

SURVEY *of the* OREGON BENCH & BAR

ON THE OREGON
RULES OF CIVIL
PROCEDURE

INSTITUTE *for the*
ADVANCEMENT
of the AMERICAN
LEGAL SYSTEM



INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

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This Report sets forth the results of the Institute for the Advancement of the American Legal System’s Survey of the Oregon Bench and Bar on the Oregon Rules of Civil Procedure (“Oregon Rules Survey”).

EXECUTIVE SUMMARY

The Oregon Rules Survey explored the views of members of the Oregon State Bar concerning civil procedure in Circuit Court, the state court of general jurisdiction. There are significant differences between the Oregon Rules of Civil Procedure (“ORCP”) and the procedural rules used in federal court and neighboring state courts. This survey was developed to examine the practical impact of these rules variations, and to contribute additional information to the dialogue on civil procedure reform.

The survey was completed by a diverse group of Oregon practitioners, representing a mix of newer and more experienced attorneys. About one-third of respondents have 10 or fewer years of experience, and another third have more than 25 years of experience. Survey respondents included both plaintiffs’ and defense attorneys, as well as attorneys in private, government, and in-house practice. Judges also responded. Highlights of the survey appear below.

Oregon practitioners prefer Oregon Circuit Court over trial courts in the federal system and in neighboring states.

A majority of survey respondents have experience litigating in other relevant courts. Over 70% of all survey respondents have litigated in the U.S. District Court for the District of Oregon, and approximately 50% have litigated in neighboring state courts (most frequently Washington, California, and Idaho). Of the group with federal experience, more respondents prefer Oregon Circuit Court to federal court. Of the group with experience in neighboring state courts, about two-thirds prefer Oregon Circuit Court. Respondents who prefer the Oregon state system frequently cited that system’s rules and procedures as a basis for that preference, commenting that discovery limits and fewer compulsory filings result in reduced litigation costs and a faster litigation process.

Respondents noted the high level of professionalism and camaraderie within the Oregon Bar, notwithstanding the fact that it has over 14,000 active members and over 3,800 inactive members. Over 85% of respondents indicated that the culture of the Oregon Bar enhances the civility of litigation in Oregon courts, and nearly two-thirds of respondents indicated that the state rules of civil procedure enhance the civility of litigation in Oregon courts.

Oregon practitioners find the state’s fact pleading rule to be beneficial.

Respondents noted numerous benefits of the rule requiring pleadings to contain “a plain and concise statement of the ultimate facts constituting the claim for relief.” Approximately two-thirds of respondents agreed that fact pleading reveals the pertinent facts and helps to narrow the issues early in the case. A majority of respondents with comparative experience in federal or neighboring state courts indicated that fact pleading increases counsel’s ability to prepare for trial and increases the efficiency of the litigation process, while it either decreases or has no effect on the time to resolution and the cost to litigants. Further, over 75% of respondents with comparative experience indicated that fact pleading either improves or has no effect on the fairness of the litigation process, and over 70% indicated that it improves or has no effect on the fairness of the outcome.

A majority of respondents disagreed that “fact pleading generally favors defendants over plaintiffs.” Notably, a majority of those who primarily represent plaintiffs expressed disagreement or gave a neutral response. Indeed, more respondents indicated a belief that Oregon courts are friendly to plaintiffs than indicated a belief that Oregon courts are friendly to defendants.

Oregon practitioners find the time limit within which trial must take place to be beneficial.

In Circuit Court, trials are required to take place within one year of filing (normally) or two years of filing (for “complex” cases). A majority of respondents with comparative experience indicated that the trial time requirement increases the efficiency of the litigation process, decreases the time to resolution, and either decreases or has no effect on litigant costs. Around 70% of these respondents indicated that the trial time requirement either improves or has no effect on procedural and outcome fairness.

Oregon practitioners find that, generally, the discovery limits have beneficial effects, but some improvements could be made.

In Circuit Court, requests for admission are limited, and there are no provisions for interrogatories or for disclosure and discovery of independent expert witnesses. A majority of respondents indicated that these limits on discovery – considered collectively – require parties to focus their discovery efforts on the disputed issues. Nearly two-thirds of respondents indicated that the limits reduce the total volume of discovery. Further, there is a general consensus that the limits do not favor defendants over plaintiffs, do not increase satellite litigation, and do not result in insufficient information at trial.

Over 60% of respondents with comparative experience indicated that the complete absence of interrogatories decreases litigant costs. A majority of respondents with comparative experience indicated that the absence of interrogatories has no effect on trial preparation, but nearly 40% find that it diminishes counsel’s ability to prepare for trial. Some respondents advocated for fact interrogatories as an efficient and cost-effective tool for obtaining certain basic information about the case, such as relevant witnesses and documents.

Nearly 60% of respondents with comparative experience indicated that the complete absence of expert discovery decreases litigant costs. However, a majority indicated that the absence of expert discovery decreases counsel’s ability to prepare for trial, and a plurality indicated that it decreases the efficiency of the litigation process. Some respondents commented that justice would be better served by simply requiring production of the expert’s name and resume, along with a short summary of the opinions to be presented.

Oregon practitioners would like to see one judge per case, increased judicial management, and stronger rule enforcement.

Respondents advocated for one judge to be assigned to each case, to hear all matters from inception to resolution. The need to educate a different decision maker at every hearing wastes resources and diminishes the quality of rulings. Moreover, the involvement of multiple judges creates confusion, delay, and inconsistent handling.

A majority of respondents agreed that increased judicial management would improve the pretrial process. Respondents were divided on whether more management would create unnecessary “busywork,” but of those who agreed that it would create such work, over 20%

indicated that it would nevertheless improve the pretrial process. Respondents were also divided on whether the court should have more control over the discovery process specifically. However, over twice as many respondents “strongly agree” as “strongly disagree” with more court control over discovery.

Respondents commonly expressed the opinion that courts should enforce the rules to a greater extent. They would like to see judges hold attorneys accountable to the expectations of the pleading and discovery rules, which would allow those rules to have their intended effects. More frequent imposition of sanctions, in particular, would prevent discovery abuses. There is a consensus that Oregon courts rarely utilize sanctions as a tool of enforcement.

Oregon practitioners believe there is room for improvement in the state civil justice system.

While acknowledging that many aspects of the state civil justice process reduce litigation time and costs in comparison to other systems, a majority of respondents nevertheless indicated that the process takes too long and nearly 80% indicated that the process is too expensive.

A plurality of respondents agreed that “the system of hourly billing for attorneys contributes disproportionately to litigation costs,” with over 20% expressing strong agreement. With respect to access, a majority of respondents in private practice belong to firms that will not refuse a case based on the amount in controversy. However, nearly 25% stated that, as a general matter, their firm will not file or defend a case unless the amount in controversy exceeds a certain dollar amount (with a median value of \$37,500).

One common complaint concerned the burden arising from the lack of certain basic information about the evidence prior to trial. Respondents suggested that a limited set of required disclosures would improve the system and streamline discovery. Suggestions for inclusion in a disclosure rule: witness and document lists; expert reports; pertinent official records; a short summary of the topics to be addressed by each witness; and jury instructions.

Oregon practitioners find that the mandatory arbitration program has some benefits but also some significant drawbacks.

In Circuit Court, monetary actions claiming \$50,000 or less are subject to mandatory arbitration. A majority of respondents indicated that the mandatory arbitration process has a faster time to disposition and a lower cost than litigation. A majority of respondents also indicated that, with respect to procedural fairness, there is no difference between arbitration and litigation. Significantly, however, 35% of respondents indicated that the arbitration process is less fair.

The written comments concerning mandatory arbitration were generally negative. Appeal of an arbitration award results in the case being tried *de novo*, which means increased delay and costs. Some respondents reported use of the process solely to gain access to the other party’s case.

I. INTRODUCTION

The Institute for the Advancement of the American Legal System at the University of Denver (“IAALS”) is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Focusing on the needs of those who use the system, IAALS conducts research to identify problems and develop innovative, practical solutions.

In September and October 2009, IAALS conducted the Oregon Rules Survey to examine the unique aspects of the Oregon Rules of Civil Procedure (“ORCP”) and the Uniform Trial Court Rules (“UTCR”).¹ This survey was completed by judges and attorneys with civil litigation experience in Oregon Circuit Court (“Circuit Court”), the state trial court of general jurisdiction governed by the ORCP and the UTCR.²

Oregon’s unique rules have a long history. Shortly after statehood, the legislature adopted the 1862 Oregon Code of Civil Procedure, which framed state civil procedure for more than 100 years.³ Although the 1938 adoption of the Federal Rules of Civil Procedure (“FRCP”) sparked a comprehensive reform effort at the state level in Oregon, the Oregon State Bar Association ultimately rejected it.⁴ In 1977, judicial rulemaking authority was vested in a new and permanent agency, the Oregon Council on Court Procedures, charged with continuous review and modification of the rules governing civil procedure.⁵ The original 1977 Council drafted a “comprehensive set of civil trial court rules,” which – with a few changes – became the ORCP adopted by the state legislature in the early 1980s.⁶

While the ORCP addressed many longstanding complaints concerning Code procedure,⁷ Oregon retained its unique approach instead of adopting the federal model. At the time of enactment, one commentator noted that the rules “primarily codify existing Oregon practice.”⁸ Indeed, the rules preserve fact pleading and provide for limited discovery, a stark contrast to the approach of notice pleading and broad discovery contained in the FRCP. In fact, as one member of the original Council observed in responding to the present Oregon Rules Survey:

¹ The UTCR, effective October 1, 1985, provides consistent “local rules” that are intended to “promote the just, speedy and inexpensive determination of every proceeding and action as well as the efficient use of judicial time and resources.” UTCR 1.010(1), (2). Individual courts are permitted to promulgate supplementary local rules, reviewed by the Chief Justice, that do not duplicate or conflict with other laws and rules. UTCR 1.040.

² OR. CONST. art. VII (Original), § 9 (Upon enactment of Amended Article VII, the provisions of Original Article VII relating to court jurisdiction have statutory status and are subject to legislative amendment.); ORCP 1(A); UTCR 1.010(1).

³ Frederic R. Merrill, *The Oregon Rules of Civil Procedure—History and Background, Basic Application, and the “Merger” of Law and Equity*, 65 OR. L. REV. 527, 530 (1986). “Although changes were constantly being made after 1862, there was no comprehensive legislative attention to the complete system of civil procedure.” *Id.* at 530, n.13 (citing Laird C. Kirkpatrick, *Procedural Reform in Oregon*, 56 OR. L. REV. 539 (1977)).

⁴ Merrill, *supra* note 3, at 530-31. Reasons that reform failed in Oregon for the majority of the 20th Century include uncertainty as to where rulemaking authority rested, an overburdened state legislature and Supreme Court, and a fear within the bar that the federal scheme would be adopted wholesale. *Id.* at 531-32.

⁵ *Id.* at 532-34; O.R.S. §§ 1.725-35.

⁶ Oregon Council on Court Procedures, *History of the Council*, <http://legacy.lclark.edu/~ccp/LegislativeHistory.htm> (accessed February 16, 2010); Merrill, *supra* note 3, at 535-36 (Rules 1-64 went into effect in 1980 and Rules 65-85 went into effect in 1981. In 1983 and 1985, the Council amended some of the rules, but did not enact any new rules.).

⁷ See generally Kirkpatrick, *supra* note 3, at 541-562.

⁸ Lois Lindsay Davis, Comment, *Civil Procedure*, 16 WILLAMETTE L. REV. 703, 723 (1979).

The council very definitely sought to preserve what was at that time known as “Oregon Code Pleading” and we definitely sought to reject wholesale [the] option of the FRCP, inasmuch as the feeling was that [in comparison to] then-existing Oregon procedure and practice, the FRCP were unwieldy, complex and grossly expensive, even with the occasional heavy hand of a federal judge applied.

Given the significant differences between the Oregon rules and the FRCP, IAALS determined that a survey of the Oregon Bench and Bar would make a valuable empirical contribution to the current national dialogue on civil procedure reform. Although such evaluative surveys are necessarily subjective, IAALS believes that attorneys and judges can speak to the successes and failures of procedural rules – and should have a stage on which to do so. In addition to their meaningful contact with litigants, they have a technical understanding of the civil justice system, possess intimate knowledge of its governing rules, and play a significant role in its operation.

The Oregon Rules Survey explored the opinions of the Oregon Bench and Bar concerning civil procedure in Circuit Court, focusing on the distinctive state rules and how they operate. The global research questions included:

- Does fact pleading advance the goals of efficiency and affordability, without sacrificing procedural fairness?
- Does a time limit for holding trial advance the goals of efficiency and affordability, and without sacrificing procedural fairness?
- Does limiting discovery advance the goals of efficiency and affordability, without sacrificing procedural fairness?
- To what extent are the Oregon rules followed, respected, and enforced?
- What role does culture play?
- Does mandatory arbitration provide a satisfactory alternative to litigation?
- How could Oregon’s system be further improved?

II. METHODOLOGY

IAALS created the Oregon Rules Survey with the help of the Butler Institute (“Butler”), an independent social science research organization at the University of Denver. The survey was distributed to the publicly available membership list of the Oregon State Bar (“OSB”), a mandatory organization that governs the legal profession in the state.⁹

A. SURVEY DEVELOPMENT

The survey development process began with a series of hypotheses and research questions concerning the ORCP, the UTCR, and practice in Circuit Court. The survey instrument was then shaped over the course of several months in an iterative process of review and revisions, informed by a previous survey of the American College of Trial Lawyers.¹⁰ IAALS created two versions of the Oregon Rules Survey, which were identical in content. A computerized version was produced using Qualtrics online survey software, while a paper version was produced using Adobe PDF.

Once completed, three diverse Oregon practitioners pilot-tested the survey.¹¹ The volunteer pilot participants were first informed that their responses would not be eligible for inclusion in the final survey population, and then were given access to both the online and hard-copy versions and instructed to complete the survey. Thereafter, an IAALS research analyst conducted a telephone interview with each participant, using a standard set of questions. Through the interviews, IAALS obtained invaluable feedback on the presentation and substance of the survey questions. IAALS also presented the survey to and received feedback from the officers and members of the Oregon Council on Court Procedures.

Upon conclusion of the pilot process, IAALS and Butler finalized the survey instrument and obtained approval for its administration from the University of Denver’s Institutional Review Board.

B. SURVEY DISTRIBUTION

The survey was designed for attorneys and judges with past or present civil litigation experience in Oregon Circuit Court, regardless of status, position, or specialty. Accordingly, IAALS decided to cast a wide net within the OSB membership. IAALS obtained from the OSB the public lists of attorneys on both “active” and “inactive” status, as well as attorneys belonging to the “Litigation” and “Business Litigation” sections. Once the lists were merged and purged of all duplicate listings, there were a total of 15,554 e-mail addresses.¹²

Butler administered the survey. Using the Qualtrics survey software, Butler sent three survey-related e-mails signed by IAALS Executive Director Rebecca Kourlis. On September 8, 2009, an e-mail informed potential participants of the upcoming study. On September 10, 2009, an

⁹ O.R.S. §§ 9.010(2), 9.160; Oregon State Bar, *General Information*, <http://www.osbar.org/osbinfo.htm> (accessed January 4, 2009). The OSB was established by the legislature and is an instrumentality of the judicial department.

¹⁰ Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, *Interim Report & Litigation Survey of the Fellows of the American College of Trial Lawyers* (Sept. 9, 2008).

¹¹ The pilot group consisted of: a Circuit Court judge; a seasoned employment attorney; and in-house counsel for a national company.

¹² Note: The OSB does not require its members to provide an email address.

e-mail explained the importance of the study and provided each potential participant with a unique link to the online version. This e-mail was distributed to the list of 15,554 addresses (with fewer than 645 returned as “undeliverable”). On September 24, 2009, an e-mail reminded potential participants to complete the survey and again provided the survey link. This e-mail was distributed to 15,191 addresses (with fewer than 484 returned as “undeliverable”). All three e-mails encouraged participation and contained instructions for requesting a hard-copy version of the survey. The survey was officially in the field for three weeks, from September 10, 2009 until October 1, 2009. However, responses were accepted for another four weeks, until October 29, 2009.

C. SURVEY ADMINISTRATION

In order to preserve the confidentiality of responses, a Butler researcher served as the point of contact for survey participants. While the survey was in the field, Butler monitored operation of the online version, responded to requests for hard-copy versions, and collected the data in a password-protected environment. Upon conclusion of the survey period, Butler exported the data into an analytical software program in a password-protected file. Thereafter, Butler conducted a data verification process, eliminating respondents who did not provide an answer to any of the substantive questions and running descriptive statistics to detect and eliminate clear errors (such as answers outside the permissible ranges). Butler then provided the data to IAALS, removed of all identifiers.

D. SURVEY RESPONSES

Survey emails were sent to all active and inactive Oregon attorneys with an email address on the OSB roster, regardless of experience. The survey e-mails explicitly informed OSB members that this was a study of civil litigation in Circuit Court. In addition, a threshold question asked whether the respondent had the requisite civil litigation experience in Circuit Court. Due to the distinctive nature of family law actions, “civil litigation” was defined to exclude domestic relations or family law.

The morning after the survey closed on October 29, 2009, the online link had been accessed 659 times, 621 individuals had given consent to participate in the study, and 547 had answered “yes” to the threshold question on the requisite experience. One individual requested and received a hard-copy version, but did not return it within the applicable time frame. After the data verification process, there were a total of 485 valid responses to the survey. At a 95% confidence level, the overall results are within $\pm 4.45\%$.

Due to the voluntary nature of the study, respondents were not required to answer all survey questions. Further, certain questions were inapplicable to some respondents, based on previous answers given. As a result of these permitted omissions and skip patterns, the precise number of respondents varies from question to question.

Due to the unknown composition of the target population, sample weights could not be used to better approximate the responses of that population. As a result of rounding, the sum of reported percentages may not equal exactly 100%.

