of mixed practice lawyers agree with this statement, with 49.1% and 37.3% of those groups strongly agreeing.

Figure 7.7: Courts do not understand the difficulties in providing e-discovery

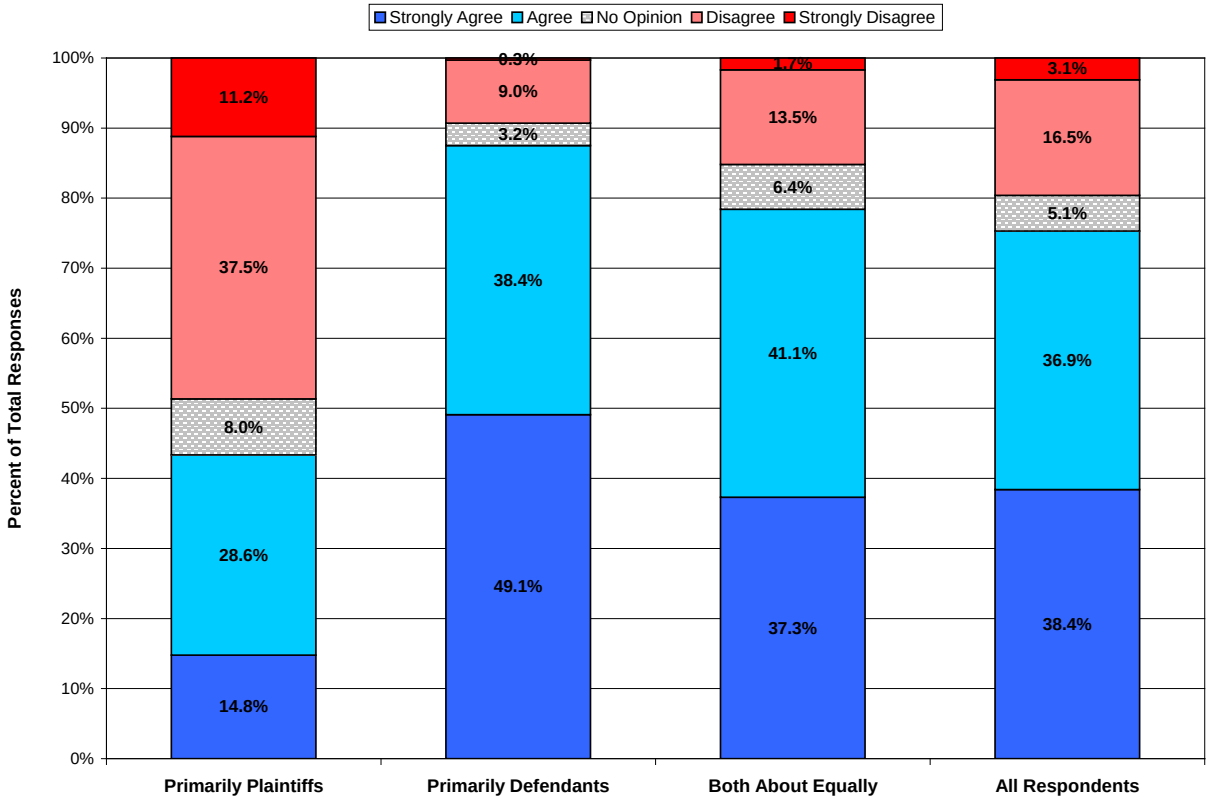

Table 7.7

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Courts do not understand the difficulties in providing e-discovery.						
Primarily Plaintiffs	14.8	28.6	37.5	11.2	8.0	528
Primarily Defendants	49.1	38.4	9.0	0.3	3.2	1228
Both About Equally	37.3	41.1	13.5	1.7	6.4	577
All Respondents	38.4	36.9	16.5	3.1	5.1	2333

7.8 E-discovery is generally overly burdensome.

In responding to this question, once again there was a wide disparity between the responses of plaintiffs' lawyers and defense lawyers. 85.7% of defense lawyers agree that e-discovery is overly burdensome, with 47.3% of those strongly agreeing. 74% of mixed practice lawyers agree, and of those, 37.1% strongly agree. Only 27.4% of plaintiffs' lawyers agree with the statement, and nearly one in four strongly disagrees. Notably, only 0.2% of defense lawyers and 2.3% of mixed practice lawyers strongly disagrees that e-discovery is overly burdensome. Plaintiffs' lawyers appear to see the benefits of e-discovery as outweighing the costs, but defense and mixed practice lawyers seemed to believe the opposite.

Figure 7.8: E-discovery is generally overly burdensome

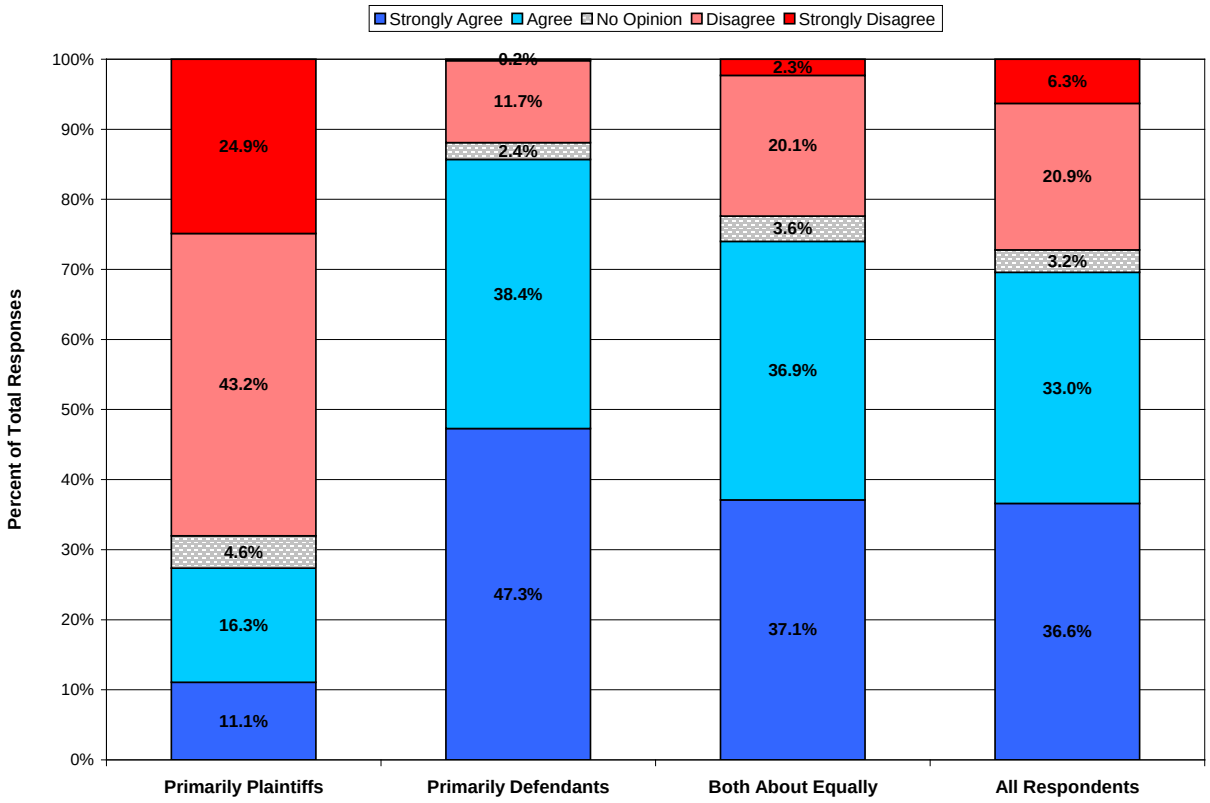

Table 7.8

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
E-discovery is generally overly burdensome.						
Primarily Plaintiffs	11.1	16.3	43.2	24.9	4.6	523
Primarily Defendants	47.3	38.4	11.7	0.2	2.4	1228
Both About Equally	37.1	36.9	20.1	2.3	3.6	577
All Respondents	36.6	33.0	20.9	6.3	3.2	2328

7.9 Courts do not sufficiently limit or otherwise protect parties against unreasonably burdensome e-discovery demands.

While 25.8% of plaintiffs' lawyers agree that courts do not sufficiently limit or otherwise protect parties against unreasonably burdensome e-discovery demands, 85.1% of defense lawyers and 71.4% of mixed practice lawyers agree, with 44.6% and 30.1% of those respondents agreeing strongly. Notably, 25% of plaintiffs' lawyers disagree strongly. These results suggest, as do the prior tables, that plaintiffs' lawyers are more likely to see benefits to e-discovery outweighing costs, while defense lawyers are more likely to be sensitive to costs and burdens.

Figure 7.9: Courts do not sufficiently limit or otherwise protect parties against unreasonably burdensome e-discovery demands

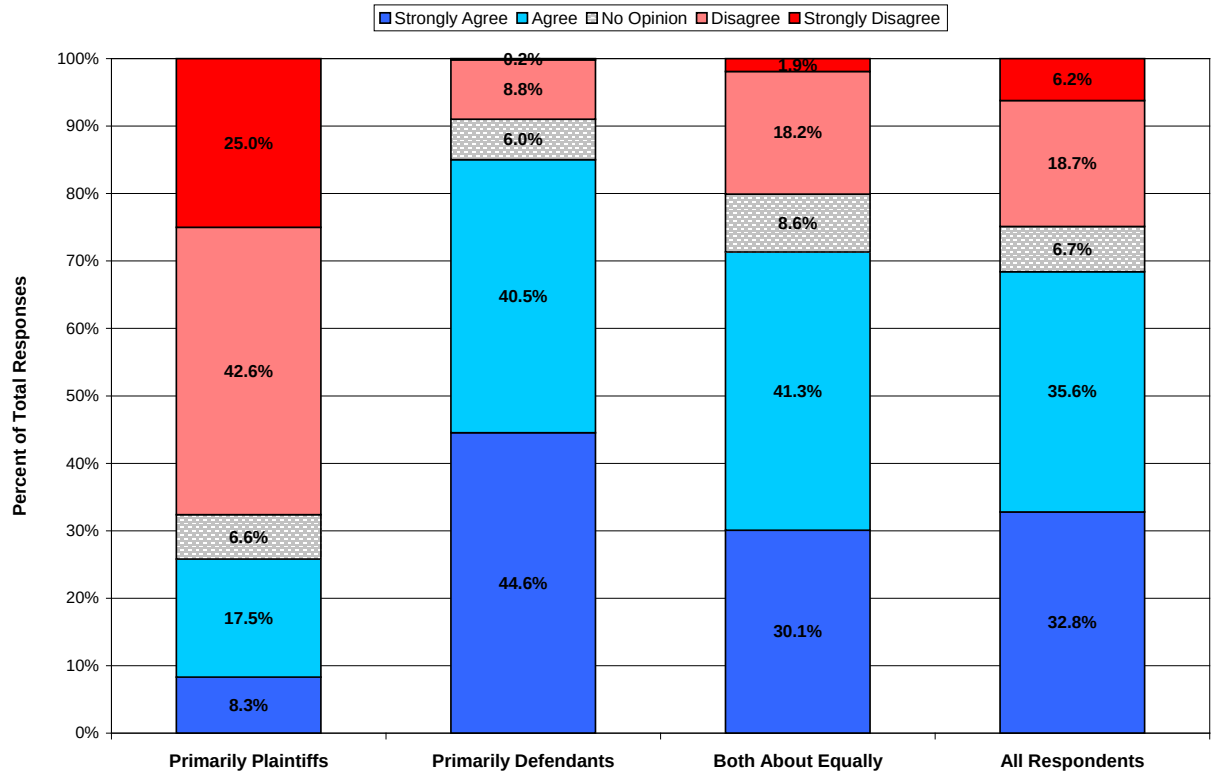

Table 7.9

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Courts do not sufficiently limit or otherwise protect parties against unreasonably burdensome e-discovery demands.						
Primarily Plaintiffs	8.3	17.5	42.6	25.0	6.6	519
Primarily Defendants	44.6	40.5	8.8	0.2	6.0	1221
Both About Equally	30.1	41.3	18.2	1.9	8.6	572
All Respondents	32.8	35.6	18.7	6.2	6.7	2312

7.10 The costs and efficiency of e-discovery will become more reasonable as technology advances.

While plaintiffs' lawyers were more optimistic about advances in technology relieving some of the burdens of e-discovery, defense and mixed practice lawyers tended to show less optimism, and were more likely than plaintiffs' lawyers to express no opinion. Almost 75% of plaintiffs' lawyers agree that the cost and efficiency of e-discovery will become more reasonable over time as technology advances, but only 45.7% of defense lawyers and 53.3% of mixed practice lawyers agree. However, only 36.7% of defense lawyers and 29.8% of mixed practice lawyers disagree, while 17.7% and 16.9%, respectively, express no opinion.

Figure 7.10: The costs and efficiency of e-discovery will become more reasonable as technology advances

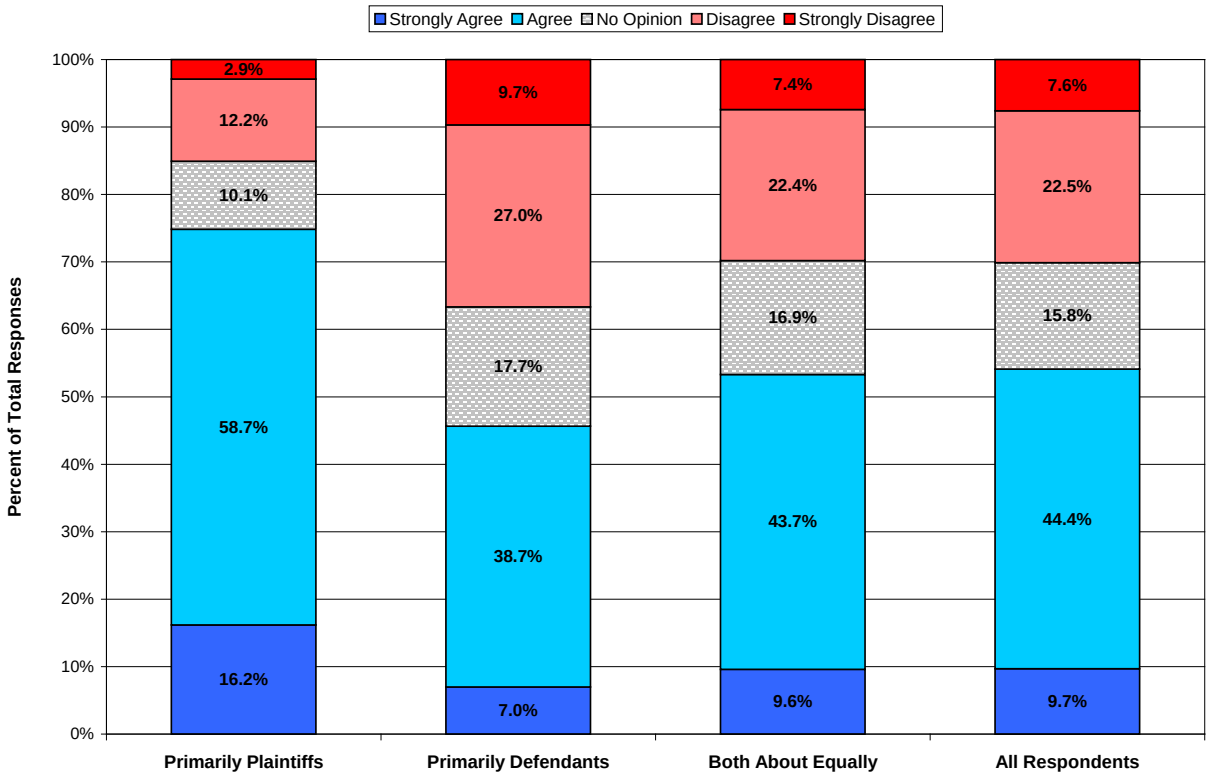

Table 7.10

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The costs and efficiency of e-discovery will become more reasonable as technology advances.						
Primarily Plaintiffs	16.2	58.7	12.2	2.9	10.1	525
Primarily Defendants	7.0	38.7	27.0	9.7	17.7	1228
Both About Equally	9.6	43.7	22.4	7.4	16.9	581
All Respondents	9.7	44.4	22.5	7.6	15.8	2334

7.11 Recent amendments to the Rules involving e-discovery.

The next set of questions asked whether the recent e-discovery amendments to the Rules have had any effect on efficiency and cost-effectiveness. As a threshold question, respondents were asked whether they had had a request for e-discovery since the new rules were enacted. Almost 95% of respondents confirmed that they had.

Table 7.11(a)

December 1, 2006 was the effective date of the e-discovery amendments to the [Rules]. Since that time, have you requested or been the recipient of a request for electronically stored information in discovery?
ALL RESPONDENTS

	N	%
Yes	2237	94.7
No	124	5.3
Total	2361	100.0

Respondents were asked whether the recent amendments provide for efficient and cost-effective discovery. While 82% of plaintiffs' lawyers agree that this is true at least some of the time, with 33.3% believing most of the time, only 54.3% of defense lawyers agree that at least some of the time this is true, and of those, only 6.4% believe that it is true most of the time. Over 63% of mixed practice lawyers believe that this is true at least some of the time, and only 7% stated that the amendments provide for efficiency most of the time.

Table 7.11(b)

Do the 2006 e-discovery amendments provide for efficient and cost-effective discovery of electronically stored information?
ALL RESPONDENTS

	N	%
Yes, most of the time	281	12.7
Yes, some of the time	1110	50.2
No	822	37.1

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
Yes, most of the time	164	33.3
Yes, some of the time	240	48.7
No	89	18.1

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
Yes, most of the time	75	6.4
Yes, some of the time	561	47.9
No	536	45.7

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
Yes, most of the time	37	7.0
Yes, some of the time	300	56.7
No	192	36.3

8. Dispositive Motions

Dispositive motions are another area in which there was disagreement between plaintiffs' lawyers and defense lawyers. Predictably, where plaintiffs' lawyers tended to see benefits rather than burdens of e-discovery, defense lawyers were much more positive about dispositive motions.

8.1 Summary judgment motions are used as a tactical tool, rather than in a good faith effort to narrow issues.

Plaintiffs' lawyers were much more likely than defense and mixed practice lawyers to see summary judgment motions as a tactical tool rather than a good faith effort to narrow issues. 73.1% of plaintiffs' lawyers agree with the statement, including 35.4% who strongly agree, while only 21.8% of defense lawyers and 39.3% of mixed practice lawyers agree. 15.6% of defense lawyers strongly disagree.

Figure 8.1: Summary judgment motions are used as a tactical tool, rather than in a good faith effort to narrow the issues

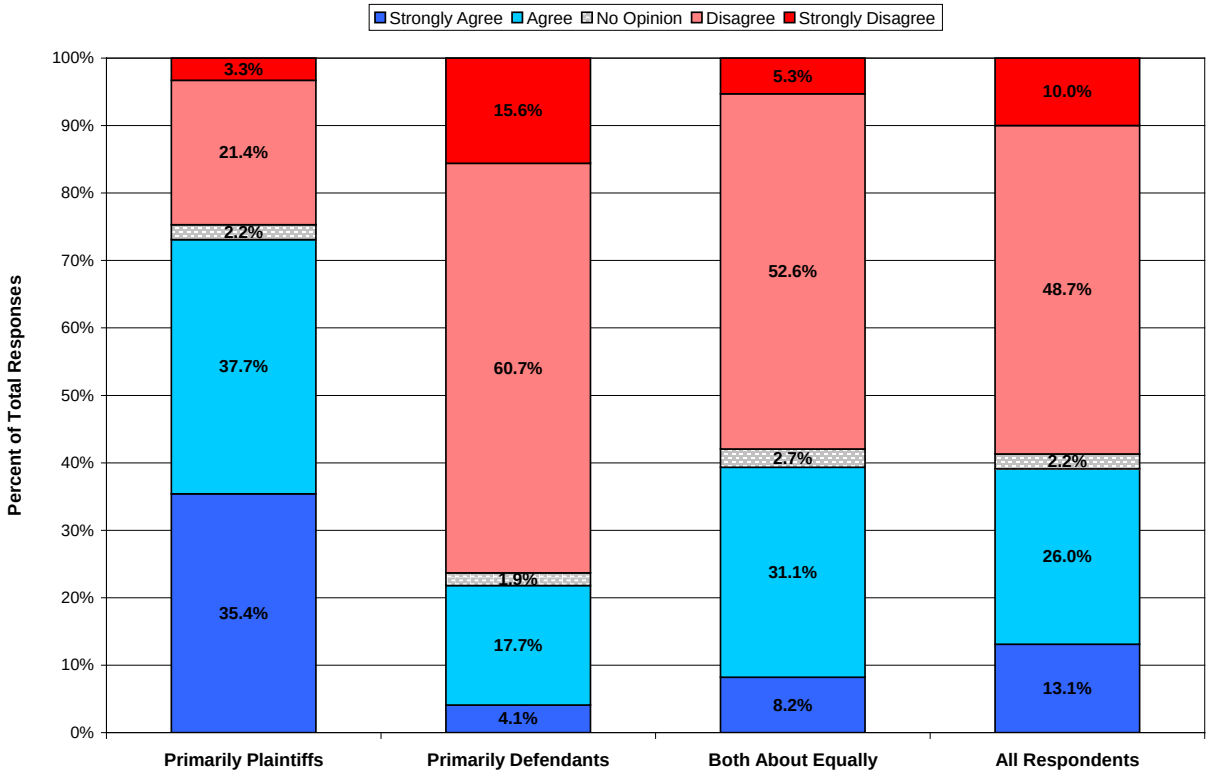

Table 8.1

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Summary judgment motions are used as a tactical tool, rather than in a good faith effort to narrow the issues.						
Primarily Plaintiffs	35.4	37.7	21.4	3.3	2.2	827
Primarily Defendants	4.1	17.7	60.7	15.6	1.9	1640
Both About Equally	8.2	31.1	52.6	5.3	2.7	768
All Respondents	13.1	26.0	48.7	10.0	2.2	3235

8.2 Summary judgment practice increases cost and delay without proportionate benefit.

In light of the previous response involving the perceived purpose of summary judgment motions, it is not surprising that plaintiffs' lawyers were much more likely to see the costs and delay outweighing the benefits of summary judgment practice. 62.2% of plaintiffs' lawyers believe that summary judgment increases costs and delays without proportionate benefit, while defense lawyers agree only 10.9% of the time. Significantly, defense lawyers strongly disagree 28.6% of the time. Mixed practice lawyers were more likely to respond like defense lawyers, with 26.5% agreeing, and 71.6% disagreeing.

Figure 8.2: Summary judgment practice increases cost and delay without proportionate benefit

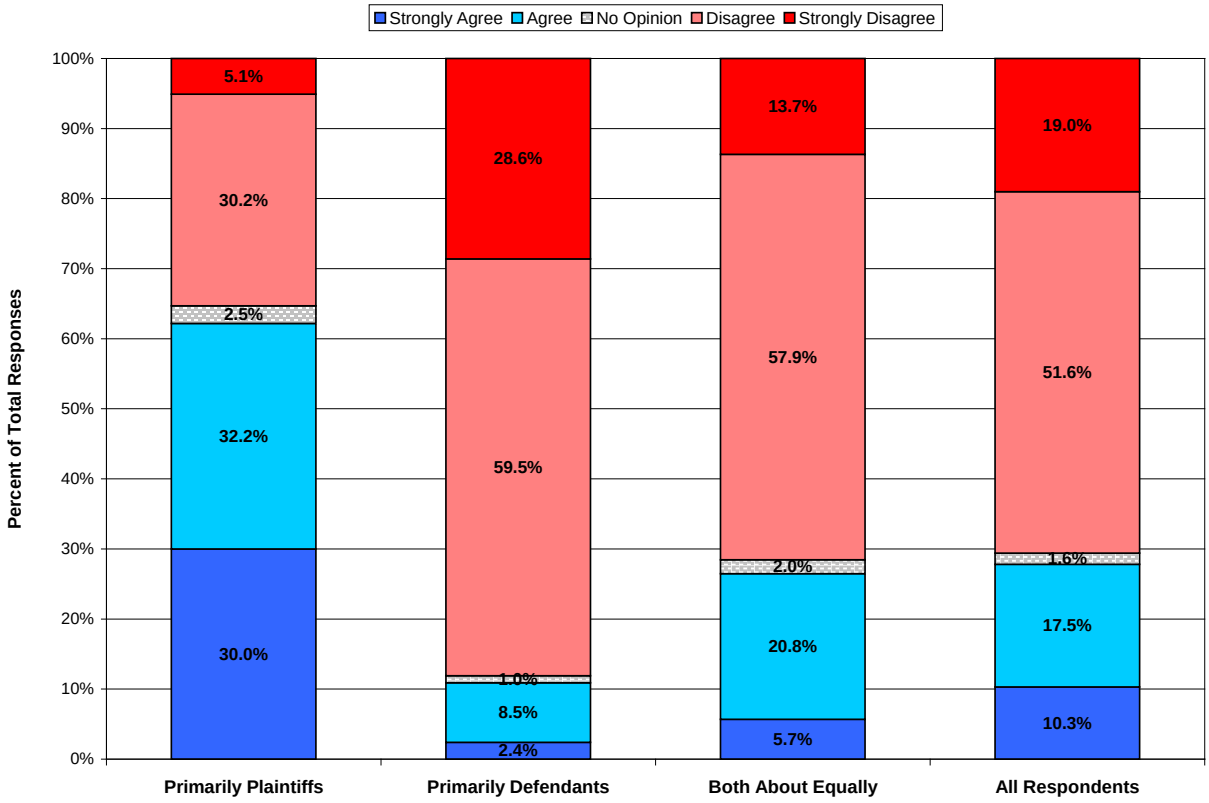

Table 8.2

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Summary judgment practice increases cost and delay without proportionate benefit.						
Primarily Plaintiffs	30.0	32.2	30.2	5.1	2.5	829
Primarily Defendants	2.4	8.5	59.5	28.6	1.0	1635
Both About Equally	5.7	20.8	57.9	13.7	2.0	769
All Respondents	10.3	17.5	51.6	19.0	1.6	3233

8.3 Judges routinely fail to rule on summary judgment motions promptly.

Respondents were more likely than not to agree that judges fail to rule promptly on summary judgment motions. 56.1% of plaintiffs' lawyers, 62.3% of defense lawyers, and 63% of mixed practice lawyers agree with the statement. Of those, 18.3%, 16.6%, and 17.9%, respectively, agree strongly.

Figure 8.3: Judges routinely fail to rule on summary judgment motions promptly

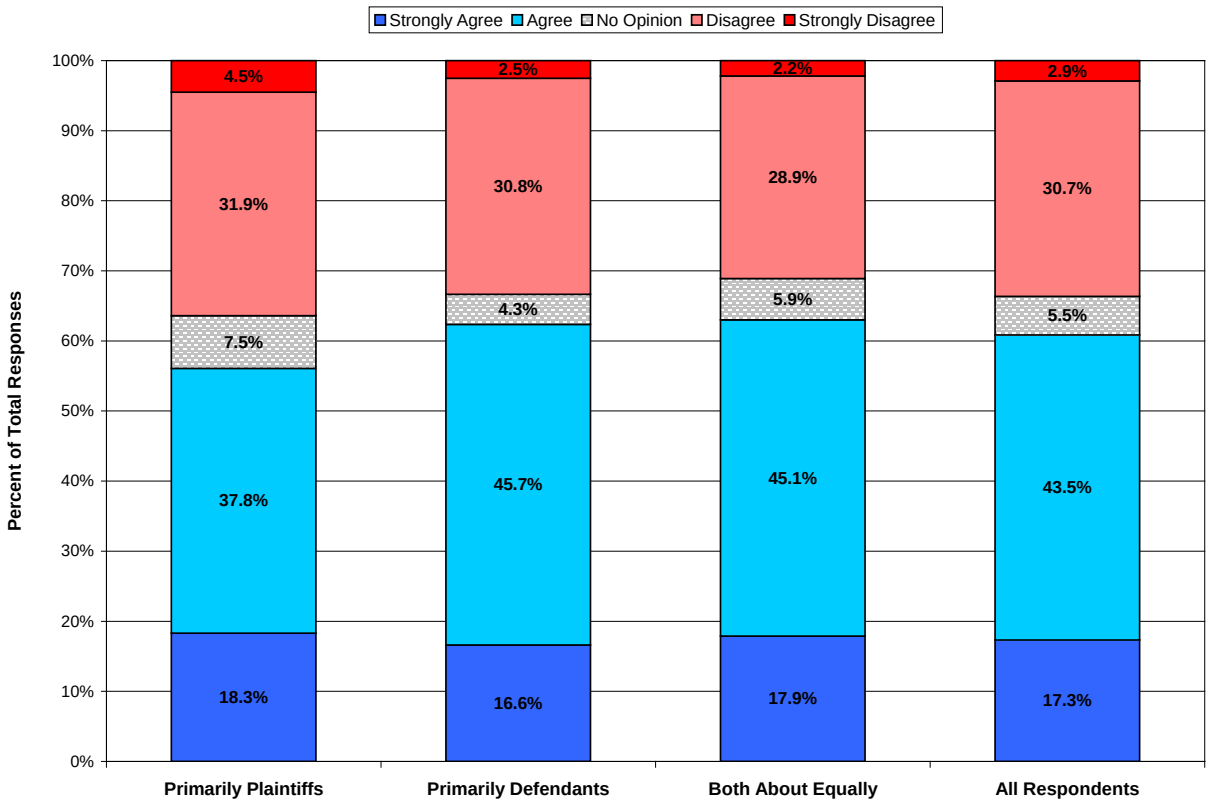

Table 8.3

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Judges routinely fail to rule on summary judgment motions promptly.						
Primarily Plaintiffs	18.3	37.8	31.9	4.5	7.5	825
Primarily Defendants	16.6	45.7	30.8	2.5	4.3	1637
Both About Equally	17.9	45.1	28.9	2.2	5.9	767
All Respondents	17.3	43.5	30.7	2.9	5.5	3229

8.4 Judges are granting summary judgment more frequently than appropriate.

While 57.5% of plaintiffs' lawyers agree that summary judgment is granted more frequently than appropriate, only 2.9% of defense lawyers agree and 13% of mixed practice lawyers agree. Notably, 27.5% of defense lawyers strongly disagree with the statement.

Figure 8.4: Judges are granting summary judgment more frequently than appropriate

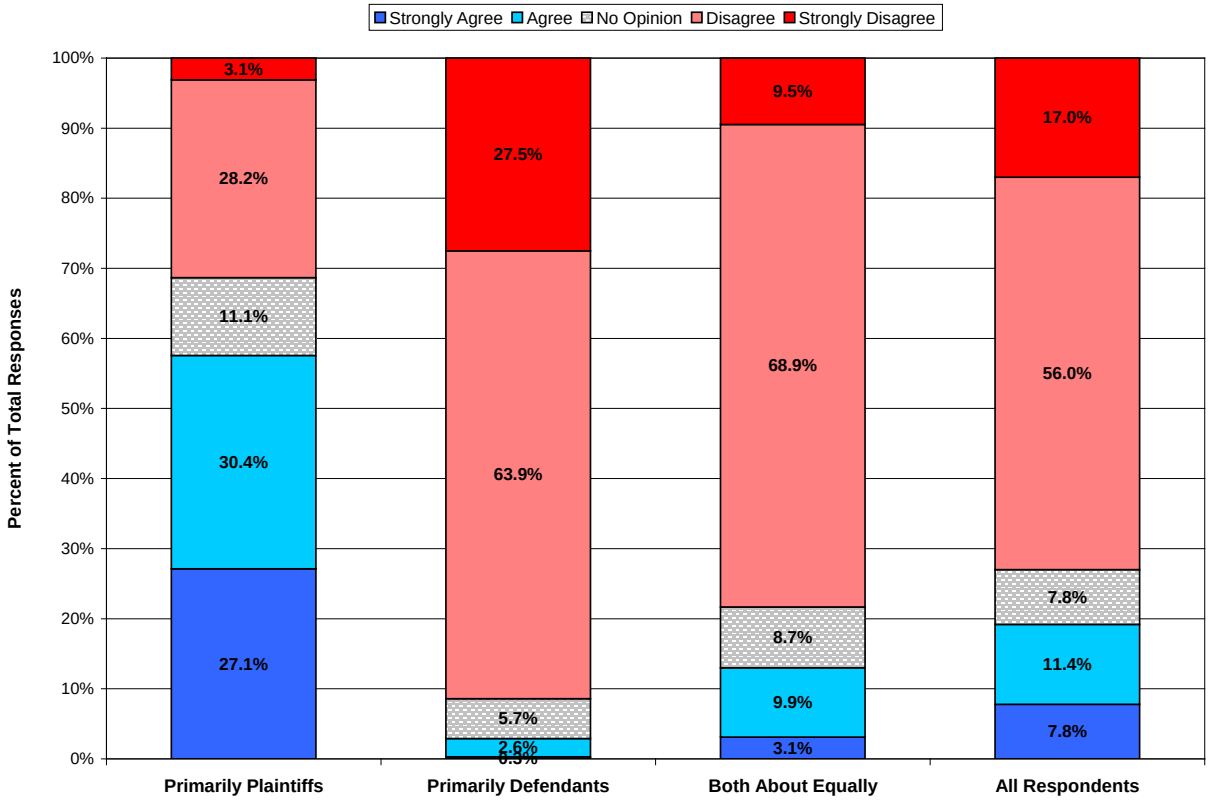

Table 8.4

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Judges are granting summary judgment more frequently than appropriate.						
Primarily Plaintiffs	27.1	30.4	28.2	3.1	11.1	826
Primarily Defendants	0.3	2.6	63.9	27.5	5.7	1636
Both About Equally	3.1	9.9	68.9	9.5	8.7	771
All Respondents	7.8	11.4	56.0	17.0	7.8	3233

8.5 Judges decline to grant summary judgment even when warranted.

Defense lawyers were much more likely to agree with this statement than plaintiffs' lawyers. Only 18.8% of plaintiffs' lawyers expressed agreement that judges decline to grant summary judgment even when warranted, whereas 61.2% of defense lawyers agree and 54.1% of mixed practice lawyers agree. Notably, 25.9% of plaintiffs' lawyers strongly disagree.

Figure 8.5: Judges decline to grant summary judgment even when warranted

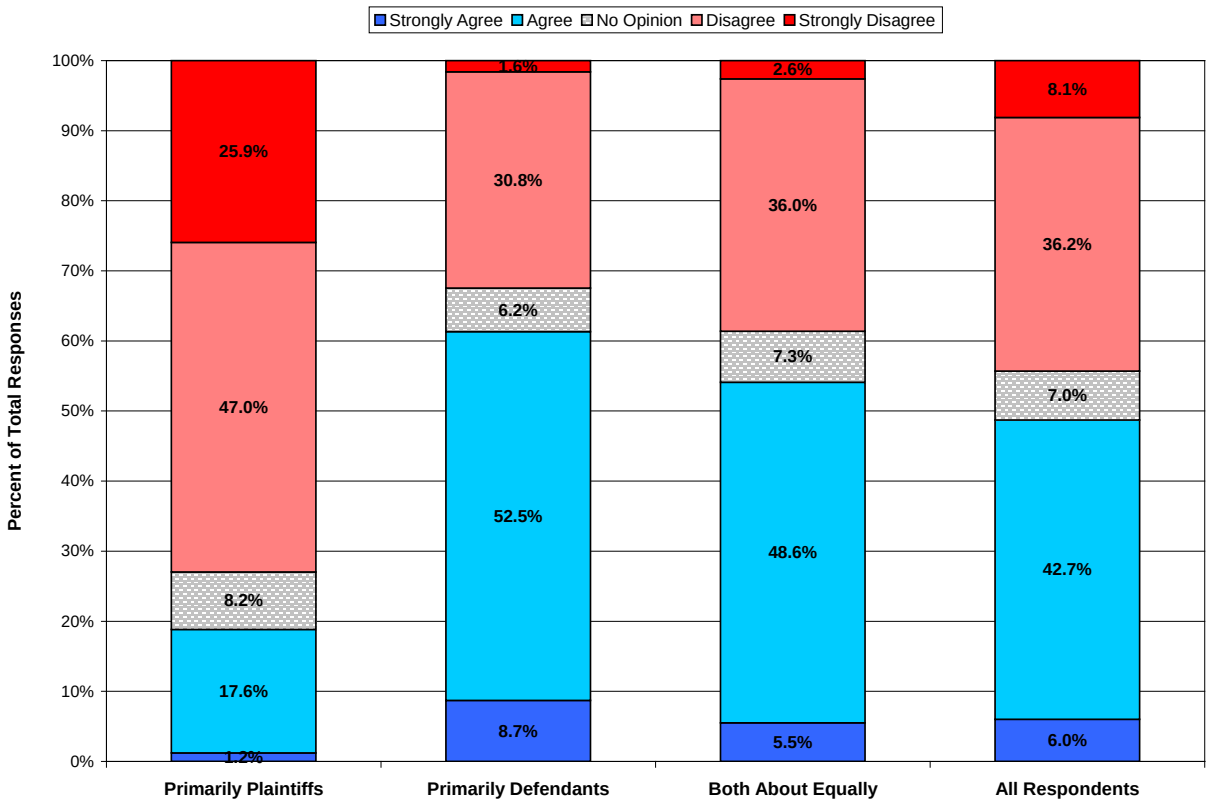

Table 8.5

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Judges decline to grant summary judgment even when warranted.						
Primarily Plaintiffs	1.2	17.6	47.0	25.9	8.2	825
Primarily Defendants	8.7	52.5	30.8	1.6	6.2	1637
Both About Equally	5.5	48.6	36.0	2.6	7.3	766
All Respondents	6.0	42.7	36.2	8.1	7.0	3228

8.6 Summary judgment motions are filed in almost every case.

Plaintiffs' lawyers were more likely than defense attorneys to perceive that summary judgment motions are filed in almost every case. For plaintiffs' lawyers, 78.5% of lawyers agree, with 33.5% strongly agreeing. Defense lawyers agree 53.6% of the time and mixed practice lawyers agree 59.9% of the time.

Figure 8.6: Summary judgment motions are filed in almost every case

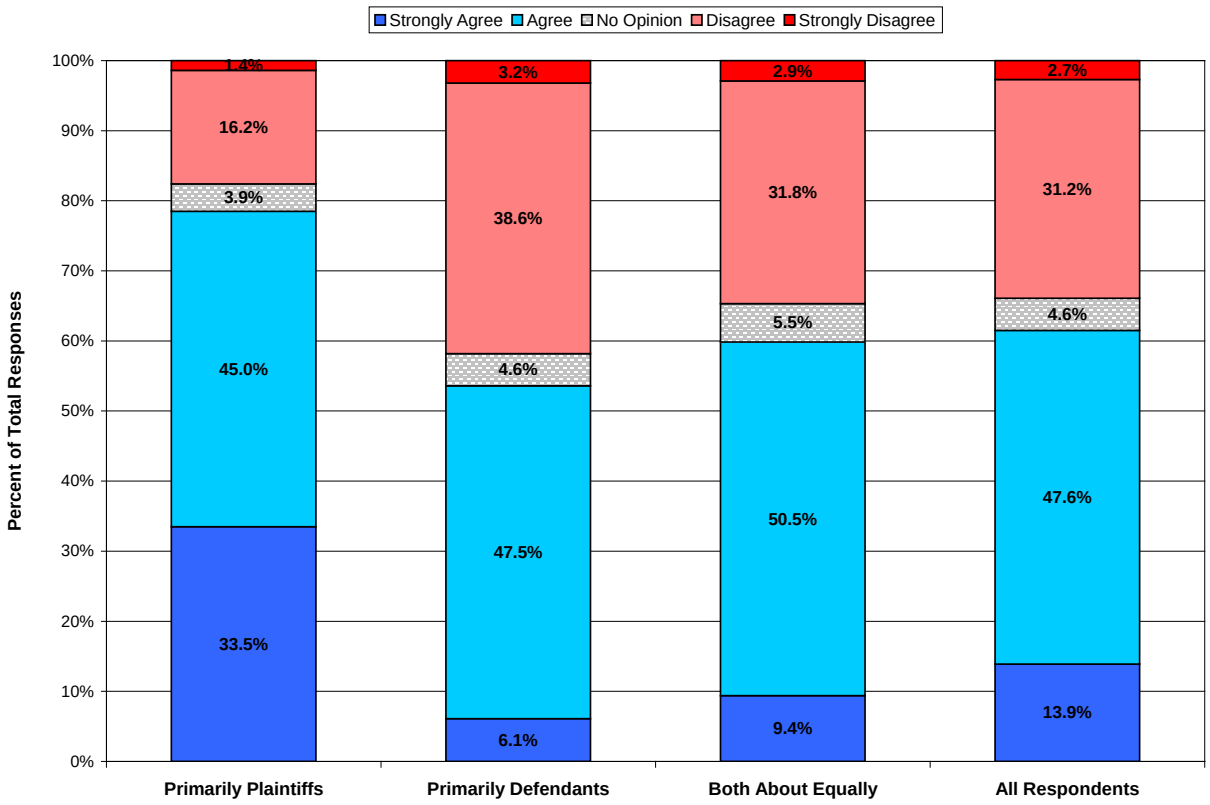

Table 8.6

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Summary judgment motions are filed in almost every case.						
Primarily Plaintiffs	33.5	45.0	16.2	1.4	3.9	829
Primarily Defendants	6.1	47.5	38.6	3.2	4.6	1634
Both About Equally	9.4	50.5	31.8	2.9	5.5	770
All Respondents	13.9	47.6	31.2	2.7	4.6	3233

9. Trial Dates

Respondents were presented with a series of questions about the setting of trial dates and asked whether they agree, disagree, or express no opinion.

9.1 Trial dates should be set early in the case.

A majority of plaintiffs' lawyers and mixed practice lawyers agree that trial dates should be set early in the case, while defense lawyers were more likely to disagree. 57.2% of plaintiffs' lawyers agree with the statement, including 25.4% who strongly agree. Mixed practice lawyers similarly agree 57.7% of the time, but strongly agree only 20.5% of the time. Defense lawyers agree only 42% of the time.

Figure 9.1: Trial dates should be set early in the case

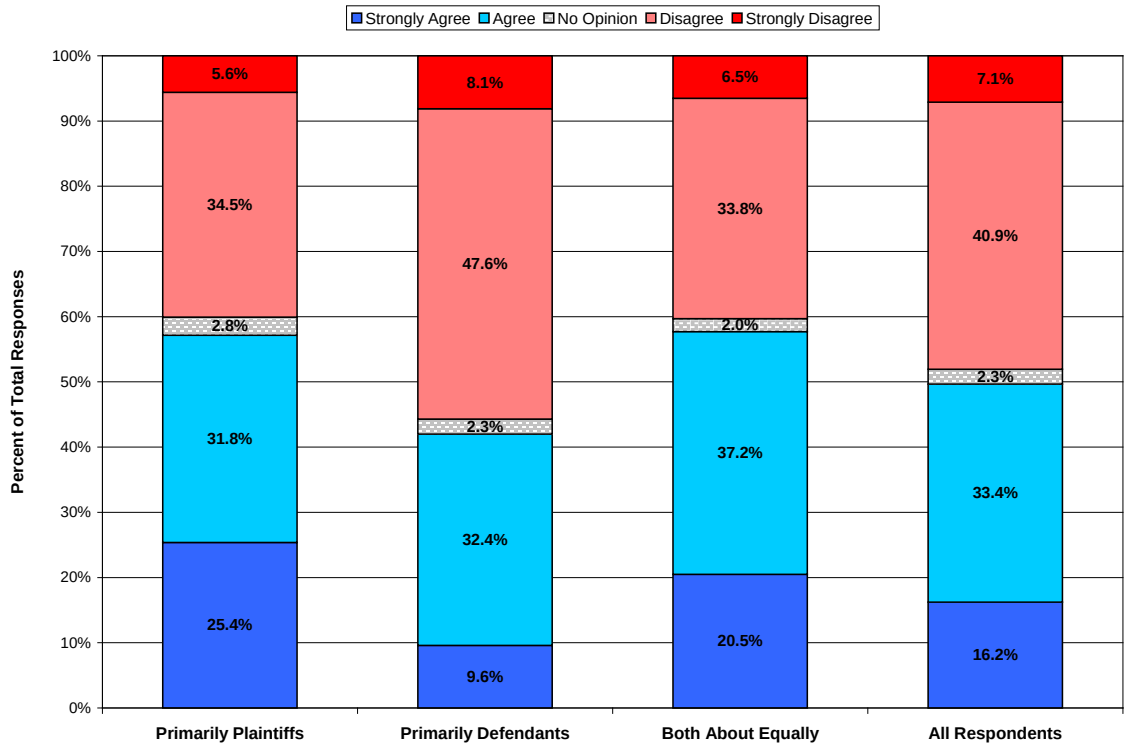

Table 9.1

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Trial dates should be set early in the case.						
Primarily Plaintiffs	25.4	31.8	34.5	5.6	2.8	824
Primarily Defendants	9.6	32.4	47.6	8.1	2.3	1633
Both About Equally	20.5	37.2	33.8	6.5	2.0	769
All Respondents	16.2	33.4	40.9	7.1	2.3	3226

9.2 Trial dates should not be set until discovery is completed.

While defense lawyers were split in their opinions on this statement, plaintiffs' lawyers and mixed practice lawyers were more likely to disagree. Approximately 51% of defense lawyers agree that discovery should be completed before setting trial dates, while 58.1% of plaintiffs' lawyers and 62.1% of mixed practice lawyers disagree, believing that trial dates should be set *before* the completion of discovery. 17% of plaintiffs' lawyers strongly disagree, as do 12.4% of mixed practice lawyers.

Figure 9.2: Trial dates should not be set until discovery is completed

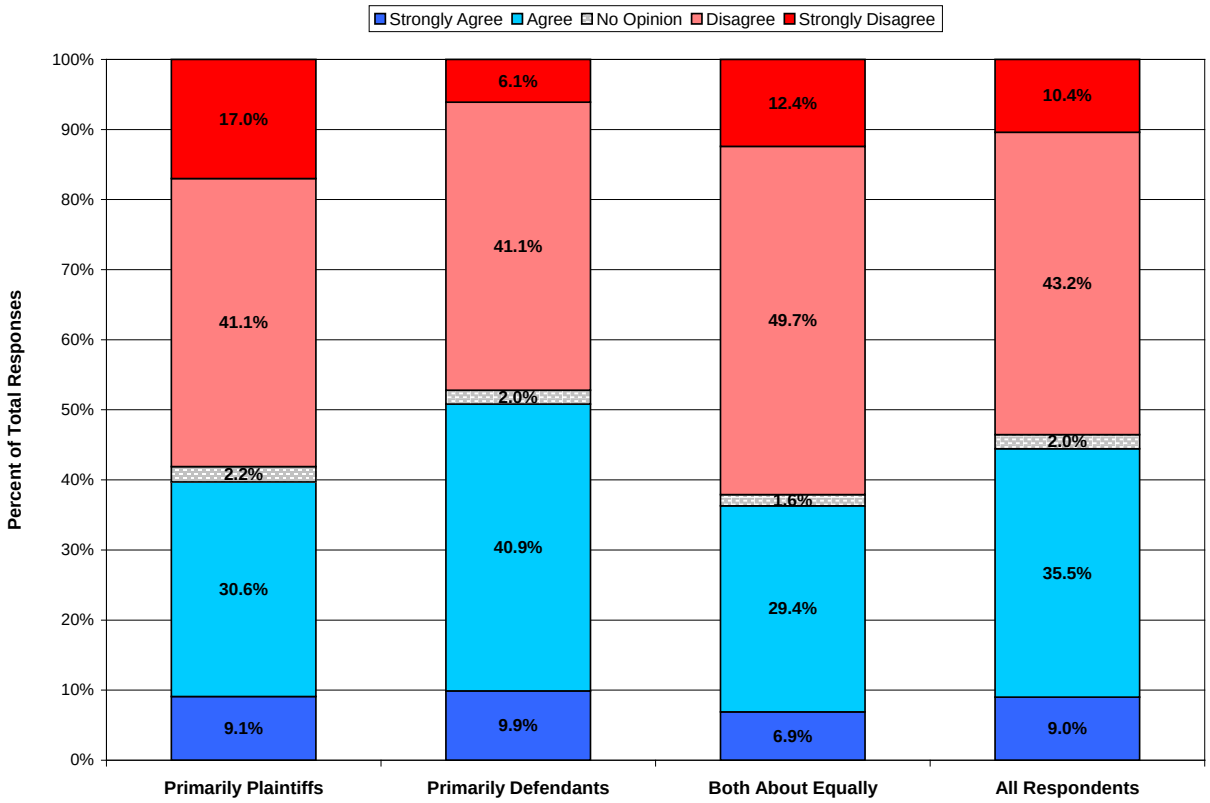

Table 9.2

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Trial dates should not be set until discovery is completed.						
Primarily Plaintiffs	9.1	30.6	41.1	17.0	2.2	824
Primarily Defendants	9.9	40.9	41.1	6.1	2.0	1630
Both About Equally	6.9	29.4	49.7	12.4	1.6	768
All Respondents	9.0	35.5	43.2	10.4	2.0	3222

9.3 Trial dates should not be set until motions for summary judgment have been decided.

Defense lawyers were more likely to agree that trial dates should not be set until after dispositive motions have been decided than were plaintiffs' lawyers and mixed practice lawyers. Defense attorneys agree with the statement 49.3% of the time, while plaintiffs' lawyers agree 28.1% of the time and mixed practice lawyers 35.7% of the time. 20% of plaintiffs' lawyers strongly disagree.

Figure 9.3: Trial dates should not be set until motions for summary judgment have been decided

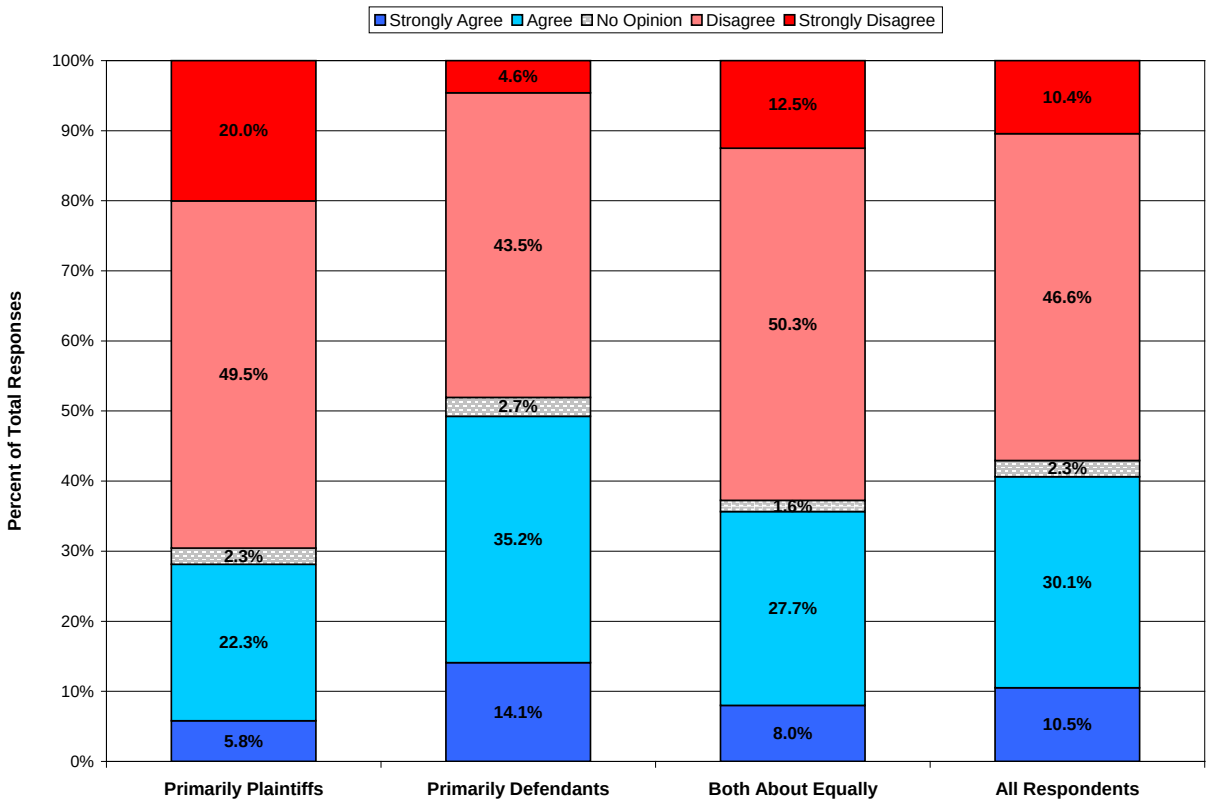

Table 9.3

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Trial dates should not be set until motions for summary judgment have been decided.						
Primarily Plaintiffs	5.8	22.3	49.5	20.0	2.3	824
Primarily Defendants	14.1	35.2	43.5	4.6	2.7	1621
Both About Equally	8.0	27.7	50.3	12.5	1.6	762
All Respondents	10.5	30.1	46.6	10.4	2.3	3207

9.4 Trial dates should not be continued or vacated except in extreme circumstances.

Within each group of respondents there were divergent views about whether trial dates should be held firm except in extreme circumstances. 56.4% of plaintiffs' lawyers, 62.4% of defense lawyers, and 57.3% of mixed practice lawyers appear to prefer some flexibility in trial dates. However, a fair number in each category agree that a trial date should be set and not continued except in extreme circumstances – 41.5% of plaintiffs' lawyers agree with the statement, 35.7% of defense lawyers agree, and 41.2% of mixed practice lawyers agree.

Figure 9.4: Trial dates should not be continued or vacated except in extreme circumstances

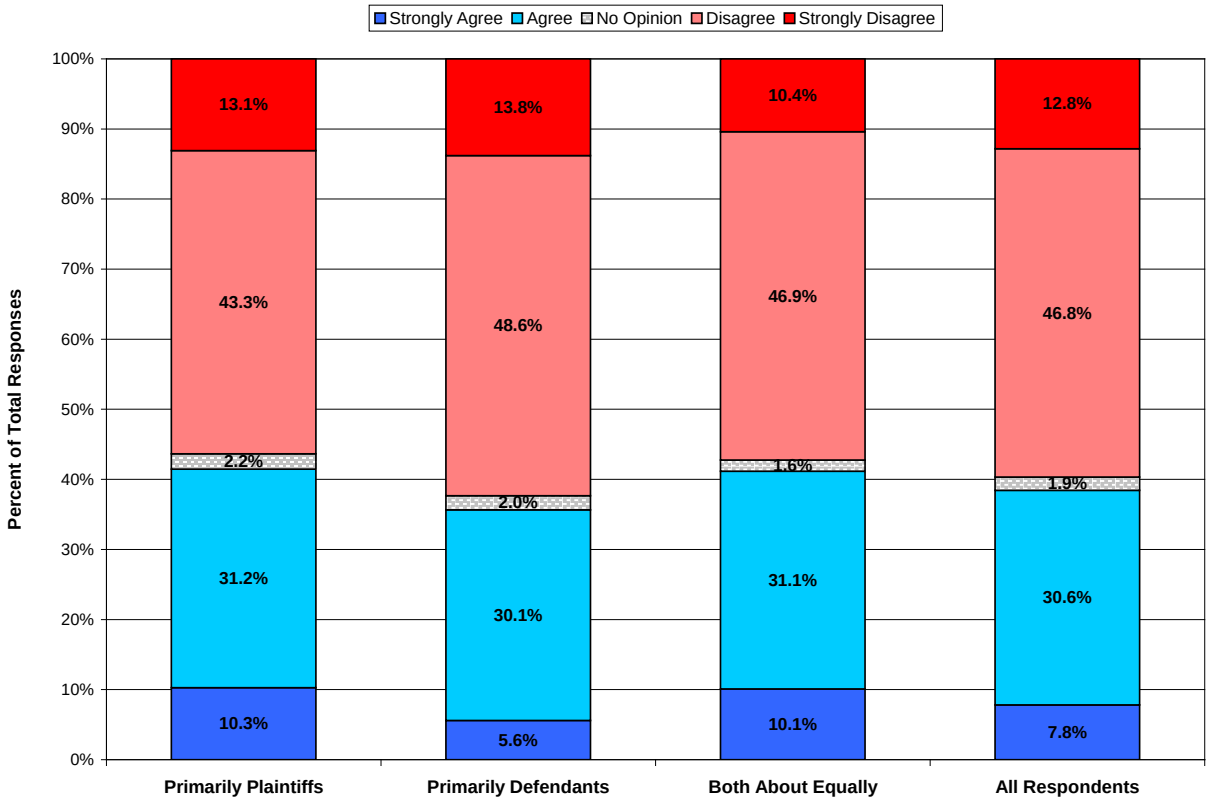

Table 9.4

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Trial dates should not be continued or vacated except in extreme circumstances.						
Primarily Plaintiffs	10.3	31.2	43.3	13.1	2.2	827
Primarily Defendants	5.6	30.1	48.6	13.8	2.0	1639
Both About Equally	10.1	31.1	46.9	10.4	1.6	766
All Respondents	7.8	30.6	46.8	12.8	1.9	3232

10. Judicial Role in Litigation

Respondents were asked a series of questions regarding the role of judges in litigation. A large number of respondents see benefits in judicial involvement early and often.

10.1 Intervention by judges or magistrate judges early in the case helps to narrow the issues.

A substantial majority of respondents in each category agree that early intervention by judges or magistrate judges helps to narrow issues. Defense and mixed practice attorneys were somewhat more likely to agree than were plaintiffs' lawyers. Approximately 70% of plaintiffs' lawyers agree with the statement, while over 81% of defense lawyers and over 82% of mixed practice lawyers agree.

Figure 10.1: Intervention by judges or magistrate judges early in the case helps to narrow the issues

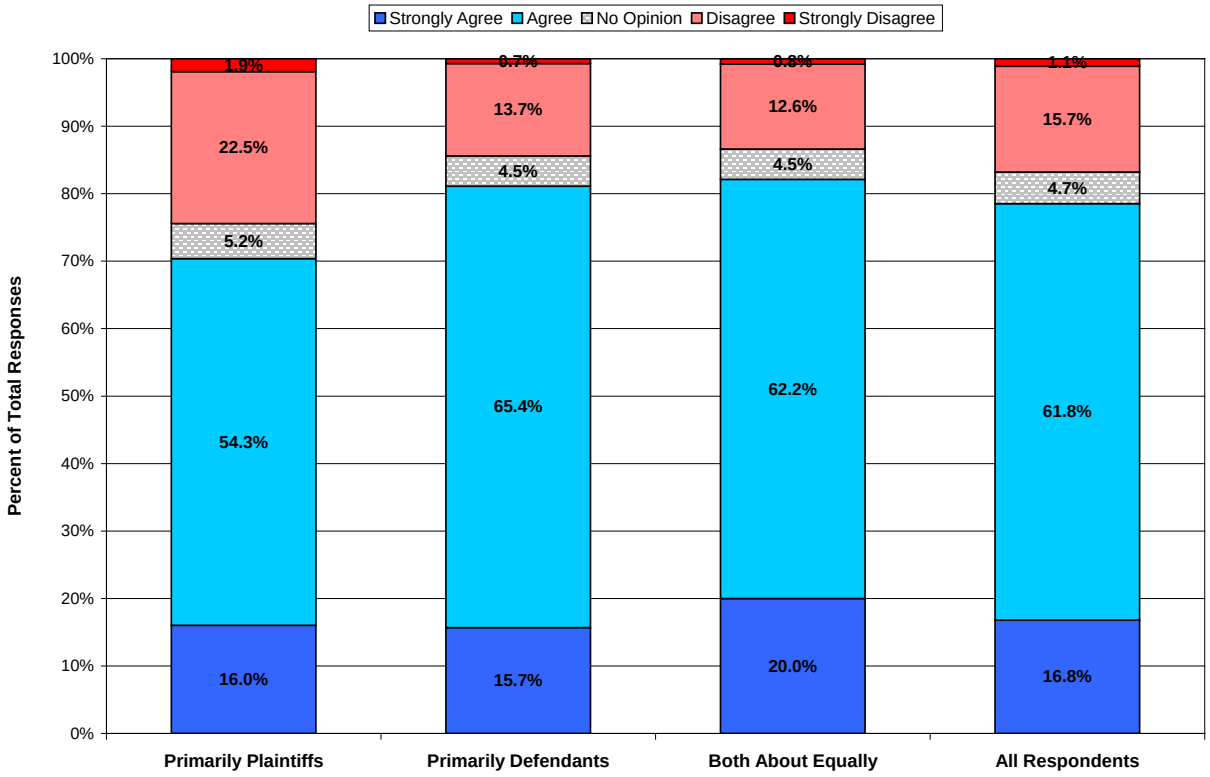

Table 10.1

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Intervention by judges or magistrate judges early in the case helps to narrow the issues.						
Primarily Plaintiffs	16.0	54.3	22.5	1.9	5.2	825
Primarily Defendants	15.7	65.4	13.7	0.7	4.5	1629
Both About Equally	20.0	62.2	12.6	0.8	4.5	1629
All Respondents	16.8	61.8	15.7	1.1	4.7	3218

10.2 Intervention by judges or magistrate judges early in the case helps to limit discovery.

As before, all respondents were more likely than not to agree that early intervention by a magistrate judge or district judge helps to limit discovery, although defense and mixed practice lawyers agree to a greater extent than plaintiffs' lawyers. 61.2% of plaintiffs' lawyers agree with the statement, as do 75.6% of defense lawyers and 76.6% mixed practice lawyers. In response to this question, mixed practice lawyers were the most likely of the groups to strongly agree, with 19.2% choosing that response.

Figure 10.2: Intervention by judges or magistrate judges early in the case helps limit discovery

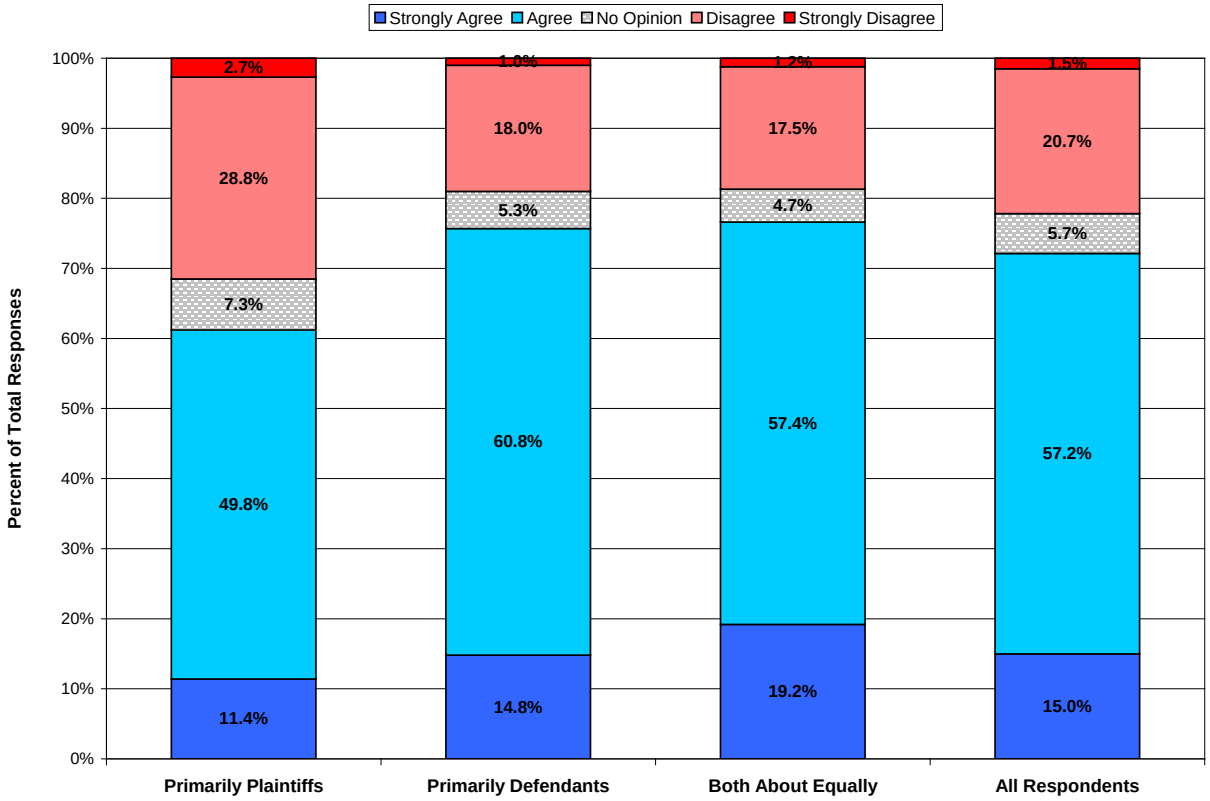

Table 10.2

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Intervention by judges or magistrate judges early in the case helps limit discovery.						
Primarily Plaintiffs	11.4	49.8	28.8	2.7	7.3	822
Primarily Defendants	14.8	60.8	18.0	1.0	5.3	1624
Both About Equally	19.2	57.4	17.5	1.2	4.7	761
All Respondents	15.0	57.2	20.7	1.5	5.7	3207

10.3 When a judicial officer gets involved early in a case and stays involved until completion, the results are more satisfactory to the clients.

A majority of the survey respondents agree that judicial involvement leads to more satisfactory outcomes for their clients. Plaintiffs' lawyers agree with the statement 64.3% of the time, defense lawyers agree 75.3% of the time, and mixed practice lawyers agree 77% of the time. Of those, 16.7% of plaintiffs' lawyers, 18.4% of defense lawyers, and 21.2% of mixed practice lawyers agree strongly.

Figure 10.3: When a judicial officer gets involved early in a case and stays involved until completion, the results are more satisfactory to the clients

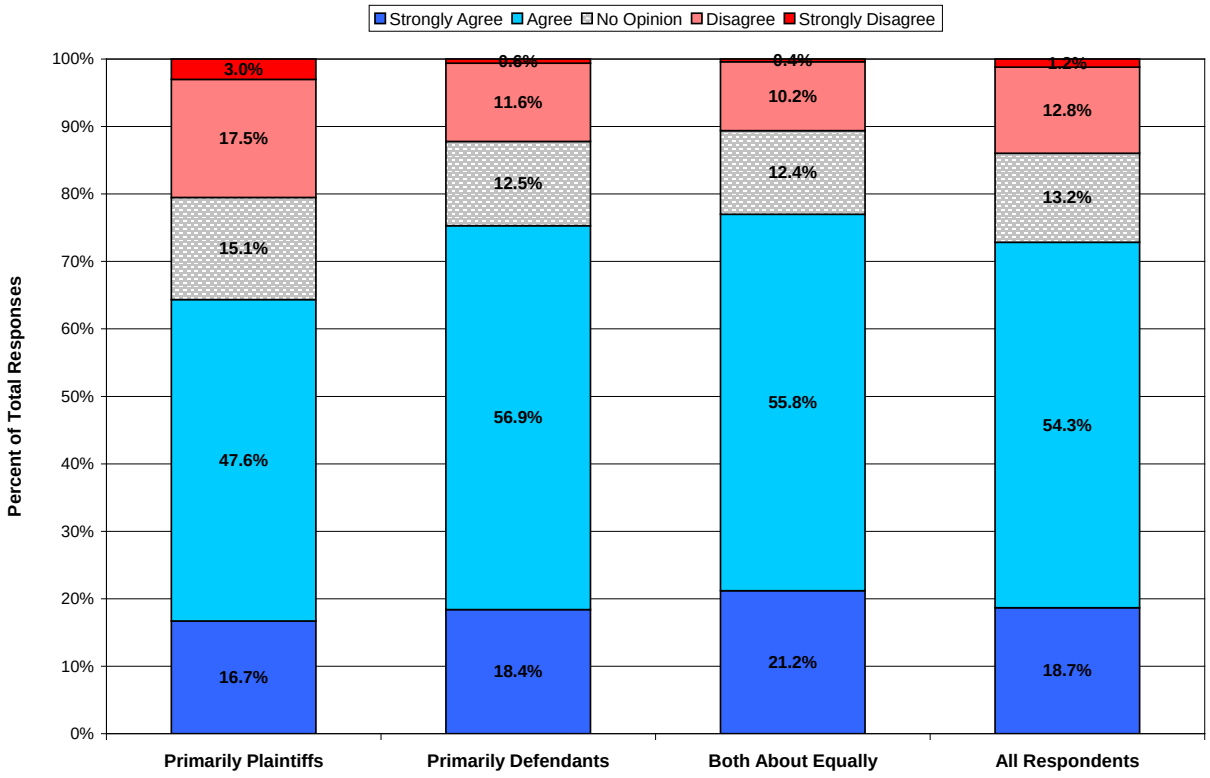

Table 10.3

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
When a judicial officer gets involved early in a case and stays involved until completion, the results are more satisfactory to the clients.						
Primarily Plaintiffs	16.7	47.6	17.5	3.0	15.1	821
Primarily Defendants	18.4	56.9	11.6	0.6	12.5	1627
Both About Equally	21.2	55.8	10.2	0.4	12.4	758
All Respondents	18.7	54.3	12.8	1.2	13.2	3206

10.4 One judicial officer should handle a case from start to finish.

This is another area in which responses among groups were consistent. 84.1% of plaintiffs' lawyers, 86% of defense lawyers, and 87.1% of mixed practice lawyers agree that one judicial officer should handle a case from start to finish.

Figure 10.4: One Judicial officer should handle a case from start to finish

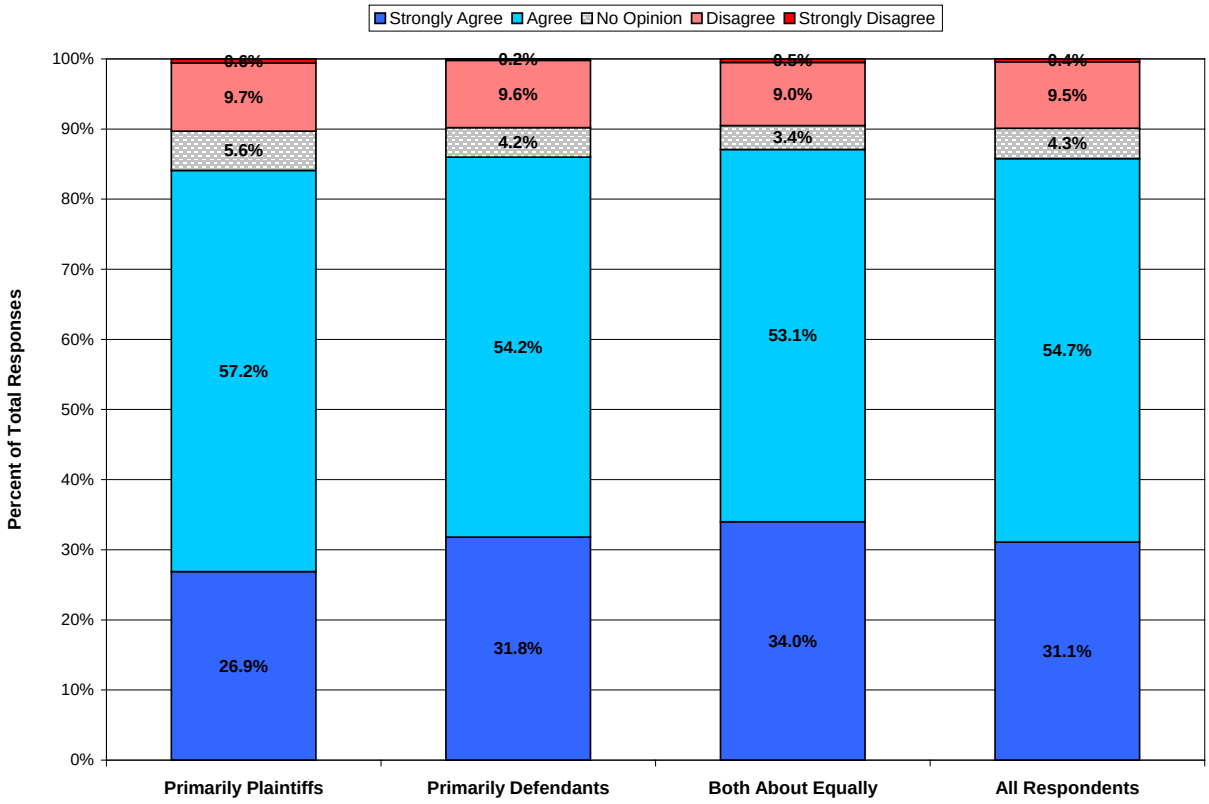

Table 10.4

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
One judicial officer should handle a case from start to finish.						
Primarily Plaintiffs	26.9	57.2	9.7	0.6	5.6	824
Primarily Defendants	31.8	54.2	9.6	0.2	4.2	1630
Both About Equally	34.0	53.1	9.0	0.5	3.4	765
All Respondents	31.1	54.7	9.5	0.4	4.3	3219

10.5 The judge who is going to try the case should handle all pre-trial matters.

Respondents were also likely to agree that the judge who takes the case to trial should handle all pre-trial matters. Plaintiffs' lawyers agree with the statement 64.8% of the time, defense lawyers 64.7% of the time, and mixed practice lawyers 65.2% of the time. Very few lawyers strongly disagree.

Figure 10.5: The judge who is going to try the case should handle all pre-trial matters

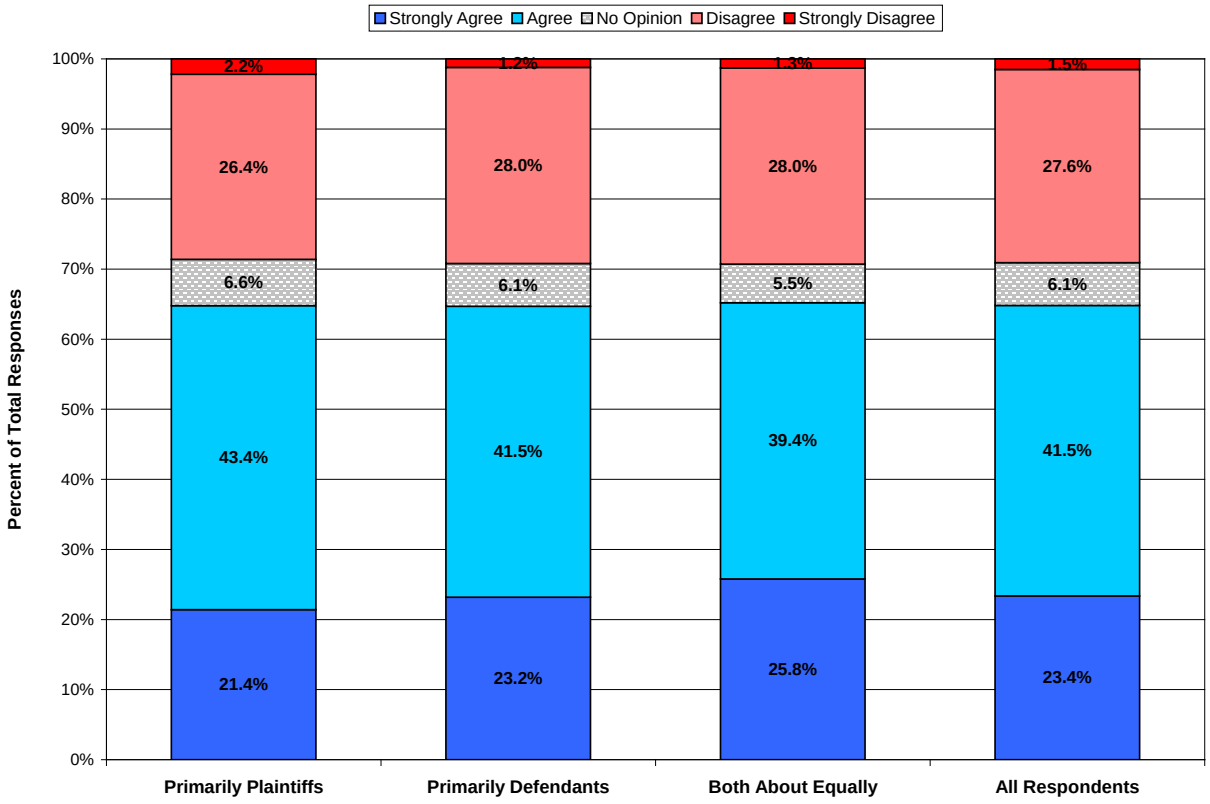

Table 10.5

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The judge who is going to try the case should handle all pre-trial matters.						
Primarily Plaintiffs	21.4	43.4	26.4	2.2	6.6	822
Primarily Defendants	23.2	41.5	28.0	1.2	6.1	1625
Both About Equally	25.8	39.4	28.0	1.3	5.5	764
All Respondents	23.4	41.5	27.6	1.5	6.1	3211

10.6 It does not matter whether the trial judge or a magistrate judge handles pre-trial matters, so long as they are handled promptly.

A majority of respondents also agree that it does not matter whether a district judge or a magistrate judge handles pre-trial matters, but there are a substantial number who disagree. 55.8% of plaintiffs' lawyers agree, as did 59.8% of defense lawyers and 58.8% of mixed practice lawyers. Over 11% of defense and mixed practice lawyers strongly agree, and over 13% of plaintiffs' lawyers strongly agree.