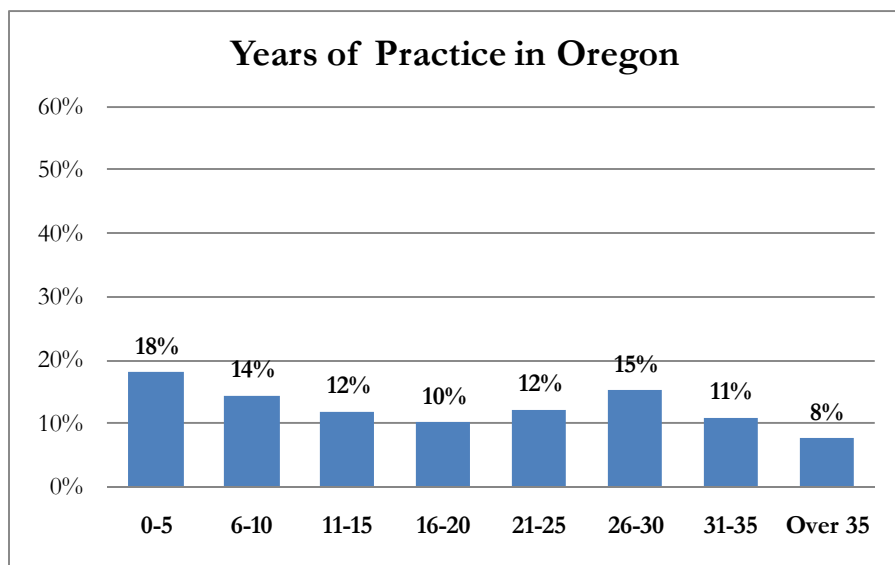
III. RESPONDENT DEMOGRAPHICS

The survey contained a number of background questions, for the purpose of putting the responses into a context. The survey was completed by a diverse group of individuals.

A. LEGAL EXPERIENCE

Survey respondents have practiced law in Oregon for an average of 19 years. Figure 1 shows the relatively even distribution of respondents by years of legal experience in the state.

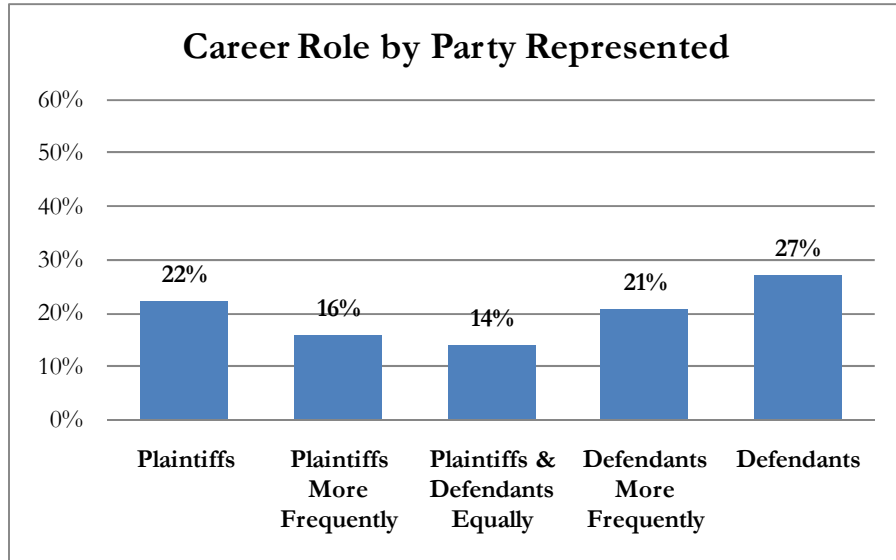
Figure 1 (Survey Question 1)



To obtain their overall perspective on civil litigation, respondents were asked to categorize their role over the course of their career, in terms of the type of party they have most frequently represented.¹³ Respondents could also indicate “neutral decision-maker,” a selection allowed in addition to any other response. Excluding those who selected neutral decision-maker as their *only* career role (5% of respondents), the distribution between plaintiffs’ and defense attorneys was fairly even, as seen in Figure 2.

¹³ The response options were: represent plaintiffs in all or nearly all cases; represent plaintiffs and defendants, but plaintiffs more frequently; represent plaintiffs and defendants equally; represent plaintiffs and defendants, but defendants more frequently; represent defendants in all or nearly all cases; neutral decision-maker.

Figure 2 (Survey Question 5)



In total, 13% of respondents selected “neutral decision-maker.” Of those, 58% selected another primary career role: 46% have primarily represented plaintiffs, 24% have represented both equally, and 30% have primarily represented defendants.

B. OREGON CIRCUIT COURT EXPERIENCE

Respondents were asked to identify up to three case types with which they have had the most experience in Circuit Court. Respondents reported having the most experience litigating personal injury cases (selected by 34%) and general torts cases (selected by 31%). Contract disputes were reported by 26%, while complex commercial and real property actions were both reported by 18% of respondents.

Figure 3 shows the distribution of respondents by number of Circuit Court civil cases in the last five years. Over 60% of respondents have been an attorney of record or a judge in more than 20 cases.

Figure 3 (Survey Question 2)

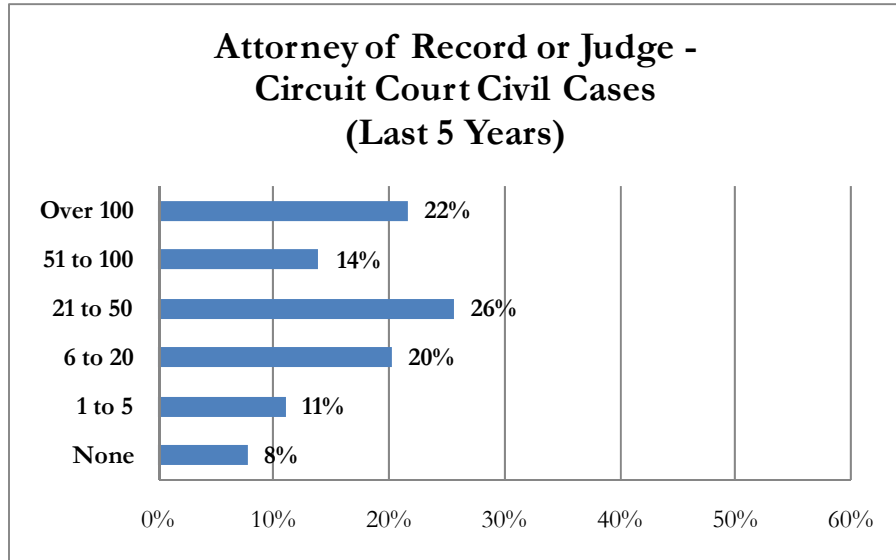
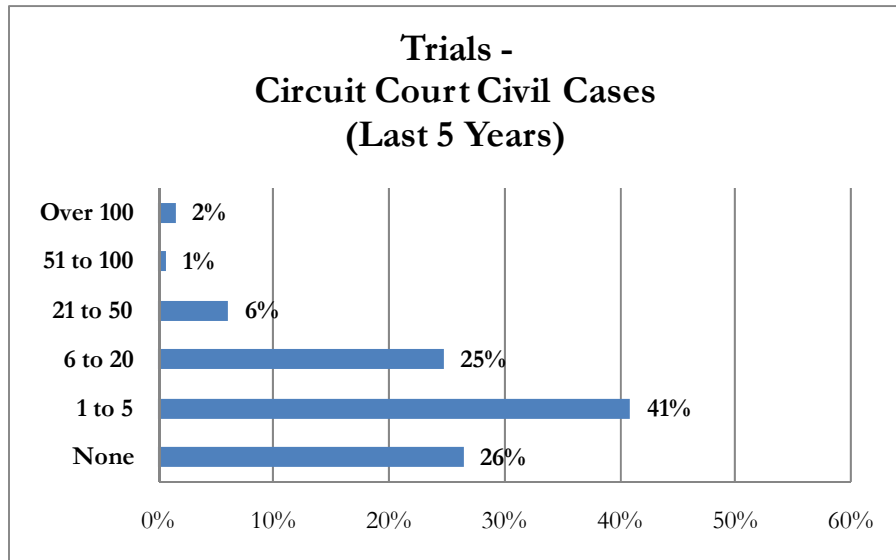


Figure 4 shows the distribution of respondents by number of Circuit Court trials in the last five years. About two-thirds averaged less than one Circuit Court civil trial per year, while about one-third averaged more than one trial per year.

Figure 4 (Survey Question 3)

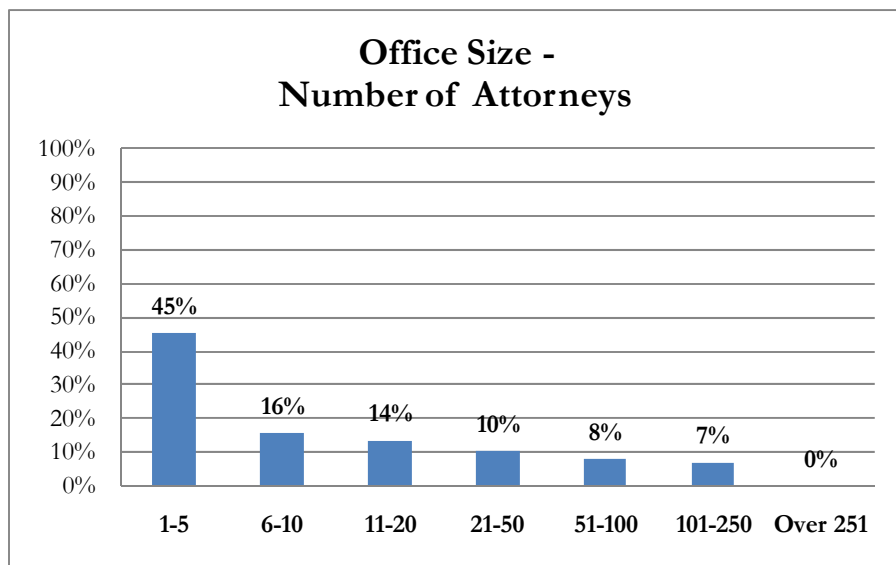


C. CURRENT POSITION

Over 70% of respondents indicated that they are currently in private practice as a law firm attorney or solo practitioner. Nearly one in ten respondents (9%) are presently judges. Over 7% indicated a current position as government counsel, while about 5% indicated a current position as in-house counsel. Only around 1% of respondents indicated being an academician or researcher, being an ADR provider, having retired, or maintaining inactive status (4% total).

Private practice, in-house, and government attorneys (84% of respondents) were asked the number of full- and part-time attorneys working for their organization in their office location. A plurality work in offices with five or fewer attorneys, while only 7% work in offices with over 100 attorneys. Figure 5 shows the distribution of respondents by office size.

Figure 5 (Survey Question 7)



IV. THE SURVEY RESULTS

This survey asked general questions about practice in Oregon Circuit Court, as well as more specific questions about the ORCP and the UTCR.

Respondents were not required to answer every question. Moreover, certain questions were omitted for respondents to whom the question would not have been applicable. Accordingly, the number of responses to a particular question may not equal the total number of survey respondents. Unless otherwise indicated, percentages reported are the portion of total responses to the particular question, not the portion of total respondents to the survey. For each figure, the number of responses to the question is noted, labeled as “*n*”.

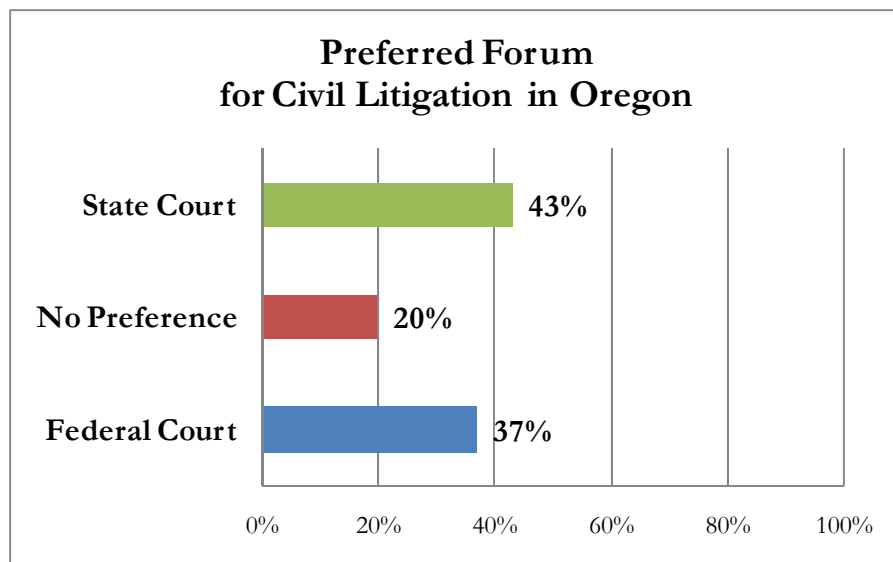
A. OREGON ATTORNEYS AND JUDGES ARE GENERALLY POSITIVE ABOUT THE OREGON STATE SYSTEM

Oregon practitioners generally prefer Oregon state court over both federal court and other state courts. This section will discuss respondents’ preferred forum for civil litigation, as well as the accompanying reasons.

1. STATE COURT V. FEDERAL COURT

Over 70% of all survey respondents reported experience litigating in the U.S. District Court for the District of Oregon. Those with federal experience, however, tend to prefer litigating in Oregon Circuit Court over the federal court. Almost two-thirds of respondents either prefer the state forum or have no preference. Figure 6 shows the level of preference for each Oregon forum.

Figure 6 (Survey Question 12)
n = 346



For respondents who prefer Circuit Court over the U.S. District of Oregon, reasons given include the applicable rules and procedures, particularly the limits on discovery. Respondents

overwhelmingly stated that the pretrial process in state court is simpler and less “onerous”¹⁴ than in federal court. Respondents frequently reported that state court litigation requires less “paperwork,” viewing federal procedures as forcing cases to be adjudicated “on paper before ever getting to trial” with “no increase in the accuracy or efficiency of litigation.” According to these respondents, fewer compulsory filings and limited discovery result in reduced litigation costs and a faster litigation process. Some of these respondents proudly and positively referred to Oregon’s system of “trial by ambush.” Many expressed appreciation for the flexibility of state procedures, as well as the level of control that the attorneys and parties are given over their cases without “micromanagement” by judges. Other reasons given for preferring state court: limited motions practice; partiality for state judges; attorney voir dire; 12-person juries; non-unanimous verdicts; and more familiarity with state court.

Respondents who prefer the U.S. District of Oregon over Circuit Court also cited the applicable rules and procedures, particularly mandatory disclosures and the availability of more discovery mechanisms. According to these respondents, federal procedures ensure better pretrial evaluation of cases and better advice to clients concerning appropriate case resolution. In addition, requiring everyone to “show their cards” means that once trial arrives, all parties know the issues and the evidence, and “trial time is not wasted on matters that ought to have been dealt with before a jury is chosen.” Respondents also voiced a qualitative preference for federal procedures. They frequently described the rules as being “clearer” – more structured, more precise, more predictable, more consistently applied, and more consistently enforced. Aside from the rules, respondents repeatedly praised the quality of the federal judiciary, and applauded active case management by judges. Many of these respondents found it important that cases are assigned to one judge for their duration, obviating the need to “educate another decision maker” each time court action is required. Other reasons given for preferring federal court: more meaningful motions practice (especially summary judgment); electronic filing and records management; higher levels of preparation and formality; and greater resources.

Many respondents who indicated “no preference” for either state or federal court cited the advantages (or disadvantages) of each forum, as described above. Some respondents indicated that the answer depends on the case or the judge, while others reported having positive experiences in both courts. One respondent commented: “The two most important factors – the judges and juries – are of equal quality in my opinion.”

Separating *only* those who expressed a preference by party represented, a majority of all respondent groups chose state court, with the exception of those who represent both parties but defendants more frequently. Those who represent plaintiffs in all or nearly all cases expressed the strongest support for state court, despite fact pleading requirements and discovery limitations.

2. OREGON COURT V. NEIGHBORING STATE COURTS

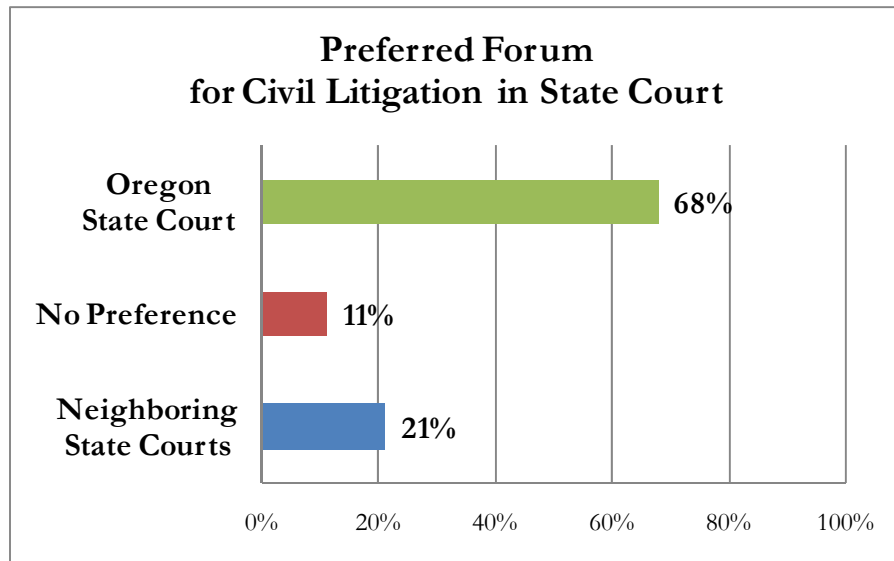
Approximately half of all survey respondents reported experience litigating in neighboring states. Respondents with such experience were asked to specify the state(s) and were permitted to list more than one. The vast majority (81%) indicated experience in Washington, and 25% indicated experience in California. Idaho was the third most frequently listed state, indicated by 12%. Every other state listed was indicated by fewer than 5%.

¹⁴ Where quotation marks are utilized without a cited source, the language has been pulled directly from the written comments submitted by survey respondents.