Figure 10.6: It does not matter whether the trial judge or a magistrate judge handles pre-trial matters, so long as they are handled promptly

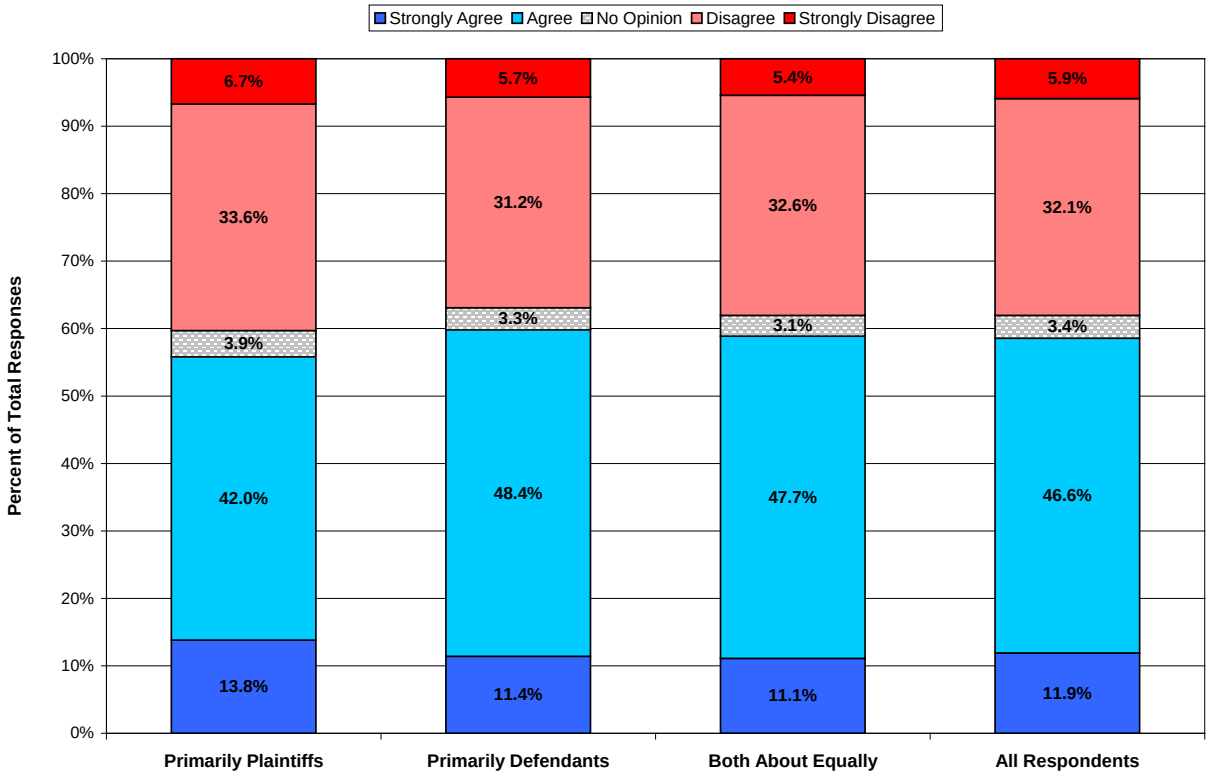

Table 10.6

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
It does not matter whether the trial judge or a magistrate judge handles pre-trial matters, so long as they are handled promptly.						
Primarily Plaintiffs	13.8	42.0	33.6	6.7	3.9	819
Primarily Defendants	11.4	48.4	31.2	5.7	3.3	1624
Both About Equally	11.1	47.7	32.6	5.4	3.1	763
All Respondents	11.9	46.6	32.1	5.9	3.4	3206

10.7 Judges inappropriately pressure parties to settle cases.

Respondents generally disagreed that judges inappropriately pressure parties to settle, although plaintiffs' lawyers were much less inclined to agree with this statement than were defense lawyers. Only 23% of plaintiffs' lawyers either agree or strongly agree, while 39.5% of defense lawyers agree and 32.8% of mixed practice lawyers agree.

Figure 10.7: Judges inappropriately pressure parties to settle cases

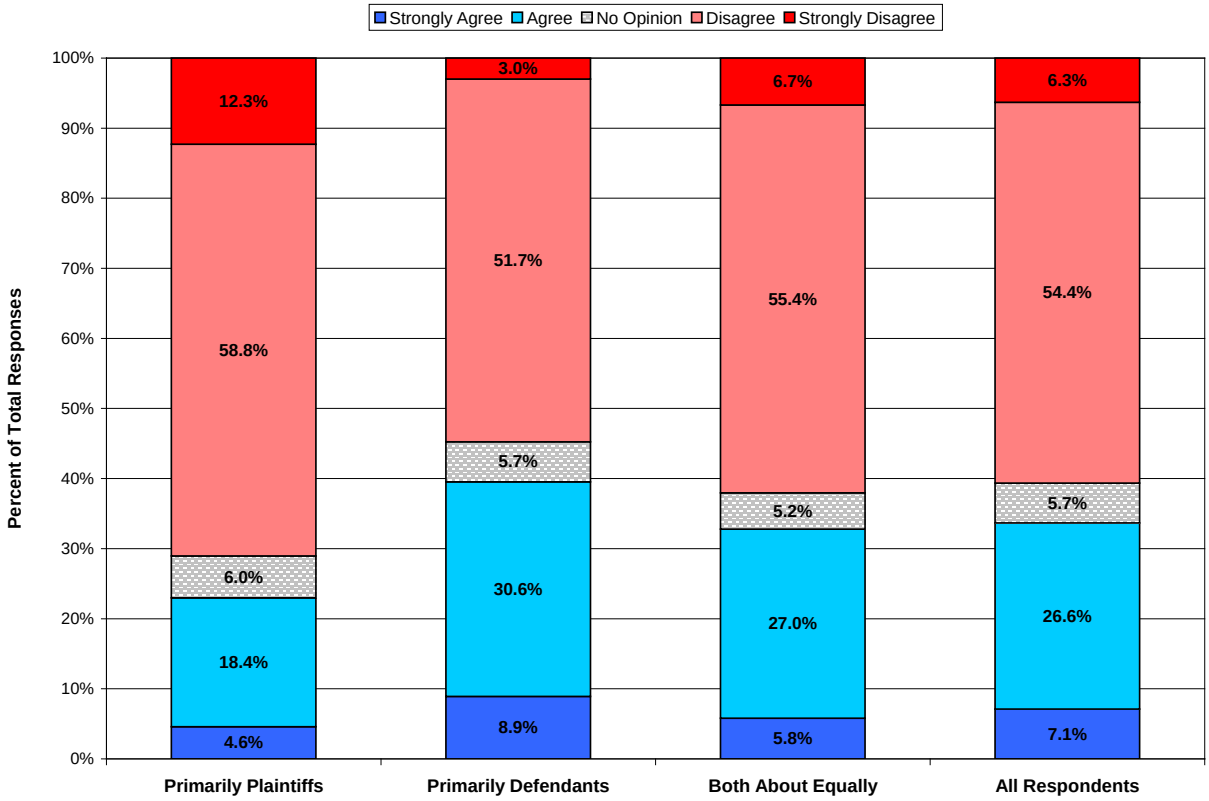

Table 10.7

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Judges inappropriately pressure parties to settle cases.						
Primarily Plaintiffs	4.6	18.4	58.8	12.3	6.0	822
Primarily Defendants	8.9	30.6	51.7	3.0	5.7	1624
Both About Equally	5.8	27.0	55.4	6.7	5.2	764
All Respondents	7.1	26.6	54.4	6.3	5.7	3210

10.8 Judges do not like taking cases to trial.

Close to a majority of each group agree with the statement that judges do not like taking cases to trial (53.1% of plaintiffs' lawyers, 49.3% of defense lawyers, and 50% of mixed practice lawyers). Approximately 13% of each group expressed no opinion.

Figure 10.8: Judges do not like taking cases to trial

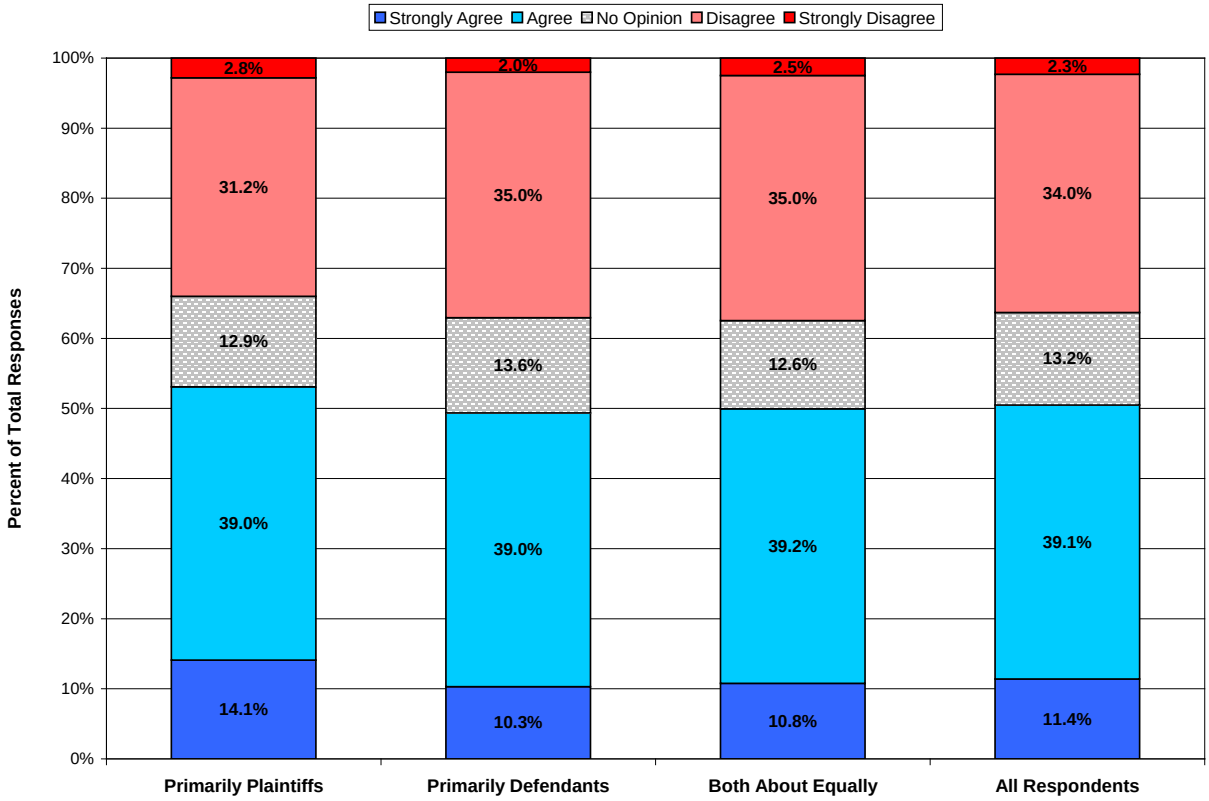

Table 10.8

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Judges do not like taking cases to trial.						
Primarily Plaintiffs	14.1	39.0	31.2	2.8	12.9	821
Primarily Defendants	10.3	39.0	35.0	2.0	13.6	1621
Both About Equally	10.8	39.2	35.0	2.5	12.6	761
All Respondents	11.4	39.1	34.0	2.3	13.2	3203

10.9 Judges with expertise in certain types of cases should be assigned those types.

A majority of each group agrees that judges with expertise in certain types of cases should be assigned those types of cases. Over 54% of plaintiffs' lawyers, 64.2% of defense lawyers, and 64.4% of mixed practice lawyers agree, with all groups strongly agreeing approximately 14% of the time.

Figure 10.9: Judges with expertise in certain types of cases should be assigned to those types

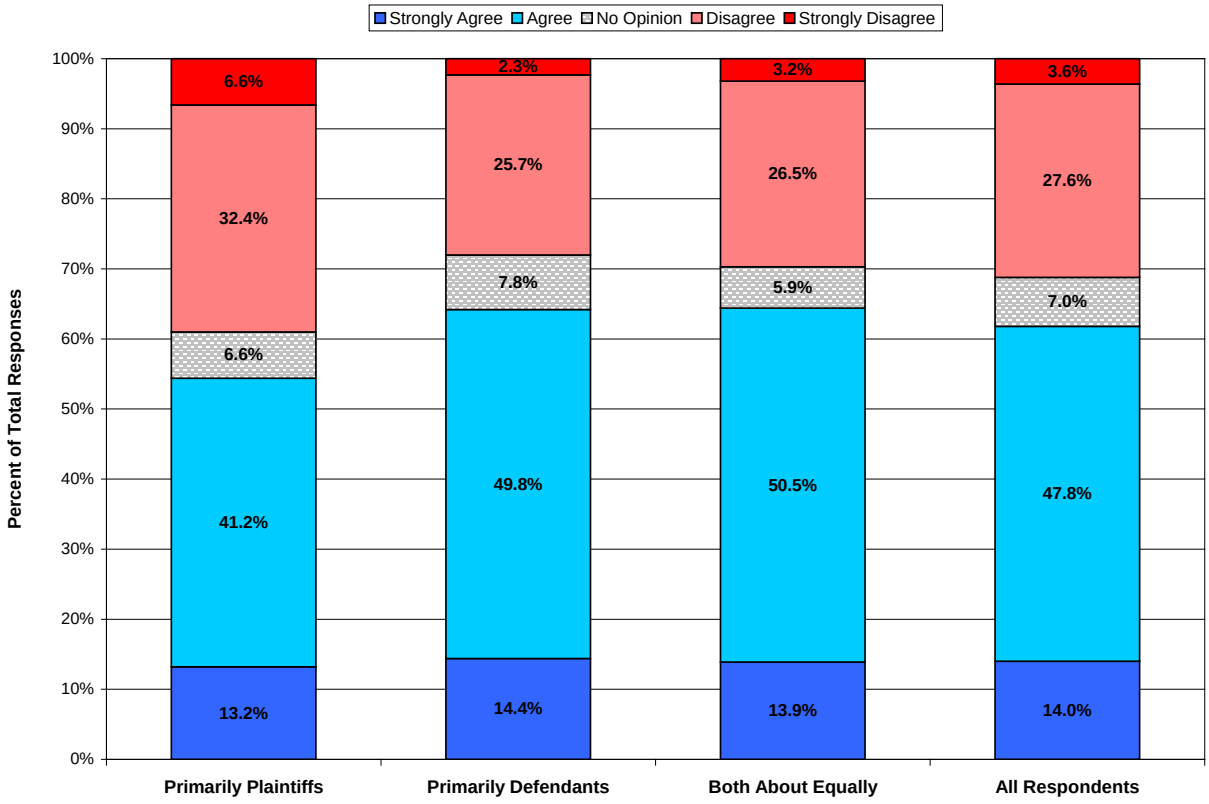

Table 10.9

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Judges with expertise in certain types of cases should be assigned to those types.						
Primarily Plaintiffs	13.2	41.2	32.4	6.6	6.6	820
Primarily Defendants	14.4	49.8	25.7	2.3	7.8	1629
Both About Equally	13.9	50.5	26.5	3.2	5.9	761
All Respondents	14.0	47.8	27.6	3.6	7.0	3210

10.10 Only individuals with significant trial experience should be chosen for positions as judges on trial courts.

Respondents were more likely than not to agree that only individuals with significant trial experience should be chosen for positions as judges on trial courts. Over 60% of lawyers in each group agree with that statement, with between 21% and 25% expressing strong agreement.

Figure 10.10: Only individuals with significant trial experience should be chosen for positions as judges on trial courts

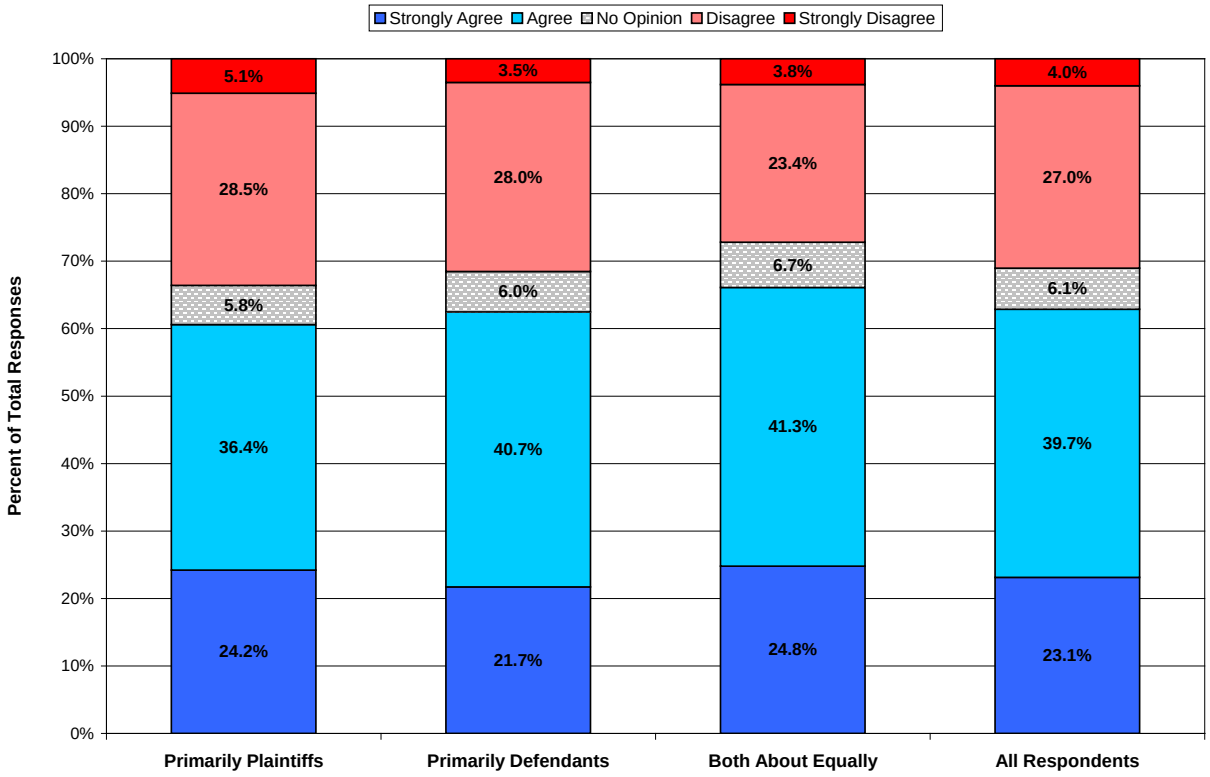

Table 10.10

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Only individuals with significant trial experience should be chosen for positions as judges on trial courts.						
Primarily Plaintiffs	24.2	36.4	28.5	5.1	5.8	822
Primarily Defendants	21.7	40.7	28.0	3.5	6.0	1623
Both About Equally	24.8	41.3	23.4	3.8	6.7	761
All Respondents	23.1	39.7	27.0	4.0	6.1	3206

10.11 Rule 16(a) pre-trial conferences.

Respondents were asked a short series of questions about pre-trial conferences in federal civil cases. As a threshold matter, respondents were asked whether pre-trial conferences were regularly held in their federal cases. A large majority, 83.8%, of respondents said yes.

Table 10.11(a)

ALL RESPONDENTS

	N	%
Are Rule 16(a) pre-trial conferences regularly held in your federal civil cases?		
Yes	2671	83.8
No	518	16.2

Respondents were then asked questions on what effect, if any, the holding of a Rule 16(a) pre-trial conference has on a case. There was little difference in the responses on each issue among the three types of lawyers. Respondents were more likely to believe that an effect of the conference was to inform the court of the issues, rather than identify and narrow issues or encourage settlement. Very few respondents believe that the conference shortens time to resolution of the dispute or saves cost.

10.11(b) Identifies and narrows the issues.

Survey respondents were split, almost 50/50 on whether they believe that a Rule 16(a) pre-trial conference is effective for identifying and narrowing issues.

Figure 10.11(b): Identifies and narrows the issues

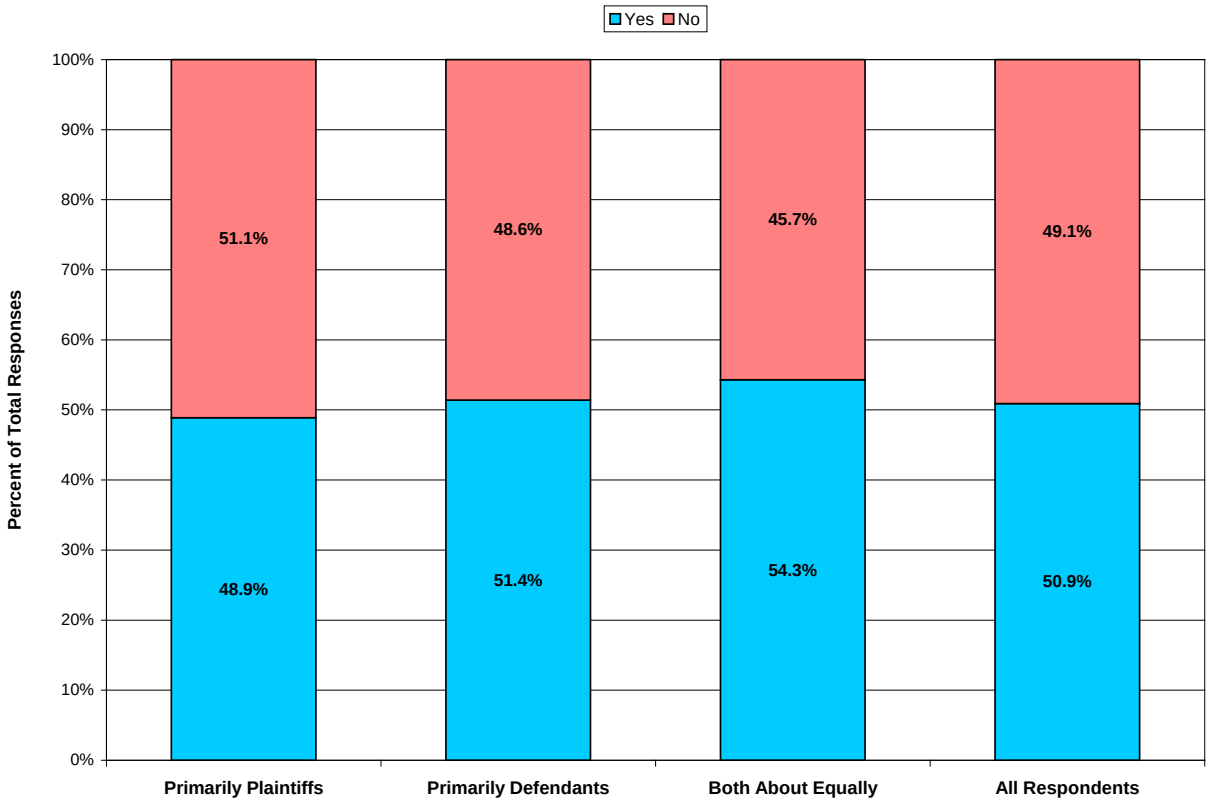

Table 10.11(b)

	Yes	No	N
Identifies and narrows the issues.			
Primarily Plaintiffs	48.9	51.1	839
Primarily Defendants	51.4	48.6	1653
Both About Equally	54.3	45.7	776
All Respondents	50.9	49.1	3348

10.11(c) Informs the court of the issues in the case.

Approximately 70% of the survey respondents stated that the Rule 16(a) pre-trial conference informs the court of issues in the case, with mixed practice lawyers slightly more likely to agree than defense or plaintiffs' lawyers.

Figure 10.11(c): Informs the court of the issues in the case

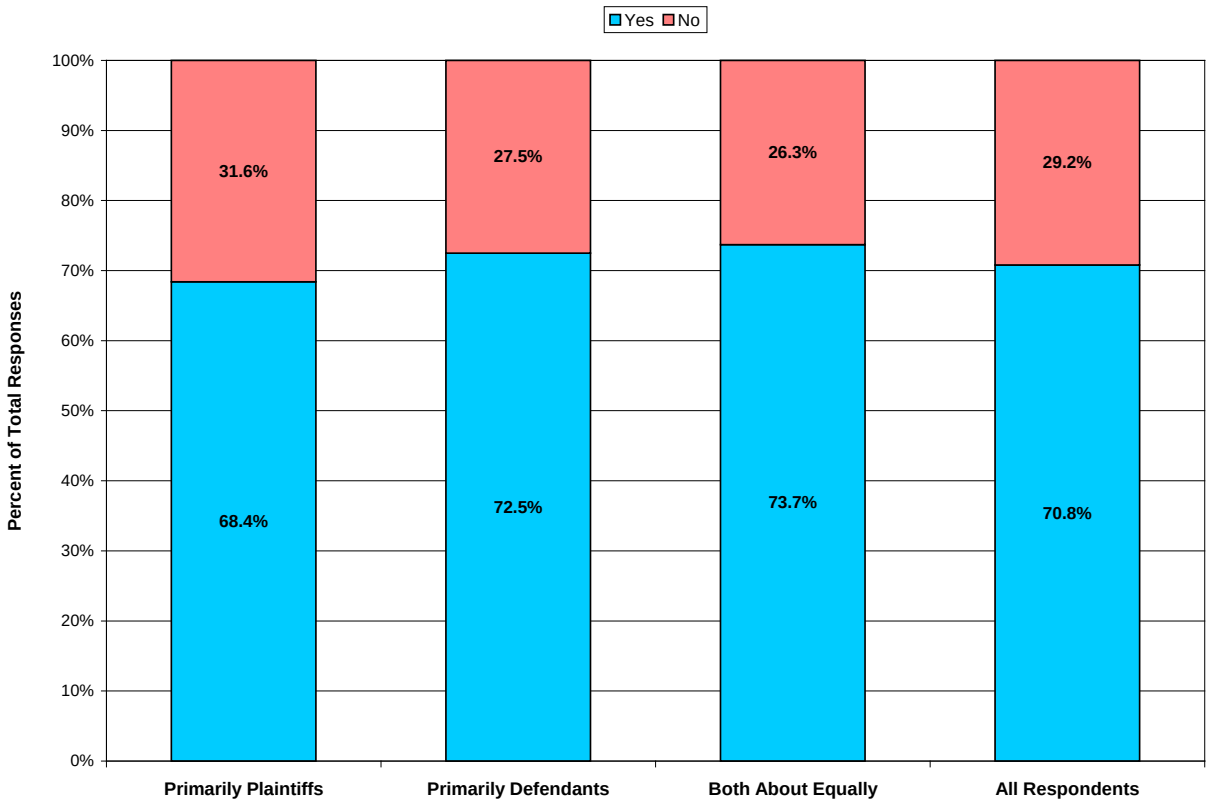

Table 10.11(c)

	Yes	No	N
Informs the court of the issues in the case.			
Primarily Plaintiffs	68.4	31.6	839
Primarily Defendants	72.5	27.5	1653
Both About Equally	73.7	26.3	776
All Respondents	70.8	29.2	3348

10.11(d) Encourages Settlement.

While mixed practice lawyers were slightly more likely to agree that a Rule 16(a) pre-trial conference encourages settlement, a majority of each group did not believe that the conferences encourage settlement. Notably, mixed practice lawyers, once again, were more likely to see the benefits of the conference.

Figure 10.11(d): Encourages settlement

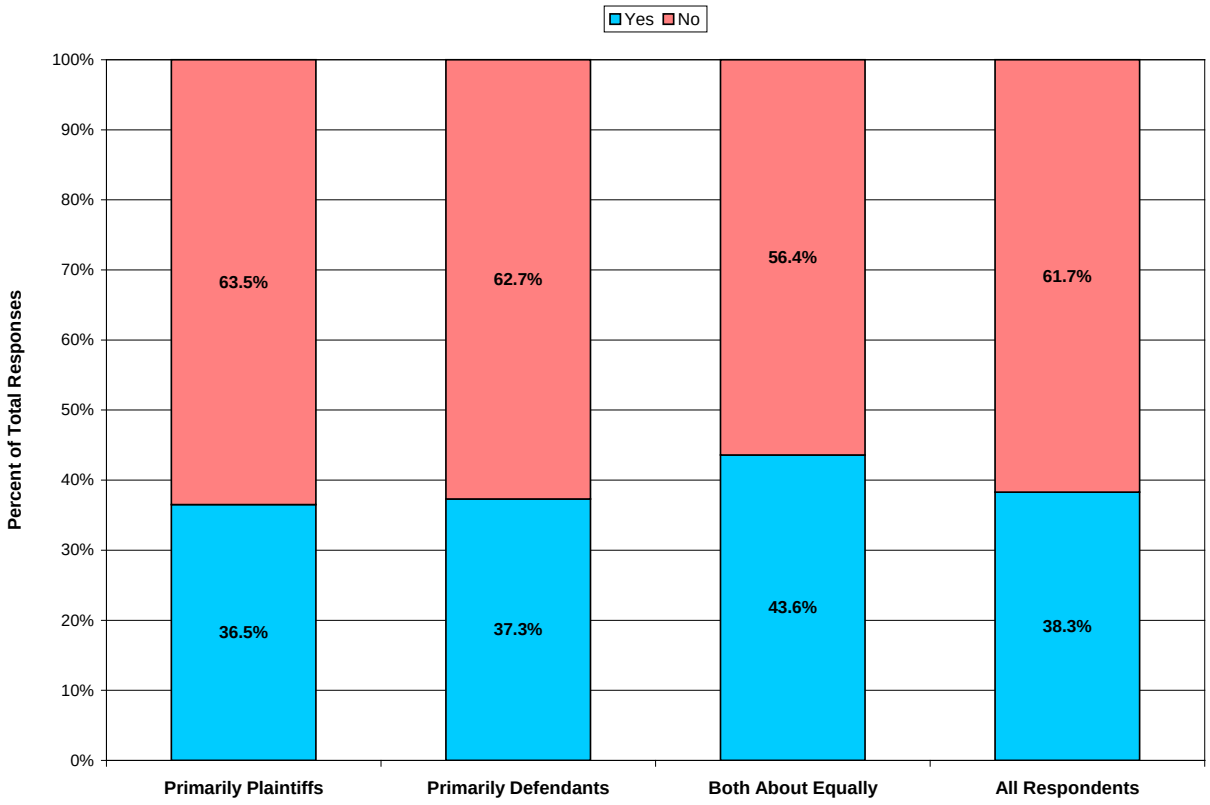

Table 10.11(d)

	Yes	No	N
Encourages settlement.			
Primarily Plaintiffs	36.5	63.5	839
Primarily Defendants	37.3	62.7	1653
Both About Equally	43.6	56.4	776
All Respondents	38.3	61.7	3348

10.11(e) Shortens the time to case resolution.

A substantial majority of respondents across the board do not believe that the conference shortens the time to case resolution, although, once again, mixed practice lawyers were somewhat more likely to believe that the conferences are time savers.

Figure 10.11(e): Shortens the time to case resolution

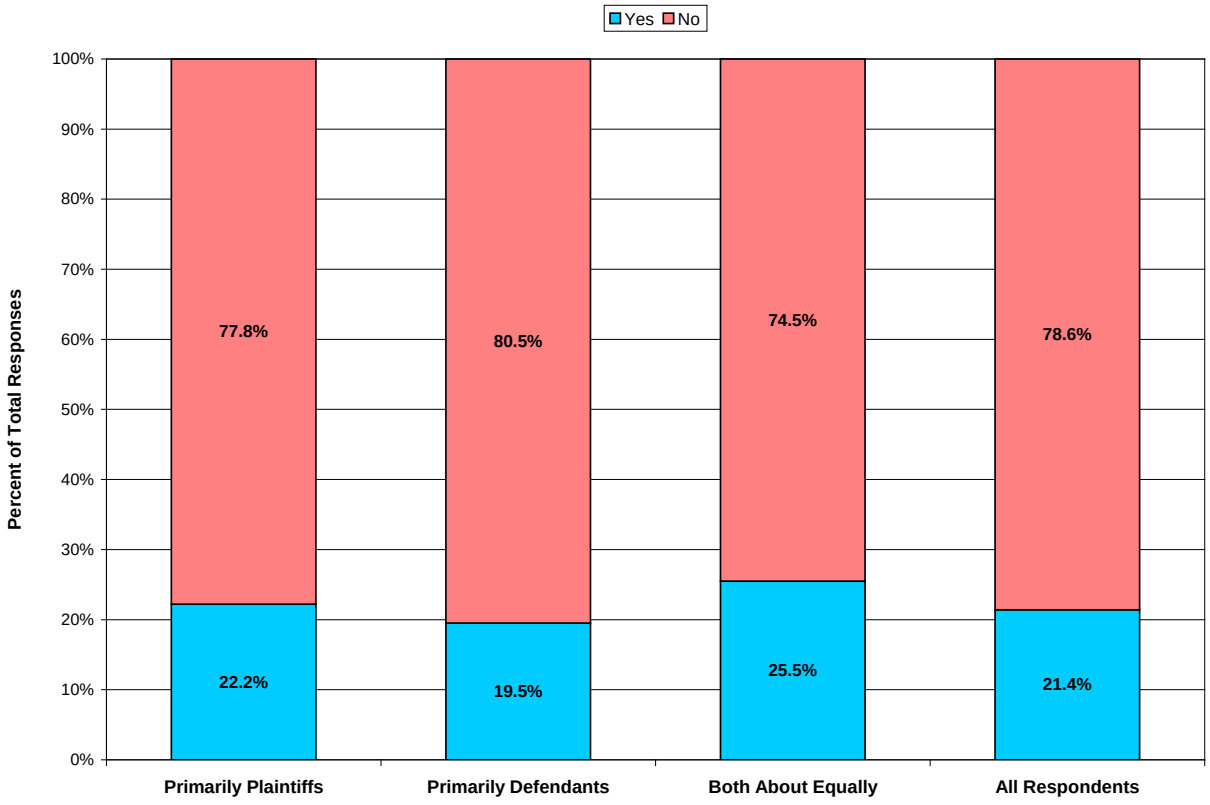

Table 10.11(e)

	Yes	No	N
Shortens the time to case resolution.			
Primarily Plaintiffs	22.2	77.8	839
Primarily Defendants	19.5	80.5	1653
Both About Equally	25.5	74.5	776
All Respondents	21.4	78.6	3348

10.11(f) Lengthens the time to case resolution.

Over 98% of all respondents do not believe that the Rule 16(a) conference lengthens the time to case resolution. Respondents seem to think that it has little effect at all on the length of time to resolution.

Figure 10.11(f): Lengthens the time to case resolution

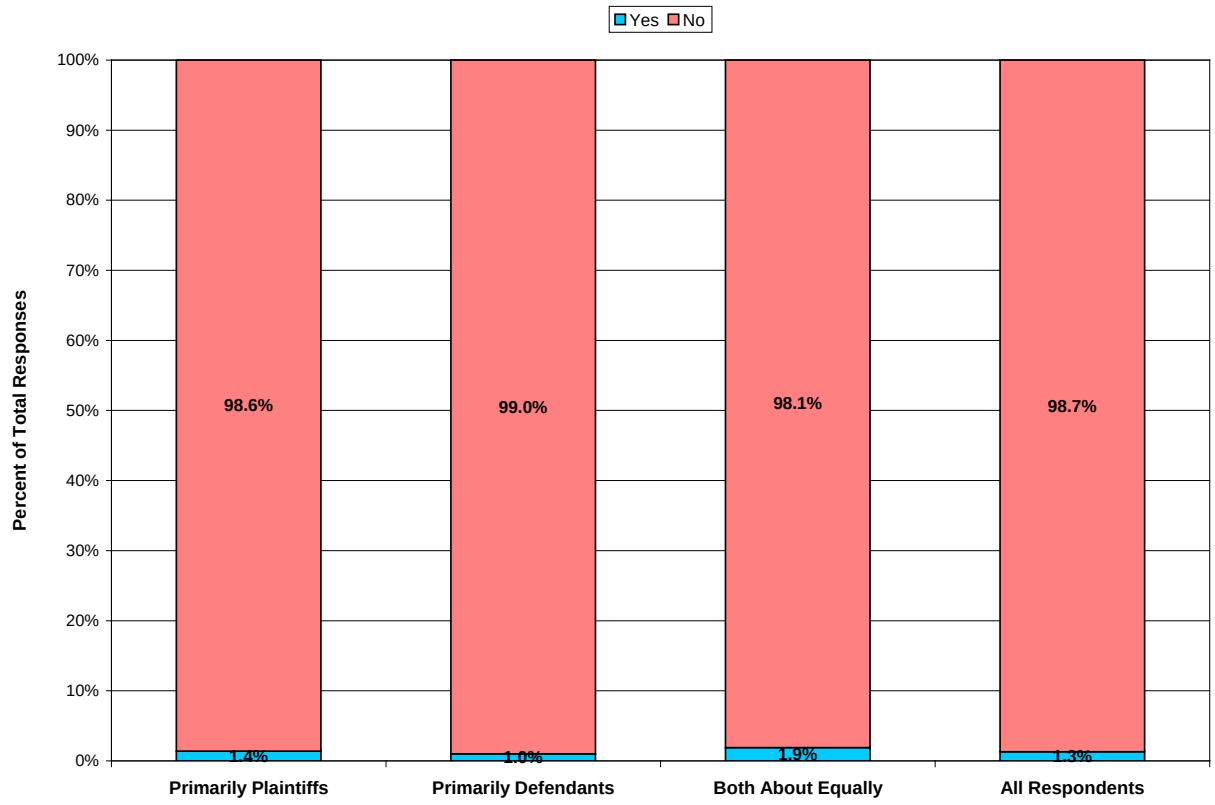

Table 10.11(f)

	Yes	No	N
Lengthens the time to case resolution.			
Primarily Plaintiffs	1.4	98.6	839
Primarily Defendants	1.0	99.0	1653
Both About Equally	1.9	98.1	776
All Respondents	1.3	98.7	3348

10.11(g) Improves time management.

Approximately 65% of respondents overall believe that the Rule 16(a) conference does not help to improve time management, although mixed practice lawyers were somewhat more inclined to agree (39.7%) than defense lawyers (33.6%) or plaintiffs' lawyers (34.9%).

Figure 10.11(g): Improves time management

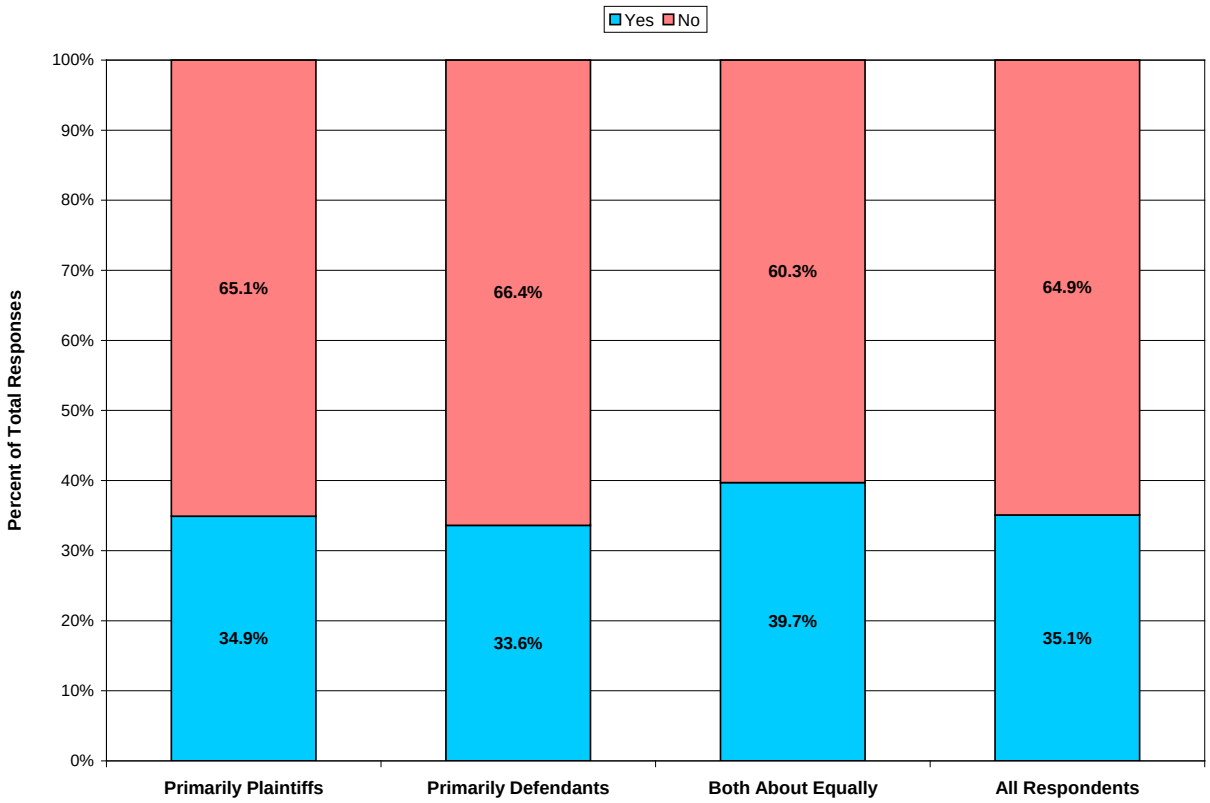

Table 10.11(g)

	Yes	No	N
Improves time management.			
Primarily Plaintiffs	34.9	65.1	839
Primarily Defendants	33.6	66.4	1653
Both About Equally	39.7	60.3	776
All Respondents	35.1	64.9	3348

10.11(h & i) Effect on cost.