As is apparent from Figure 7, respondents with litigation experience in neighboring states prefer Oregon state court at a three-to-one ratio. In fact, nearly 80% of respondents either prefer Oregon or have no preference.

Figure 7 (Survey Question 14)

n = 237



Respondents who prefer litigating in Oregon Circuit Court over neighboring state courts provided three main reasons for the preference: pretrial rules and practices; the collegiality of the Oregon Bar; and greater familiarity with Oregon state court. With respect to rules and practices, respondents described Oregon’s process as straightforward, streamlined, and efficient, without many of the “ridiculous time-sensitive procedures” found elsewhere. According to these respondents, time and money is saved due to the lack of interrogatories and expert discovery, which do not provide a benefit sufficient to justify the burden and expense. One respondent stated that expert depositions “rarely tell you anything you didn’t already know or anticipate [the expert would] be saying.” Moreover, respondents expressed frustration with local rules in neighboring states, specifically their inconsistency from court to court and their often unwritten nature.

With respect to the collegiality of the Oregon Bar, respondents who prefer Oregon state court described opposing counsel in Circuit Court as friendly, civil, cooperative, professional, and ethical. In contrast, these respondents described opposing counsel in neighboring states as combative, uncooperative, and even “shady.” However, some of this sentiment may have to do with reaction to out-of-state lawyers, as one respondent reported feeling “home-towned” and another respondent simply stated “[a]ll law is local.” With respect to familiarity, it comes as no surprise that Oregon practitioners reported simply being most comfortable in the forum with which they have the most experience.

Respondents who prefer litigating in neighboring state courts over Circuit Court overwhelmingly cited the more liberal disclosure and discovery rules adopted in other states. These respondents commented that federal-type rules lead to more transparency. One respondent stated that “[t]oo little disclosure in Oregon hides the truth from [the] fact-finder,” and another remarked that “Oregon’s ‘trial by ambush’ rules should have no part in a trial ‘search for the truth.’” Familiarity played an admitted role with these respondents, as well. One respondent also reported a

danger of being “home-towned” in Circuit Court and another respondent described Oregon as a “good-old-boy system.” Finally, a few respondents stated that more law and precedent exist in other states.

Most of the respondents who indicated “no preference” for either Circuit Court or neighboring state courts simply stated that the different forums have different advantages and weaknesses. A number professed too little experience in the different courts to draw a fair comparison.

Separating *only* those who expressed a preference by party most frequently represented, at least 69% of every respondent group chose Oregon state court.

B. THE UNIQUE ASPECTS OF THE OREGON RULES AND THE GOALS OF EFFICIENCY, AFFORDABILITY, AND PROCEDURAL FAIRNESS

The survey probed Oregon practitioners for an assessment of the unique aspects of the Oregon rules, including fact pleading, the time constraint for holding trial, and the limits on discovery.

1. FACT PLEADING

Under ORCP 18, pleadings asserting a claim must contain “a plain and concise statement of the ultimate facts constituting the claim for relief without unnecessary repetition.”¹⁵ The Oregon Supreme Court has interpreted this rule to mean that “whatever the theory of recovery, facts must be alleged which, if proved, will establish the right to recovery.”¹⁶ Thus, a pleading is sufficient if it contains “an allegation of material fact as to each element of the claim for relief, even if vague.”¹⁷ Legal conclusions are disregarded except to the extent that they are supported by facts that would prove them.¹⁸ In reviewing a motion to dismiss, all allegations and the reasonable inferences to be drawn therefrom are accepted as true.¹⁹

This portion of the survey sought to determine the effects of this fact-based pleading rule, as well as how it is applied in practice.

a. The Effects of Fact Pleading

Figure 8 shows Oregon practitioners’ perceptions of the effects of fact pleading on litigation.²⁰ The most profound effects are “reveal[ing] the pertinent facts early in the case” and “help[ing] narrow the issues early in the case.” With both statements, approximately two-thirds of respondents agreed and, notably, exactly 20% of respondents expressed strong agreement. Nevertheless, only about 40% of respondents believe that fact pleading ultimately “reduces the total volume of discovery,” while a majority disagreed with the statement.

¹⁵ In this context, a “claim” includes original claims, counterclaims, cross-claims, and third party claims.

¹⁶ *Davis v. Tye Industries, Inc.*, 668 P.2d 1186, 1193 (1983).

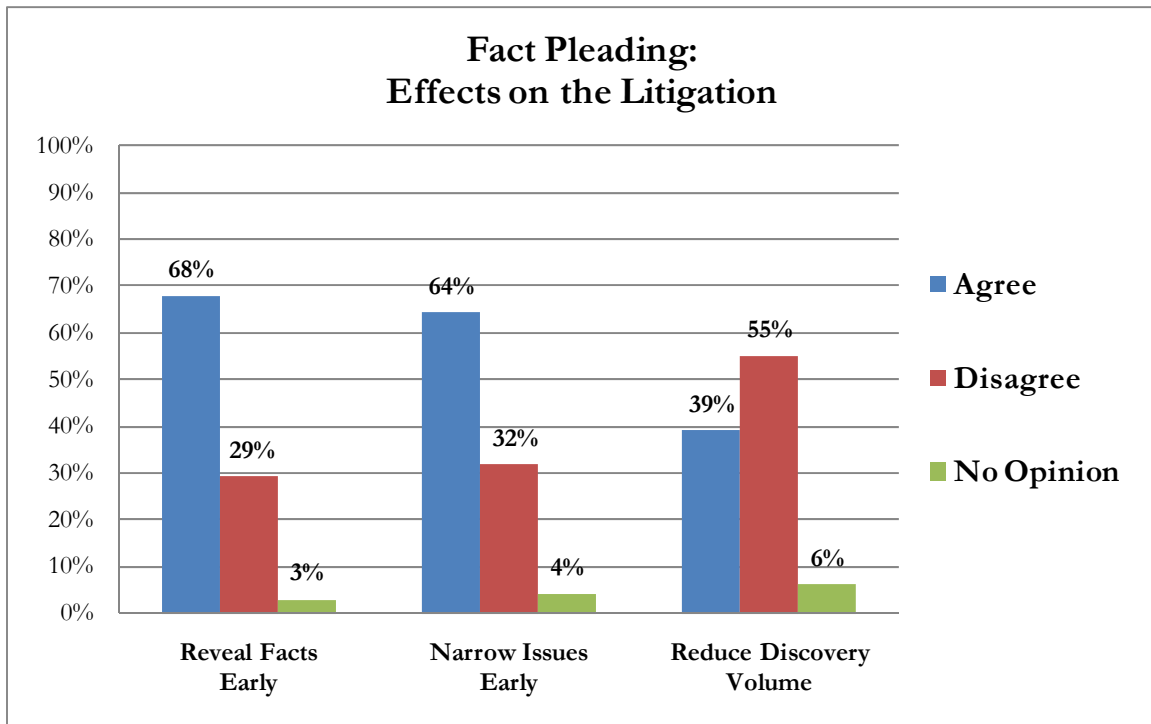
¹⁷ *McAlpine v. Multnomah County*, 883 P.2d 869, 870 (Or. App. 1994).

¹⁸ *Huang v. Claussen*, 936 P.2d 394, 394 (Or. App. 1997).

¹⁹ *Id.*; *McAlpine*, *supra* note 17. Accordingly, Oregon’s fact-based pleading standard contains no aspect of “plausibility,” the standard recently adopted by the U.S. Supreme Court for federal actions. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

²⁰ The categories “strongly disagree” and “disagree” are collapsed into one category unless otherwise noted. The same holds for the “strongly agree” and “agree” categories.

Figure 8 (Survey Questions 19a-19c)
 n = 453; 452; 452



Separated by party most frequently represented, a majority of all groups agreed that fact pleading reveals facts early and narrows issues early. A majority of those who primarily represent plaintiffs²¹ and those who represent both parties equally disagreed that fact pleading reduces the volume of discovery. However, a narrow plurality of those who primarily represent defendants indicated that fact pleading does reduce discovery volume (49% agreed; 48% disagreed).

When faced with the statement that “fact pleading generally favors defendants over plaintiffs,” a majority of respondents (57%) disagreed or strongly disagreed. Moreover, considering *all* respondents to the survey, one in five were neutral, selecting “no opinion” (13%) or declining to answer the question (7%). See Figure 9 for the distribution of answers.

²¹ The category “primarily represent plaintiffs” is an aggregate of the responses given by those who “represent plaintiffs in all or nearly all cases” and those who “represent plaintiffs and defendants, but plaintiffs more frequently.” The same applies to the category “primarily represent defendants.”

Figure 9 (Survey Question 19d)
n = 452

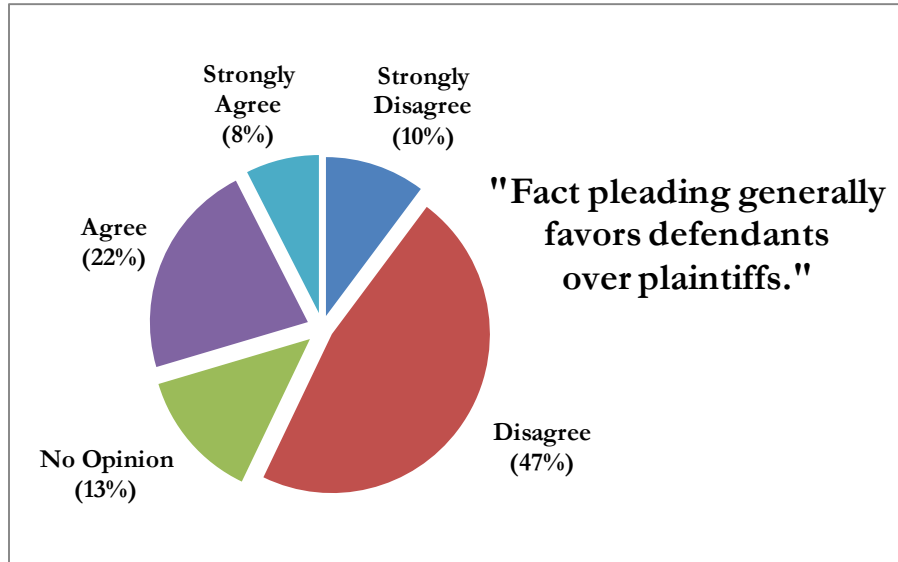
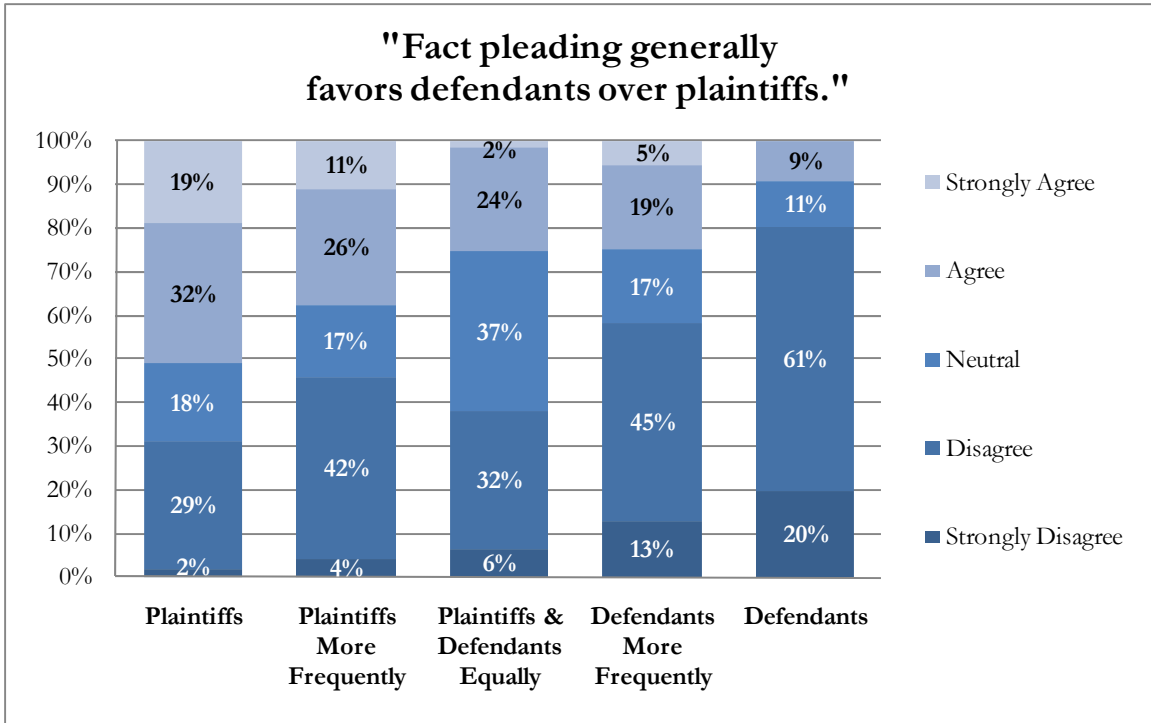


Figure 10 shows the differences across parties. Predictably, plaintiffs’ attorneys were more likely than defense attorneys to agree that fact pleading favors defendants. However, regarding those who represent plaintiffs more frequently than defendants, a plurality (46%) disagreed with the statement, and a majority (63%) either disagreed or were neutral on the issue.²² Further, regarding those who represent plaintiffs and defendants equally, a plurality (38%) disagreed with the statement and 75% either disagreed or were neutral.

²² In Figure 10, the “neutral” category includes both those who selected “no opinion” and those who declined to answer the question.

Figure 10 (Survey Questions 5, 19d)
 n = 100; 72; 63; 93; 122



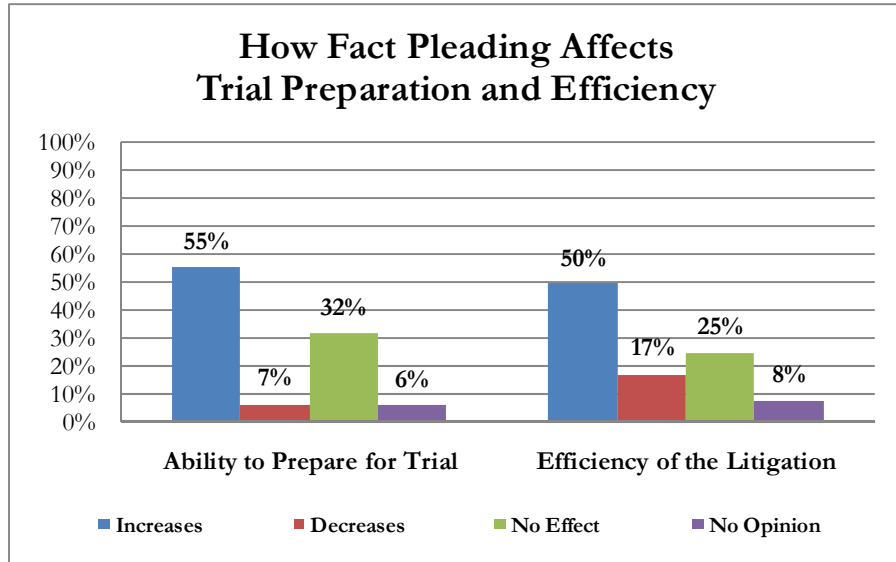
b. Comparative Assessment

The survey asked those respondents with Oregon federal and/or neighboring state litigation experience for a comparative assessment of fact pleading.

i. Functioning of the Litigation Process

As demonstrated in Figure 11, Oregon practitioners generally believe that fact pleading has a positive effect on how the litigation process functions. A majority of respondents with comparative experience indicated that fact pleading increases counsel’s ability to prepare for trial and increases the efficiency of the litigation process. Ultimately, over 85% believe that fact pleading has a beneficial effect or “no effect” on trial preparation, and 75% believe that fact pleading has a beneficial effect or “no effect” on costs.

Figure 11 (Survey Question 21c, 21f)
 n = 363; 360



When the responses regarding trial preparation are separated by party represented, a plurality of those who primarily represent plaintiffs (42%), as well as a majority of those represent plaintiffs and defendants equally (54%) and those who primarily represent defendants (64%), reported that fact pleading enhances counsel’s ability to prepare for trial. In addition, fewer than 11% within any group indicated a belief that fact pleading inhibits trial preparation, and only 2% of those who represent plaintiffs and defendants equally reported holding this belief.

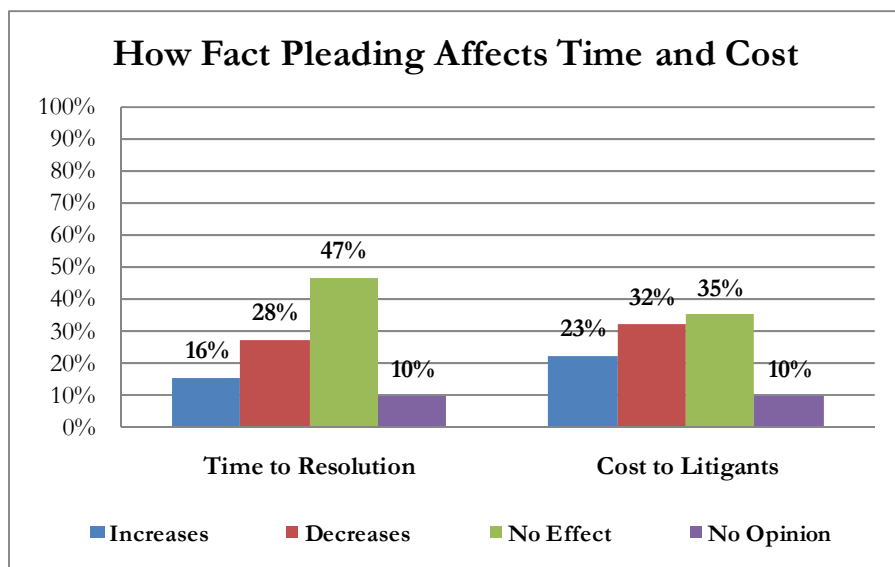
When the responses regarding efficiency are separated by party represented, it is clear that those who primarily represent defendants tend to believe that fact pleading increases the efficiency of the litigation process at a higher rate (61%) than those who primarily represent plaintiffs (36%). Nevertheless, “increases” was the most common response within every group, except those who represent plaintiffs in all or nearly all cases, who were equally divided on the efficiency issue. However, even in that group, nearly 60% indicated that fact pleading either increases or has no effect on litigation efficiency.

ii. *Duration and Cost of the Litigation*

With respect to time to resolution and cost to litigants, a plurality of respondents with comparative experience reported that fact pleading has no effect. However, the second most common response on both issues was that fact pleading decreases time and costs. Ultimately, 85% gave a favorable (“decreases”) or neutral (“no effect” or “no opinion”) answer as to the effect on time, and over three-quarters gave a favorable or neutral answer as to the effect on costs. See Figure 12.

Figure 12 (Survey Question 21a, 21b)

n = 363; 364



When the responses regarding time are separated by party represented, a majority of all groups believe that fact pleading either decreases or has no effect on the time to resolution, while no more than 25% of any group believes that fact pleading increases litigation time. Consistent with the aggregate result, the most common answer for all groups was “no effect.”

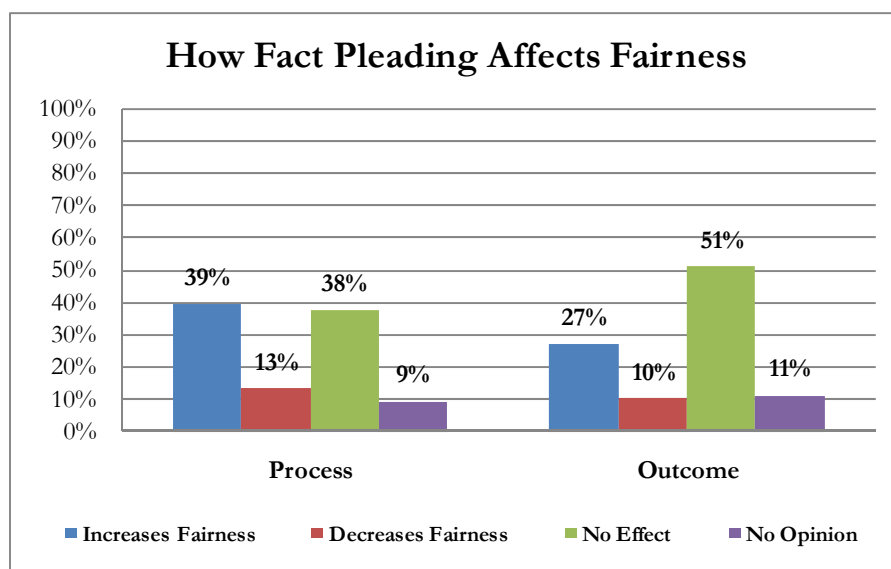
When the responses regarding cost are separated by party represented, a majority of all groups believe that fact pleading either decreases or has no effect on litigation costs, while no more than 30% of any group believes that fact pleading increases costs. A plurality (45%) of those who primarily represent defendants indicated that fact pleading decreases costs.

iii. *Fairness of the Litigation*

As demonstrated in Figure 13, Oregon practitioners generally find that, to the extent fact pleading has an effect on fairness in litigation, it tends to increase fairness. With respect to the process, a plurality of respondents with comparative experience indicated that fact pleading increases fairness, and over 75% indicated that it either increases or has no effect on procedural fairness. With respect to the outcome, over 75% indicated that fact pleading either increases fairness or has no effect on the ultimate resolution.

Figure 13 (Survey Question 21d, 21e)

n = 360; 362



When the responses regarding procedural fairness are separated by party represented, it is clear that those who primarily represent defendants tend to believe that fact pleading increases fairness at a higher rate (49%) than those who primarily represent plaintiffs (28%). However, a majority of all groups indicated that fact pleading either increases or has no effect on the fairness of the litigation process. Only approximately one in four attorneys who primarily represent plaintiffs (27%) reported a decrease in fairness.

When the responses regarding outcome fairness are separated by party represented, “no effect” was the most common response within every group, and more than 60% of each group indicated that fact pleading either increases or has no effect on the fairness of the outcome. Only 18% of plaintiffs’ attorneys, 6% of defense attorneys, and 7% of those who represent both equally reported a decrease in fairness.

c. Fact Pleading in Operation

The survey examined how fact pleading functions in practice in Circuit Court, including amendments to the pleadings, satellite litigation on the pleadings, and the effect of the pleadings at trial.

Figure 14 shows the Oregon Bar’s perception of how often: 1) parties seek and 2) courts allow amendments to the pleadings as the facts develop.²³ This data demonstrates that Oregon’s approach is fairly flexible. On both issues, only one respondent chose the “almost never” response option.

Exactly 50% of respondents reported that parties seek to amend the pleadings “often” or “almost always,” while exactly 50% reported that parties seek to amend the pleadings “about half the time” or “occasionally.” When separated by party represented, all groups were fairly consistent on the frequency with which amendments are sought. “Often” was the most common response within

²³ Due to the small percentages of attorneys who indicated “no experience” with these issues (1% “parties seek”; 2% “courts allow”), those respondents are not included in the percentage calculation for Figure 14.

every group (between 35% and 40%), except those who represent defendants in all or nearly all cases. Interestingly, that group believes that amendments are requested less often, as nearly 40% selected “occasionally.”

An overwhelming majority (93%) of respondents indicated that courts allow amendments to insufficient pleadings “almost always” or “often.” When separated by party represented, all groups were quite consistent.

Figure 14 (Survey Questions 20b, 20c)
 n = 446; 442

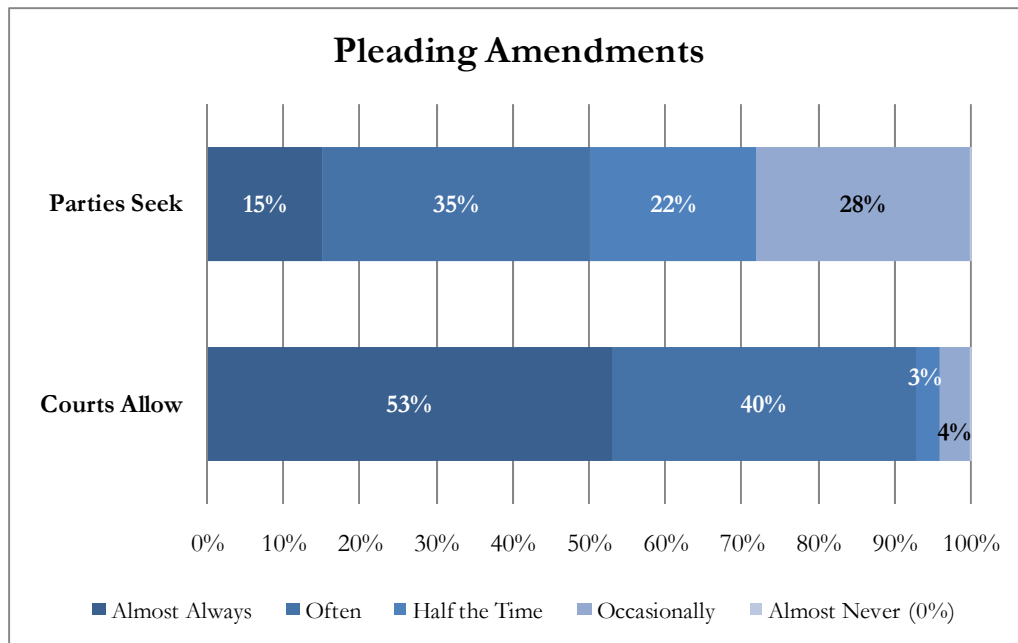


Figure 15 shows the Oregon Bar’s perception of how often parties litigate the scope and adequacy of the pleadings. Half of respondents indicated that this type of satellite litigation occurs “almost never” or only “occasionally,” nearly 20% indicated that it occurs “about half the time,” and approximately one-quarter indicated that it occurs “often” or “almost always.” Separated by party represented, “occasionally” was the most common response for all groups by at least ten percentage points, except those who represent both parties equally. That group selected “often” at a rate of 32%, and “occasionally” at a rate of 28%.

Figure 15 (Survey Questions 20a)
n = 454

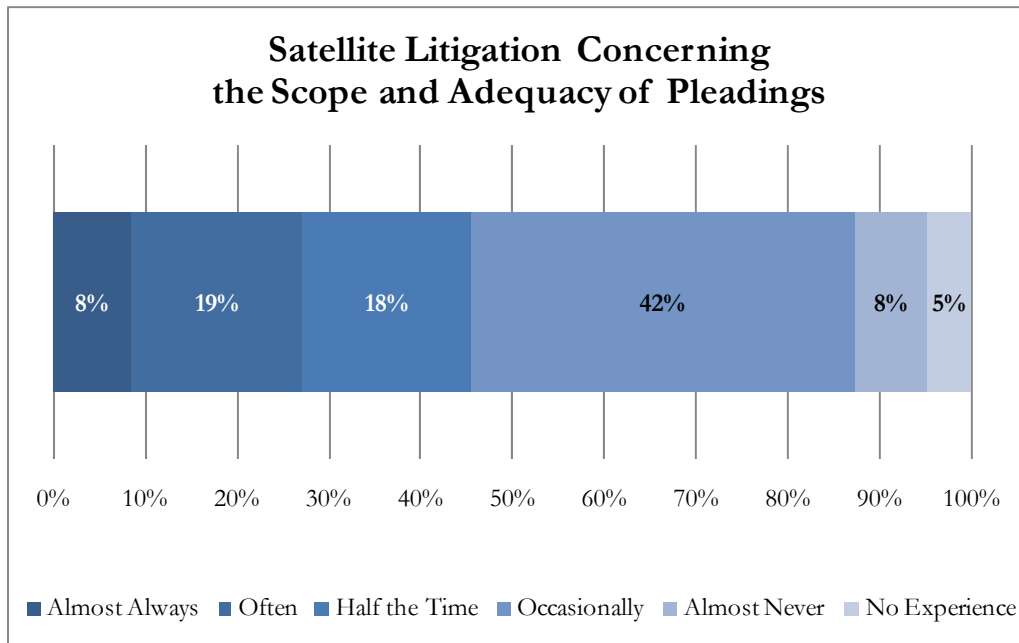
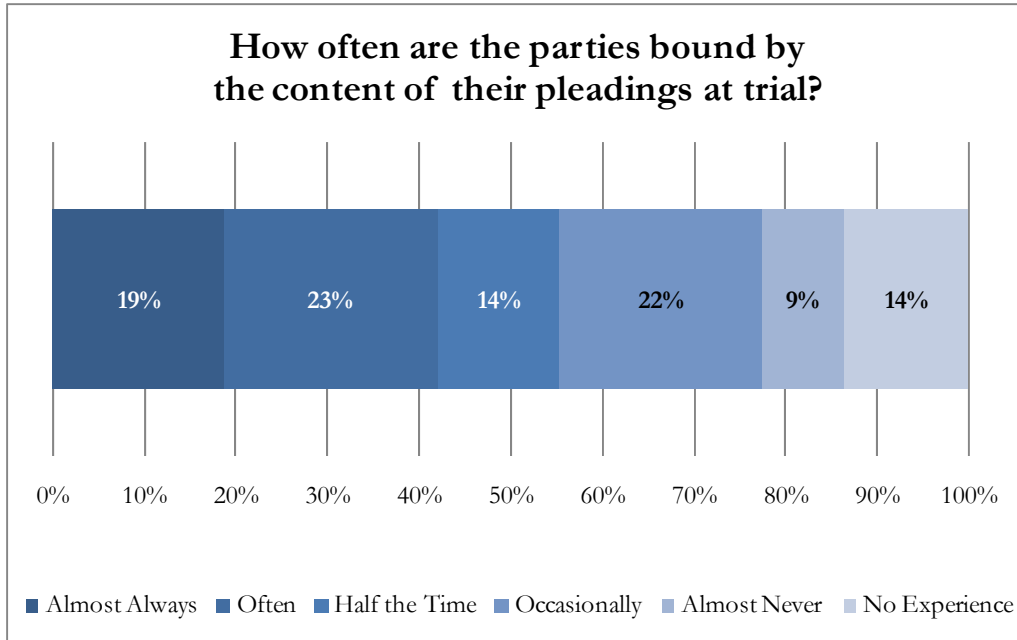


Figure 16 shows the Oregon Bar’s perception of how often parties are bound by the content of their pleadings at trial. The experience of respondents varies. Over 40% indicated that the pleadings define the scope of the trial “almost always” or “often,” nearly 15% indicated that this occurs “about half the time,” and over 30% indicated that it occurs only “occasionally” or “almost never.” Notably, almost 15% of respondents have no experience with the issue. Separated by party represented, the respondent groups were fairly evenly split between the response options. The most common response for all groups was “occasionally,” except those who represent plaintiffs in all or nearly all cases, who most frequently selected “often,” and those who represent both parties equally, who most frequently selected “almost always.”

Figure 16 (Survey Question 20d)
 n = 453



d. Respondent Comments

Written comments on the pleading standard were divided between supporters of fact pleading and advocates for notice pleading. Comments by supporters of fact pleading include:

- In Oregon, “pleadings actually mean something.”
- “Fact pleading also cleans up the process and makes the parties focus on what the case is really about.”
- “I generally like Oregon fact pleading requirements. Forces both sides to refine their cases/claims, and defines [the] ‘relevance’ of issues for both discovery and trial better than discovery mechanisms alone.”
- “I feel that the parties benefit from presenting the actual theory of the case in definite terms so as to evaluate the exposure and reach resolution earlier without extensive fishing expeditions.”
- “[W]ith fact based pleading you can do away with much of this discovery process and focus on what is important.”
- “The material point about fact pleading is that you rarely see ‘kitchen sink’ lawsuits, where every claim plus fraud is trotted out and given its day in the sun.”

Notice pleading advocates either provided no reason for their preference or described fact pleading as leading to “frivolous” attacks on the pleadings and “needless” motions on pleading issues.

Some respondents commented that the problem is not the fact pleading rule, but its lack of application in practice. They reported that many Oregon judges tend to proceed as if notice pleading is in effect, and the appellate courts give a “generous” interpretation to the rule. One respondent commented that fact pleading would greatly increase the efficiency of litigation, but its requirements are rarely followed or enforced. Others made an explicit request for stricter enforcement of the rule.

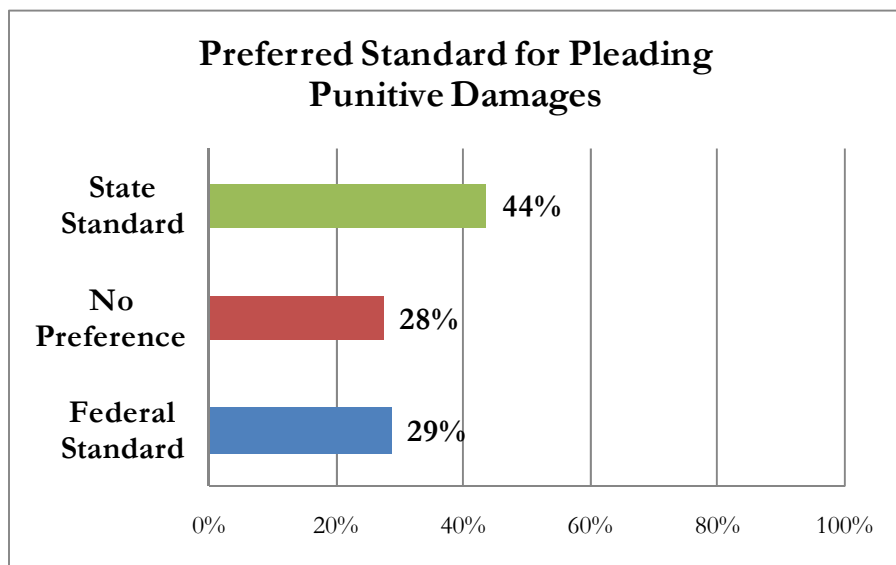
One respondent suggested that pleading practice could be reduced by allowing one amendment as a matter of right after discovery is substantially complete, to accommodate an improved understanding of the facts (“so long as it does not change the character of the litigation or otherwise prejudice the defendant”). Another respondent, while praising fact pleading, stated that active case management is actually more effective in driving cases to resolution.

e. Pleading Punitive Damages

Pursuant to O.R.S. § 31.725, an initial pleading in Circuit Court may not contain a request for punitive damages.²⁴ Rather, a party must separately move the court to amend the pleading to assert such a claim, and produce “some evidence in support of a *prima facie* case” for punitive damages.²⁵ Only after the court holds a hearing and grants the motion may the plaintiff obtain discovery on the defendant’s ability to pay.²⁶

One-quarter of respondents indicated no experience with punitive damages. Of those who *do* have such experience, a plurality reported a preference for the state standard. See Figure 17.

Figure 17 (Survey Question 22)
n = 247



Not surprisingly, those who primarily represent plaintiffs prefer the federal standard, while those who primarily represent defendants prefer the state standard. However, those who represent plaintiffs and defendants equally tended toward a state preference (38% state; 25% federal).

²⁴ O.R.S. § 31.725(1).

²⁵ O.R.S. §§ 31.725(2), (3)(a); *Bolt v. Influence, Inc.*, 43 P.3d 425, 428 (Or. 2002).

²⁶ O.R.S. § 31.725(5), 6).

Respondents who prefer the state standard for pleading punitive damages commented that requiring a threshold showing of a basis for the claim helps to manage both plaintiffs' expectations and defendants' risks. According to these respondents, this issue can emotionally charge the litigation, and Oregon's procedure minimizes the inclusion of punitive damages claims simply to gain "leverage." When a claim lacks merit, the procedure allows the parties to focus on the real issues. When a claim has merit, the procedure assists in trial preparation. In either case, the procedure focuses discovery and facilitates settlement by clarifying rights and liabilities at an earlier point.

Respondents who prefer the federal standard for pleading punitive damages commented that the federal procedure is more efficient. Requiring a threshold showing of a basis for the claim simply creates an extra step that increases time, cost, and hassle. According to these respondents, there is little point to the state procedure. In practice, courts liberally allow inclusion of punitive damages claims, and the plaintiff still has the burden of proof regarding its claims. One respondent remarked that the state procedure adds a layer to the litigation, to "drag cases out" and "make it even more difficult for people to get justice." Moreover, in federal court, the parties know right away whether punitive damages will need to be addressed.