Respondents appear to agree that the conference has very little effect on cost. Over 80% of each group believes that the Rule 16(a) conference helps to lowers cost, and over 90% of each believes that the conference results in increased costs.

Figure 10.11(h): Lowers cost

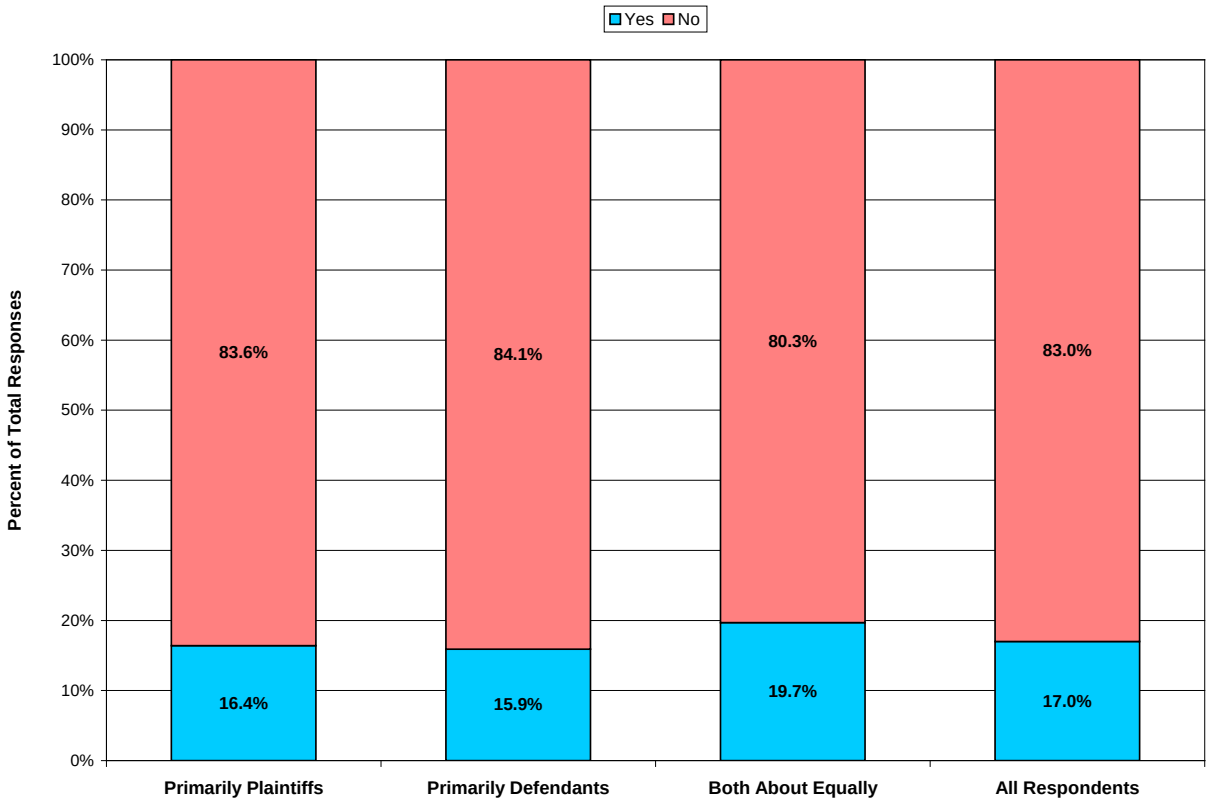

Table 10.11(h)

	Yes	No	N
***Lowers** cost.*			
Primarily Plaintiffs	16.4	83.6	839
Primarily Defendants	15.9	84.1	1653
Both About Equally	19.7	80.3	776
All Respondents	17.0	83.0	3348

Figure 10.11(i): Increases cost

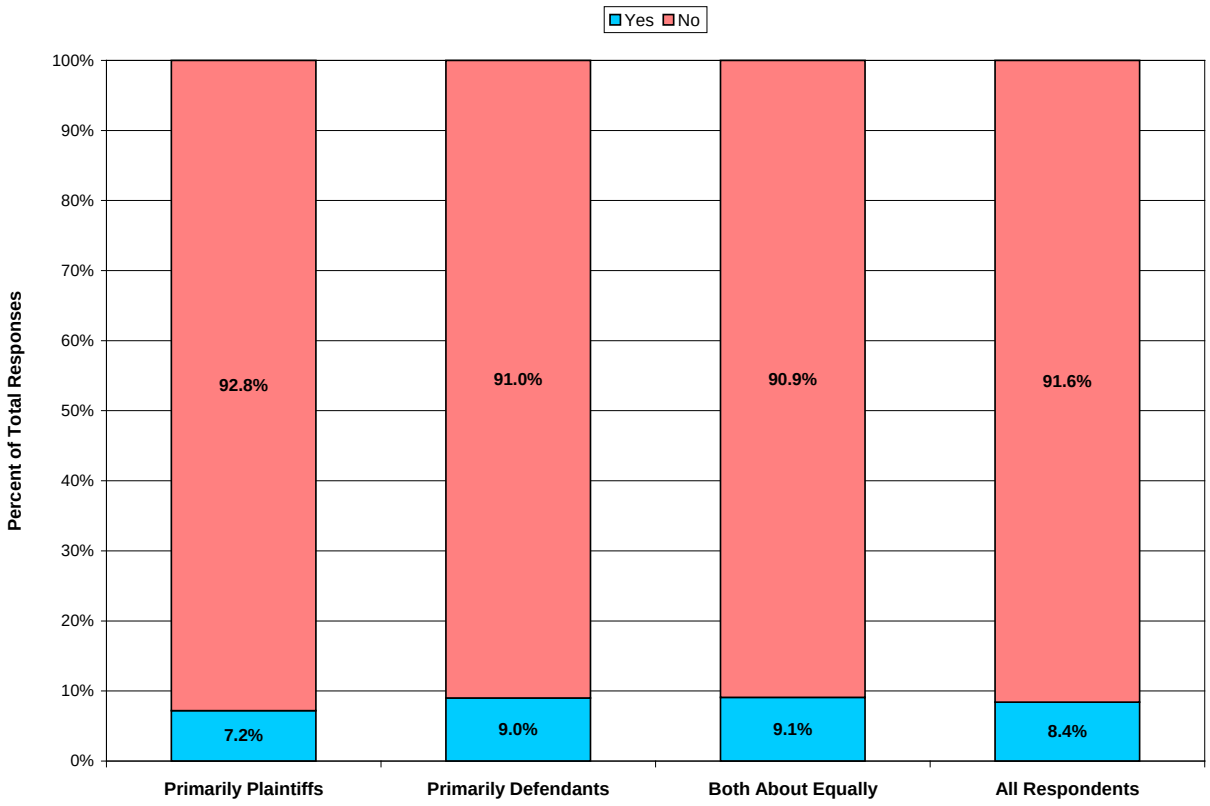

Table 10.11(i)

	Yes	No	N
***Increases** cost.*			
Primarily Plaintiffs	7.2	92.8	839
Primarily Defendants	9.0	91.0	1653
Both About Equally	9.1	90.9	776
All Respondents	8.4	91.6	3348

10.11(j) The holding of a Rule 16(a) pre-trial conference has no effect on a case.

Nearly 90% of all respondents believe that the holding of a Rule 16(a) has some effect on a case.

Figure 10.11(j): The holding of a Rule 16(a) pre-trial conference has no effect on a case

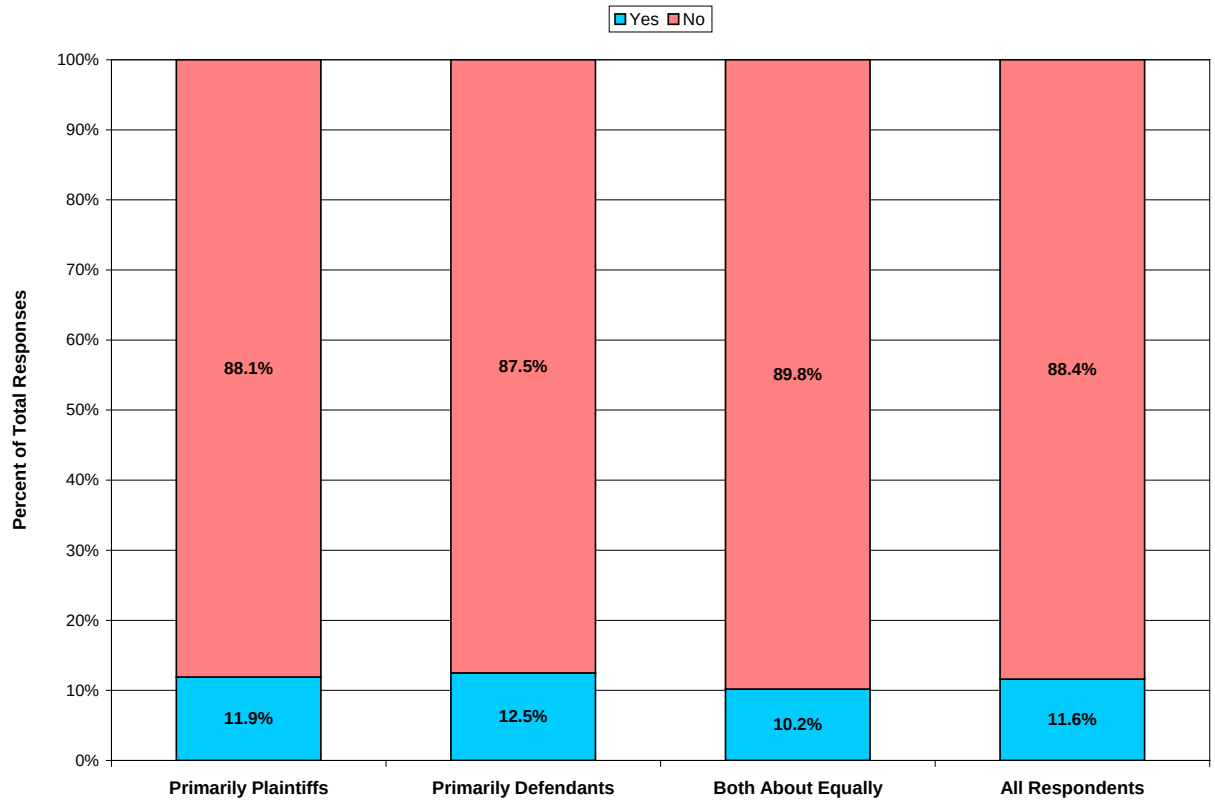

Table 10.11(j)

	Yes	No	N
The holding of a Rule 16(a) pre-trial conference has no effect on a case.			
Primarily Plaintiffs	11.9	88.1	839
Primarily Defendants	12.5	87.5	1653
Both About Equally	10.2	89.8	776
All Respondents	11.6	88.4	3348

10.12 Rule 16(e) Final Pre-trial Orders.

Respondents were asked a series of questions about Rule 16(e) pre-trial orders. Survey respondents were more likely than not (70.5%) to believe that pre-trial orders are more helpful if they are made after a ruling on summary judgment.

Table 10.12(a)

What effect, if any, does the timing of a Rule 16(e) final pre-trial order have?

ALL RESPONDENTS

	N	%
After ruling on summary judgment is more helpful than before	2159	70.5
Before ruling on summary judgment is more helpful than after	292	9.5
Timing makes no difference	611	20.0

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
After ruling on summary judgment is more helpful than before	432	58.9
Before ruling on summary judgment is more helpful than after	96	13.1
Timing makes no difference	206	28.1

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
After ruling on summary judgment is more helpful than before	1183	75.6
Before ruling on summary judgment is more helpful than after	124	7.9
Timing makes no difference	258	16.5

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
After ruling on summary judgment is more helpful than before	523	71.4
Before ruling on summary judgment is more helpful than after	66	9.0
Timing makes no difference	143	19.5

10.12(b) Helpfulness of Rule 16(e) Final Pre-trial Orders.

Respondents were then asked, to what extent are Rule 16(e) final pre-trial orders helpful in preparing the case for trial. Over 80% of each group agrees (with 26.4% strongly agreeing) that the pre-trial orders are either somewhat helpful or very helpful for preparing a case for trial.

Figure 10.12(b): To what extent are Rule 16(e) final pretrial orders helpful in preparing the case for trial?

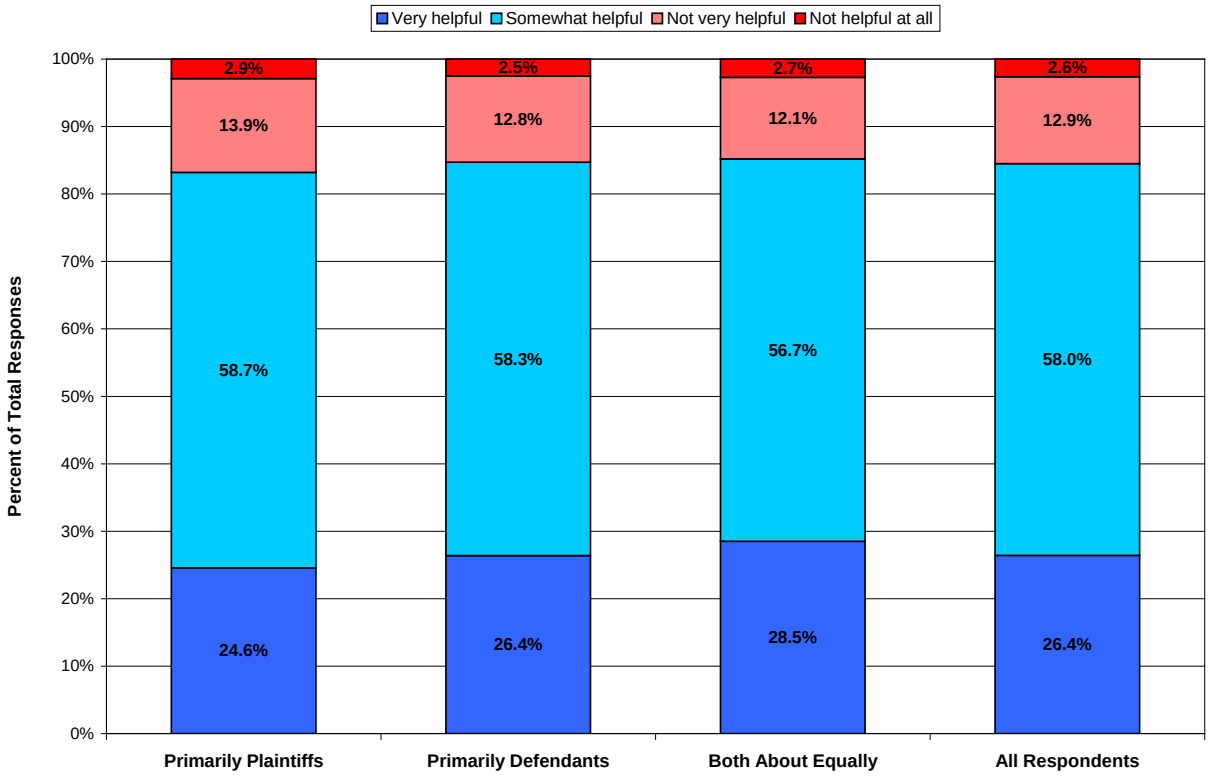

Table 10.12(b)

	Very Helpful	Somewhat Helpful	Not Very helpful	Not Helpful at all	N
Primarily Plaintiffs	24.6	58.7	13.9	2.9	736
Primarily Defendants	26.4	58.3	12.8	2.5	1,636
Both About Equally	28.5	56.7	12.1	2.7	357
All Respondents	26.4	58.0	12.9	2.6	3,104

11. Costs

Respondents were offered general statements about the costs of litigation and asked whether they agree or disagree with the statement, or if they have no opinion. Overall, plaintiffs' lawyers were less concerned with costs than defense and mixed practice lawyers, although all groups agree that litigation is too expensive.

11.1 Continuances cost clients money.

Mixed practice lawyers were somewhat more likely than defense lawyers and plaintiffs' lawyers to believe that continuances cost clients money. Whereas, 73.3% of mixed practice lawyers agree or strongly agree that continuances cost money, 65.9% of defense lawyers and 54.7% of plaintiffs' lawyers agree.

Figure 11.1: Continuances cost clients money

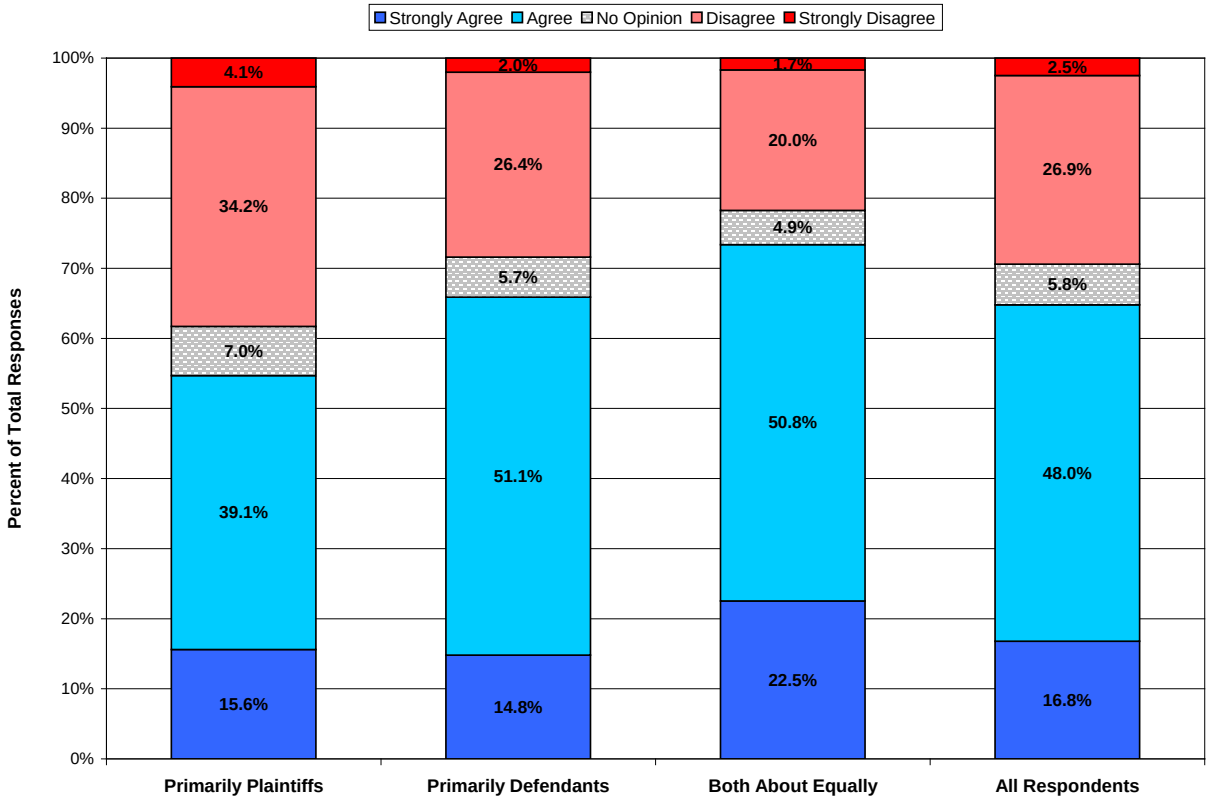

Table 11.1

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Continuances cost clients money.						
Primarily Plaintiffs	15.6	39.1	34.2	4.1	7.0	809
Primarily Defendants	14.8	51.1	26.4	2.0	5.7	1624
Both About Equally	22.5	50.8	20.0	1.7	4.9	754
All Respondents	16.8	48.0	26.9	2.5	5.8	3187

11.2 The longer a case goes on, the more it costs.

Over 75% of respondents in all groups believe that the longer a case goes on, the more it costs. Plaintiffs' lawyers agree 78.1% of the time, with 26% strongly agreeing. Defense lawyers agree 82% of the time, with 24.2% strongly agreeing. Mixed practice lawyers agree 85.9% of the time, with 33.8% strongly agreeing.

Figure 11.2: The longer a case goes on, the more it costs

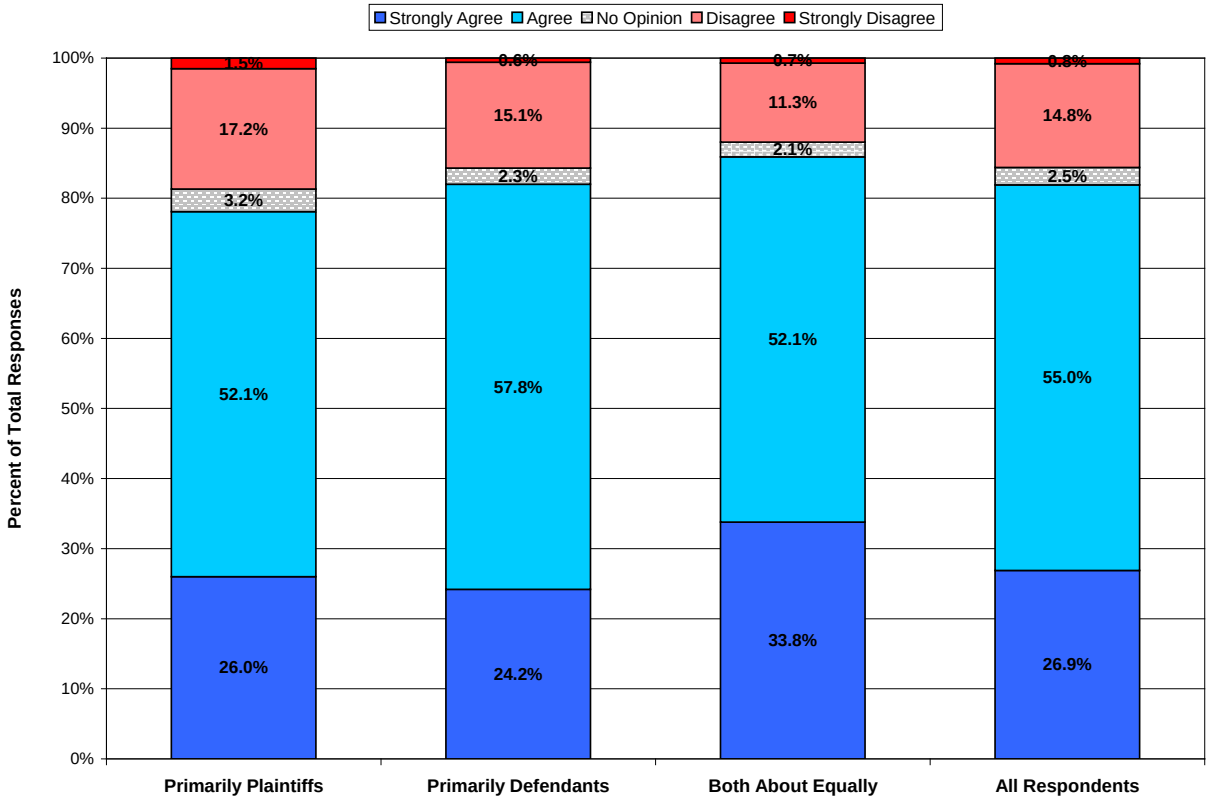

Table 11.2

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
The longer a case goes on, the more it costs.						
Primarily Plaintiffs	26.0	52.1	17.2	1.5	3.2	812
Primarily Defendants	24.2	57.8	15.1	0.6	2.3	1620
Both About Equally	33.8	52.1	11.3	0.7	2.1	760
All Respondents	26.9	55.0	14.8	0.8	2.5	3192

11.3 Expediting a case costs more.

The majority of lawyers disagree that expediting a case costs more. Only 23.2% of plaintiffs' lawyers agree, as do 27% of defense lawyers and 26.2% of mixed practice lawyers.

Figure 11.3: Expediting cases costs more

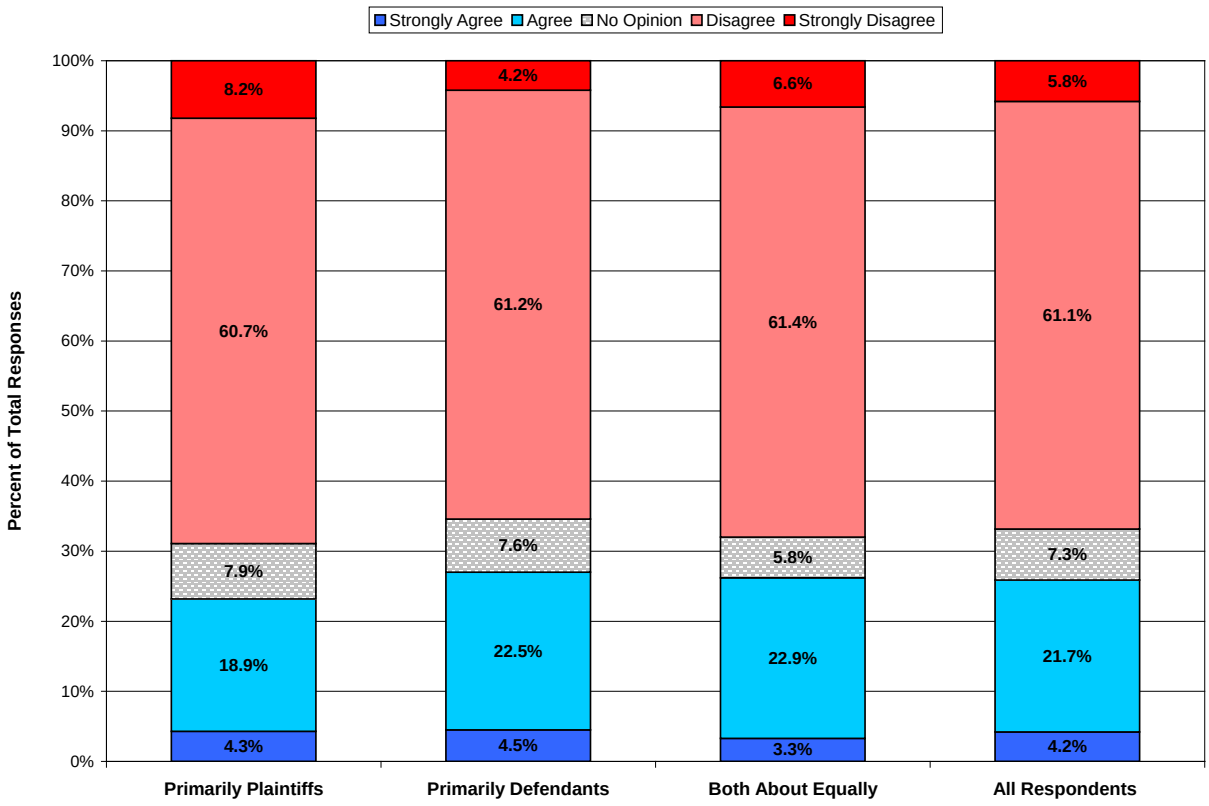

Table 11.3

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Expediting cases costs more.						
Primarily Plaintiffs	4.3	18.9	60.7	8.2	7.9	809
Primarily Defendants	4.5	22.5	61.2	4.2	7.6	1611
Both About Equally	3.3	22.9	61.4	6.6	5.8	759
All Respondents	4.2	21.7	61.1	5.8	7.3	3179

11.4 Litigation is too expensive.

A large percentage of all three groups agree that litigation is too expensive, although defense and mixed practice lawyers were somewhat more likely to agree than were plaintiffs' lawyers. 86.6% of defense lawyers agree; 86.9% of mixed practice lawyers agree; and 65.8% of plaintiffs' lawyers agree. Notably, the group with the highest percentage of respondents strongly agreeing was the mixed practice lawyers, 34.7% of which strongly agree.

Figure 11.4: Litigation is too expensive

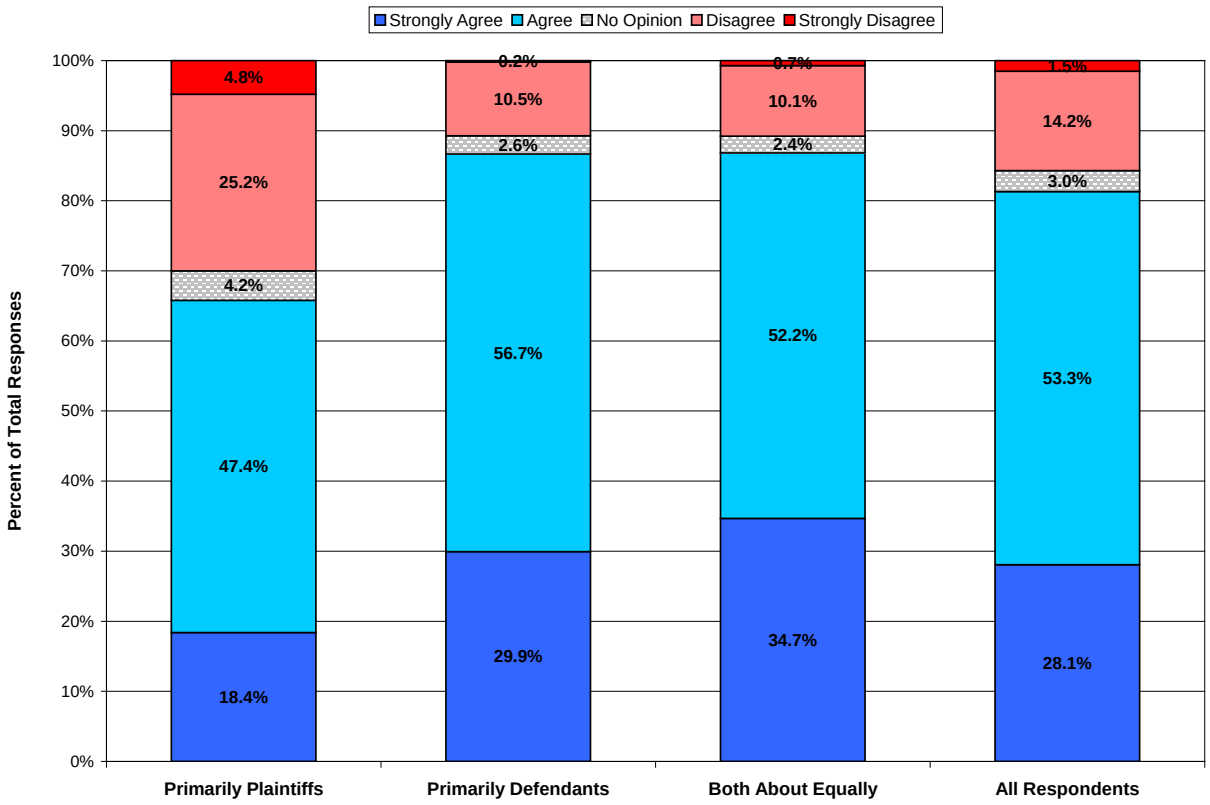

Table 11.4

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Litigation is too expensive.						
Primarily Plaintiffs	18.4	47.4	25.2	4.8	4.2	816
Primarily Defendants	29.9	56.7	10.5	0.2	2.6	1624
Both About Equally	34.7	52.2	10.1	0.7	2.4	755
All Respondents	28.1	53.3	14.2	1.5	3.0	3195

11.5 Discovery is too expensive.

Defense and mixed practice lawyers were more likely to agree that discovery is too expensive than were plaintiffs' lawyers. Only 61.4% of plaintiffs' lawyers agree with the statement, while 89.5% of defense lawyers and 89.3% of mixed practice lawyers agree.

Figure 11.5: Discovery is too expensive

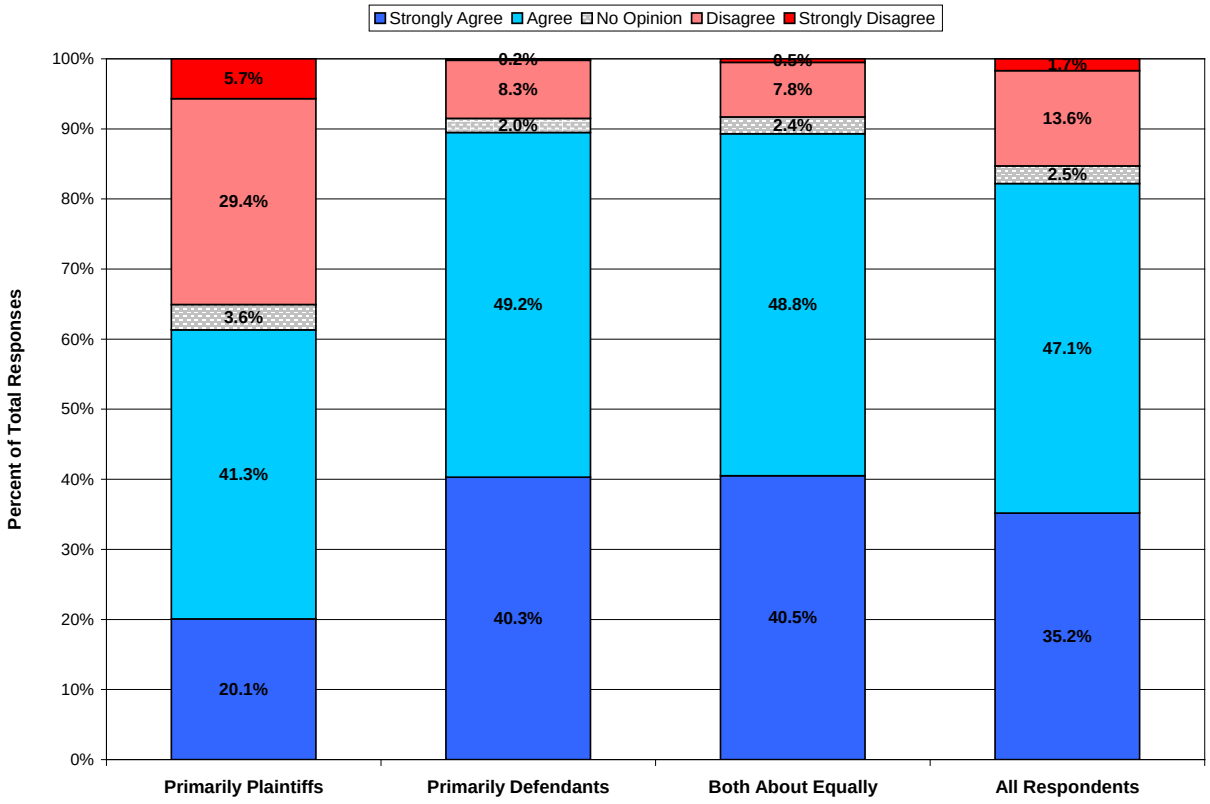

Table 11.5

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Discovery is too expensive.						
Primarily Plaintiffs	20.1	41.3	29.4	5.7	3.6	812
Primarily Defendants	40.3	49.2	8.3	0.2	2.0	1615
Both About Equally	40.5	48.8	7.8	0.5	2.4	758
All Respondents	35.2	47.1	13.6	1.7	2.5	3185

11.6 When all counsel are collaborative and professional, the case costs the client less.

In another area where approximately 95% of each group agree, collaboration and professionalism among lawyers is seen as a cost-saver for clients.

Figure 11.6: When all counsel are collaborative and professional, the case costs the client less

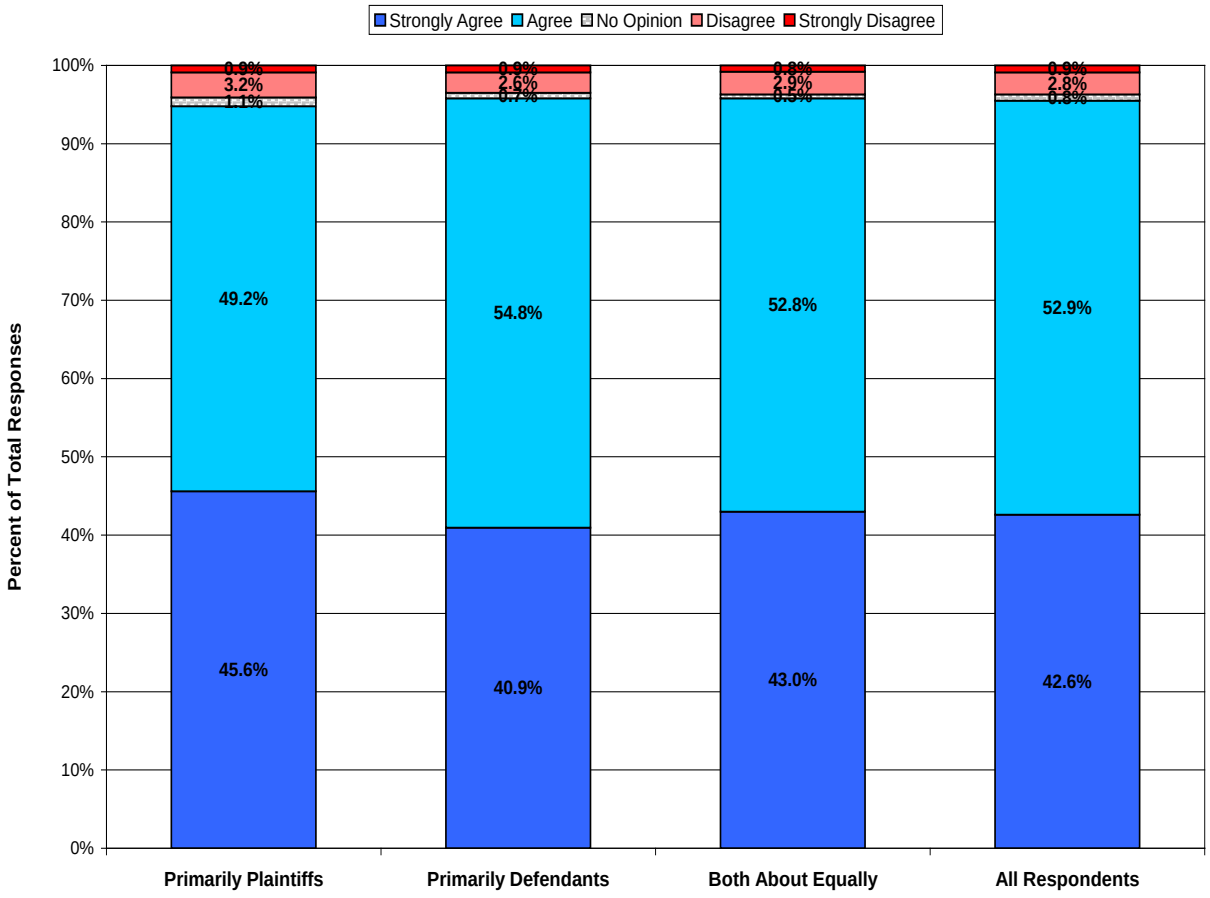

Table 11.6

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
When all counsel are collaborative and professional, the case costs the client less.						
Primarily Plaintiffs	45.6	49.2	3.2	0.9	1.1	811
Primarily Defendants	40.9	54.8	2.6	0.9	0.7	1625
Both About Equally	43.0	52.8	2.9	0.8	0.5	762
All Respondents	42.6	52.9	2.8	0.9	0.8	3198

11.7 Litigation costs are not proportional to the value of a small case.

Survey respondents tended to agree that litigation costs are not proportional to the value of a small case. Over 78% of plaintiffs' attorneys, 91.4% of defense attorneys, and 93.6% of mixed practice attorneys agree, with 31.9%, 42.2%, and 48.5% strongly agreeing. Only 0.8% overall strongly disagree.