Respondents who do not have a preference commented that there is no material difference in the procedures; state judges tend to "rubber stamp" punitive damages claims, and factual support is required under either procedure. Many of these respondents admitted to insufficient experience to make a comparison.

Interestingly, one respondent favoring the state procedure and one respondent favoring the federal procedure each remarked that Oregon's rule placates "tort reform" advocates.

2. TRIAL TIME REQUIREMENT

Under UTCR 7.020(5) and 7.030(4), trial must take place within one year of filing (normally) or within two years of filing (for "complex" cases), absent a showing of good cause. This portion of the survey sought to determine how the trial time requirement operates, as well as its ultimate effects.

a. Trial Time Requirement in Operation

Figure 18 shows the perception of the Oregon Bar as to whether the requirement allows sufficient time for trial preparation. More than three out of four respondents indicated that the requirement allows for sufficient preparation of the majority of cases. Separated by party represented, all respondent groups were quite consistent, with over 70% of every group expressing agreement with the statement.

Figure 18 (Survey Question 15)
 n = 463

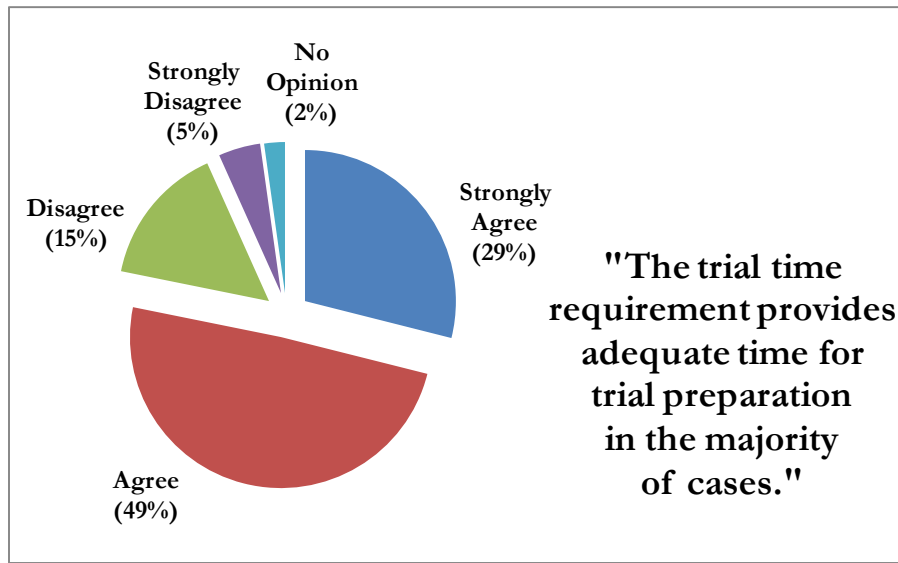
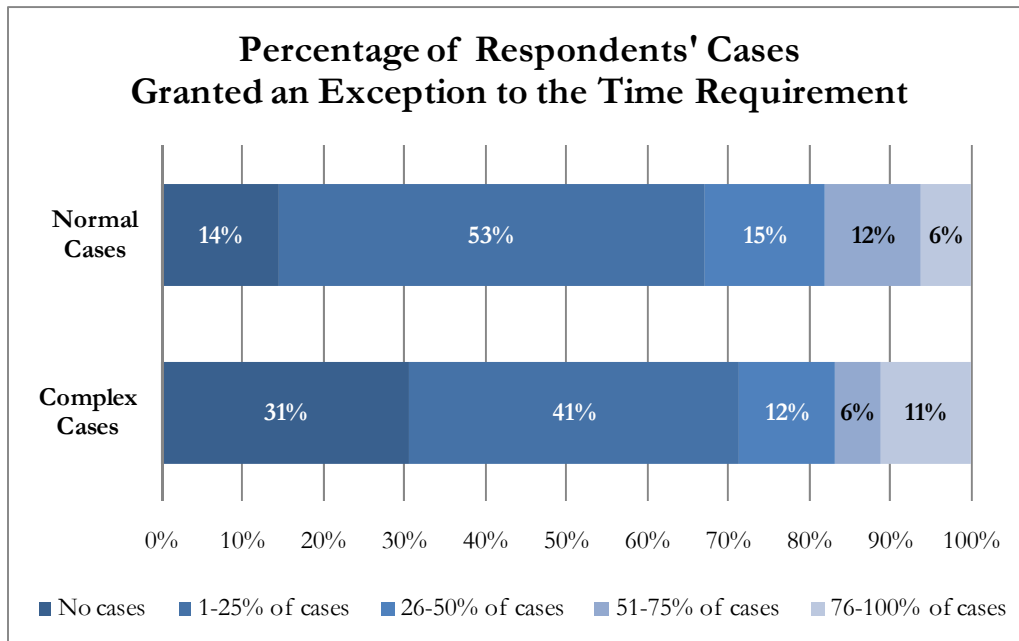


Figure 19 shows the percentage of respondents' cases in which an exception to the time requirement has been granted, for "normal" and "complex" cases.²⁷ For both types of cases, the majority of respondents indicated that the deadline was extended in less than one-quarter of cases, and a solid portion of respondents indicated no exceptions in their practice. Fewer than 20% of respondents indicated extension of the deadline in more than half of cases. Separated by party represented, the most common responses within each group was "1-25%" or "0%".

Figure 19 (Survey Questions 17, 18)
 n = 437; 331



²⁷ The percentages reported for Figure 19 include only those respondents who indicated experience with the type of case at issue, and exclude those who have not litigated either "normal" or "complex" cases.

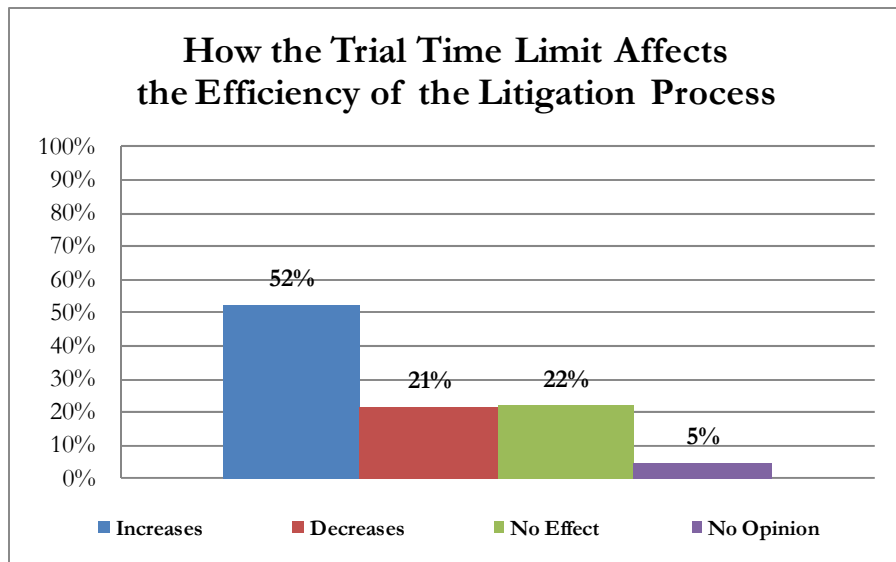
b. Comparative Assessment

The survey asked those respondents with Oregon federal and/or neighboring state litigation experience for a comparative assessment of the trial time requirement.

i. *Functioning of the Litigation Process*

As demonstrated in Figure 20, Oregon practitioners generally believe that the trial time requirement has a positive effect on how the litigation process functions. A majority of respondents with comparative experience indicated that the requirement increases efficiency. Ultimately, nearly 75% gave a favorable or neutral answer.

Figure 20 (Survey Question 16c)
n = 370

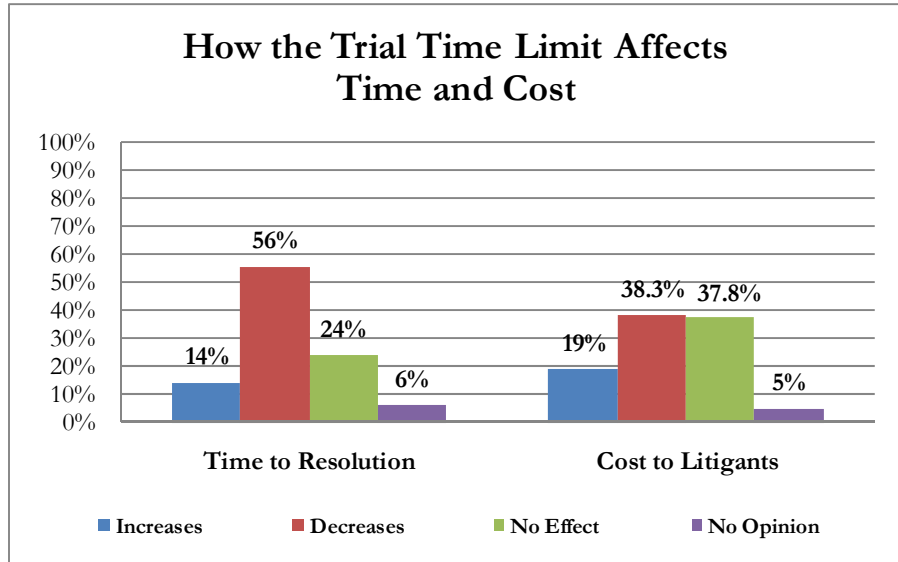


Separated by party represented, the most common response within every respondent group was that the time requirement “increases” efficiency.

ii. *Duration and Cost of the Litigation*

A majority of respondents with comparative experience reported that the trial time requirement decreases the time to resolution, and exactly 80% reported either a decrease or no effect. A very narrow plurality of respondents also reported that the requirement decreases the cost of litigation for litigants, and over 75% reported either a decrease or no effect. Fewer than one in five attorneys reported an increase in either time or cost as a result of the trial time requirement. See Figure 21.

Figure 21(Survey Questions 16a, 16b)
 n = 373; 373



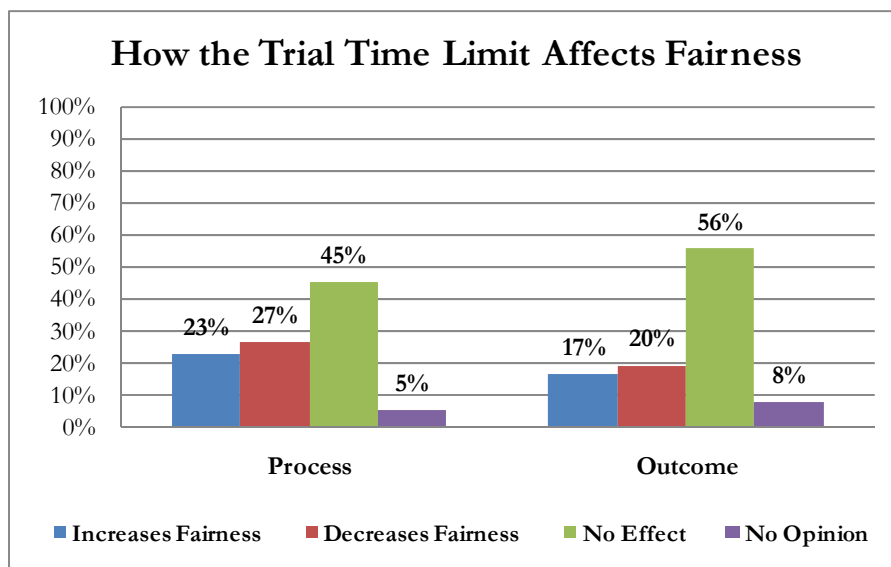
When the responses regarding time are separated by party represented, “decreases” was the most common response within every respondent group.

When the responses regarding cost are separated by party represented, “decreases” was the most common response within every respondent group, with the exception of those who represent plaintiffs in all or nearly all cases and those who represent defendants in all or nearly all cases. Within those two groups, “no effect” was the most common response.

iii. Fairness of the Litigation

As demonstrated in Figure 22, Oregon practitioners do not generally find that the trial time requirement has a deleterious effect on fairness in litigation. A majority (68%) of respondents with comparative experience reported that the requirement either increases or has no effect on procedural fairness. In addition, a strong majority (73%) reported that the requirement either increases or has no effect on the fairness of the outcome.

Figure 22 (Survey Questions 16d, 16e)
n = 372; 370



Separated by party represented, the most common response within every respondent group was that the trial time requirement has “no effect.”

c. Respondent Comments

Respondents who chose to provide written comments on the trial time requirement mainly expressed frustration with the practicalities of the rule. Those comments have two basic themes. First, commenting respondents observed that the deadline is not realistic for certain types of cases.²⁸ In such cases, there is pressure to settle rather than litigate unprepared, and a tendency to expend additional effort to petition for an exemption and/or reach an agreement to dismiss and re-file the case. Moreover, litigants face inconsistency in terms of the amount of leeway different courts will allow. According to some respondents, permitting the parties to agree on the trial date would solve these problems.

Second, commenting respondents observed that the deadline is not realistic for certain jurisdictions. The lack of resources means there are simply not enough judges to hear every case within the deadline. In some locales, as many as eight cases are set for the same trial date, but only one can proceed and the rest must be rescheduled even if fully prepared for trial. This is highly inconvenient for everyone involved, and increases expenses for litigants. According to one respondent, “No civil case should ever be reset on the day of trial.”

²⁸ Respondents who selected “Labor Law” as one of their main practice areas were the most likely to indicate that the requirement does not provide adequate time for trial preparation (36%), followed by “Property Damage” (32%), and “Professional Malpractice” (30%). Least likely to indicate that the time limit is inadequate for trial preparation were respondents who selected “Product Liability” (13%) “Complex Commercial” (10%), and “Probate” (0%) as one of their main practice areas. However, it is difficult to interpret this data, as respondents were allowed to select up to three main practice areas and did not rank or apportion their caseload.

3. RESTRICTIONS ON DISCOVERY

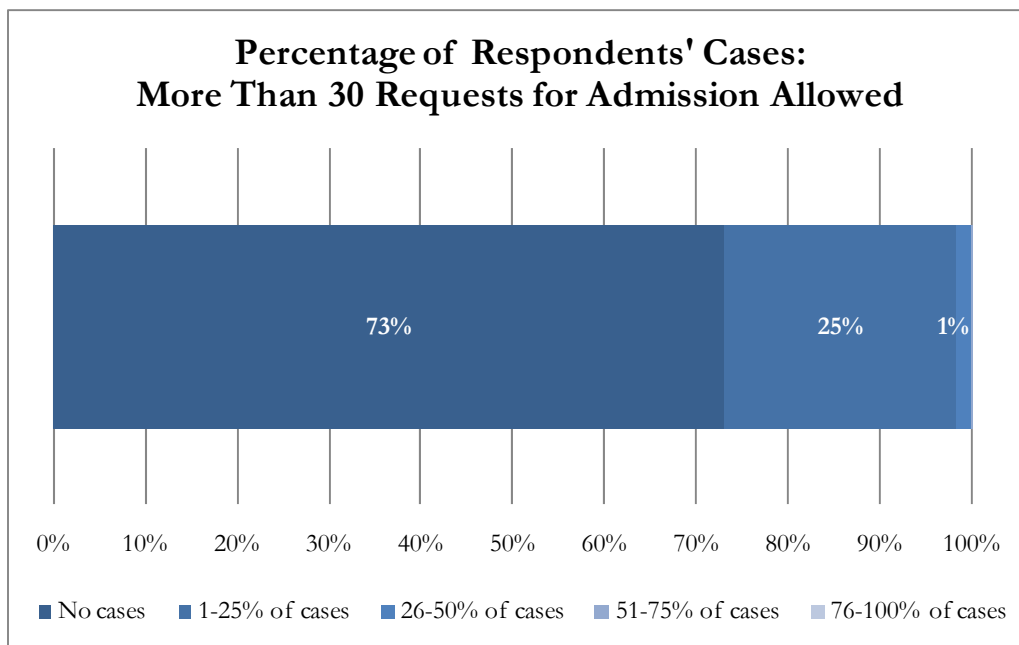
This section includes discussion of the limit on requests for admission, the absence of interrogatories, and the absence of expert witness disclosure and discovery.

a. Requests for Admission

Under ORCP 45(F), each party may serve no more than 30 total requests for admission upon an adverse party, absent a court order finding good cause for additional requests.

As Figure 23 shows, very few exceptions to the limit on requests for admission are granted. Nearly three-quarters of respondents have had no cases in which more requests were allowed, and only 1% of respondents have experienced an exception in more than 25% of their cases. No respondents have experienced an exception in more than half of cases.

Figure 23 (Survey Question 28)
n = 425



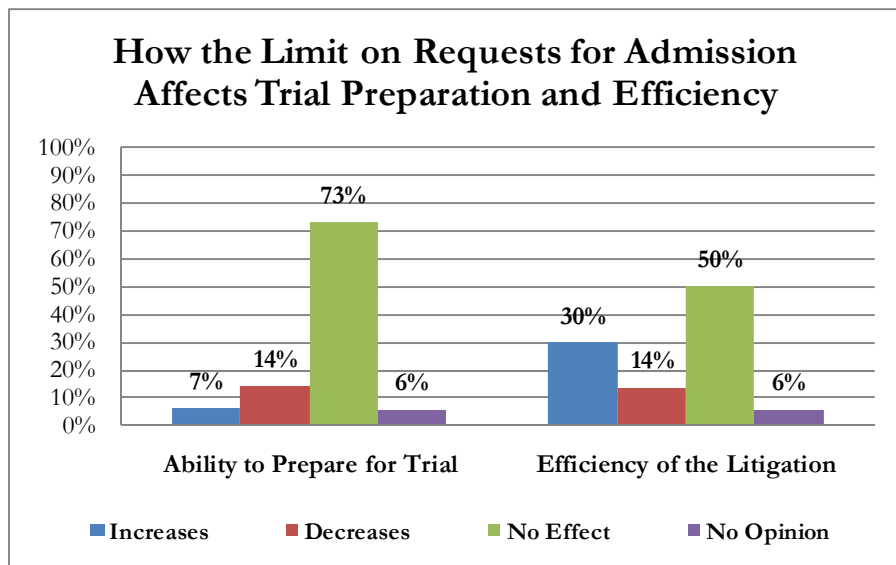
i. Comparative Assessment

The survey asked those respondents with Oregon federal and/or neighboring state litigation experience for a comparative assessment of the limit on requests for admission.