Figure 11.7: Litigation costs are not proportional to the value of a small case

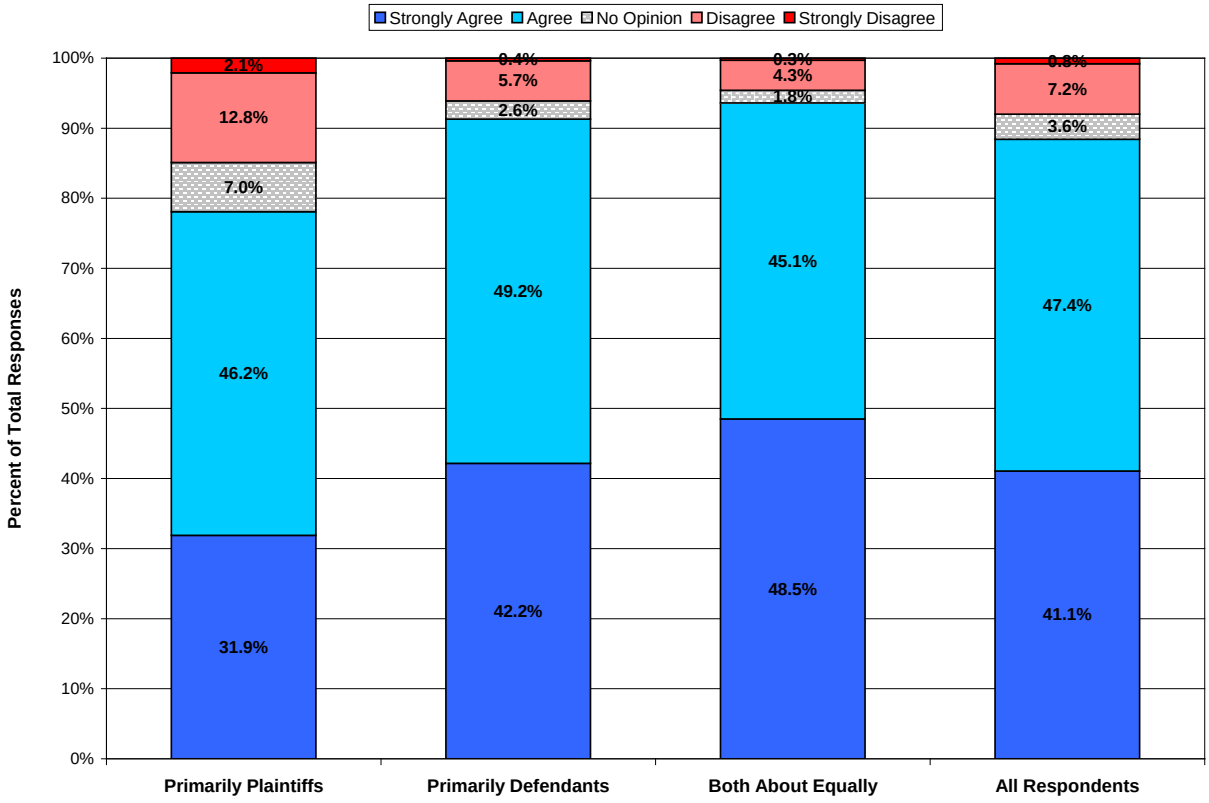

Table 11.7

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Litigation costs are not proportional to the value of a small case.						
Primarily Plaintiffs	31.9	46.2	12.8	2.1	7.0	814
Primarily Defendants	42.2	49.2	5.7	0.4	2.6	1625
Both About Equally	48.5	45.1	4.3	0.3	1.8	763
All Respondents	41.1	47.4	7.2	0.8	3.6	3202

11.8 Litigation costs are not proportional to the value of a large case.

A substantial minority of each group agrees that litigation costs are not proportional to the value of a large case, although a majority disagrees. Plaintiffs' lawyers agree 32.8% of the time, while 43.5% of defense lawyers agree, and 41.3% of mixed practice lawyer agree. So it seems that although proportions are more in line for large cases, there are still many who perceive the costs to be too high for the benefit received.

Figure 11.8: Litigation costs are not proportional to the value of a large case

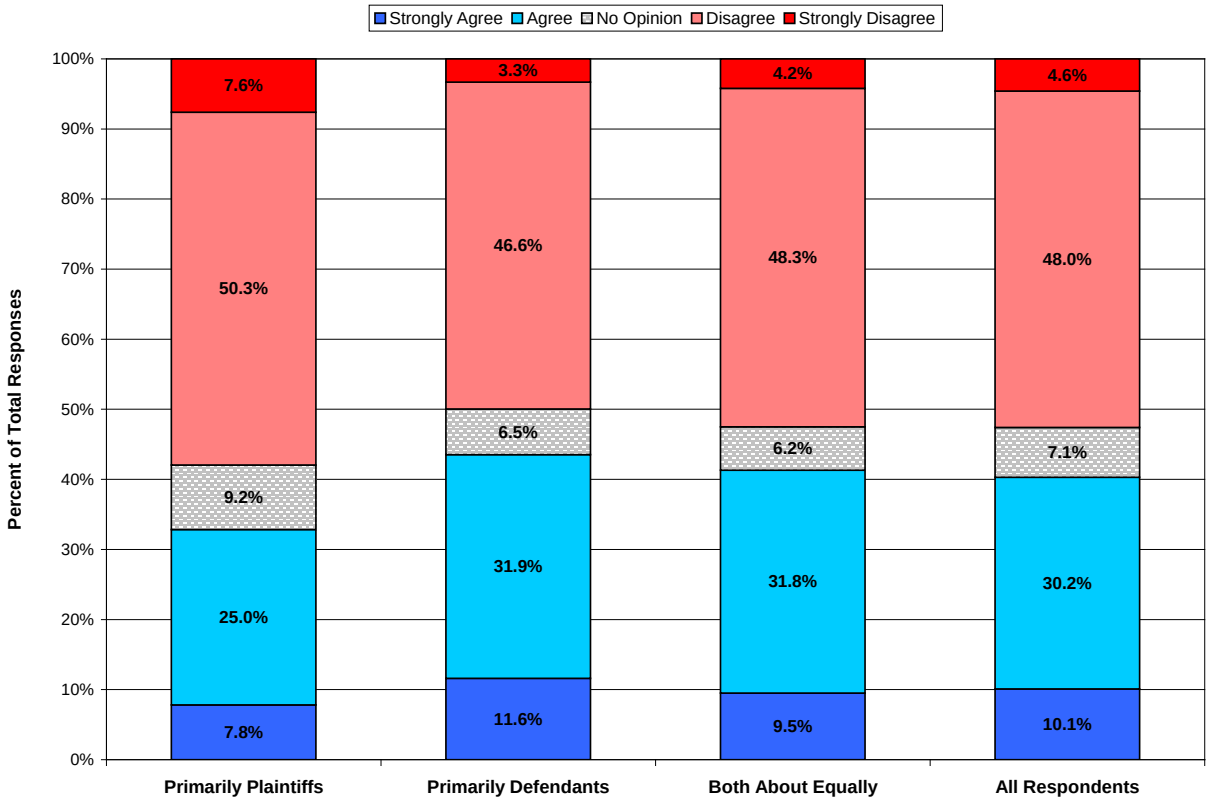

Table 11.8

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Litigation costs are not proportional to the value of a large case.						
Primarily Plaintiffs	7.8	25.0	50.3	7.6	9.2	811
Primarily Defendants	11.6	31.9	46.6	3.3	6.5	1619
Both About Equally	9.5	31.8	48.3	4.2	6.2	760
All Respondents	10.1	30.2	48.0	4.6	7.1	3190

11.9 Economic models in many law firms encourage more discovery than is necessary.

Interestingly, plaintiffs' lawyers were most likely to agree with the statement that economic models in law firms encourage more discovery than necessary. Plaintiffs' lawyers agree with the statement 63.3% of the time, while defense lawyers agree 49.8% of the time, and mixed practice lawyers agree 62.2% of the time. These groups strongly agree 28.1% of the time, 16% of the time, and 22.2% of the time, respectively.

Figure 11.9: Economic models in many law firms encourage more discovery than is necessary

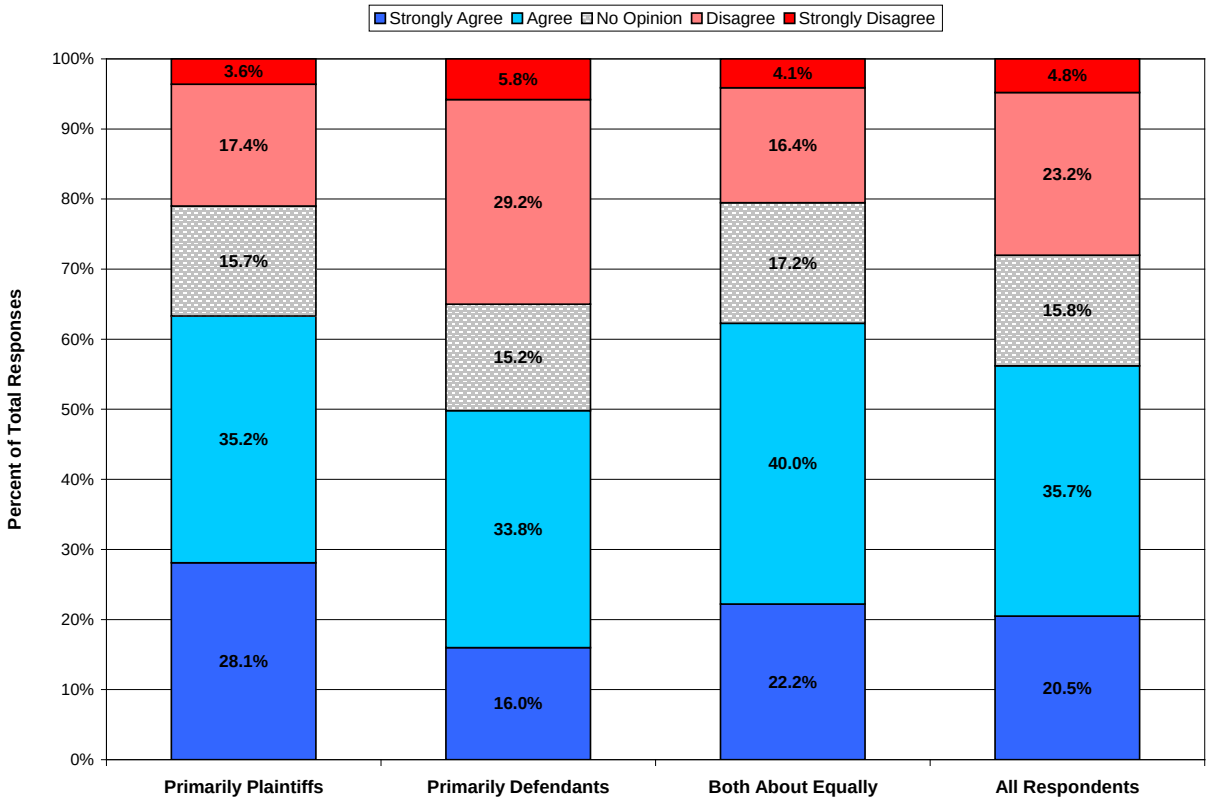

Table 11.9

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
Economic models in many law firms encourage more discovery than is necessary.						
Primarily Plaintiffs	28.1	35.2	17.4	3.6	15.7	809
Primarily Defendants	16.0	33.8	29.2	5.8	15.2	1622
Both About Equally	22.2	40.0	16.4	4.1	17.2	760
All Respondents	20.5	35.7	23.2	4.8	15.8	3191

11.10 Delays in the litigation process.

Respondents were fairly consistent in their thoughts on the primary causes of delay in the litigation process. All groups cited the time required to complete discovery as the biggest cause of delay. Plaintiffs' lawyers chose this option 37.9% of the time, defense lawyers chose it 54.9% of the time, and mixed practice lawyers chose discovery 45.5% of the time. The second most frequently selected cause was the delay on rulings on pending motions, with plaintiffs' lawyers selecting this option 28.6% of the time, defense lawyers 22.9% of the time, and mixed practice lawyers 27.3% of the time. This was followed in all cases by attorney requests for extensions and continuances (17.4% overall), other (7% overall), and a very small number who selected court continuances of scheduled events (less than 2% overall).

Table 11.10

The primary cause of delay in the litigation process is:

ALL RESPONDENTS

	N	%
Delayed rulings on pending motions	808	25.3
Court continuances of scheduled events	62	1.9
Attorney requests for extensions and continuances	554	17.4
The time required to complete discovery	1543	48.4
Other	222	7.0

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
Delayed rulings on pending motions	230	28.6
Court continuances of scheduled events	20	2.5
Attorney requests for extensions and continuances	158	19.7
The time required to complete discovery	304	37.9
Other	91	11.3

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
Delayed rulings on pending motions	367	22.9
Court continuances of scheduled events	23	1.4
Attorney requests for extensions and continuances	264	16.5
The time required to complete discovery	881	54.9
Other	69	4.3

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
Delayed rulings on pending motions	205	27.3
Court continuances of scheduled events	19	2.5
Attorney requests for extensions and continuances	127	16.9
The time required to complete discovery	342	45.5
Other	59	7.8

11.11 Cost forcing settlement.

When asked whether the cost of litigation forces cases to settle that should not settle based on the merits, defense and mixed practice lawyers responded affirmatively over 92% of the time, while only 53.2% of plaintiffs' lawyers agree.

Table 11.11

	Yes	No
Does the cost of litigation force cases to settle that should not settle based on the merits?		
Primarily Plaintiffs	53.2	46.8
Primarily Defendants	93.2	6.8
Both about Equally	92.2	7.8
All Respondents	82.7	17.3

Respondents were then asked how important certain factors are in driving a decision to settle. They responded very important, somewhat important, somewhat unimportant, or not important at all. The factors in order of importance were:

	Very Important	Somewhat or Very Important
The monetary stakes in the litigation	74.2	98.4
Likelihood of unfavorable verdict or judgment	71.7	97.5
Overall discovery costs	62.7	97.5
Attorney fees	61.7	94.5
Trial costs	56.1	93.3
E-discovery cots	46.3	89.1
Deposition and time costs	33.2	91.8
Document production costs	33.1	86.3
Expert witness costs	22.1	81.7
Possibility of an unfavorable precedent	20.6	63.6
Costs of motion practice	13.4	65.8
Possibility of unfavorable publicity from trial	12.8	57.6
Costs of legal research	5.6	39.6
Court appearances other than trial	4.6	33.5

11.12 Expert witness costs and the decision to settle.

Over 81% of all lawyers agree that expert witness costs are at least somewhat important to the decision to settle. Plaintiffs' lawyers (85.1%) were somewhat more likely than defense lawyers (79.9%) or mixed practice lawyers (83.2%) to find them important or very important to the ultimate decision to settle. Plaintiffs' lawyers were also almost twice as likely as defense lawyers to find those costs very important.

Figure 11.12: Expert witness costs

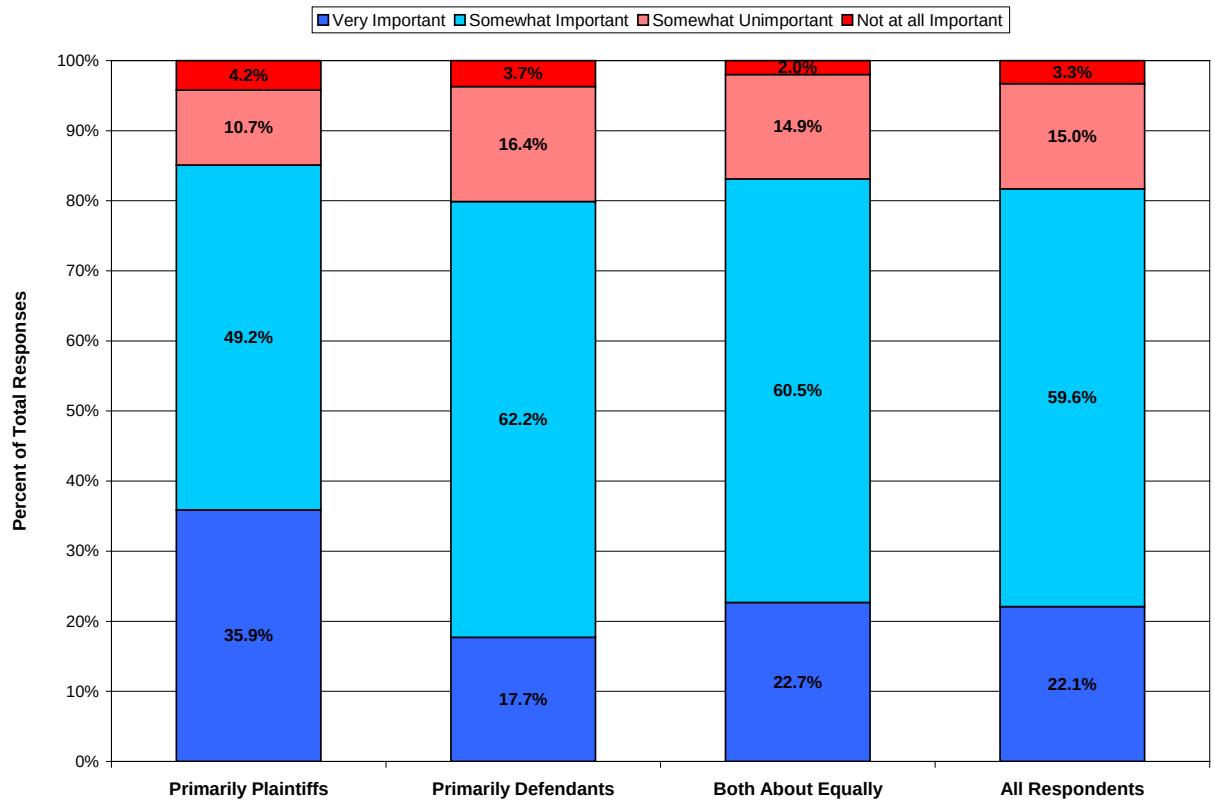

Table 11.12

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
Expert witness costs.					
Primarily Plaintiffs	35.9	49.2	10.7	4.2	429
Primarily Defendants	17.7	62.2	16.4	3.7	1495
Both About Equally	22.7	60.5	14.9	2.0	706
All Respondents	22.1	59.6	15.0	3.3	2656

11.13 Overall discovery costs and the decision to settle.

Survey respondents were in strong agreement that discovery costs overall drive the decision to settle. Over 94% of plaintiffs' lawyers, 97.8% of defense lawyers, and 98.8% of mixed practice lawyers believe that discovery costs are at least somewhat important to the decision on whether to settle. Over 50% of plaintiffs' lawyers, over 65% of defense lawyers, and over 64% of mixed practice lawyers all believe the costs are very important to that decision.

Figure 11.13: Overall discovery costs

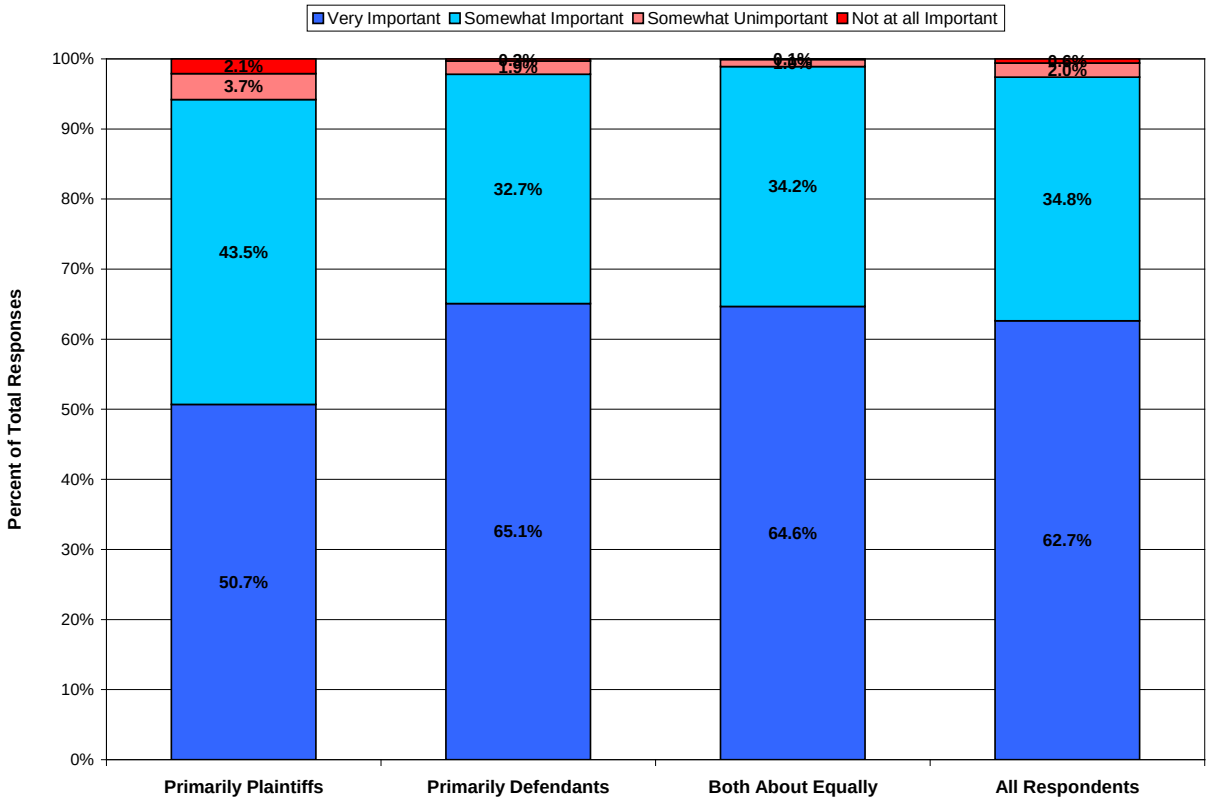

Table 11.13

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
Overall discovery costs.					
Primarily Plaintiffs	50.7	43.5	3.7	2.1	432
Primarily Defendants	65.1	32.7	1.9	0.3	1503
Both About Equally	64.6	34.2	1.0	0.1	704
All Respondents	62.7	34.8	2.0	0.6	2665

11.14 Deposition and time costs and the decision to settle.

Over 91% of survey respondents agree that deposition and time costs are at least somewhat important to the decision to settle, with defense and mixed practice lawyers somewhat more likely to agree than plaintiffs' lawyers, but not by a wide margin. Over 88% of plaintiffs' lawyers, 91.6% of defense lawyers, and 94.5% of mixed practice lawyers found these costs at least somewhat important, with above 30% in each category finding these costs very important to the decision to settle.

Figure 11.14: Deposition time and costs

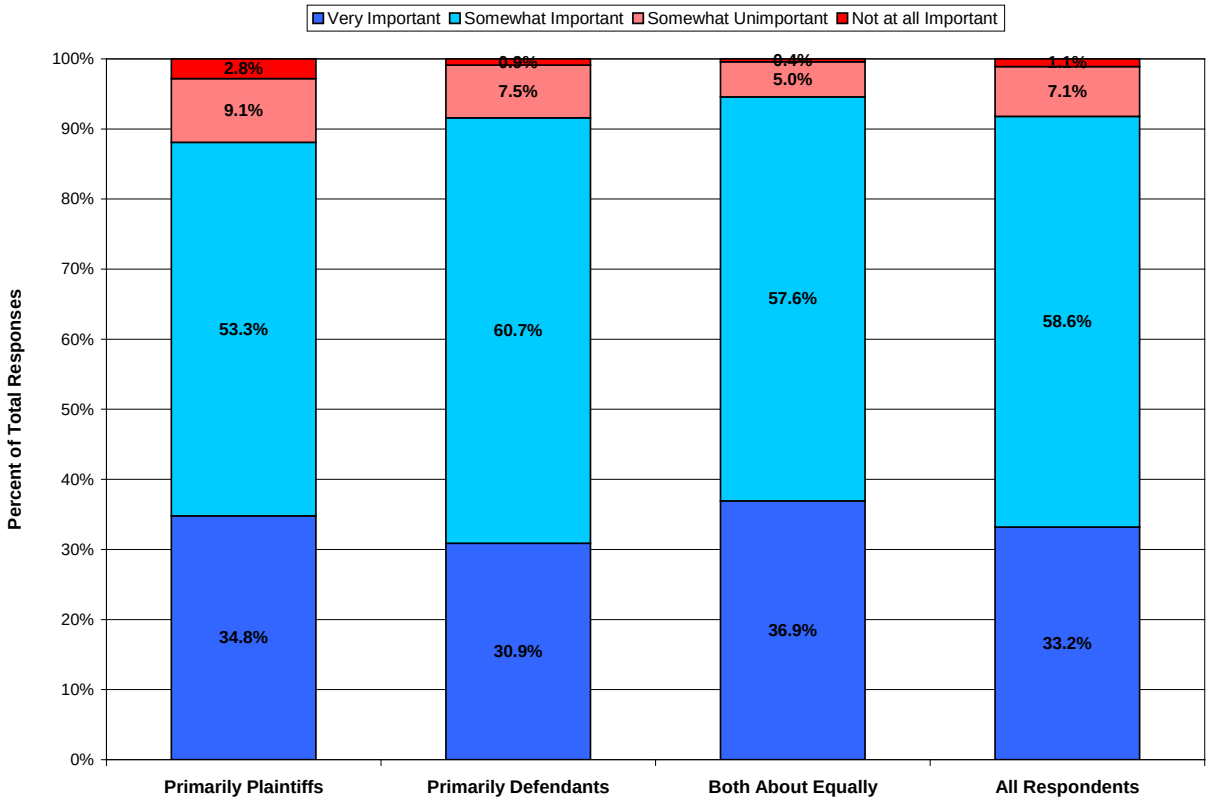

Table 11.14

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
Deposition time and costs.					
Primarily Plaintiffs	34.8	53.3	9.1	2.8	428
Primarily Defendants	30.9	60.7	7.5	0.9	1495
Both About Equally	36.9	57.6	5.0	0.4	696
All Respondents	33.2	58.6	7.1	1.1	2645

11.15 Document production costs and the decision to settle.

While nearly 90% of mixed practice and defense lawyers agree that document production costs are at least somewhat important to the decision to settle, only 71% of plaintiffs' lawyers agree, and nearly 5% of plaintiffs' lawyers believe that it is not important at all.

Figure 11.15: Document production costs

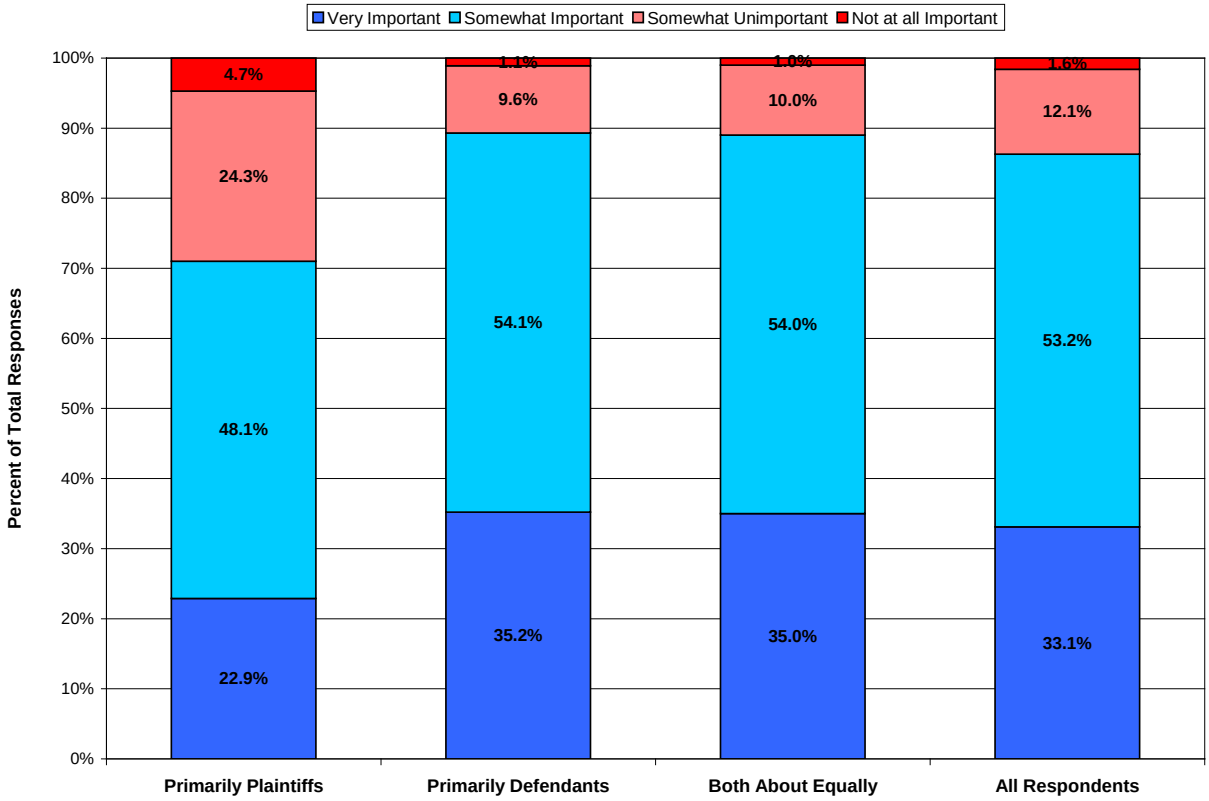

Table 11.15

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
Document production costs.					
Primarily Plaintiffs	22.9	48.1	24.3	4.7	428
Primarily Defendants	35.2	54.1	9.6	1.1	1498
Both About Equally	35.0	54.0	10.0	1.0	698
All Respondents	33.1	53.2	12.1	1.6	2650

11.16 E-discovery costs and the decision to settle.

In line with other questions in this survey regarding e-discovery, plaintiffs' lawyers are less likely to cite e-discovery costs as being important to the decision to settle. 91.5% of defense lawyers state that it is an important factor, with over 50% agreeing that it is very important. Similarly, 92.8% of mixed practice lawyers cite e-discovery as at least somewhat important to the decision to settle, with 46.9% agreeing that it is very important.

Figure 11.16: E-discovery costs

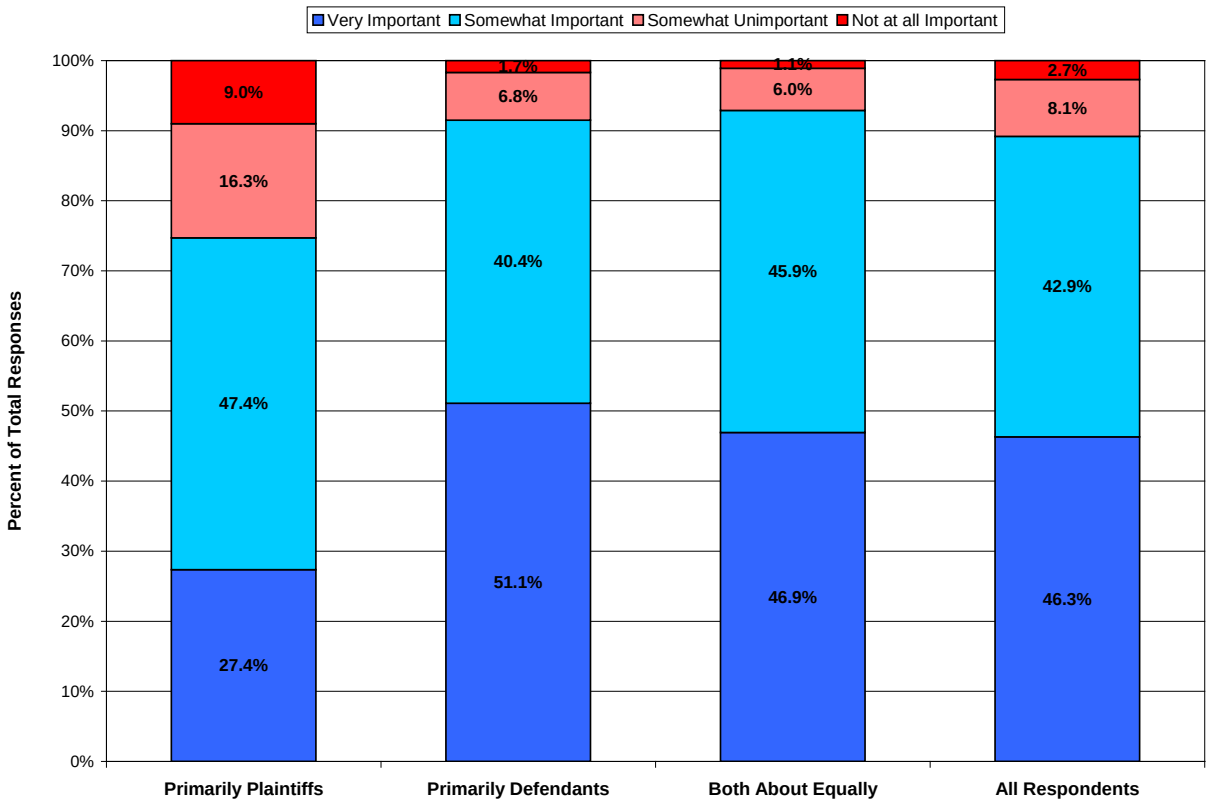

Table 11.16

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
E-discovery costs.					
Primarily Plaintiffs	27.4	47.4	16.3	9.0	424
Primarily Defendants	51.1	40.4	6.8	1.7	1496
Both About Equally	46.9	45.9	6.0	1.1	699
All Respondents	46.3	42.9	8.1	2.7	2644

11.17 Trial costs and the decision to settle.

Over 90% of all respondents agree that trial costs are at least a somewhat important factor in driving the decision to settle, with over 52% of each group agreeing that it is a very important factor.

Figure 11.17: Trial costs

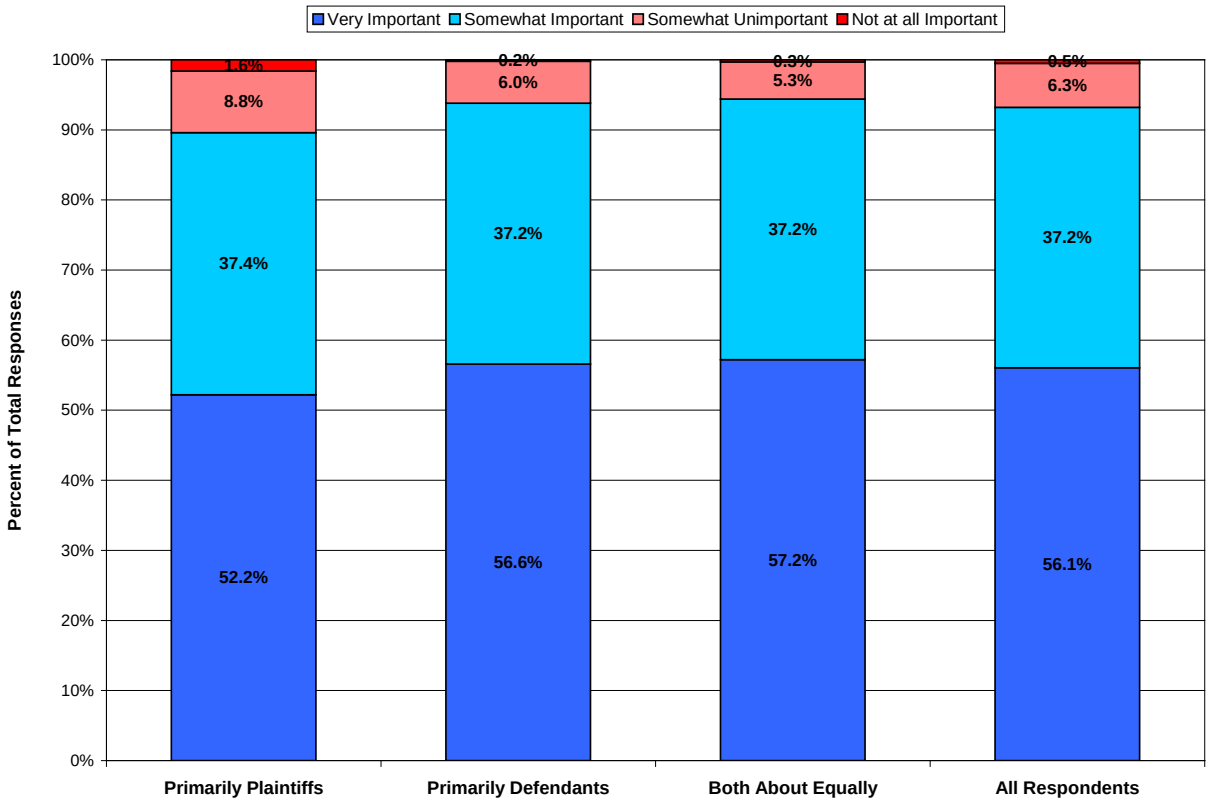

Table 11.17

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
Trial costs.					
Primarily Plaintiffs	52.2	37.4	8.8	1.6	433
Primarily Defendants	56.6	37.2	6.0	0.2	1504
Both About Equally	57.2	37.2	5.3	0.3	699
All Respondents	56.1	37.2	6.3	0.5	2662

11.18 Costs of legal research and the decision to settle.

The costs of legal research are not seen by the majority of any group as a somewhat important factor. 61.3% of plaintiffs' lawyers, 61.9% of defense lawyers, and 57.7% of mixed practice lawyers believe that it is somewhat unimportant or not important at all to the decision to settle.