(A) Functioning of the Litigation Process

As demonstrated in Figure 24, Oregon practitioners generally believe that the limit on requests for admission has limited impact on how the litigation process functions. Nearly three out of four respondents with comparative experience indicated that the limit has no effect on counsel's ability to prepare for trial. Exactly half indicated that the limit has no effect on the efficiency of the litigation process, but a notable 30% find that it does increase efficiency. Separated by party represented, all groups were consistent on both issues.

Figure 24 (Survey Questions 27c, 27f)
 n = 356; 355

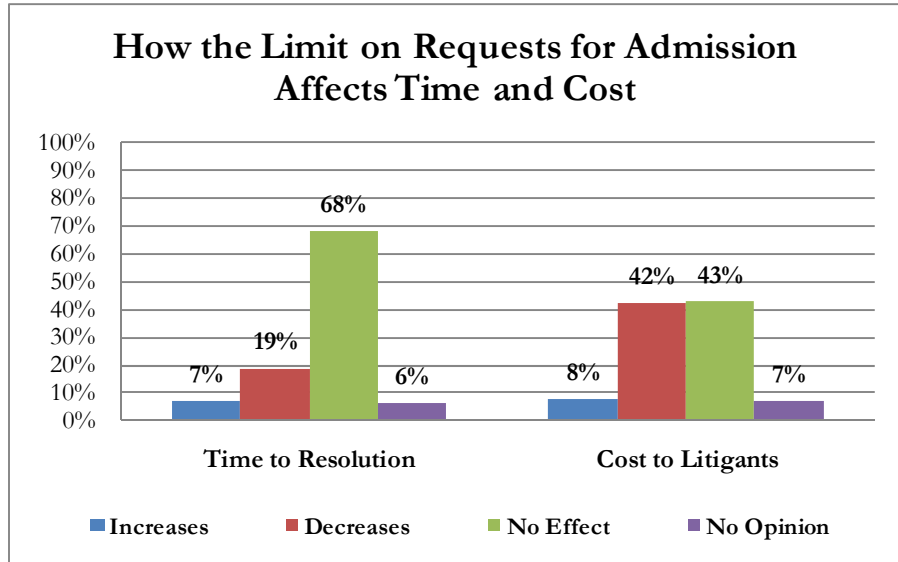


(B) Duration and Cost of the Litigation

With respect to time to resolution, Oregon practitioners generally find that the limit on requests for admission has little impact. A strong majority of respondents with comparative experience indicated that the limit has no effect on time. However, to the extent that an effect is felt, it is more often beneficial, as nearly 20% indicated that the limit decreases litigation time. When the responses regarding time are separated by party represented, a majority within each group indicated that the limit has no effect on time to resolution. “Decreases” was the second most common response for all respondent groups.

With respect to cost to litigants, Oregon practitioners are fairly evenly split on whether the limit on requests for admission decreases or has no effect on costs. Ultimately, 85% of respondents with comparative experience gave a favorable or neutral answer, with fewer than 10% indicating that the limit increases costs. When the responses regarding cost are separated by party represented, the two most common responses for all groups were “decreases” and “no effect.” However, a plurality of those who primarily represent defendants indicated that the limit reduces costs, while a plurality of those who primarily represent plaintiffs and a majority of those who represent both equally indicated no effect. See Figure 25.

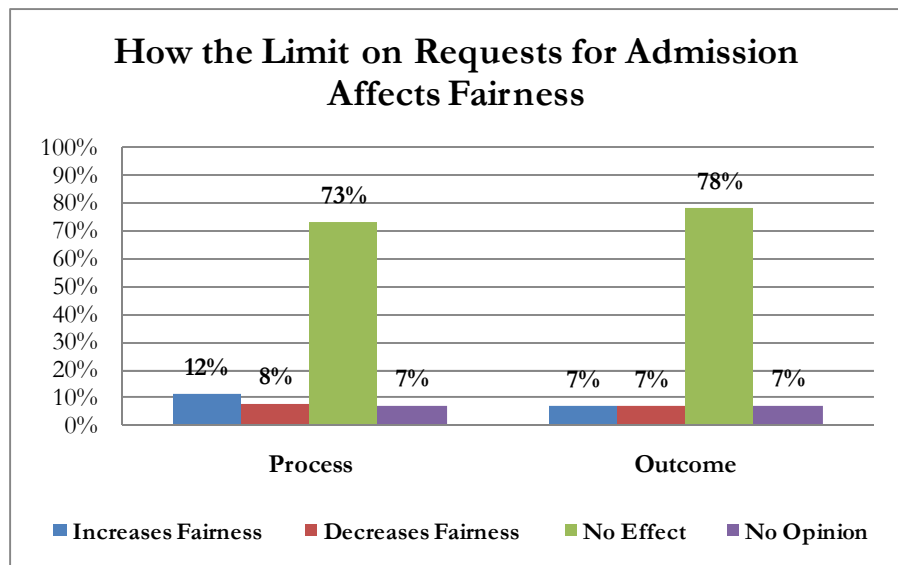
Figure 25 (Survey Questions 27a, 27b)
n = 357; 355



(C) Fairness of the Litigation

As demonstrated in Figure 26, Oregon practitioners generally believe that the limit on requests for admission does not impact fairness in litigation. Close to three-quarters of respondents with comparative experience indicated that the limit has no effect on procedural fairness, and 78% indicated that it has no effect on the fairness of the outcome. Separated by party represented, a majority of all groups chose the “no effect” option and were otherwise fairly consistent on both types of fairness. However, those who primarily represent plaintiffs tended to indicated that the limit decreases fairness more often than the other groups.

Figure 26 (Survey Questions 27d, 27e)
n = 357; 354



b. Interrogatories

The ORCP does not provide for written interrogatories as a discovery mechanism,²⁹ rendering them unavailable in Circuit Court practice.

i. Comparative Assessment

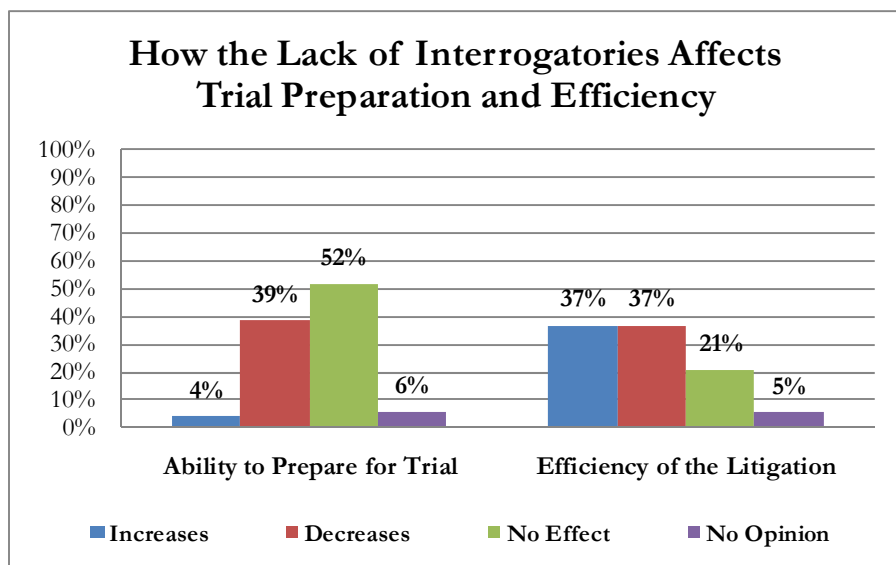
The survey asked those respondents with Oregon federal and/or neighboring state litigation experience for a comparative assessment of the absence of interrogatories as a discovery tool.

(A) Functioning of the Litigation Process

With respect to counsel's ability to prepare the case for trial, Oregon practitioners generally believe that, to the extent the lack of interrogatories has an effect, it is negative. Just over half of respondents with comparative experience indicated no effect, while nearly 40% indicated a decreased ability to prepare for trial. Separated by party represented, "no effect" and "decreases" were the most common responses within every group. However, those who represent plaintiffs in all or nearly all cases selected "decreases" more often than "no effect," while it was the opposite for every other respondent group.

With respect to the efficiency of the litigation process, Oregon practitioners are divided as to the effect of the lack of interrogatories. An equal number of respondents with comparative experience indicated decreased efficiency as increased efficiency. Separated by party represented, all groups were split on the issue. See Figure 27.

Figure 27 (Survey Questions 26c, 26f)
n = 353; 355

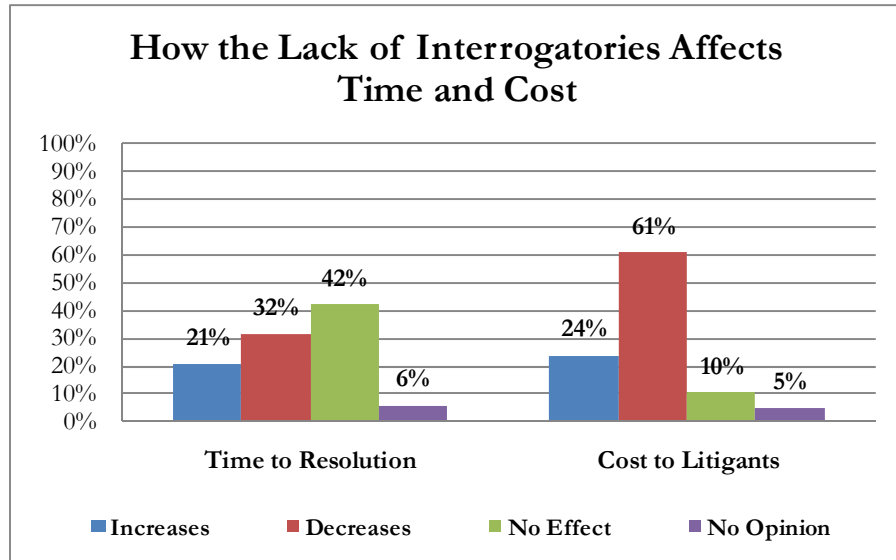


²⁹ See ORCP 36(A).

(B) Duration and Cost of the Litigation

As demonstrated in Figure 28, the absence of interrogatories does not have a clear effect on time to resolution, but Oregon practitioners do find that it reduces litigant costs. With respect to litigation time, a plurality of respondents with comparative experience selected “no effect,” with “decreases” as the next most common response. Ultimately, nearly three-quarters gave a favorable or neutral answer as to the effect on time. With respect to cost, a majority indicated that the lack of interrogatories decreases litigant costs.

Figure 28 (Survey Questions 26a, 26b)
n = 355; 356



When the responses regarding time are separated by party represented, all groups reflected the same response pattern as the aggregate result, with two exceptions. A plurality of those who represent plaintiffs in all or nearly all cases indicated a decrease in time to resolution. A plurality of those who represent both equally reported no effect, however, the same number of respondents selected “decreases” as “increases.”

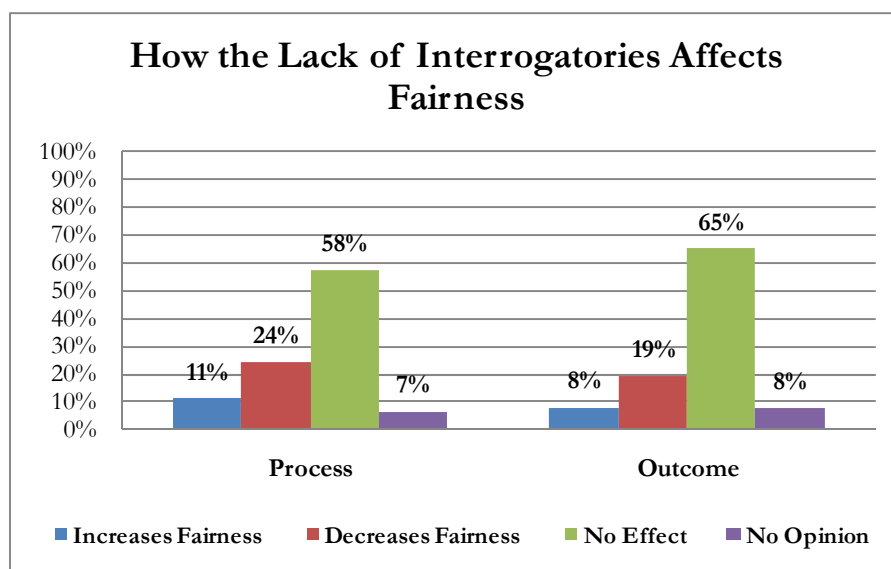
When the responses regarding cost are separated by party represented, all groups reflected the same response pattern as the aggregate result.

(C) Fairness of the Litigation

As demonstrated in Figure 29, Oregon practitioners generally find that the absence of interrogatories has little impact on fairness in litigation. A majority of respondents with comparative experience selected “no effect” for both the fairness of the process and the fairness of the outcome. However, to the extent that an effect is felt, more respondents believe that the lack of interrogatories decreases fairness than believe that it increases fairness.

Figure 29 (Survey Questions 26d, 26e)

n = 356; 352



When the responses regarding both procedural fairness and outcome fairness are separated by party represented, all groups followed the same response pattern, with “no effect” as the most common answer and “decreases” as the next most common answer. Interestingly, however, those who primarily represent plaintiffs were over twice as likely to indicate that the lack of interrogatories increases both aspects of fairness as the other groups. Those who represent both equally were among the least likely to indicate increased fairness (7% process; 2% outcome).

ii. Respondent Comments

The written comments contain a common call for allowing the limited use of interrogatories. Respondents noted that the unavailability of interrogatories to learn certain basic information about the other party – such as relevant witnesses and documents – increases costs and reduces efficiency. Oftentimes, the only other method for obtaining this information is through depositions, an expensive alternative.

Notably, the comparative questions concerning the effects of the absence of interrogatories (Figures 27-29) addressed all types of interrogatories. However, commenting respondents were careful to specify that only interrogatories seeking facts (form and special interrogatories) should be allowed, and contention interrogatories should be prohibited. Moreover, some respondents suggested limiting the number and providing a specific definition of what constitutes one interrogatory.

These respondents listed the benefits of fact interrogatories, including reducing the number of pleadings motions, eliminating blind requests for documents, streamlining or eliminating certain depositions, enhancing trial preparation by better framing the issues, forcing a frank discussion about the facts, and increasing the fairness of the litigation. One respondent stated: “If you believe that the justice system is a mechanism for truth-seeking and not gamesmanship, then you should allow interrogatories.”

Commenting respondents were not unanimous on this issue. A number of respondents described interrogatories as a waste of time, with attorneys spending countless hours writing and responding to “ridiculous sets of interrogatories” that rarely impart useful information.

c. Independent Experts

The ORCP does not provide for any disclosure or discovery concerning independent expert witnesses. The Oregon Supreme Court has concluded that “[w]ithout a specific provision authorizing expert discovery,” trial courts lack the authority to require parties to disclose the identity or anticipated testimony of their experts before trial.³⁰

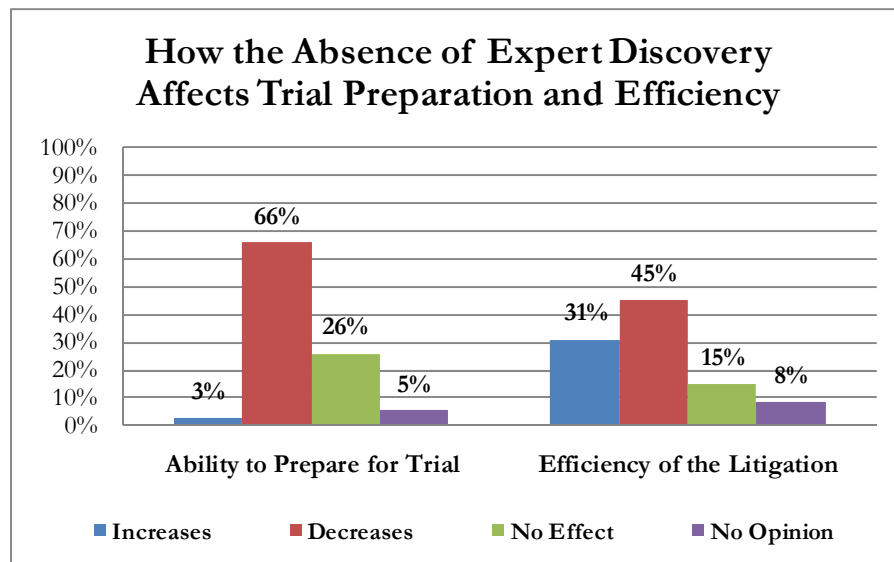
i. Comparative Assessment

The survey asked those respondents with Oregon federal and/or neighboring state litigation experience for a comparative assessment of the unavailability of discovery for expert witnesses.

(A) Functioning of the Litigation Process

As demonstrated in Figure 30, Oregon practitioners generally believe that the complete absence of expert discovery has a negative effect on how the litigation process functions. A majority of respondents with comparative experience indicated that the lack of expert discovery decreases counsel’s ability to prepare for trial, while only 3% indicated that it “increases” that ability. The picture is slightly better with respect to the efficiency of the litigation process, though there is no real consensus. While a plurality of respondents indicated that the lack of expert discovery decreases efficiency, a sizeable portion (31%) indicated an increase in efficiency.

Figure 30 (Survey Questions 25c, 25f)
n = 357; 357



³⁰ *Stevens v. Czerniak*, 84 P.3d 140, 147 (Or. 2004); see also *Poppino v. Columbia Neurosurgical Associates, L.L.C.*, 2006WL4041462 (Or. Cir. Ct. August 5, 2006) (“To this court’s knowledge, Oregon remains the only jurisdiction in the country which does not require some type of expert witness disclosure or discovery in civil litigation.”).

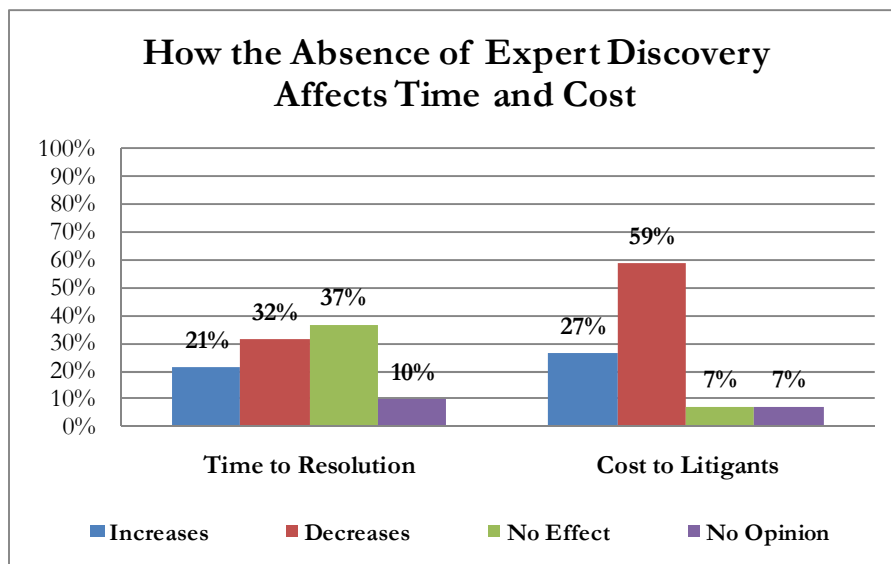
When the responses regarding trial preparation are separated by party represented, all groups were consistent with the aggregate result.

When the responses regarding efficiency are separated by party represented, those who primarily represent plaintiffs were equally divided over whether the lack of expert discovery increases (36%) or decreases (36%) the efficiency of the litigation process. However, a plurality of those who primarily represent defendants and a majority of those who represent both equally believe that efficiency is decreased.

(B) Duration and Cost of the Litigation

As demonstrated in Figure 31, Oregon practitioners are divided about the effect that the complete absence of expert discovery has on the time to resolution, but many observe that it reduces litigant costs. With respect to time, a plurality of respondents with comparative experience reported that the lack of expert discovery has no effect. Approximately one in three respondents believe that the duration of the litigation is reduced, while approximately one in five respondents believe that it is increased. With respect to cost, a majority of respondents reported a decrease, although a sizeable portion (27%) reported an increase due to the lack of expert discovery.

Figure 31 (Survey Questions 25a, 25b)
n = 355; 357



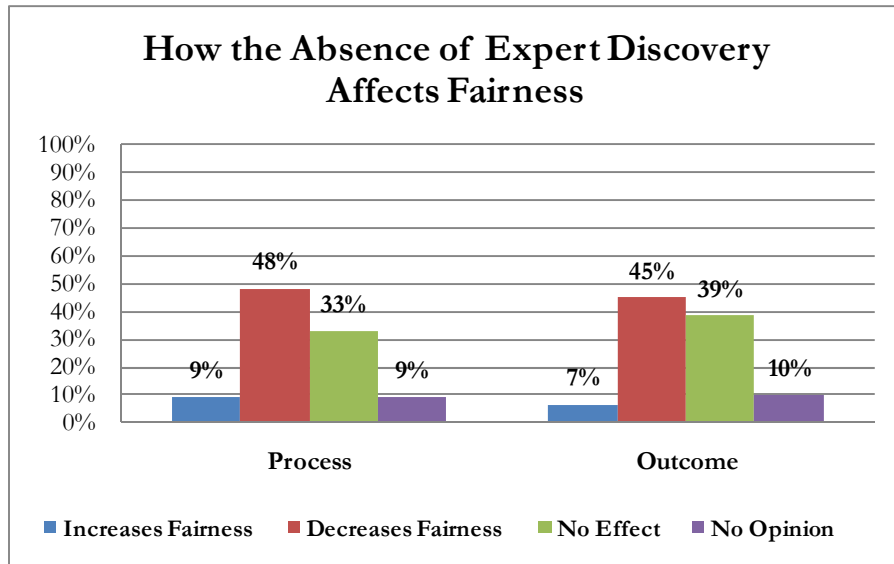
Those who primarily represent plaintiffs and those who primarily represent defendants more frequently indicated that the absence of expert discovery “decreases” time to resolution, while those who represent plaintiffs and defendants equally were more likely to report an increase in time to resolution.

When the responses regarding cost are separated by party represented, the response pattern for every group reflects the aggregate result. The only point of note is that a plurality, rather than a majority, of those who represent plaintiffs and defendants equally indicated decreased costs. That group tended to select the “increases” response at a higher rate than those who primarily represent plaintiffs or primarily represent defendants.

(C) Fairness of the Litigation

As demonstrated in Figure 32, Oregon practitioners also generally believe that the complete absence of expert discovery has a negative effect on fairness in litigation. A plurality of respondents with comparative experience indicated that the lack of expert discovery decreases the fairness of both the process and the outcome, while about one in three respondents indicated no effect. Notably, fewer than 10% indicated an increase in fairness.

Figure 32 (Survey Questions 25d, 25e)
n = 354; 356



When the responses regarding procedural fairness are separated by party represented, the response pattern for every group reflects the aggregate result. The only point of note is that 27% of those who solely represent plaintiffs reported an increase in fairness, while that number did not exceed 11% for any of the other groups, including those who represent plaintiffs more frequently than defendants.

When the responses regarding outcome fairness are separated by party represented, a plurality of those who solely represent plaintiffs and those who solely represent defendants selected the “no effect” response, while a plurality of those who represent both plaintiffs and defendants to some degree selected the “decreases” response. However, the differences are relatively small. Those who solely represent plaintiffs reported a positive effect on fairness at a higher rate (19%) than any of the other groups, for which that number did not exceed 9%.

ii. Respondent Comments

By far, the most common sentiment expressed in the written comments was a call for disclosure and/or discovery of expert witnesses. According to commenting respondents, the absence of any such discovery increases the costs and risks associated with trial. The practice of discovering opposing expert witnesses only when called to the stand, described by one respondent as “arcane,” causes surprises that could be dealt with more effectively earlier in the process. Some respondents reported that the inability to assess the necessity of a counter-expert leads to the preemptive hiring of experts. Moreover, Oregon’s practice requires the court to call a recess in the

middle of trial to allow for the formulation of a response, while offering little chance for effective impeachment. One respondent indicated that the lack of disclosure, combined with lax admissibility standards for expert opinions, encourages the use of “bogus” experts.

According to these respondents, having information on expert witnesses prior to trial would make the process more “meaningful,” and lead to a more honest assessment of a case’s strengths and weaknesses. The following comment is illustrative of the general sentiment:

Limited expert discovery – say, disclosure of the name, the resume, and a summary of opinions – would go a long way toward making the process more fair and enabl[ing] better evaluation of one another’s cases. Learning who the experts are when they take the stand can be a challenging experience for the very best of us. While I do my utmost to take advantage of the lack of expert discovery every single time, I’m not at all sure that the current rule contributes to the justness of the result and experience.

Some respondents offered suggestions for ways in which an expert discovery rule could be moderated to ensure reasonableness. For example, it might include disclosures but not depositions, or depositions only on a limited basis (e.g., for “key” experts). Other suggestions offered: regulate the fees expert witnesses are permitted to charge; limit the number of experts to one or two per subject; limit testimony to the scope of a written report; and decrease trial date continuances to avoid having to pay the expert twice.

Nevertheless, commenting respondents were not unanimous on the issue. A few expressed that the unavailability of expert discovery does not affect outcomes and is less expensive “in almost every case.” A couple of respondents found expert discovery often to be a waste of time, as experts rarely say anything that cannot be anticipated. Moreover, the lack of expert discovery is sometimes tempered in practice. One respondent reported the use of an informal system for expert discovery in construction defect cases. Another respondent spoke of an “unwritten rule” that the substance of any expert’s opinion will be set forth in the complaint (a level of specificity not otherwise required).

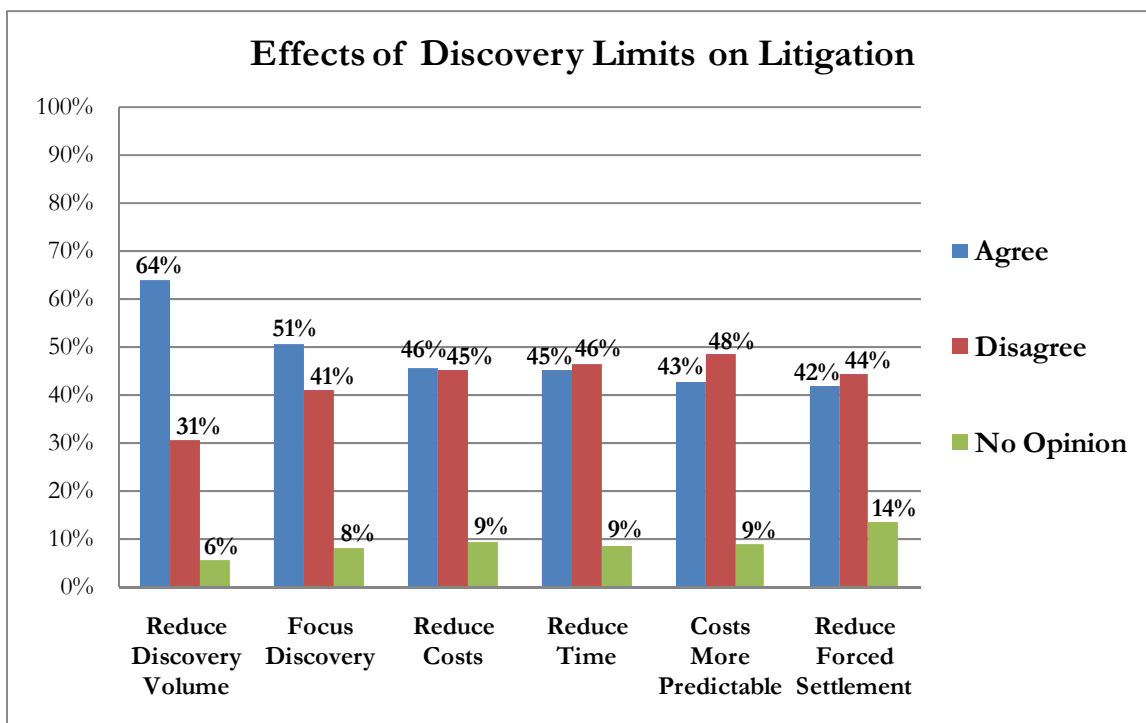
d. The Discovery Limits as a Whole

The survey defined Oregon’s “limits on discovery” to include the rule limiting requests for admission, the absence of a provision for interrogatories, and the absence of a provision for expert witness discovery. The survey then asked respondents to consider these limits collectively, and to report on their significance as a whole.

Figure 33 shows what the Oregon Bar perceives to be the effects of the discovery limits on litigation. There is a substantial consensus that the limits reduce the total volume of discovery (64% agreed; 31% disagreed), with a notable portion of respondents (20%) expressing strong agreement. A majority also agreed that the limits require parties to “focus their discovery efforts to the disputed issues” (51% agreed; 41% disagreed). The Bar is evenly split on whether the discovery limits reduce the total cost of litigation (46% agreed; 45% disagreed), and whether the limits on discovery reduce the total time required for litigation (45% agreed; 46% disagreed). Again, however, a notable portion of respondents expressed strong agreement with both statements (21% limits reduce costs; 18% limits reduce time). There is not a consensus within the Oregon Bar that the limits on discovery make litigation costs “more predictable” (43% agreed; 48% disagreed) or “reduce the use of discovery as a tool to force settlement” (42% agreed; 44% disagreed).

Figure 33 (Survey Questions 23a-23f)

n = 446; 445; 441; 441; 444; 442



It is interesting to examine the effects of the discovery limits, collectively, by party represented. A majority of every group agreed that the limits reduce the volume of discovery. Either a majority or a plurality of every group expressed agreement that the limits focus discovery, with the exception of those who represent plaintiffs and defendants equally. Respondents within every group were relatively split on the issues of whether the limits reduce litigation costs, reduce litigation time, and make litigation costs more predictable, although those who primarily represent defendants were more likely to agree on these positive effects, while those who primarily represent plaintiffs were more likely to disagree. Interestingly, those who represent both parties equally expressed the highest levels of disagreement with respect to all three issues. There was also a relative split within each group concerning whether the limits reduce the use of discovery as a tool to force settlement, but those who primarily represent defendants were more likely to agree and those who primarily represent plaintiffs were more likely to disagree. Notably, those who represent both parties equally were perfectly divided on the issue (45% agreed; 45% disagreed).

When faced with the statement that the “limits on discovery favor defendants over plaintiffs,” two-thirds of practitioners (67%) disagreed or strongly disagreed with the statement. Moreover, considering all respondents to the survey, more than one in five were neutral, selecting “no opinion” (13%) or declining to answer the question (9%). See Figure 34 for the distribution of answers.

Figure 34 (Survey Question 23g)
 n = 443

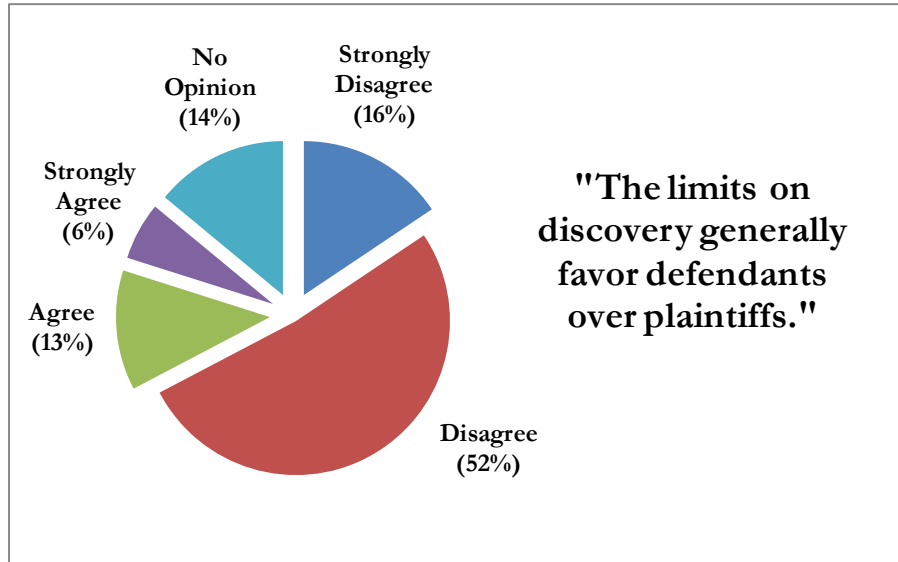
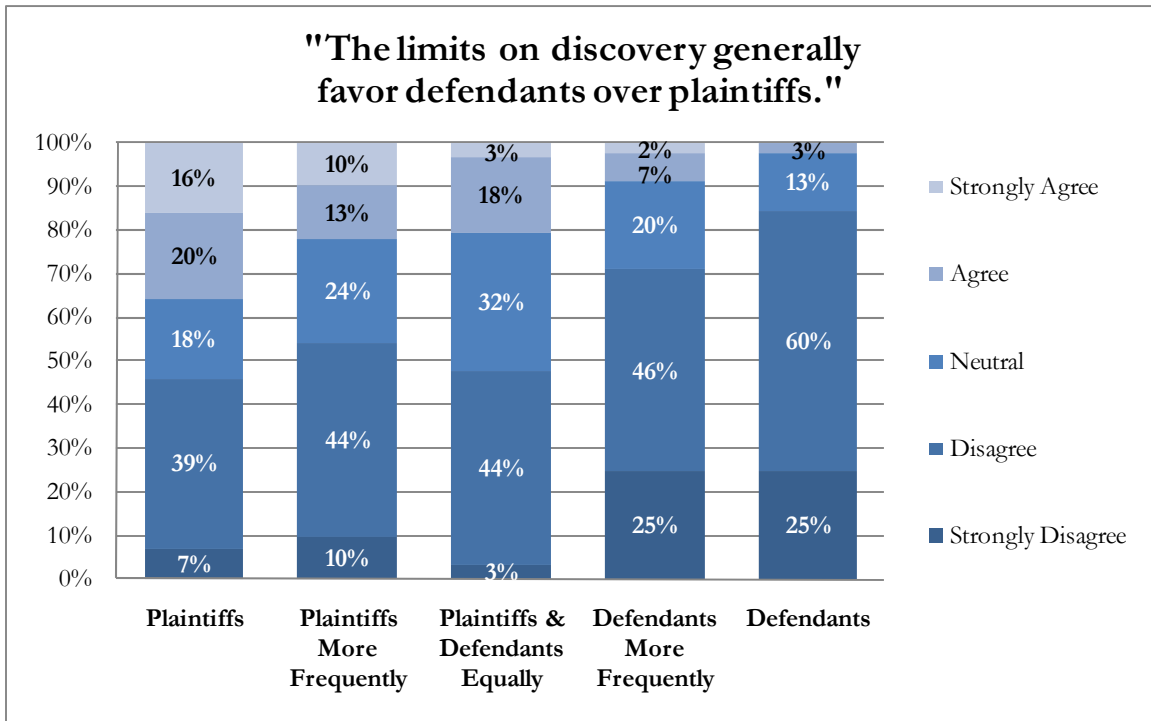


Figure 35 shows the differences across parties. Although those who primarily represent defendants were more likely to disagree that the discovery limits favor defendants, a majority in all groups disagreed or were neutral,³¹ while only a minority within each group agreed.