Figure 11.18: Costs of legal research

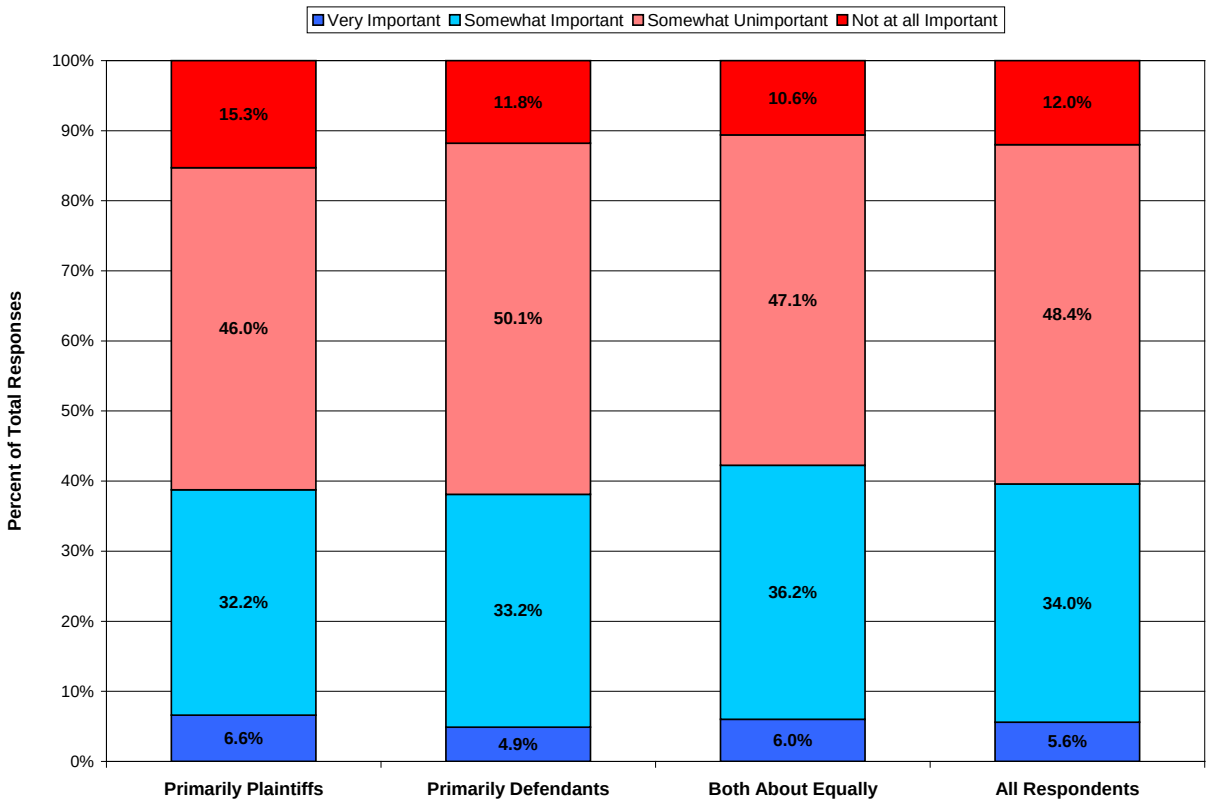

Table 11.18

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
Costs of legal research.					
Primarily Plaintiffs	6.6	32.2	46.0	15.3	426
Primarily Defendants	4.9	33.2	50.1	11.8	1492
Both About Equally	6.0	36.2	47.1	10.6	698
All Respondents	5.6	34.0	48.4	12.0	2641

11.19 Costs of motion practice and the decision to settle.

Mixed practice lawyers are the most likely to respond that the costs of motion practice are an important or very important factor in the decision to settle. 70% of mixed practice lawyers, 64.8% of defense lawyers, and 61.7% of plaintiffs' lawyers agree that it is at least somewhat important.

Figure 11.19: Costs of motion practice

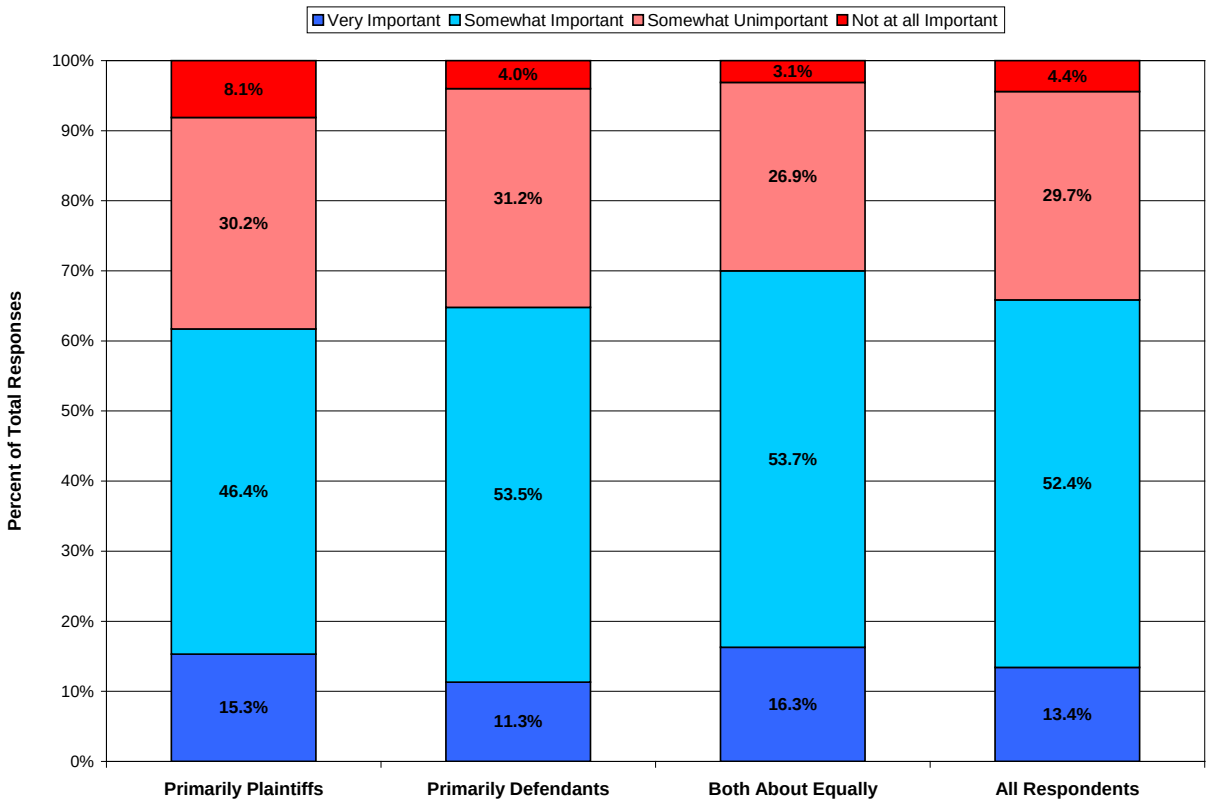

Table 11.19

	Very Important	Somewhat Important	Somewhat Unimportant	No at all Important	N
Costs of motion practice.					
Primarily Plaintiffs	15.3	46.4	30.2	8.1	431
Primarily Defendants	11.3	53.5	31.2	4.0	1490
Both About Equally	16.3	53.7	26.9	3.1	700
All Respondents	13.4	52.4	29.7	4.4	2646

11.20 Court appearances other than trial and the decision to settle.

Only 33.5% of all respondents agree that court appearances other than trial are at least somewhat important, and very few cited it as a very important factor in the decision to settle a case. Significantly, 13.8% of mixed practice lawyers, 15.6% of defense lawyers, and 16.9% of plaintiffs' lawyers believe that it is not important at all.

Figure 11.20: Court appearance other than trial

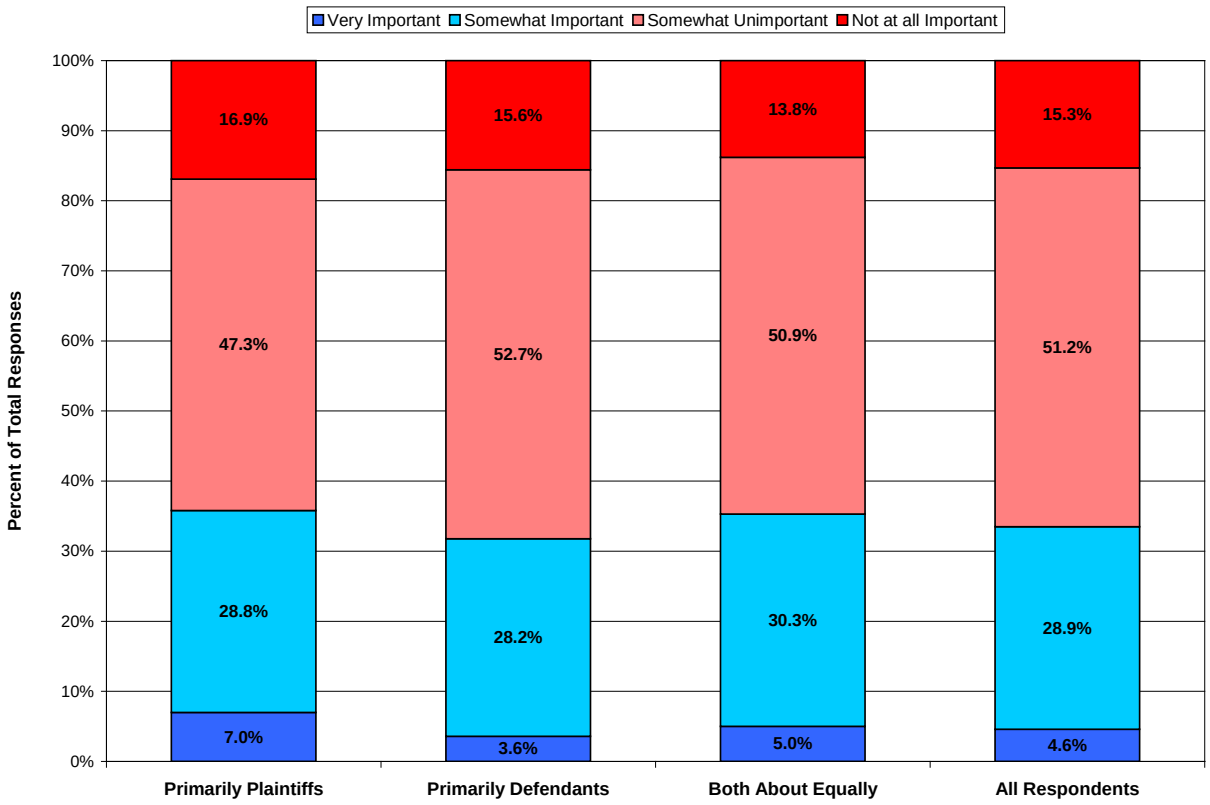

Table 11.20

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
Court appearance other than trial.					
Primarily Plaintiffs	7.0	28.8	47.3	16.9	427
Primarily Defendants	3.6	28.2	52.7	15.6	1489
Both About Equally	5.0	30.3	50.9	13.8	697
All Respondents	4.6	28.9	51.2	15.3	2638

11.21 Attorney fees and the decision to settle.

Over 94% of survey respondents agree that attorney fees are at least somewhat important to the decision to settle. A majority of defense and mixed practice lawyers cited attorney fees as very important (62.4% of defense lawyers, 67.7% of mixed practice lawyers, and 49.4% of plaintiffs' lawyers).

Figure 11.21: Attorney fees

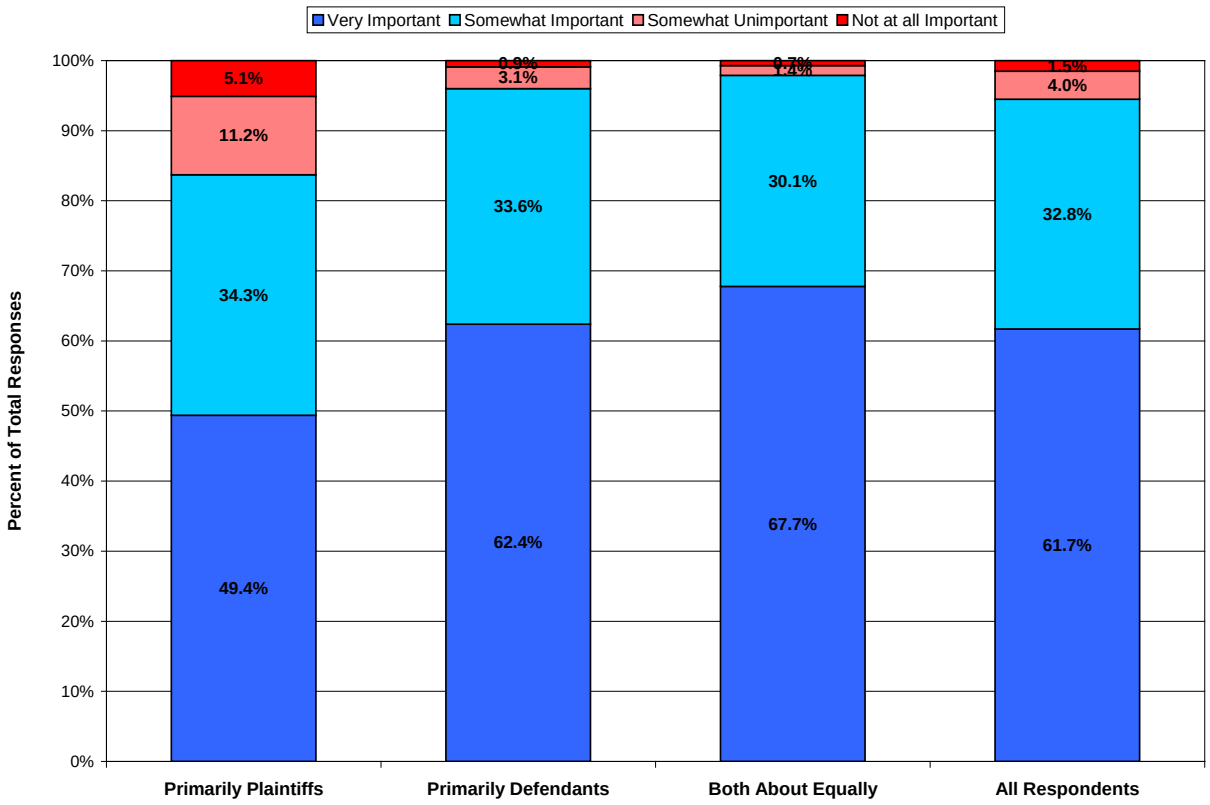

Table 11.21

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
Attorney fees.					
Primarily Plaintiffs	49.4	34.3	11.2	5.1	429
Primarily Defendants	62.4	33.6	3.1	0.9	1500
Both About Equally	67.7	30.1	1.4	0.7	700
All Respondents	61.7	32.8	4.0	1.5	2654

11.22 The monetary stakes in the litigation and the decision to settle.

Over 96% of plaintiffs' lawyers, 99% of defense lawyers, and 98.1% of mixed practice lawyers believe that the monetary stakes in litigation are at least somewhat important in the decision to settle. Of those, 68.3% of plaintiffs' lawyers, 75.8% of defense lawyers, and 74.2% of mixed practice lawyers stated that it is a very important factor.

Figure 11.22: The monetary stakes in the litigation

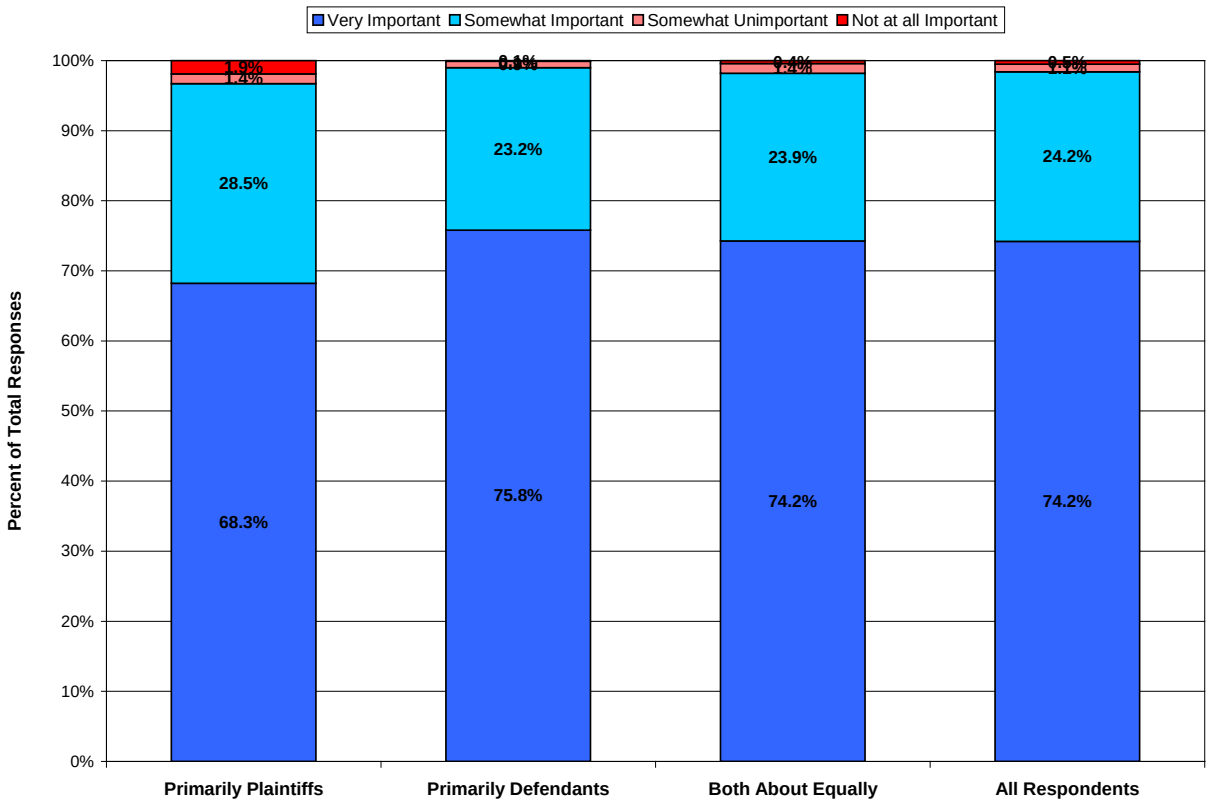

Table 11.22

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
The monetary stakes in the litigation.					
Primarily Plaintiffs	68.3	28.5	1.4	1.9	432
Primarily Defendants	75.8	23.2	0.9	0.1	1500
Both About Equally	74.2	23.9	1.4	0.4	699
All Respondents	74.2	24.2	1.1	0.5	2656

11.23 Likelihood of an unfavorable verdict or judgment and the decision to settle.

Over 96% of all respondents called the likelihood of an unfavorable verdict or judgment at least somewhat important, with 67.8% of plaintiffs' lawyers, 74.1% of defense lawyers, and 68.9% of mixed practice lawyers agreeing that it is a very important factor in deciding whether to settle.

Figure 11.23: Likelihood of an unfavorable verdict or judgment

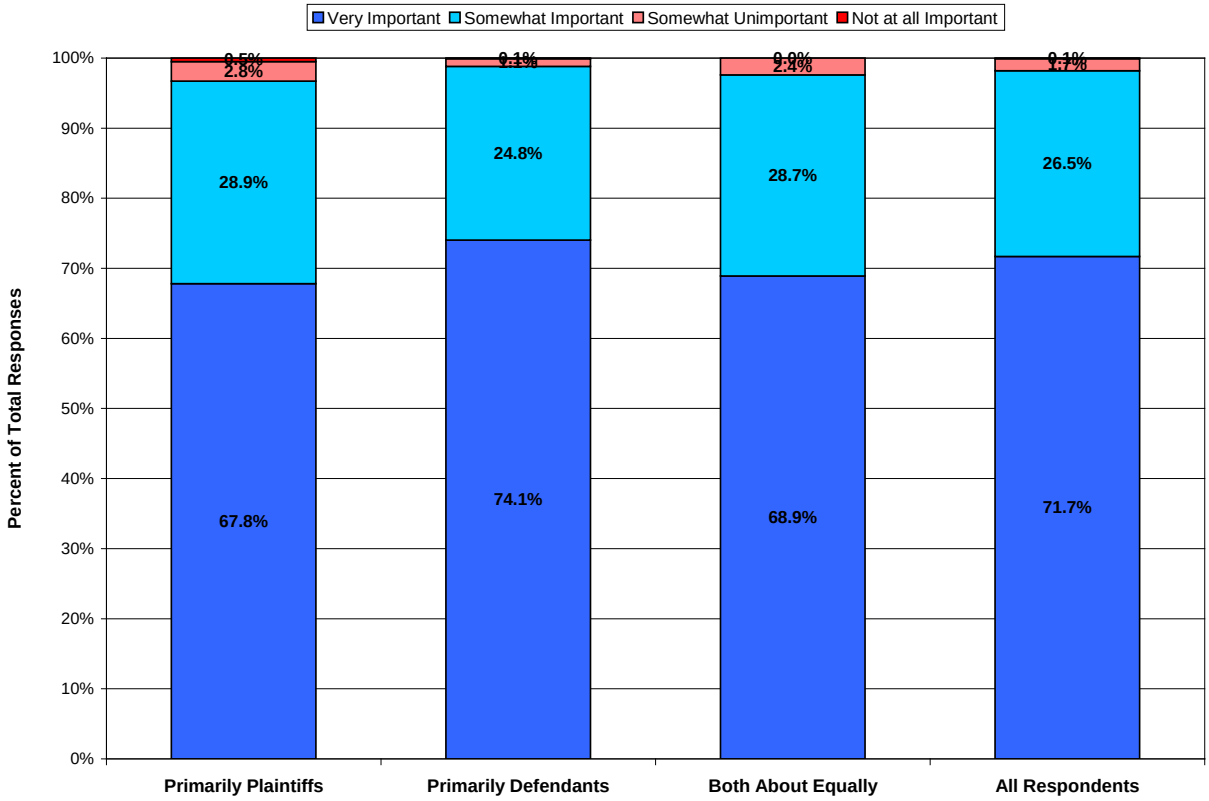

Table 11.23

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
Likelihood of an unfavorable verdict or judgment.					
Primarily Plaintiffs	67.8	28.9	2.8	0.5	429
Primarily Defendants	74.1	24.8	1.1	0.1	1504
Both About Equally	68.9	28.7	2.4	0.0	698
All Respondents	71.7	26.5	1.7	0.1	2656

11.24 Possibility of an unfavorable precedent and the decision to settle.

The possibility of an unfavorable precedent was seen by a moderate majority as an important factor that drives clients to settle. 59.4% of plaintiffs' lawyers, 69.7% of defense lawyers, and 53.2% of mixed practice lawyers all cited this possibility as at least somewhat important, with the majority of those respondents stating that it was only somewhat important rather than very important. Predictably, defense lawyers were somewhat more likely to fear an unfavorable precedent than plaintiffs' lawyers.

Figure 11.24: Possibility of an unfavorable precedent

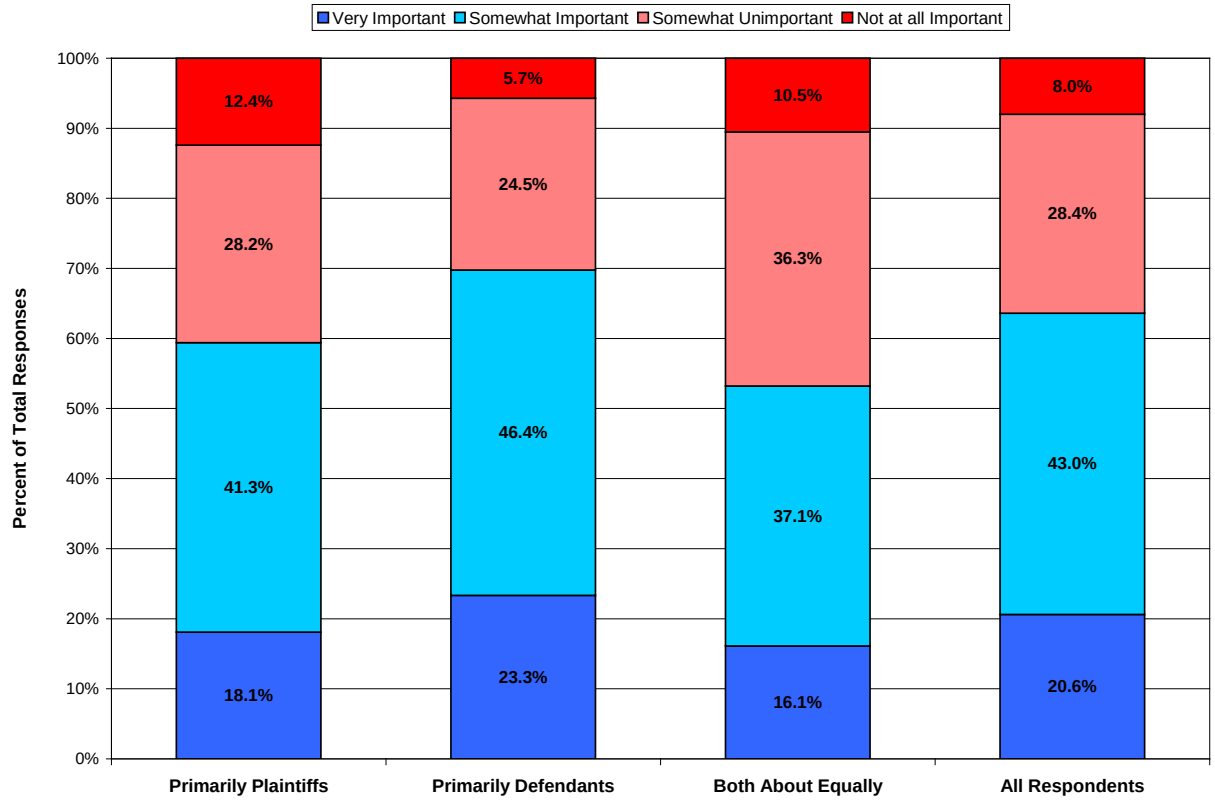

Table 11.24

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
Possibility of an unfavorable precedent.					
Primarily Plaintiffs	18.1	41.3	28.2	12.4	426
Primarily Defendants	23.3	46.4	24.5	5.7	1495
Both About Equally	16.1	37.1	36.3	10.5	695
All Respondents	20.6	43.0	28.4	8.0	2640

11.25 Possibility of unfavorable publicity from trial and the decision to settle.

Defense lawyers were somewhat more sensitive to the possibility of unfavorable publicity from trial for their clients than were plaintiffs' lawyers or mixed practice lawyers. While only 44.1% of plaintiffs' lawyers cited it as at least somewhat important to the decision to settle, 50% of mixed practice lawyers and 64.9% of defense lawyers believe it to be so. Notably, 20% of plaintiffs' lawyers found unfavorable publicity to be not important at all to the decision to settle.

Figure 11.25: Possibility of unfavorable publicity from trial

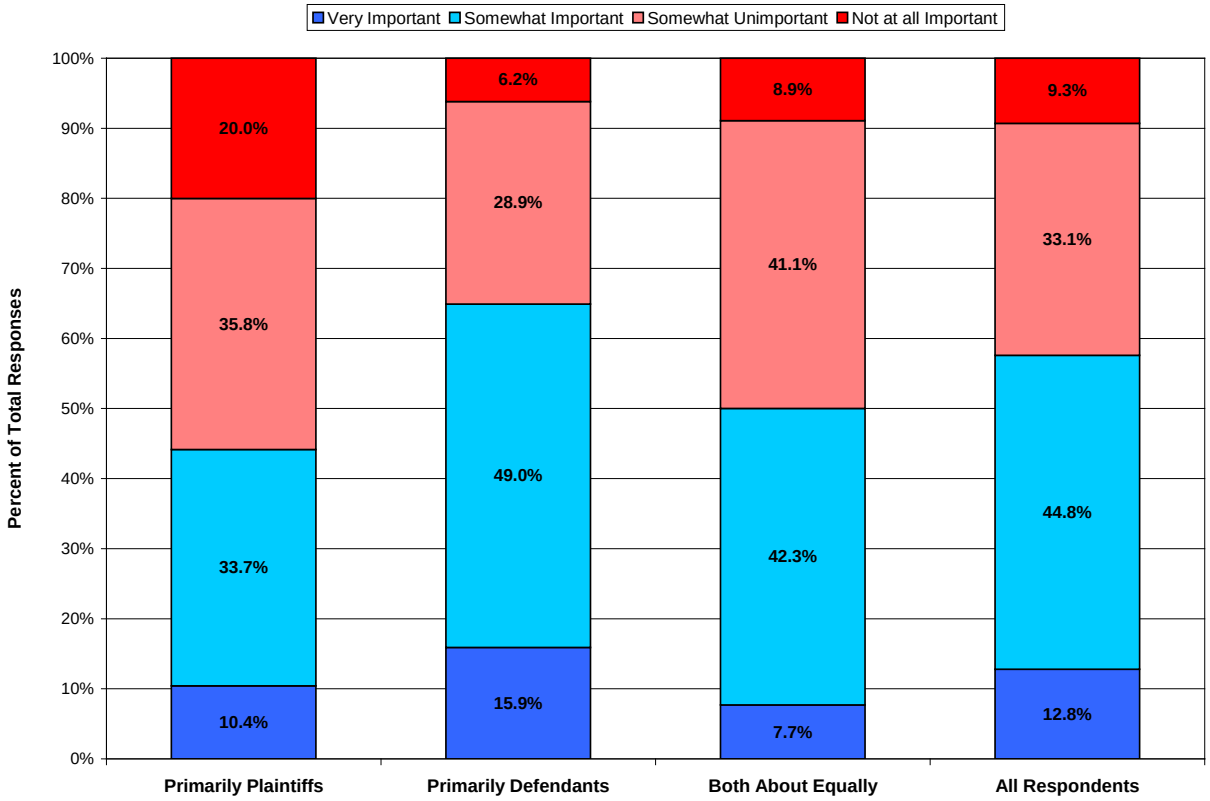

Table 11.25

	Very Important	Somewhat Important	Somewhat Unimportant	Not at all Important	N
Possibility of unfavorable publicity from trial.					
Primarily Plaintiffs	10.4	33.7	35.8	20.0	424
Primarily Defendants	15.9	49.0	28.9	6.2	1495
Both About Equally	7.7	42.3	41.1	8.9	698
All Respondents	12.8	44.8	33.1	9.3	2641

Turning away cases when they are not cost-effective and the decision to settle.

Respondents were asked a series of questions involving their willingness to turn away cases when it is not cost-effective to handle them, and what size case is too small is not cost effective to handle.

11.26 In general, does your firm turn away cases when it is not cost-effective to handle them?

Plaintiffs' lawyers were more likely than either defense or mixed practice lawyers to turn down a case because it was not cost-effective. Almost 90% of plaintiffs' lawyers agree that their firm, in general, will turn down a case if it is not cost-effective to handle it. 76.3% of defense lawyers and 84.5% of mixed practice lawyers responded that their firm would turn away such cases.

Table 11.26

	Yes	No	Not Sure	N
In general, does your firm turn away cases when it is not cost-effective to handle them?				
Primarily Plaintiffs	89.5	5.2	5.3	770
Primarily Defendants	76.3	10.9	12.8	1,528
Both About Equally	84.5	7.1	8.3	721
All Respondents	81.7	8.5	9.7	3,062

11.27 Threshold values.

Just over 25.2% of plaintiffs' lawyers cited $100,000 as a threshold value for cost-effectiveness. However, 43.1% of plaintiffs' lawyers responded either that they do not turn away cases based on the amount of money, or that the question was not applicable. Almost 30% of defense lawyers also cited $100,000 as the threshold value, but an additional 10.4% cited $250,000 as the threshold. Of defense lawyers, 47.4% stated that they either do not turn cases away, or that the question is not applicable to them. Mixed practice lawyers also cited $100,000 as the most common threshold, at 29.1%, with an additional 11.9% citing $250,000 as the threshold figure. 43.9% of mixed practice lawyers state that they do not turn cases away or the question is not applicable to them.

Table 11.27

Our firm routinely turns away cases with less than _____ at issue because it is not cost-effective to handle them.

ALL RESPONDENTS

	N	%
$100,000	687	28.5
$250,000	241	10.0
$500,000	170	7.0
$1,000,000	124	5.1
$5,000,000	99	4.1
We do not routinely turn cases away based on amount of money	717	29.7
Not applicable	374	15.5

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
$100,000	167	25.2
$250,000	50	7.5
$500,000	47	7.1
$1,000,000	47	7.1
$5,000,000	67	10.1
We do not routinely turn cases away based on amount of money	167	25.2
Not applicable	119	17.9

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
$100,000	336	29.9
$250,000	117	10.4
$500,000	69	6.1
$1,000,000	50	4.4
$5,000,000	20	1.8
We do not routinely turn cases away based on amount of money	370	32.9
Not applicable	163	14.5

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
$100,000	174	29.1
$250,000	71	11.9
$500,000	52	8.7
$1,000,000	26	4.4
$5,000,000	12	2.0
We do not routinely turn cases away based on amount of money	175	29.3
Not applicable	87	14.6

11.28 Growth or decline in practice.

When questioned on whether their firm's litigation practice has increased, decreased, or remained there same in the past five years, measured by the number of attorneys in litigation, 51.4% of defense lawyers, 47.2% of mixed practice lawyers, and 39% of plaintiffs' lawyers reported an increase. Less than 15% of respondents in each group reported a decrease in the number of lawyers practicing, and a significant percentage reported that the number stayed the same. It is unclear whether the responses are the result of consolidation among firms or growth of the nation's litigation business.

Table 11.28(a)

	Increased	Decreased	Remained the same	N
In your firm, has the litigation practice increased or decreased in the past five years (measured by number of attorneys doing litigation)?				
Primarily Plaintiffs	39.0	13.3	47.7	746
Primarily Defendants	51.4	14.7	33.9	1,460
Both About Equally	47.2	12.0	40.8	709
All Respondents	47.4	13.7	38.9	2,945

Survey respondents who answered affirmatively were then asked to estimate by what percentage their firm's litigation practices have grown. Plaintiffs' lawyers reported an average increase of 38.5%, while defense lawyers report an average of 27.1% growth, and mixed practice lawyers reported an increase of 29.8%. The median growth was significantly lower for each group, at 25%, 20%, and 21%, respectively. Again it is unclear whether the responses are the result of consolidation among firms or more from overall litigation.

Table 11.28(b)

	Mean	Median	N
*If **increased**, by what percentage has the litigation practice in your firm increased over the past five years?*			
Primarily Plaintiffs	38.5	25.0	262
Primarily Defendants	27.1	20.0	654
Both About Equally	29.8	21.0	306
All Respondents	30.2	20.0	1241

Survey respondents who replied that their practices decreased in the past five years were asked the same question. Plaintiffs' lawyers reported an average decrease of 27.8%, defense lawyers reported a 20.5% decrease, and mixed practice lawyers reported a 26.3% decrease.

Table 11.28(c)

	Mean	Median	N
*If **decreased**, by what percentage has the litigation practice in your firm decreased over the past five years?*			
Primarily Plaintiffs	27.8	25.0	88
Primarily Defendants	20.5	20.0	188
Both About Equally	26.3	20.0	73
All Respondents	23.5	20.0	352

11.29 Fee Arrangements.

Survey respondents were asked to identify their usual fee arrangement with clients. Predictably, plaintiffs' lawyers were much more likely than defense attorneys to charge contingent fees. Almost 75% of plaintiffs' lawyers charge contingent fees, while only 0.1% of defense lawyers and 4.6% mixed practice lawyers do so. Conversely, only 20.4% of plaintiffs' lawyers charge hourly fees, while 97.7% of defense lawyers and 90.8% of mixed practice lawyers charge by the hour.

Table 11.29

What is your usual arrangement with clients regarding attorney fees?

ALL RESPONDENTS

	N	%
Hourly fees	1123	73.2
Contingent fee	355	23.1
Other arrangement	14	0.9
I can't say	43	2.8

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
Hourly fees	92	20.4
Contingent fee	334	74.2
Other arrangement	6	1.3
I can't say	18	4.0

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
Hourly fees	687	97.7
Contingent fee	1	0.1
Other arrangement	5	0.7
I can't say	10	1.4

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
Hourly fees	337	90.8
Contingent fee	17	4.6
Other arrangement	3	0.8
I can't say	14	3.8

11.30 Billable Hours.

Respondents who bill by the hour rate were then asked to select their usual hourly rate. Mixed practice lawyers had the highest average, at $393.48 per hour, plaintiffs' lawyers the second highest at $387.60 per hour, and defense lawyers the least at $367.85 per hour. The median figures were somewhat lower than the mean, at $362.50 for mixed practice lawyers, $350 for plaintiffs' lawyers, and $335 for defense lawyers.

Table 11.30(a)

	Mean	Median	N
What is your usual hourly rate?			
Primarily Plaintiffs	387.60	350.00	392
Primarily Defendants	367.85	335.00	1404
Both About Equally	393.48	362.50	676
All Respondents	378.07	350.00	2496

The respondents were asked whether their firm has an expectation of annual billable hours and what level of hours their firm requires. Only 29.6% of plaintiffs' lawyers responded affirmatively, and reported an average billable requirement of just under 1900 hours. Defense lawyers reported an annual billable requirement 77.7% of the time, with an average requirement of 1829 hours, just over the median response of 1800 hours. Mixed practice lawyers responded affirmatively 61.5% of the time, and reported an annual requirement of just less than 1800 hours, which was also the median.

Table 11.30(b)

	Yes	No	N
Does your firm have an expectation of annual billable hours for lawyers at your level?			
Primarily Plaintiffs	29.6	70.4	767
Primarily Defendants	77.7	22.3	1710
Both About Equally	61.5	38.5	730
All Respondents	61.4	38.6	3035

Table 11.30(c)

	Mean	Median	N
What is the expectation of annual billable hours?			
Primarily Plaintiffs	1889.41	1900	205
Primarily Defendants	1828.89	1800	1114
Both About Equally	1790.35	1800	431
All Respondents	1826.58	1800	1763

12. Alternative Dispute Resolution

Survey respondents were asked to respond to a series of questions regarding their experience with alternative dispute resolution ("ADR"). Respondents were asked about costs, efficiency, and fairness of three types of ADR.

12.1 How much of your practice is devoted to ADR?

Respondents were asked what percentage of their cases proceeds exclusively through some ADR process as opposed to the courts. Responses were fairly consistent among the groups, with mixed practice lawyers more likely to report a larger number of cases proceeding exclusively through ADR tribunals. Plaintiffs' lawyers reported less than 10% of their cases 61.8% of the time. Over 54% of defense lawyers and 48% of mixed practice lawyers also reported less than 10% of their cases proceeding through ADR tribunals. 23.8% of defense lawyers and 25.4% of mixed practice lawyers reported that between 10% and 25% of their practices proceeded exclusively through ADR, while only about 10% of each group reported more than 50% of their practice being conducted exclusively through such processes.

Table 12.1

	Less than 10%	10-25%	25-50%	More than 50%	N
Primarily Plaintiffs	61.8	15.5	12.0	10.8	809
Primarily Defendants	54.2	23.8	11.9	10.2	1602
Both About Equally	48.0	25.4	16.3	10.3	759
All Respondents	54.5	22.1	12.9	10.5	3204

12.2 Do clients prefer ADR over litigation?

Respondents were then asked whether, in general, their clients would choose arbitration or other private ADR over litigation if they had a choice. A fairly substantial majority of each group reported that their clients would not choose private ADR over litigation. While 63.5% of defense lawyers and 69% of mixed practice lawyers believe that their clients would not choose ADR over a court, 80.4% of plaintiffs' lawyers believe that their clients prefer litigation.

Table 12.2

	Yes	No	N
Primarily Plaintiffs	19.6	80.4	802
Primarily Defendants	36.5	63.5	1593
Both About Equally	31.0	69.0	758
All Respondents	30.8	69.2	3187

12.3 Arbitration versus Litigation.

Respondents were asked a series of questions regarding the efficiency and effectiveness of arbitration as compared to litigation. Survey respondents expressed a variety of views on cost. Plaintiffs' lawyers were more likely than the other groups to believe that arbitration increases costs (27.9% versus 15.1% of defense lawyers and 17.4% of mixed practice lawyers). Defense and mixed practice lawyers were more likely to believe that arbitration decreases costs (39.2% and 37.7%, respectively), or makes no difference in cost (36.2% and 38.4%, respectively).

Figure 12.3(a): Increase or decrease costs to your client

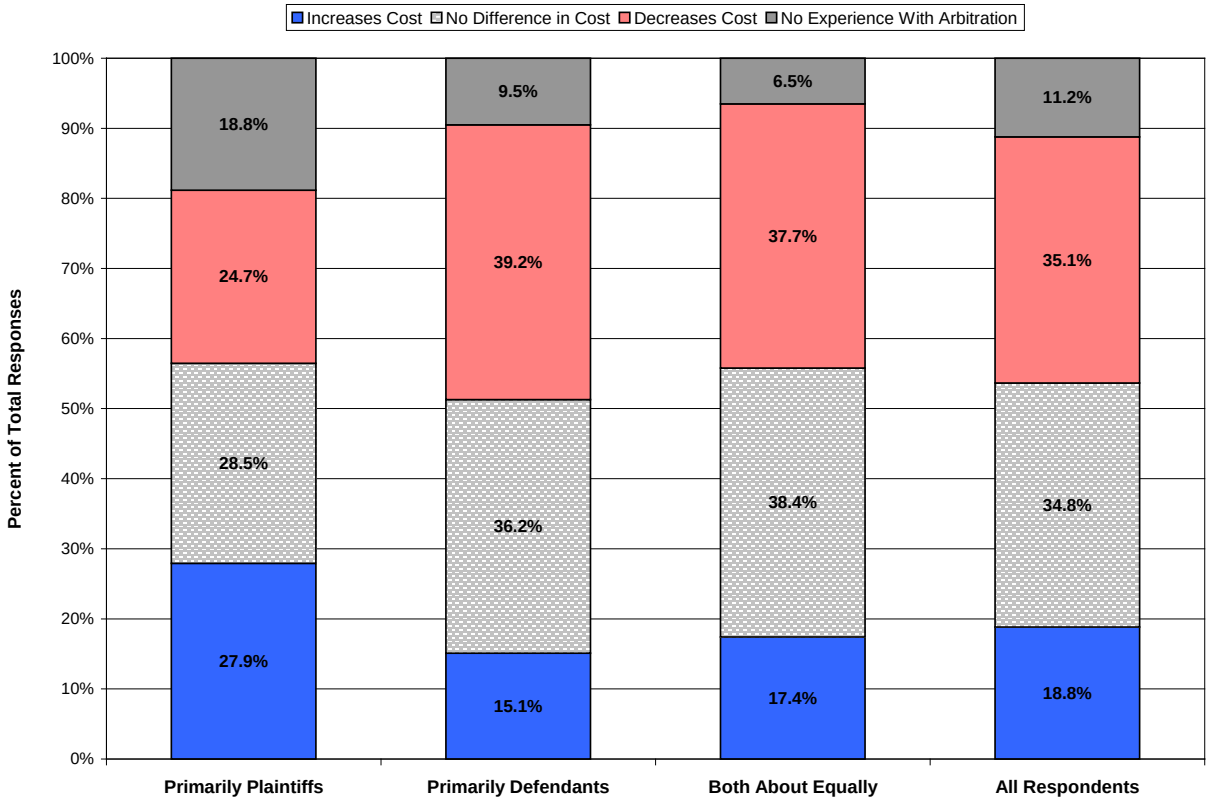

Table 12.3(a)

	Increases Cost	Decreases Cost	No Difference in Cost	No Experience With Arbitration	N
Increase or decrease costs to your client.					
Primarily Plaintiffs	27.9	24.7	28.5	18.8	796
Primarily Defendants	15.1	39.2	36.2	9.5	1600
Both About Equally	17.4	37.7	38.4	6.5	758
All Respondents	18.8	35.1	34.8	11.2	3187

Respondents were then asked whether arbitration shortens or lengthens the time to resolution. A majority of each group believe that arbitration shortens the time to resolution, although defense lawyers and mixed practice lawyers were more likely to respond that way than plaintiffs' lawyers. Over 68% of defense lawyers and over 63% of mixed practice lawyers stated that arbitration shortens time to disposition, while only 51.2% of plaintiffs' lawyers agree. Plaintiffs' lawyers were more likely to believe that arbitration lengthens the time to disposition.

Figure 12.3(b): Lengthen or shorten the time to disposition

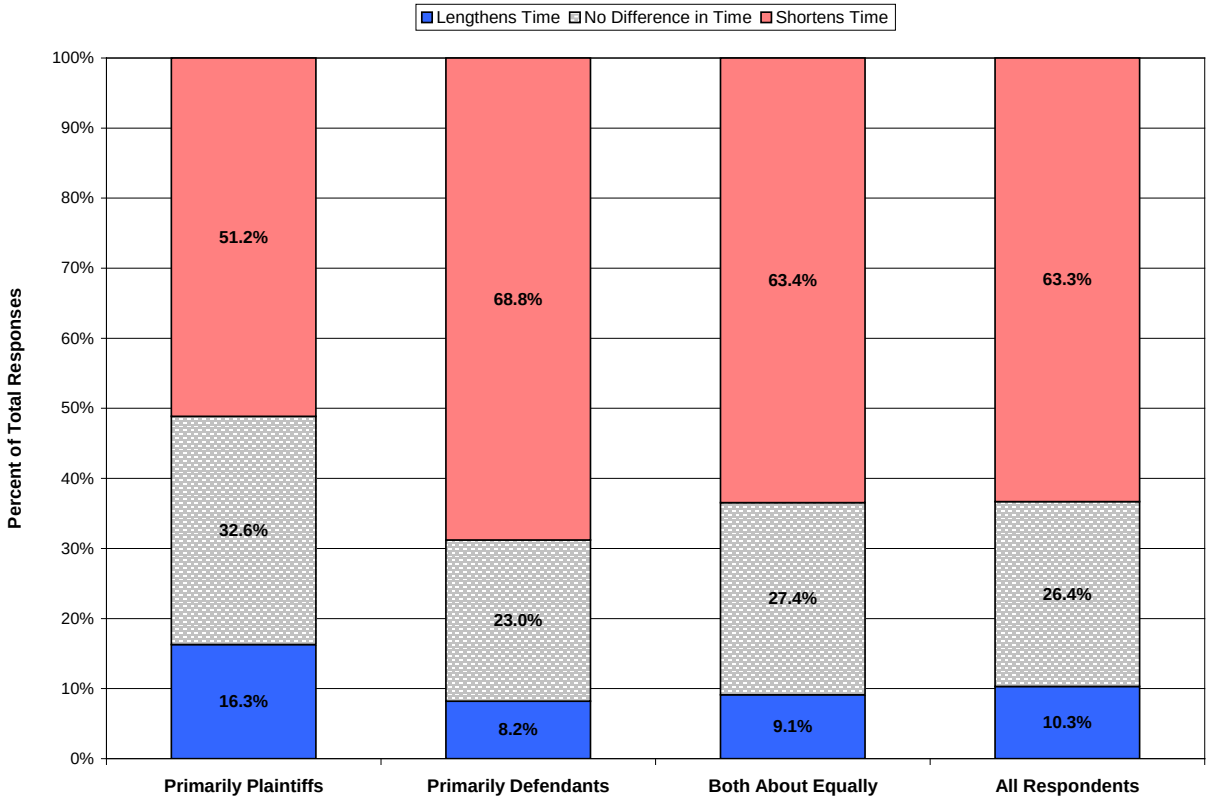

Table 12.3(b)

	Lengthens Time	Shortens Time	No Difference in Time	N
Lengthen or shorten the time to disposition.				
Primarily Plaintiffs	16.3	51.2	32.6	645
Primarily Defendants	8.2	68.8	23.0	1441
Both About Equally	9.1	63.4	27.4	711
All Respondents	10.3	63.3	26.4	2823

Finally, respondents were asked whether arbitration produces fairer or less fair outcomes. A majority of plaintiffs' lawyers and a significant percentage of defense and mixed practice lawyers believe that arbitration leads to less fair outcomes. Over 60% of plaintiffs' lawyers, about half of defense lawyers and 44.4% of mixed practice lawyers believe that there is no difference. Only about 10% of defense and mixed practice lawyers, and only 7.6% of plaintiffs' lawyers responded that the outcomes of arbitration proceedings are actually fairer.

Figure 12.3(c): Produce fairer or less fair outcomes

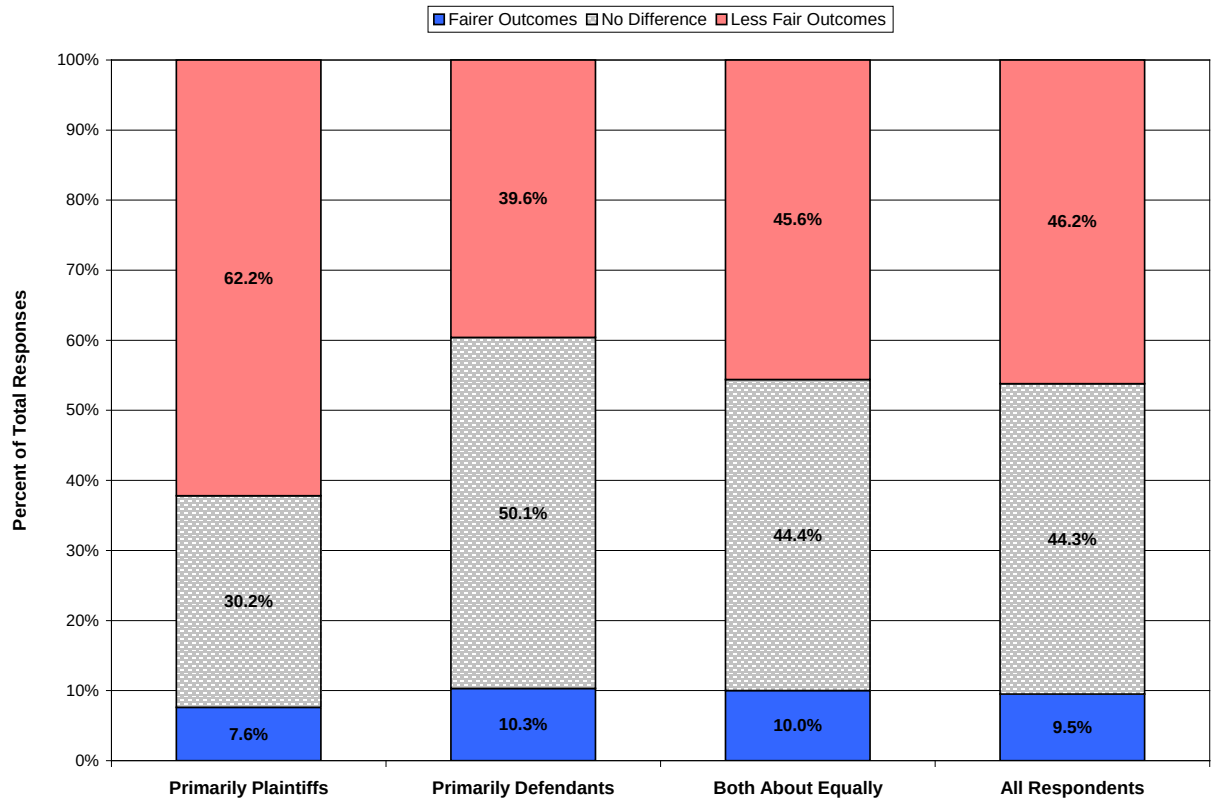

Table 12.3(c)

	Fairer Outcomes	Less Fair Outcomes	No Difference	N
Produce fairer or less fair outcomes.				
Primarily Plaintiffs	7.6	62.2	30.2	633
Primarily Defendants	10.3	39.6	50.1	1418
Both About Equally	10.0	45.6	44.4	702
All Respondents	9.5	46.2	44.3	2779

12.4 Mediation versus Litigation.

In stark contrast to the responses about arbitration, survey respondents routinely saw time and cost benefits to mediation, and responded commonly that mediation leads to fairer outcomes. Approximately 80% of all lawyers believe that mediation has either no effect, or a positive effect on cost. Almost 60% of plaintiffs' lawyers and approximately 65% of defense and mixed practice lawyers agree that mediation generally decreases the costs to the client. About half of the remaining lawyers in each group were divided between believing that there were increased costs to mediation, or that there was no difference in cost.

Figure 12.4(a): Increase or decrease costs to your client

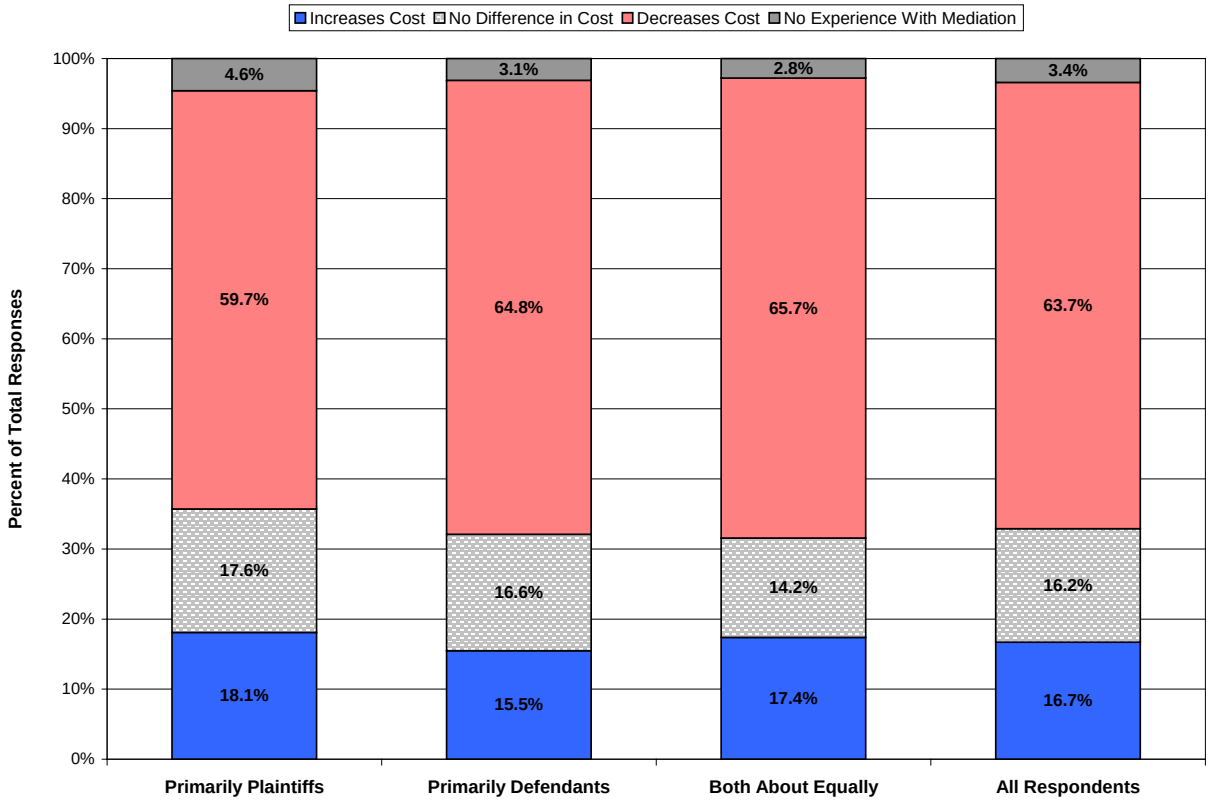

Table 12.4(a)

	Increases Cost	Decreases Cost	No Difference in Cost	No Experience With Mediation	N
Increase or decrease costs to your client.					
Primarily Plaintiffs	18.1	59.7	17.6	4.6	802
Primarily Defendants	15.5	64.8	16.6	3.1	1587
Both About Equally	17.4	65.7	14.2	2.8	755
All Respondents	16.7	63.7	16.2	3.4	3177

Survey respondents also generally agree that mediation does not lengthen time to disposition. Approximately 70% of lawyers in each group believe that mediation shortens time to disposition, and over 20% of each group believes that it makes no time difference.

Figure 12.4(b): Lengthen or shorten the time to disposition

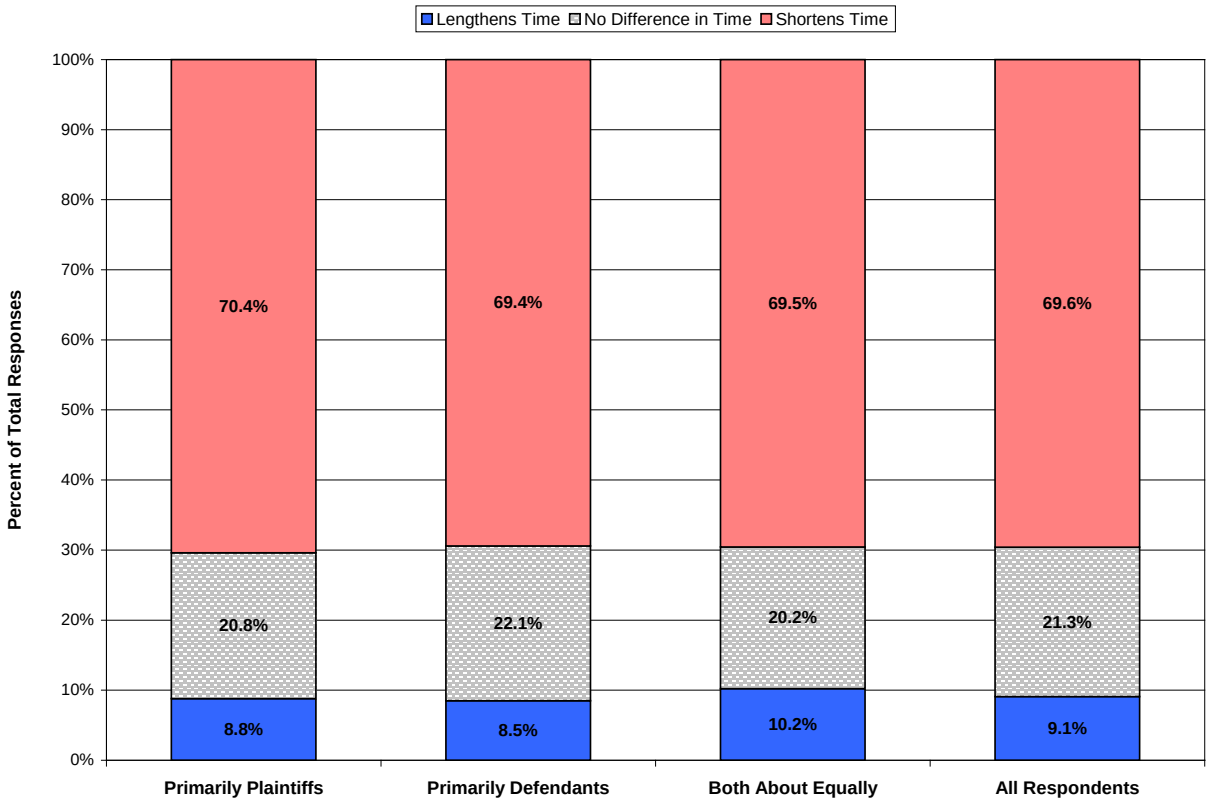

Table 12.4(b)

	Lengthens Time	Shortens Time	No Difference in Time	N
Lengthen or shorten the time to disposition.				
Primarily Plaintiffs	8.8	70.4	20.8	764
Primarily Defendants	8.5	69.4	22.1	1541
Both About Equally	10.2	69.5	20.2	732
All Respondents	9.1	69.6	21.3	3069

Unlike arbitration, where a significant number of lawyers stated that outcomes are less fair, survey respondents were much more likely to agree that mediation leads to fairer outcomes. Over 50% of mixed practice lawyers, 48.5% of plaintiffs' lawyers, and 47.3% of defense lawyers agree that mediation leads to fairer outcomes. Only 16.4% of defense lawyers, 12.9% of mixed practice lawyers, and 11% of plaintiffs' lawyers believe the outcomes produced are less fair. The remaining 35-40% from each group state that there is no difference in outcomes.

Figure 12.4(c): Produce fairer or less fair outcomes

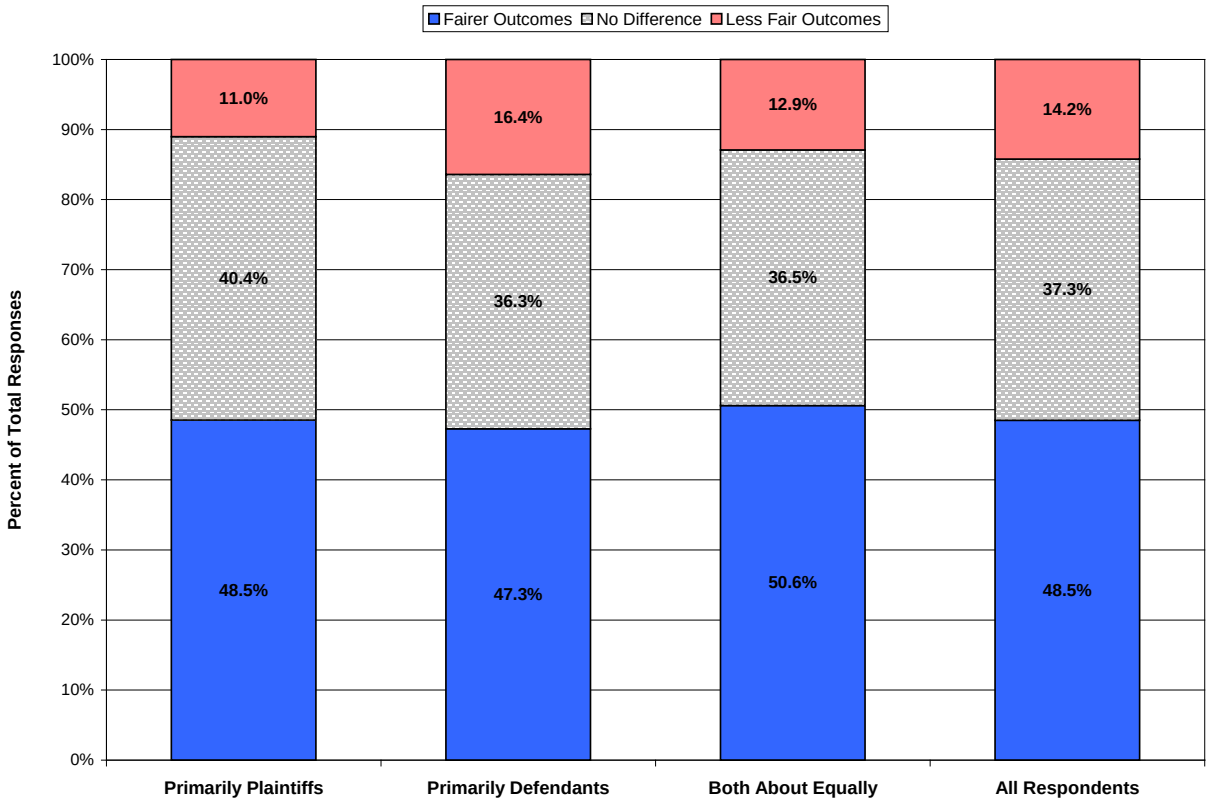

Table 12.4(c)

	Fairer Outcomes	Less Fair Outcomes	No Difference	N
Produce fairer or less fair outcomes.				
Primarily Plaintiffs	48.5	11.0	40.4	752
Primarily Defendants	47.3	16.4	36.3	1511
Both About Equally	50.6	12.9	36.5	721
All Respondents	48.5	14.2	37.3	3014

12.5 Early Neutral Evaluation versus Litigation.

Around half of all survey respondents reported no experience with early neutral evaluation. Of those that have had experience with it, over half the respondents believe that it decreases costs, approximately 14% stated that there is no difference in cost, and 8.2% of all respondents believe it increases costs.

Figure 12.5(a): Increase or decrease costs to your client

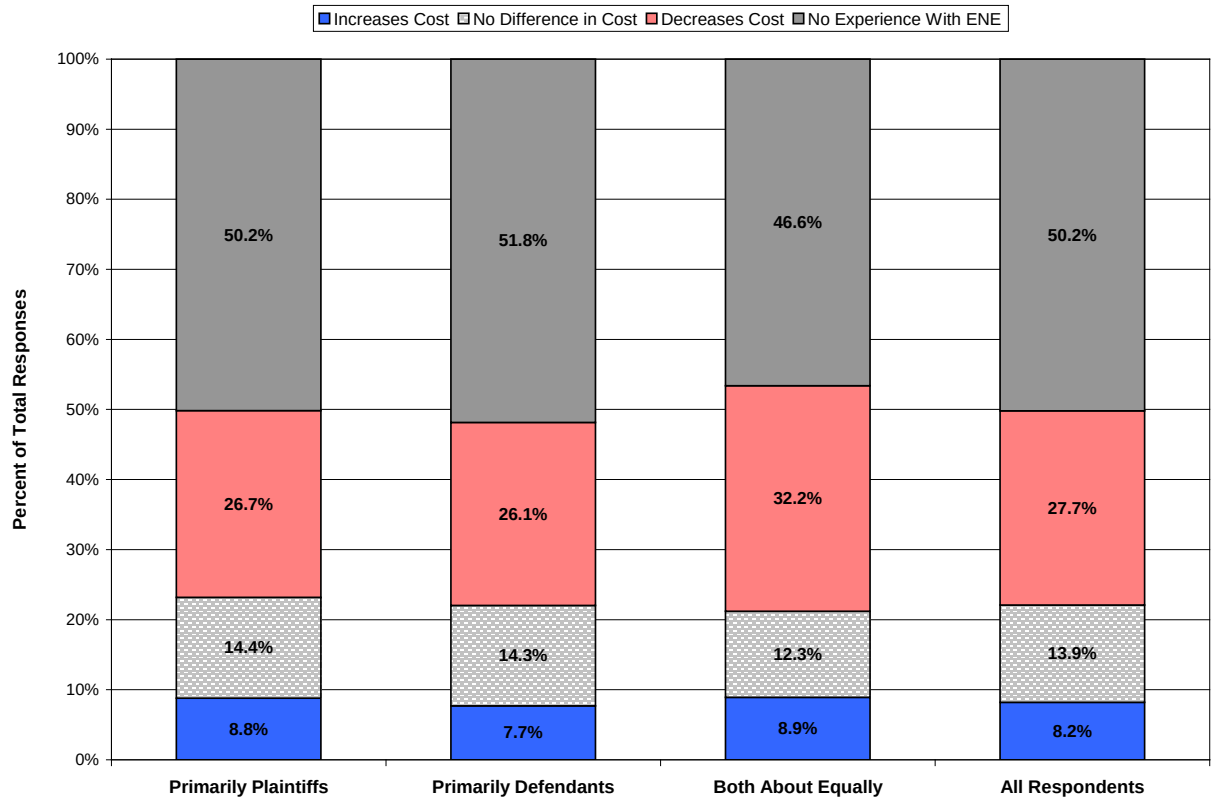

Table 12.5(a)

	Increases Cost	Decreases Cost	No Difference in Cost	No Experience With ENE	N
Increase or decrease costs to your client.					
Primarily Plaintiffs	8.8	26.7	14.4	50.2	799
Primarily Defendants	7.7	26.1	14.3	51.8	1590
Both About Equally	8.9	32.2	12.3	46.6	745
All Respondents	8.2	27.7	13.9	50.2	3167

Over half of mixed practice lawyers and almost half of the other groups believe that early neutral evaluation shortens the time to disposition. A significant percentage of each group also believes that it makes no difference in time. Only 13% of plaintiffs' lawyers and less than 10% of defense and mixed practice lawyers believe that early neutral evaluation lengthens the time to disposition.

Figure 12.5(b): Lengthen or shorten the time to disposition

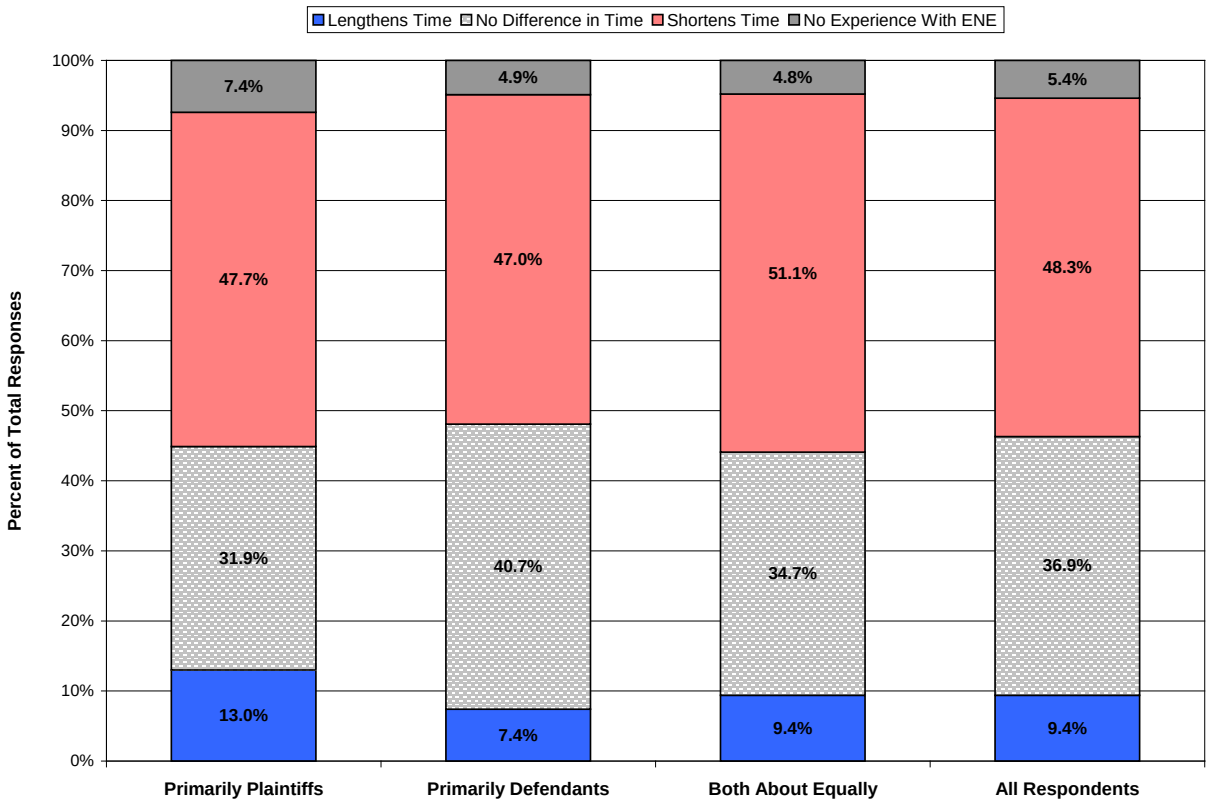

Table 12.5(b)

	Lengthens Time	Shortens Time	No Difference in Time	No Experience With ENE	N
Lengthen or shorten the time to disposition.					
Primarily Plaintiffs	13.0	47.7	31.9	7.4	392
Primarily Defendants	7.4	47.0	40.7	4.9	759
Both About Equally	9.4	51.1	34.7	4.8	395
All Respondents	9.4	48.3	36.9	5.4	1560

Over half of all respondents believe that there is no difference in outcome in early neutral evaluation as compared with litigation. Only 12.5% of plaintiffs' lawyers and less than 10% of defense and mixed practice lawyers believe outcomes are less fair in early neutral evaluation.

Figure 12.5(c): Produce fairer or less fair outcomes

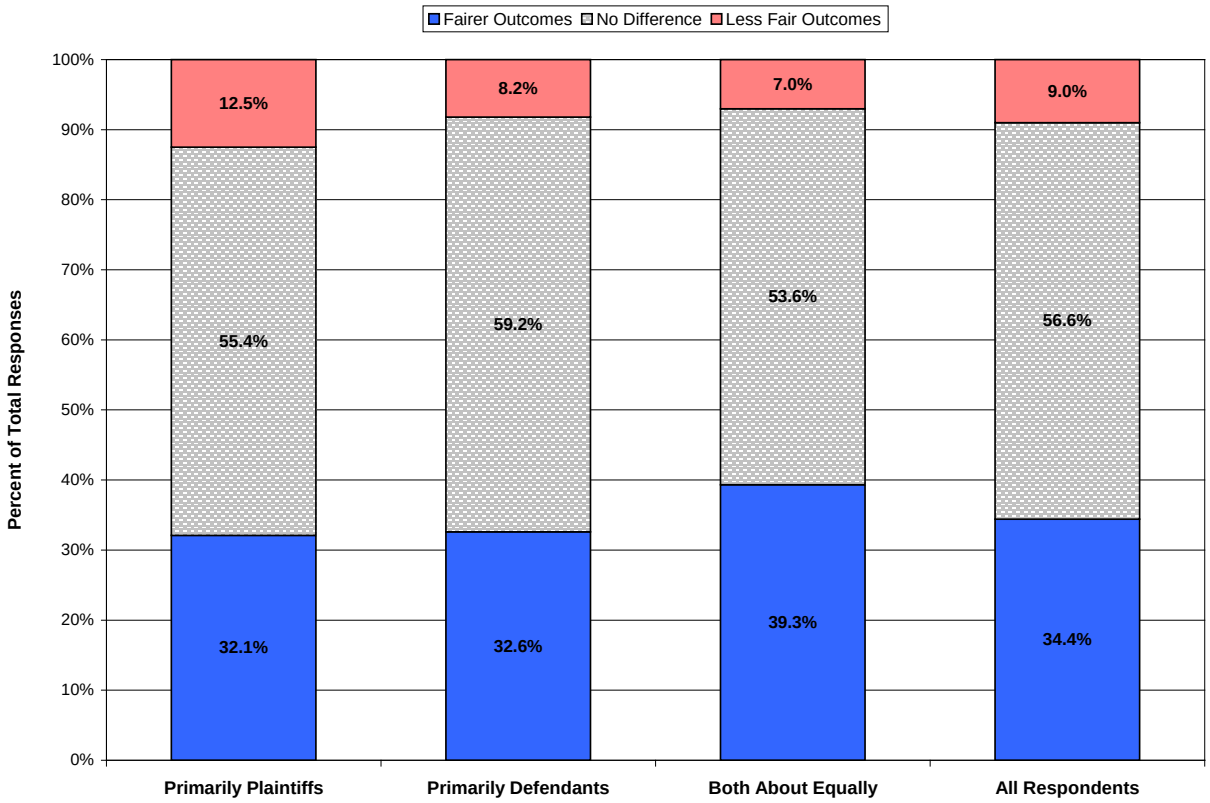

Table 12.5(c)

	Fairer Outcomes	Less Fair Outcomes	No Difference	N
Produce fairer or less fair outcomes.				
Primarily Plaintiffs	32.1	12.5	55.4	368
Primarily Defendants	32.6	8.2	59.2	731
Both About Equally	39.3	7.0	53.6	384
All Respondents	34.4	9.0	56.6	1497

12.6 Cost savings of ADR.

Respondents were asked which of the ADR processes generally provides the greatest savings in time and expense over litigation. Over 66% of plaintiffs' lawyers, 60.4% of defense lawyers, and 61.9% of mixed practice lawyers responded that mediation provides the greatest savings in time and expense over litigation. Less than 11% of respondents in each group responded that any of the other alternatives were the most cost-effective, although 17.2% of plaintiffs' lawyers, 15.5% of defense lawyers, and 13.7% of mixed practice lawyers reported that they do not know which is the greatest time and cost saver.

Table 12.6

Which of the following alternative dispute resolution processes generally provides the greatest savings in time and expense over litigation?

ALL RESPONDENTS

	N	%
Arbitration	242	7.7
Mediation	1961	62.3
Early Neutral Evaluation	252	8.0
No Difference	201	6.4
Do Not Know	493	15.7

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
Arbitration	33	4.2
Mediation	526	66.7
Early Neutral Evaluation	47	6.0
No Difference	47	6.0
Do Not Know	136	17.2

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
Arbitration	148	9.3
Mediation	958	60.4
Early Neutral Evaluation	128	8.1
No Difference	106	6.7
Do Not Know	245	15.5

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
Arbitration	59	7.9
Mediation	460	61.9
Early Neutral Evaluation	77	10.4
No Difference	45	6.1
Do Not Know	102	13.7

12.7 Fairness of ADR.

When asked whether litigation or one of the ADR processes results in the highest level of fairness, 48.1% of plaintiffs' lawyers, 40.8% of defense lawyers, and 41.1% of mixed practice lawyers responded that they believe mediation provides the fairest outcomes. The second most popular choice was litigation, as 26.7% of plaintiffs' lawyers, 23.4% of defense lawyers, and 22.9% of mixed practice lawyers chose litigation as resulting in the fairest outcomes. A number of lawyers responded that they do not know which provides a higher level of fairness, with 15.4% of plaintiffs' lawyers, 17.1% of defense lawyers, and 13% of mixed practice lawyers responding that way. Only 2.4% of plaintiffs' lawyers, 5.7% of defense lawyers, and 6.1% of mixed practice lawyers choose arbitration, and only 3.3% of plaintiffs' lawyers, 4.1% of defense lawyers, and 6.8% of mixed practice lawyers choose early neutral evaluation.

Table 12.7

Which of the following processes generally provides the highest level of fairness?

ALL RESPONDENTS

	N	%
Arbitration	155	4.9
Mediation	1341	42.7
Early Neutral Evaluation	140	4.5
Litigation	759	24.2
No Difference	249	7.9
Do Not Know	494	15.7

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
Arbitration	19	2.4
Mediation	380	48.1
Early Neutral Evaluation	26	3.3
Litigation	211	26.7
No Difference	32	4.1
Do Not Know	122	15.4

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
Arbitration	90	5.7
Mediation	644	40.8
Early Neutral Evaluation	64	4.1
Litigation	370	23.4
No Difference	140	8.9
Do Not Know	270	17.1

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
Arbitration	45	6.1
Mediation	304	41.1
Early Neutral Evaluation	50	6.8
Litigation	169	22.9
No Difference	75	10.1
Do Not Know	96	13.0

12.8 Effect of court-ordered ADR.

Respondents were then asked whether court-ordered ADR is a negative or positive development in managing the costs of litigation. Over 60% of all respondents agree that it has been a positive development, including 56.6% of plaintiffs' lawyers, 60.5% of defense lawyers, and 64.6% of mixed practice lawyers. Significantly, only 22% of plaintiffs' lawyers, 19.4% of defense lawyers, and 18.4% of mixed practice lawyers believe that it has had a negative impact.

Table 12.8(a)

Is court-ordered alternative dispute resolution a negative or positive development in managing costs?

ALL RESPONDENTS

	N	%
Negative	612	19.8
Positive	1873	60.5
No Impact	610	19.7

RESPONDENTS PRIMARILY REPRESENTING PLAINTIFFS

	N	%
Negative	171	22.0
Positive	440	56.6
No Impact	167	21.5

RESPONDENTS PRIMARILY REPRESENTING DEFENDANTS

	N	%
Negative	301	19.4
Positive	940	60.5
No Impact	312	20.1

RESPONDENTS REPRESENTING PLAINTIFFS AND DEFENDANTS ABOUT EQUALLY

	N	%
Negative	135	18.4
Positive	473	64.6
No Impact	124	16.9

Over 70% of each group believes that court-ordered ADR increases the number of cases that settle without trial.

Figure 12.8(b): Increase the number of cases that settle without trial

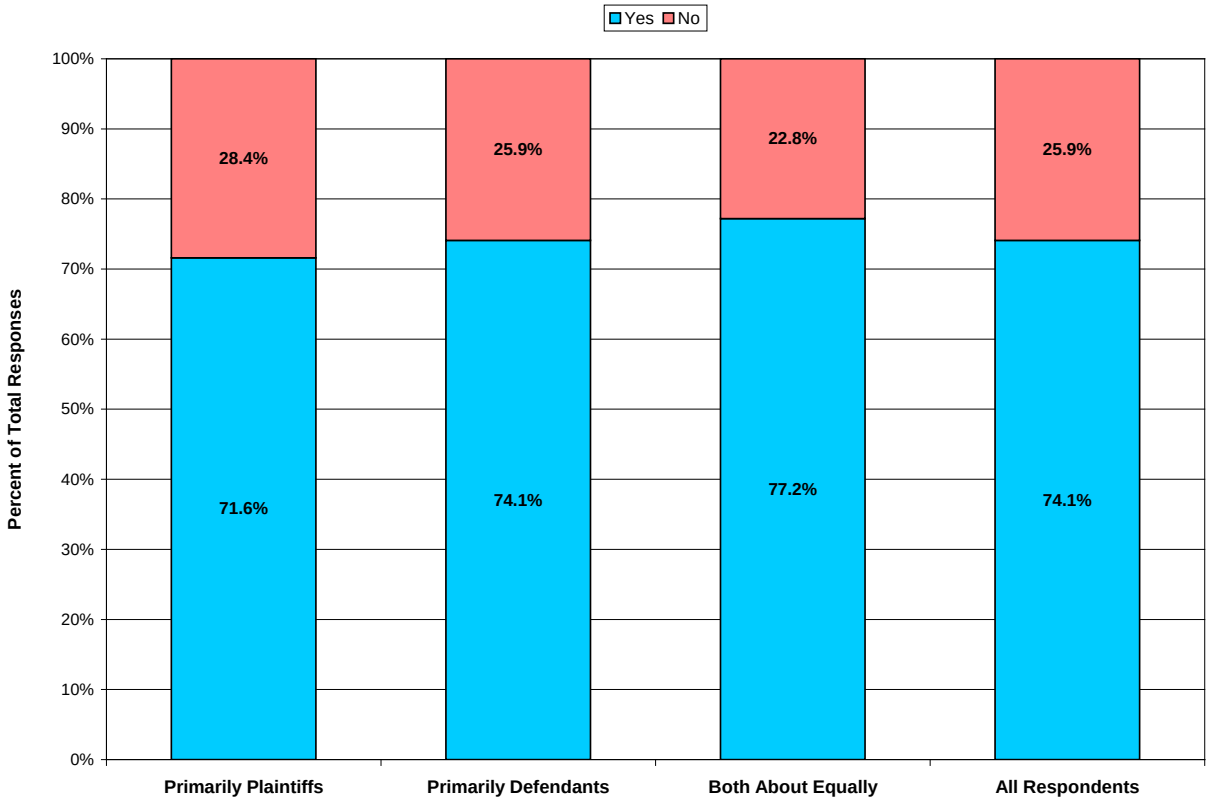

Table 12.8(b)

	Yes	No	N
Increase the number of cases that settle without trial.			
Primarily Plaintiffs	71.6	28.4	770
Primarily Defendants	74.1	25.9	1550
Both About Equally	77.2	22.8	727
All Respondents	74.1	25.9	3078

Over 62% of plaintiffs' lawyers, 64% of defense lawyers, and nearly 70% of mixed practice lawyers responded that ADR results in earlier settlement than regular civil litigation.

Figure 12.8(c): Result in earlier settlements

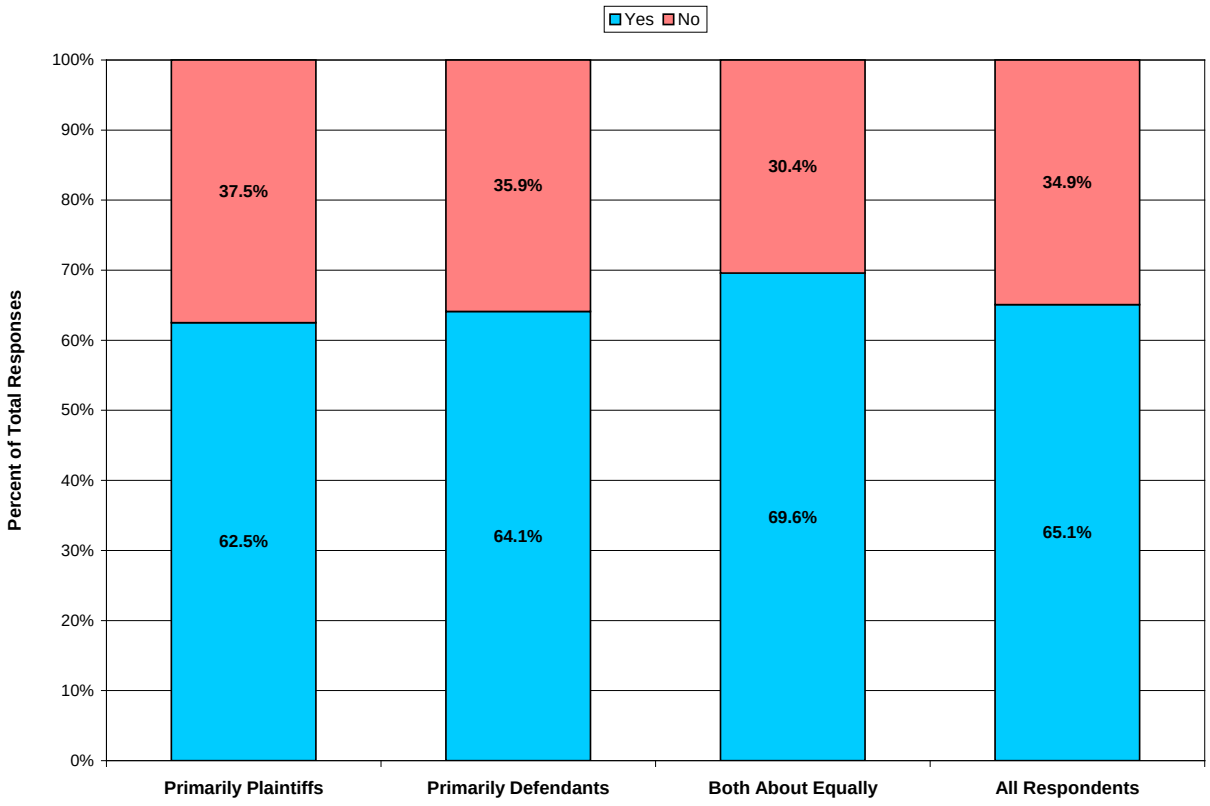

Table 12.8(c)

	Yes	No	N
Result in earlier settlements			
Primarily Plaintiffs	62.5	37.5	771
Primarily Defendants	64.1	35.9	1545
Both About Equally	69.6	30.4	724
All Respondents	65.1	34.9	3070

Survey respondents were very likely to agree that cases settling without trial as a result of court-ordered ADR is a positive development. Over 82% of plaintiffs' lawyers, 84.4% of defense lawyers, and 90% of mixed practice lawyers agree that this has been a positive development.

Figure 12.8(d): Are cases settling without trial, due to court-ordered alternative dispute resolution, a negative or positive development?

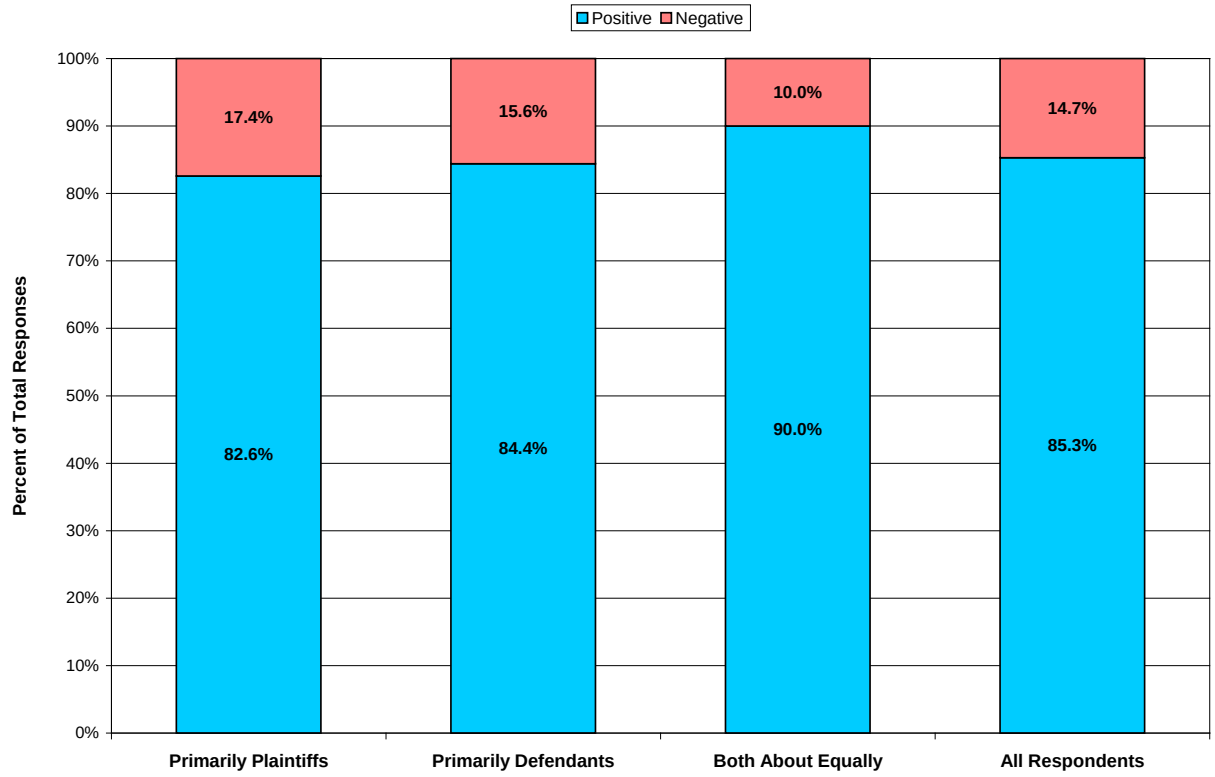

Table 12.8(d)

	Positive	Negative	N
Are cases settling without trial, due to Court-ordered ADR, a negative or positive development?			
Primarily Plaintiffs	82.6	17.4	755
Primarily Defendants	84.4	15.6	1507
Both About Equally	90.0	10.0	711
All Respondents	85.3	14.7	3003

APPENDIX

THE SURVEY QUESTIONNAIRE

Civil Rules Survey

The Section of Litigation is conducting a survey about the cost, efficiency, and effectiveness of the current Federal Rules of Civil Procedure. The ultimate purpose of the survey is to inform the Advisory Committee on Civil Rules about attorney-members' experiences with the federal civil justice system. The Advisory Committee is charged with the responsibility of drafting and amending the federal civil rules. The Section will also use your views to inform its position on matters of policy relating to civil justice.

You have received this survey request because our records indicate that you are an attorney-member of the Section and are currently engaged in civil litigation. If you are not an attorney or if you are no longer practicing law, please disregard this request.

Confidentiality: Completion of the survey is completely anonymous. Your identity is not and will not be known to anyone. Findings will be reported in aggregate and individual views will not be identifiable.

Results of this survey will be published and available at www.fjc.gov.

If you have any questions about the survey, please consult the Frequently Asked Questions (FAQ) sheet that is linked to the email containing Judge Kravitz's letter. If you have questions that the FAQ does not answer, please contact Emery Lee, elee@fjc.gov, (202) 502-4078 or Tom Willging, twillgin@fjc.gov, (202) 502-4049. If, for any reason, you are unable to complete this survey, there is no need to inform anyone.

1) We are seeking information from lawyers who practice in the area of civil litigation.

Are you currently engaged in the practice of law?

- ❍ Yes
- ❍ No

I. ABOUT YOUR PRACTICE

2) In what state and zip code is your law practice located? If your practice is in more than one location, please provide the information for the location of your primary practice.

State: _____

ZIP Code: _____

3) Please choose the option that best describes your practice.

- ❍ Law firm, including solo practice
- ❍ In-house counsel
- ❍ Government
- ❍ Non-profit or advocacy group
- ❍ Other (please specify)

If you selected other, please specify

_____

4) How many attorneys currently practice with your law firm or, if not a law firm, in your practice? Please include attorneys who practice full- or part-time at any office location.

- ❍ Between 1 and 5
- ❍ Between 6 and 10
- ❍ Between 11 and 20
- ❍ Between 21 and 50
- ❍ Between 51 and 100
- ❍ Between 101 and 250
- ❍ Between 251 and 500
- ❍ More than 500

5) Does your law firm or practice have offices in multiple locations?

- ❍ Yes
- ❍ No

6) How many attorneys practice at your office location? Please include attorneys who practice full- or part-time.

- ❍ Between 1 and 5
- ❍ Between 6 and 10
- ❍ Between 11 and 15
- ❍ Between 16 and 20
- ❍ Between 21 and 50
- ❍ Between 51 and 100
- ❍ Between 101 and 250
- ❍ Between 251 and 500
- ❍ More than 500

7) How many years have you practiced law?

_____years

8) How many years have you practiced civil litigation?

_____years

9) How many of your civil cases have gone to trial in the last five years?

_____cases

10) Approximately what percentage of those trials were jury trials?

_____%

11) Do you currently practice as a plaintiffs' attorney, a defendants' attorney, or both?

- ❍ Plaintiffs' attorney
- ❍ Defendants' attorney
- ❍ Both

12) In the majority of your cases, are you a plaintiffs' attorney or a defendants' attorney?

- ❍ Plaintiffs' attorney
- ❍ Defendants' attorney
- ❍ About evenly split between plaintiff and defense

13) What types of cases do you most often litigate? If you often litigate in more than one substantive area, please select up to three areas in which you most often litigate.

Please do not select an area unless it accounts for at least 1/3 of your practice.

- ❑ Administrative law
- ❑ Bankruptcy
- ❑ Civil rights
- ❑ Complex commercial disputes
- ❑ Construction

- ❑ Contracts
- ❑ Domestic relations
- ❑ Employment discrimination
- ❑ ERISA
- ❑ Insurance disputes
- ❑ Intellectual property
- ❑ Labor law
- ❑ Personal injury
- ❑ Professional malpractice
- ❑ Product liability
- ❑ Real property
- ❑ Securities
- ❑ Torts (generally)
- ❑ Mass torts
- ❑ Oil and Gas
- ❑ Maritime
- ❑ Antitrust
- ❑ Other (please specify)

If you selected other, please specify

_____

14) In which forum does <u>most</u> of your litigation practice take place?

- ❍ State courts
- ❍ Federal courts
- ❍ Roughly equal split of state and federal courts
- ❍ Roughly equal split of courts and arbitration panels
- ❍ Arbitration panels
- ❍ International tribunals
- ❍ Administrative Agencies
- ❍ Other (please specify)

If you selected other, please specify

_____

15) In which state do you primarily litigate? If you litigate in more than one state, please indicate the one in which you spend the most time.

_____(state)

16) In which federal district do you primarily litigate? If you litigate in more than one federal district, please indicate the one in which you spend the most time.

_____(district)

For the balance of this questionnaire, primary jurisdiction refers to your answers to the two previous questions.

17) In your primary state and federal courts identified in the two previous questions, when you have a choice, do you prefer to litigate in state court or federal court?

- ❍ State court
- ❍ Federal court
- ❍ No preference
- ❍ Other (please specify)

If you selected other, please specify

_____

18) In your primary state court, what are the advantages of litigating in <u>state court</u>, as compared to federal court? Please select all that apply.

- ❑ Less expensive
- ❑ Quicker time to disposition
- ❑ Less hands-on management of cases by judicial officers
- ❑ More hands-on management of cases by judicial officers
- ❑ Judicial officers are more available to resolve disputes
- ❑ Quality of judges
- ❑ More substantive legal knowledge of my case type among the judges
- ❑ More favorable to plaintiffs
- ❑ More favorable to defendants
- ❑ The court's experience with the type of case
- ❑ Geographical area from which jury is drawn
- ❑ More careful consideration of dispositive motions
- ❑ The applicable rules of civil procedure
- ❑ The applicable rules of evidence
- ❑ Non-unanimous verdicts
- ❑ Ability to conduct voir dire
- ❑ Convenience
- ❑ Availability of interlocutory appeals
- ❑ Better substantive outcomes

- ❑ Judicial temperament
- ❑ There are no advantages to litigating in state court
- ❑ Other (please specify)

If you selected other, please specify

_____

19) In your primary federal court, what are the advantages of litigating in federal court, as compared to state court? Please select all that apply.

- ❑ Less expensive
- ❑ Quicker time to disposition
- ❑ Less hands-on management of cases by judicial officers
- ❑ More hands-on management of cases by judicial officers
- ❑ Judicial officers are more available to resolve disputes
- ❑ Quality of judges
- ❑ More substantive legal knowledge of my case type among the judges
- ❑ More favorable to plaintiffs
- ❑ More favorable to defendants
- ❑ The court's experience with the type of case
- ❑ Geographical area from which jury is drawn
- ❑ More careful consideration of dispositive motions
- ❑ The applicable rules of civil procedure
- ❑ The applicable rules of evidence
- ❑ Single judge assigned to case
- ❑ Convenience
- ❑ Better substantive outcomes
- ❑ Judicial temperament
- ❑ Unanimous verdicts
- ❑ There are no advantages to litigating in federal court.
- ❑ Other (please specify)

If you selected other, please specify

_____

II. FEDERAL RULES OF CIVIL PROCEDURE

20) Rule 1 of the Federal Rules of Civil Procedure (FRCP or Rules), provides that the Rules shall be construed and administered to secure the "just, speedy, and inexpensive determination of every action." Are the Rules for the most part conducive to meeting this goal?

- ❍ Yes
- ❍ No

21) The following are statements about the Federal Rules of Civil Procedure (Rules). For each, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
There are too many Rules.	❍	❍	❍	❍	❍
The Rules are too complex.	❍	❍	❍	❍	❍
The Rules, as a whole, are internally inconsistent.	❍	❍	❍	❍	❍
The Rules are adequate as written.	❍	❍	❍	❍	❍
The Rules are enforced as written.	❍	❍	❍	❍	❍
The Rules are enforced in an inconsistent manner, even within a single district.	❍	❍	❍	❍	❍
The Rules should be more flexible.	❍	❍	❍	❍	❍
The Rules should be more rigid.	❍	❍	❍	❍	❍
The Rules need minor amendments in order to make them work.	❍	❍	❍	❍	❍

The Rules must be reviewed in their entirety and rewritten to address the needs of today's litigants.	❍	❍	❍	❍	❍
The Rules promote unnecessary conflict between counsel.	❍	❍	❍	❍	❍
One set of Rules cannot accommodate every case type.	❍	❍	❍	❍	❍

22) The following are statements about <u>Local Rules in federal districts</u>. For each, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
Local Rules promote inconsistency and unpredictability.	❍	❍	❍	❍	❍
Local Rules provide necessary flexibility from one jurisdiction to the next.	❍	❍	❍	❍	❍
Local Rules are uniformly applied within the district to	❍	❍	❍	❍	❍

which they pertain.					
Local Rules are always consistent with the FRCP.	❍	❍	❍	❍	❍

23) Please provide any additional comments you may have about the FRCP or the Local Rules in federal districts.

_____
_____
_____

III. PLEADINGS

24) The following are statements about pleadings. For each, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
In notice pleading (a "short and plain statement of the claim," which is adequate under the FRCP), the answer to a complaint (as distinguished from affirmative defenses or counterclaims)	❍	❍	❍	❍	❍

narrows the issues.					
Notice pleading has become a problem, because extensive discovery is required to narrow the claims and defenses.	❍	❍	❍	❍	❍
Fact pleading (which requires substantial factual allegations and is required in some state courts), can narrow the scope of discovery.	❍	❍	❍	❍	❍
Frivolous claims and defenses are asserted more frequently than they were five years ago.	❍	❍	❍	❍	❍
Motions to dismiss for failure to state a claim in notice pleading are not effective tools to limit claims and narrow litigation.	❍	❍	❍	❍	❍

25) Please provide any additional comments you may have about pleadings.

_____
_____
_____

IV. INITIAL DISCLOSURES

26) The following are statements about Rule 26(a)(1) initial disclosures. For each, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
Rule 26(a)(1) initial disclosures reduce discovery.	❍	❍	❍	❍	❍
Rule 26(a)(1) initial disclosures save the client money.	❍	❍	❍	❍	❍
Rule 26(a)(1) initial disclosures add to the client's costs of litigation.	❍	❍	❍	❍	❍

27) What percentage of your federal court cases require further discovery, after initial disclosures?

_____%

V. DISCOVERY

28) The following are statements about discovery in general, including, if applicable, discovery of electronically stored information. For each statement, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
Current discovery mechanisms work well.	❍	❍	❍	❍	❍
Discovery is abused in almost every case.	❍	❍	❍	❍	❍
District judges are available to resolve discovery disputes on a timely basis.	❍	❍	❍	❍	❍
Magistrate judges are available to resolve discovery disputes on a timely basis.	❍	❍	❍	❍	❍
Most discovery in my cases occurs informally.	❍	❍	❍	❍	❍
Cases involving informal discovery are	❍	❍	❍	❍	❍

less expensive.					
Sanctions allowed by the discovery rules are seldom imposed.	❍	❍	❍	❍	❍
Counsel use discovery as a tool to force settlement.	❍	❍	❍	❍	❍
Clients, not attorneys, drive excessive discovery.	❍	❍	❍	❍	❍
Fear of malpractice claims forces attorneys to conduct more discovery than necessary.	❍	❍	❍	❍	❍
Discovery is used more to develop evidence for or in opposition to summary judgment than it is used to understand the other party's claims and defenses for trial.	❍	❍	❍	❍	❍
Discovery is used more to determine the value of the case for settlement than it is used to understand the other party's	❍	❍	❍	❍	❍

claims and defenses for trial.					
The duty to confer with opposing counsel before filing a discovery motion serves little purpose.	❍	❍	❍	❍	❍
Requiring clients to sign all requests for extensions or continuances limits the number of those requests.	❍	❍	❍	❍	❍
In the majority of my cases, counsel agree on the scope and timing of most discovery.	❍	❍	❍	❍	❍
Counsel do not typically request limitations on discovery under Rule 26(b)(2)(C) (burden or expense outweighs the likely benefit, etc).	❍	❍	❍	❍	❍
Judges do not invoke Rule 26(b)(2)(C) on their own initiative.	❍	❍	❍	❍	❍

Judges do not enforce Rule 26(b)(2)(C) to limit discovery.	❍	❍	❍	❍	❍
Counsel with limited trial experience seek more discovery than experienced trial lawyers.	❍	❍	❍	❍	❍
Discovery about the adequacy of e-discovery responses is used as a tool to force settlement.	❍	❍	❍	❍	❍

29) To what extent is each of the following an important discovery tool?

	Very Important	Somewhat Important	Not Important	No Opinion
Requests for admission	❍	❍	❍	❍
Interrogatories	❍	❍	❍	❍
Requests for production of hard copy documents	❍	❍	❍	❍
Requests for production of electronically-stored documents, including email	❍	❍	❍	❍
Depositions of	❍	❍	❍	❍

fact witnesses				
Depositions of expert witnesses where expert testimony is limited to the expert report	❍	❍	❍	❍
Depositions of expert witnesses where expert testimony is NOT limited to the expert report	❍	❍	❍	❍

30) To what extent is each of the following a cost-effective discovery tool?

	Very Cost-Effective	Somewhat Cost-Effective	Not Cost-Effective	No Opinion
Requests for admission	❍	❍	❍	❍
Interrogatories	❍	❍	❍	❍
Requests for production of hard copy documents	❍	❍	❍	❍
Requests for production of electronically-stored documents, including email	❍	❍	❍	❍
Depositions of fact witnesses	❍	❍	❍	❍

Depositions of expert witnesses where expert testimony is limited to the expert report	❍	❍	❍	❍
Depositions of expert witnesses where expert testimony is NOT limited to the expert report	❍	❍	❍	❍

31) Do Rule 26(f) party conferences frequently occur?

- ❍ Yes
- ❍ No

32) When Rule 26(f) party conferences occur, are they helpful in managing the discovery process?

- ❍ Yes
- ❍ No
- ❍ No experience with Rule 26(f) party conferences

33) Beginning with the concern about abuse of discovery that was identified by the Pound Conference in 1976 and continuing through 2007, there have been numerous changes in the discovery provisions of the Rules including initial disclosure requirements, 26(f) discovery conferences, disclosure of expert testimony, provisions for sanctions, the 2000 amendment narrowing the subject-matter-of-the-action scope of discovery, and the recent e-discovery provisions.

The following statement is about all of the changes that were made in the discovery rules from 1976 through 2007. Please give your opinion.

The cumulative effect of the changes has significantly reduced discovery abuse.

- ❍ Strongly Agree
- ❍ Agree
- ❍ Disagree
- ❍ Strongly Disagree

34) Please think about typical cases that <u>do not go to trial</u> and are not dismissed on an initial 12(b) motion. What percentage of total expenses and time spent on that case <u>is incurred</u> in connection with discovery (including discovery motions and other discovery related disputes)?

_____%

35) For cases that do not go to trial and are not dismissed on an initial 12(b) motion, what percentage of total expenses and time spent on such cases <u>should be incurred</u> in connection with discovery (including discovery motions and other discovery related disputes)?

_____%

36) Should there be an automatic stay of discovery in all cases, pending determination of a threshold motion to dismiss?

❍ Yes
❍ No

VI. ELECTRONIC DISCOVERY

37) Have you had any cases that raise e-discovery issues?

❍ Yes
❍ No

38) The following are general statements about e-discovery. For each statement, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
E-discovery has enhanced the ability of counsel to discover all relevant information.	❍	❍	❍	❍	❍
When properly managed, discovery of electronic records can reduce the costs of discovery.	❍	❍	❍	❍	❍
E-discovery increases the costs of litigation.	❍	❍	❍	❍	❍
Discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery.	❍	❍	❍	❍	❍
The costs of outside vendors have increased the costs of e-discovery without commensurate value to the client.	❍	❍	❍	❍	❍
E-discovery is being abused by counsel.	❍	❍	❍	❍	❍
Courts do not understand the difficulties in providing e-	❍	❍	❍	❍	❍

discovery.					
E-discovery is generally overly burdensome.	❍	❍	❍	❍	❍
Courts do not sufficiently limit or otherwise protect parties against unreasonably burdensome e-discovery demands.	❍	❍	❍	❍	❍
The costs and efficiency of e-discovery will become more reasonable as technology advances.	❍	❍	❍	❍	❍

39) December 1, 2006 was the effective date of the e-discovery amendments to the FRCP. Since that time, have you requested or been the recipient of a request for electronically stored information in discovery?

❍ Yes
❍ No

40) Do the 2006 e-discovery amendments provide for efficient and cost-effective discovery of electronically stored information?

❍ Yes, most of the time
❍ Yes, some of the time
❍ No

41) Please provide any additional comments you may have about initial disclosure, discovery, or e-discovery.

_____
_____
_____

VII. DISPOSITIVE MOTIONS

42) The following are general statements about dispositive motions. For each statement, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
Summary judgment motions are used as a tactical tool, rather than in a good faith effort to narrow the issues.	❍	❍	❍	❍	❍
Summary judgment practice increases cost and delay without proportionate benefit.	❍	❍	❍	❍	❍
Judges routinely fail to rule on summary judgment motions promptly.	❍	❍	❍	❍	❍

Judges are granting summary judgment more frequently than appropriate.	❍	❍	❍	❍	❍
Judges decline to grant summary judgment even when warranted.	❍	❍	❍	❍	❍
Summary judgment motions are filed in almost every case.	❍	❍	❍	❍	❍

VIII. TRIAL DATES

43) The following are general statements related to trial dates. For each, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
Trial dates should be set early in the case.	❍	❍	❍	❍	❍
Trial dates should not be set until discovery is completed.	❍	❍	❍	❍	❍

Trial dates should not be set until motions for summary judgment have been decided.	❍	❍	❍	❍	❍
Trial dates should not be continued or vacated except in exceptional circumstances.	❍	❍	❍	❍	❍

44) Please provide any additional comments you may have about trial dates.

_____
_____
_____

IX. JUDICIAL ROLE IN LITIGATION

45) The following are statements about the judicial role in litigation. For each, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
Intervention by judges or magistrate judges early in the case helps	❍	❍	❍	❍	❍

to narrow the issues.					
Intervention by judges or magistrate judges early in the case helps to limit discovery.	❍	❍	❍	❍	❍
When a judicial officer gets involved early in a case and stays involved until completion, the results are more satisfactory to the clients.	❍	❍	❍	❍	❍
One judicial officer should handle a case from start to finish.	❍	❍	❍	❍	❍
The judge who is going to try the case should handle all pre-trial matters.	❍	❍	❍	❍	❍
It does not matter whether the trial judge or a magistrate judge handles pre-trial matters, so long as they are handled appropriately.	❍	❍	❍	❍	❍
Judges inappropriately pressure parties	❍	❍	❍	❍	❍

to settle cases.					
Judges do not like taking cases to trial.	❍	❍	❍	❍	❍
Judges with expertise in certain types of cases should be assigned to those types.	❍	❍	❍	❍	❍
Only individuals with significant trial experience should be chosen for positions as judges on trial courts.	❍	❍	❍	❍	❍

46) Are Rule 16(a) pretrial conferences regularly held in your federal civil cases?

❍ Yes
❍ No

47) What effect, if any, does the holding of a Rule 16(a) pretrial conference have on a case?

Please choose all that apply.

❑ Identifies and narrows the issues
❑ Informs the court of the issues in the case
❑ Encourages settlement
❑ Shortens the time to case resolution
❑ Lengthens the time to case resolution
❑ Improves time management
❑ Lowers cost
❑ Increases cost
❑ The holding of a Rule 16(a) pretrial conference has no effect on a case.
❑ Other (please specify)

If you selected other, please specify

_____

48) To what extent are Rule 16(e) final pretrial orders helpful in preparing the case for trial?

- ❍ Very helpful
- ❍ Somewhat helpful
- ❍ Not very helpful
- ❍ Not helpful at all

49) What effect, if any, does the timing of a Rule 16(e) final pretrial order have?

- ❍ Issuing final pretrial order after ruling on summary judgment is more helpful than issuing it before ruling
- ❍ Issuing final pretrial order before ruling on summary judgment is more helpful than issuing it after ruling
- ❍ The timing of the final pretrial order makes no difference

50) Please provide any additional comments you may have about the judicial role in litigation.

_____
_____
_____

X. COSTS

51) The following are general statements about litigation costs. For each statement, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
Continuances cost clients money.	❍	❍	❍	❍	❍
The longer a case goes on, the more it costs.	❍	❍	❍	❍	❍
Expediting cases costs more.	❍	❍	❍	❍	❍
Litigation is too expensive.	❍	❍	❍	❍	❍
Discovery is too expensive.	❍	❍	❍	❍	❍
When all counsel are collaborative and professional, the case costs the client less.	❍	❍	❍	❍	❍
Litigation costs are not proportional to the value of a small case (small amount in dispute).	❍	❍	❍	❍	❍
Litigation costs are not proportional to the value of a large case (large amount in dispute).	❍	❍	❍	❍	❍
Economic models in many law firms result	❍	❍	❍	❍	❍

in more discovery and thus more expense than is necessary.					

52) The primary cause of delay in the litigation process is:

- ❍ Delayed rulings on pending motions
- ❍ Court continuances of scheduled events
- ❍ Attorney requests for extensions of time and continuances
- ❍ The time required to complete discovery
- ❍ Other (please specify)

If you selected other, please specify

_____

53) Does the cost of litigation force cases to settle that should not settle based on the merits?

- ❍ Yes
- ❍ No

54) How important is each of the following factors in driving the decision to settle?

If there are factors that are not listed, please enter those in the Comment field.

	Very Important	Somewhat Important	Somewhat Unimportant	Not At All Important
Expert witness costs	❍	❍	❍	❍
Overall discovery costs	❍	❍	❍	❍
Deposition time and costs	❍	❍	❍	❍

Document production costs	❍	❍	❍	❍
E-discovery costs	❍	❍	❍	❍
Trial costs	❍	❍	❍	❍
Costs of legal research	❍	❍	❍	❍
Costs of motion practice	❍	❍	❍	❍
Court appearance other than trial	❍	❍	❍	❍
Attorney fees	❍	❍	❍	❍
The monetary stakes in the litigation	❍	❍	❍	❍
Likelihood of an unfavorable verdict or judgment	❍	❍	❍	❍
Possibility of an unfavorable precedent	❍	❍	❍	❍
Possibility of unfavorable publicity from trial	❍	❍	❍	❍

55) The next series of questions apply to the private law firm environment. Is your practice in a private law firm environment?

❍ Yes
❍ No

56) In general, does your firm turn away cases when it is not cost-effective to handle them?

- ❍ Yes
- ❍ No
- ❍ Not sure

57) Please complete the following sentence:

Our firm routinely turns away cases with less than $_____ at issue because it is not cost-effective to handle them.

- ❍ $100,000
- ❍ $250,000
- ❍ $500,000
- ❍ $1,000,000
- ❍ $5,000,000
- ❍ We do not routinely turn away cases based on amount in controversy
- ❍ Not applicable

58) Of the revenue attributable to the civil litigation practice in your firm, what percentage is attributable to discovery (including discovery motions and related discovery disputes)?

_____%

59) In your firm, has the civil litigation practice increased or decreased in the past five years (measured by number of attorneys doing civil litigation)?

- ❍ Increased
- ❍ Decreased
- ❍ Remained the same

60) By what percentage has the civil litigation practice in your firm increased over the past five years (measured by number of attorneys doing litigation)?

_____%

61) By what percentage has the litigation practice in your firm decreased over the past five years (measured by number of attorneys doing litigation)?

_____%

62) What is the usual arrangement with clients regarding attorney fees?

- ❍ Hourly fees
- ❍ Salaried employee of client (including government)
- ❍ Contingent fee (percentage of recovery)
- ❍ Other arrangement not based on hours or case outcome
- ❍ I can't say

63) What is your usual hourly rate?

$ _____

64) Does your firm have an expectation of annual billable hours for lawyers at your level?

- ❍ Yes
- ❍ No

65) What is the expectation?

_____hours/year

66) Please identify up to three ways that the cost of litigation could be decreased and still permit the exchange of necessary information.

1. _____
2. _____
3. _____

XI. ALTERNATIVE DISPUTE RESOLUTION

67) What percentage of your cases are processed exclusively through some alternative dispute resolution process versus the courts?

- ❍ Less than 10%
- ❍ 10-25%
- ❍ 25-50%
- ❍ More than 50%

68) In general, do your clients choose arbitration or other private alternative dispute resolution over litigation if they have a choice?

- ❍ Yes
- ❍ No

69) As compared to litigation, does arbitration generally increase or decrease the costs to your client?

- ❍ Increases cost
- ❍ Decreases cost
- ❍ No difference in cost
- ❍ No experience with arbitration

70) As compared to litigation, does arbitration generally lengthen or shorten the time to disposition?

- ❍ Lengthens the time to disposition
- ❍ Shortens the time to disposition
- ❍ No difference in time to disposition

71) As compared to litigation, does arbitration generally produce fairer or less fair outcomes?

- ❍ Arbitration generally produces fairer outcomes than litigation.
- ❍ Arbitration generally produces less fair outcomes than litigation.
- ❍ Arbitration generally produces outcomes that are not different from litigation.

72) As compared to litigation, does mediation generally increase or decrease the costs to your client?

- ❍ Increases cost
- ❍ Decreases cost
- ❍ No difference in cost
- ❍ No experience with mediation

73) As compared to litigation, does mediation generally lengthen or shorten the time to disposition?

- ❍ Lengthens the time to disposition
- ❍ Shortens the time to disposition
- ❍ No difference in time to disposition

74) As compared to litigation, does mediation generally produce fairer or less fair outcomes?

- ❍ Mediation generally produces fairer outcomes than litigation.
- ❍ Mediation generally produces less fair outcomes than litigation.
- ❍ Mediation generally produces outcomes that are not different from litigation.

75) As compared to litigation, does early neutral evaluation (in which a NEUTRAL experienced attorney evaluates a case before discovery or motion practice) generally increase or decrease the costs to your client?

- ❍ Increases cost
- ❍ Decreases cost
- ❍ No difference in cost
- ❍ No experience with early neutral evaluation

76) As compared to litigation, does early neutral evaluation generally lengthen or shorten the time to disposition?

- ❍ Lengthens the time to disposition
- ❍ Shortens the time to disposition
- ❍ No difference in time to disposition
- ❍ No experience with arbitration

77) As compared to litigation, does early neutral evaluation generally produce fairer or less fair outcomes?

❍ Early neutral evalation generally produces fairer outcomes than litigation.
❍ Early neutral evalation generally produces less fair outcomes than litigation.
❍ Early neutral evalation generally produces outcomes that are not different from litigation.

78) Which of the following alternative dispute resolution processes generally provides the greatest savings in time and expense over litigation?

❍ Arbitration
❍ Mediation
❍ Early Neutral Evaluation
❍ No difference among these
❍ Do not know

79) Which of the following processes generally provides the highest level of fairness?

❍ Arbitration
❍ Early Neutral Evaluation
❍ Litigation
❍ Mediation
❍ No difference among these
❍ Do not know

80) Is court-ordered alternative dispute resolution a negative or positive development in managing costs?

❍ Negative development
❍ Positive development
❍ No impact on managing costs

81) Does court-ordered alternative dispute resolution increase the number of cases that settle without trial?

❍ Yes
❍ No

82) Does court-ordered alternative dispute resolution result in earlier settlements?

❍ Yes
❍ No

83) Are cases settling without trial, due to court-ordered alternative dispute resolution, a negative or positive development?

- ❍ Negative development
- ❍ Positive development

XII. ADDITIONAL COMMENTS

84) Please use the space below to provide any additional comments on the civil litigation system that you want to include.

_____
_____
_____

Thank you for your interest in the Civil Litigation Survey. We are only collecting information from lawyers currently practicing in the area of civil litigation.

Thank you for participating in this important survey. Your answers will be combined with those of other attorney-members of the Section of Litigation and become part of the ongoing discussion about improving the civil justice system in the United States. If you have any questions or comments, please contact Emery Lee at elee@fjc.gov or (202)502-4078, or Tom Willging at twillgin@fjc.gov or (202)502-4049.