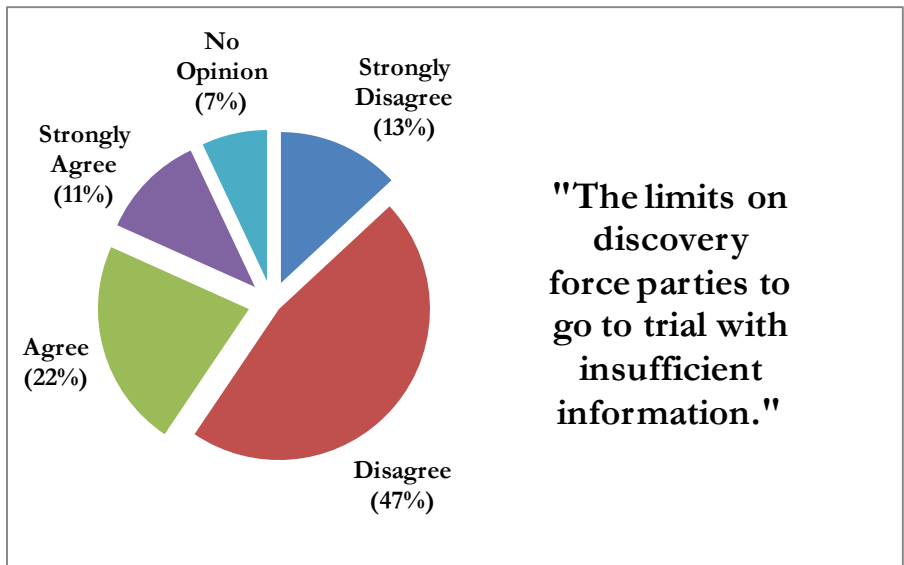
Figure 35 (Survey Questions 5, 23g)
 n = 100; 72; 63; 93; 122



³¹ In Figure 35, the "neutral" category includes both those who selected "no opinion" and those who declined to answer the question.

When faced with the statement that the “limits on discovery force parties to go to trial with insufficient information,” a majority of respondents (60%) expressed some degree of disagreement with the statement. See Figure 36 for the distribution of answers.

Figure 36 (Survey Question 23h)
n = 444



Moreover, neither those who primarily represent plaintiffs nor those who primarily represent defendants believe that the presumptive limits result in insufficient information at trial, as about 60% of those groups expressed disagreement and only about 30% expressed agreement. In contrast, those who represent both parties equally were split on the issue (46% agreed; 43% disagreed).

C. THE ROLE OF LEGAL CULTURE

Practitioners often note a high level of civility in Oregon litigation, as compared to other jurisdictions. At least one commentator has contemplated the reasons therefor:

[T]he cause may be the laid-back lifestyle and good health of Oregonians, the sylvan setting, the mild climate, the good food and wine, and the frequent vision of snow capped mountains in the Cascade range. I also suspect, though, that Oregon rules of civil procedure permit fewer opportunities to engage in “litigation within litigation.” I certainly know that to be true with respect to discovery.³²

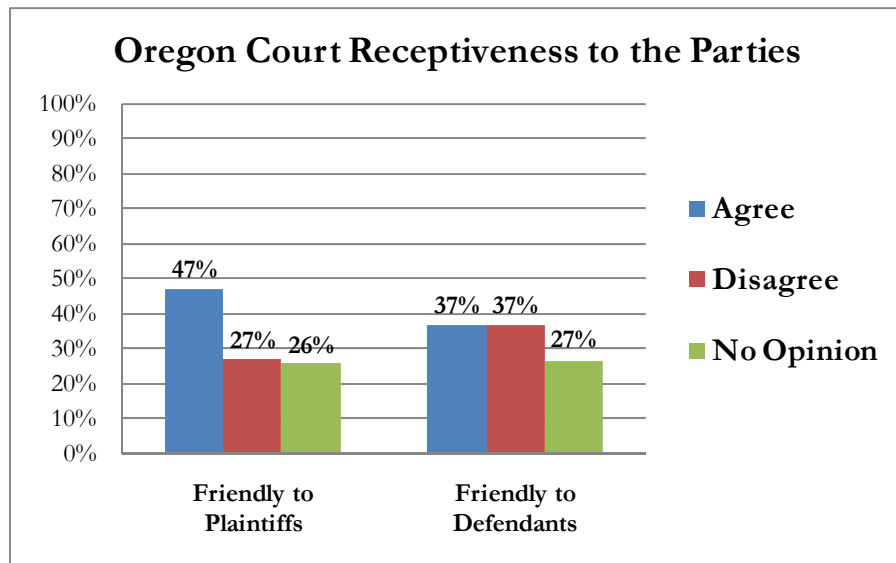
This section will examine respondents opinions on questions relating to the culture of Circuit Court practice.

³² Douglas M. Branson, *No Contest: Corporate Lawyers and the Perversion of Justice in America*, 48 CASE W. RES. L. REV. 459, 472-73 (1998) (book review).

1. CULTURE GENERALLY

The survey raised the issue of whether Oregon state court is “friendly” to plaintiffs and defendants. Over one-third of all respondents were neutral with respect to friendliness to plaintiffs, selecting “no opinion” (23%) or declining to answer the question (11%). Where a response was provided, a plurality (47%) indicated that Oregon courts are friendly to plaintiffs. In fact, nearly three in four respondents expressed agreement or had no opinion on the issue. Again, over one-third of all respondents were neutral with respect to friendliness to defendants, selecting “no opinion” (24%) or declining to answer the question (11%). Where a response was provided, an equal portion agreed as disagreed with the statement that Oregon courts are friendly to defendants. However, a majority (63%) of respondents expressed agreement or had no opinion on the issue. Figure 37 shows the distribution of responses. These results may be surprising to those who view fact pleading and discovery limitations as necessarily disadvantageous to plaintiffs.

Figure 37 (Survey Questions 30g, 30h)
n = 432; 432



Figures 38 and 39 shows impressions of court receptiveness to plaintiffs and defendants, separated by party. Although those who primarily represent defendants tend to agree more readily that Oregon courts are friendly to plaintiffs and those who primarily represent plaintiffs tend to agree more readily that Oregon courts are friendly to defendants, a majority of all groups either agreed or were neutral on the issue.³³

³³ In Figures 38 and 39, the “neutral” category includes both those who selected “no opinion” and those who declined to answer the question.

Figure 38 (Survey Questions 5, 30g)
n = 100; 72; 63; 93; 122

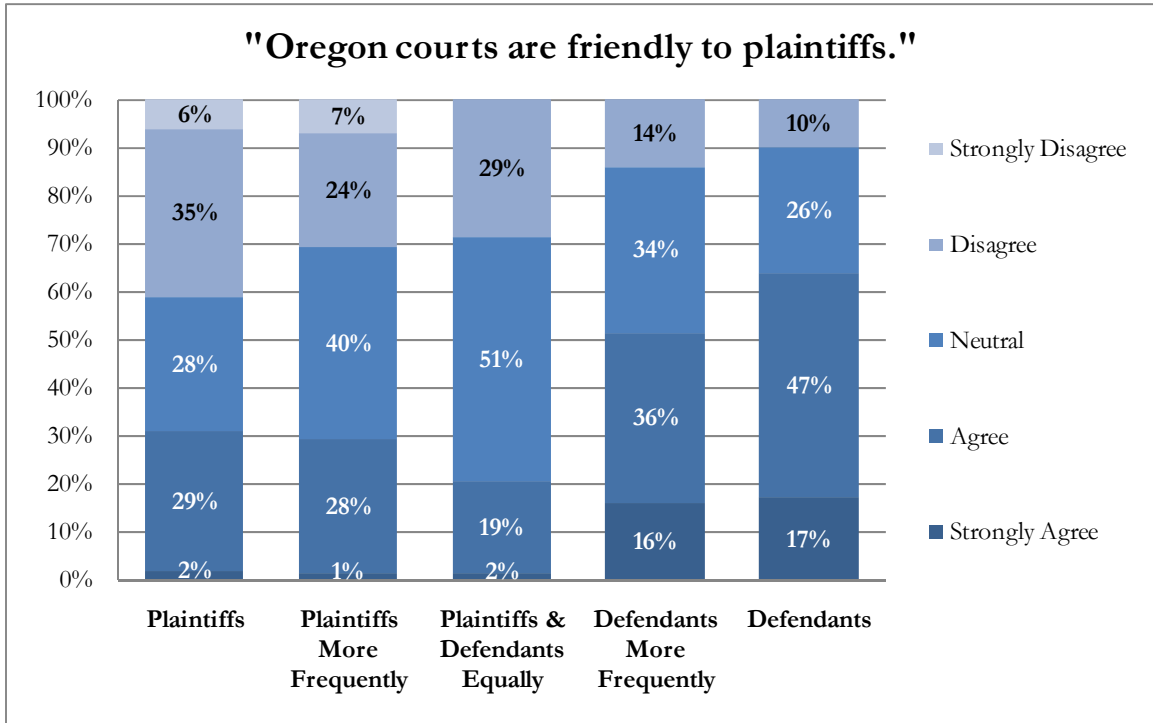
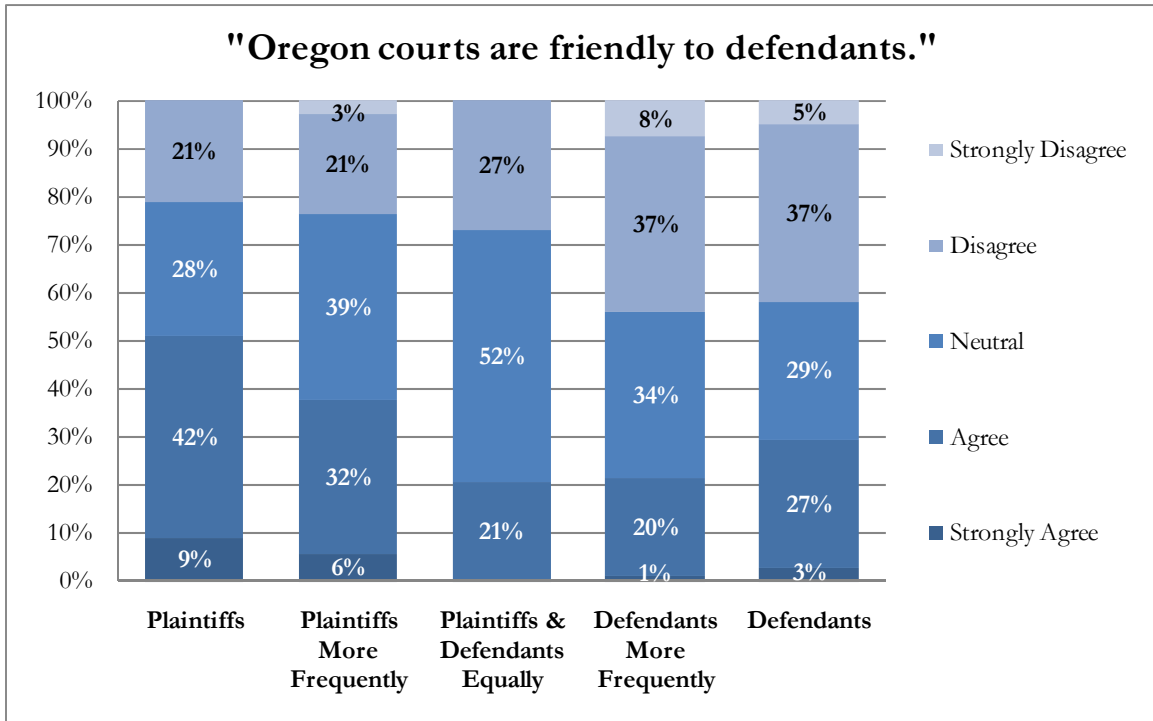


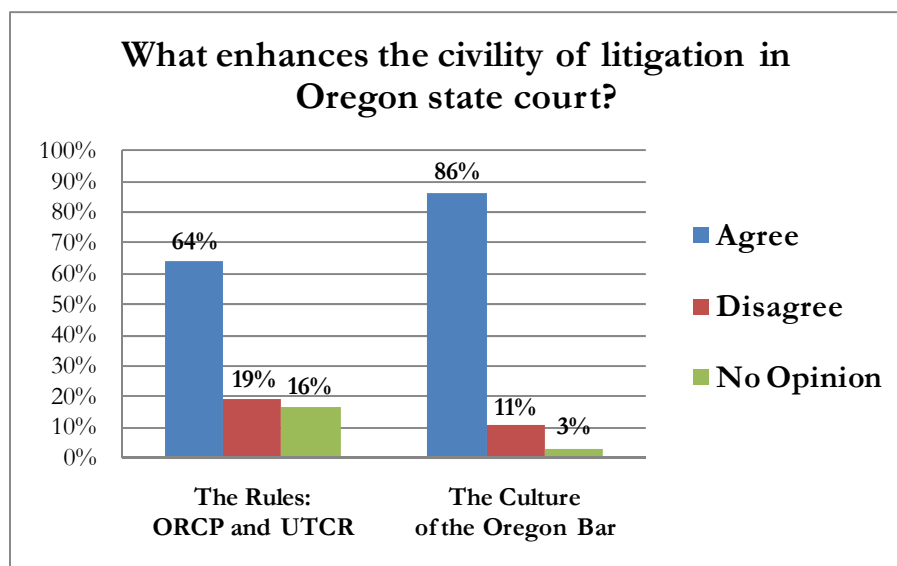
Figure 39 (Survey Questions 5, 30h)
n = 100; 72; 63; 93; 122



The survey examined how the applicable procedural rules and the culture of the Oregon Bar affect civility in Oregon state court. With respect to the rules, a strong majority (64%) agreed that the “ORCP and UTCR enhance the civility of litigation,” while only about one in five respondents expressed disagreement. Separated by party represented, a majority of all respondent groups agreed with the statement.

With respect to culture, respondents overwhelmingly (86%) agreed that the culture of the Oregon Bar enhances the civility of litigation, while only about one in ten respondents expressed disagreement. Moreover, only a very small portion (3%) indicated “no opinion” on the effect of culture on civility. Separated by party represented, between 75% and 95% of all respondent groups agreed with the statement. Figure 40 shows the distribution of responses for these two issues.³⁴

Figure 40 (Survey Questions 30a, 30b)
n = 434; 437



³⁴ The issue of the culture of the Oregon Bar will be explored more fully in Section IV.C.2., below.

As demonstrated in Figure 41, a majority of respondents believe that divergence from the rules should occur if all parties join in a request to do so, while about one-third disagree.

Figure 41 (Survey Question 29c)
n = 432

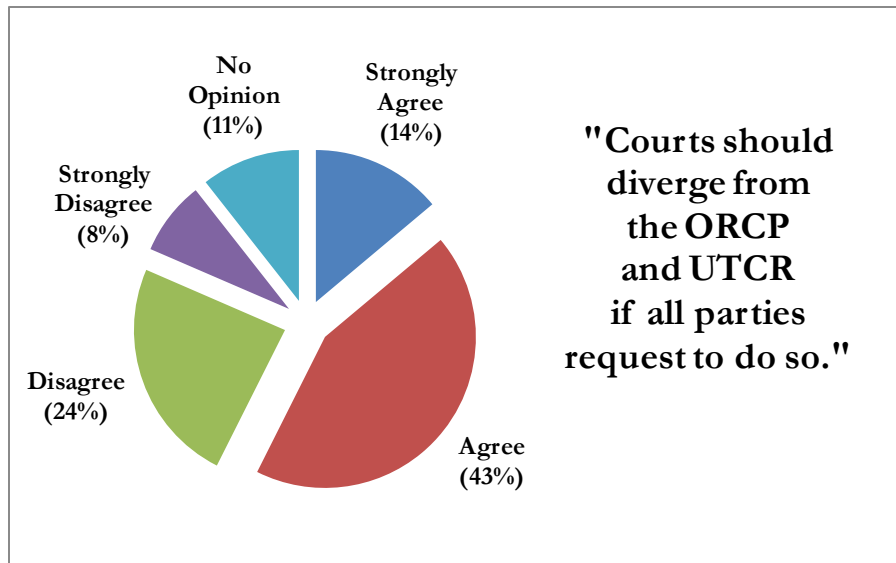
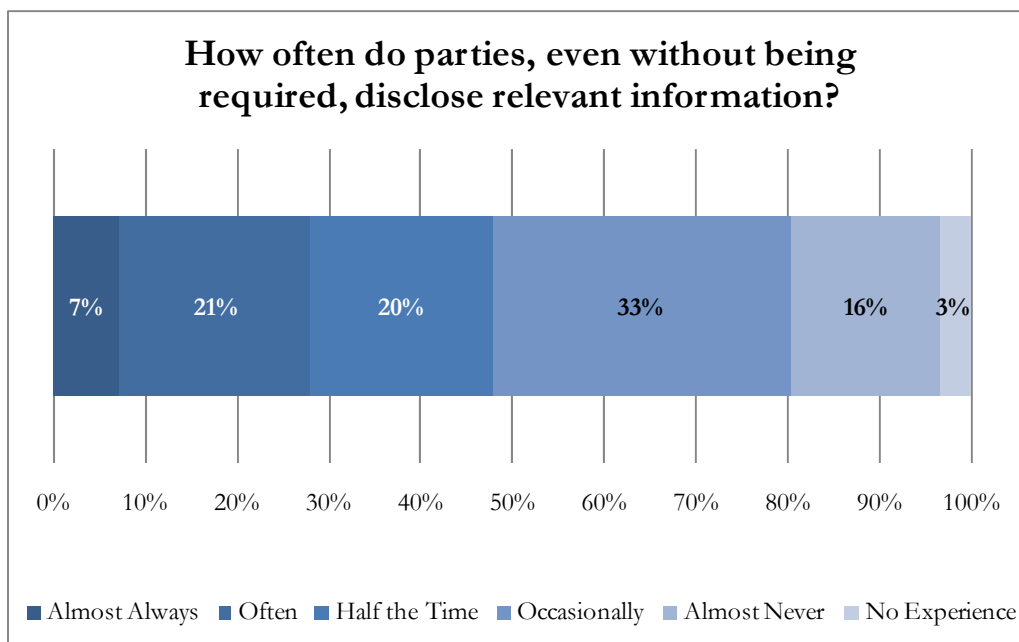


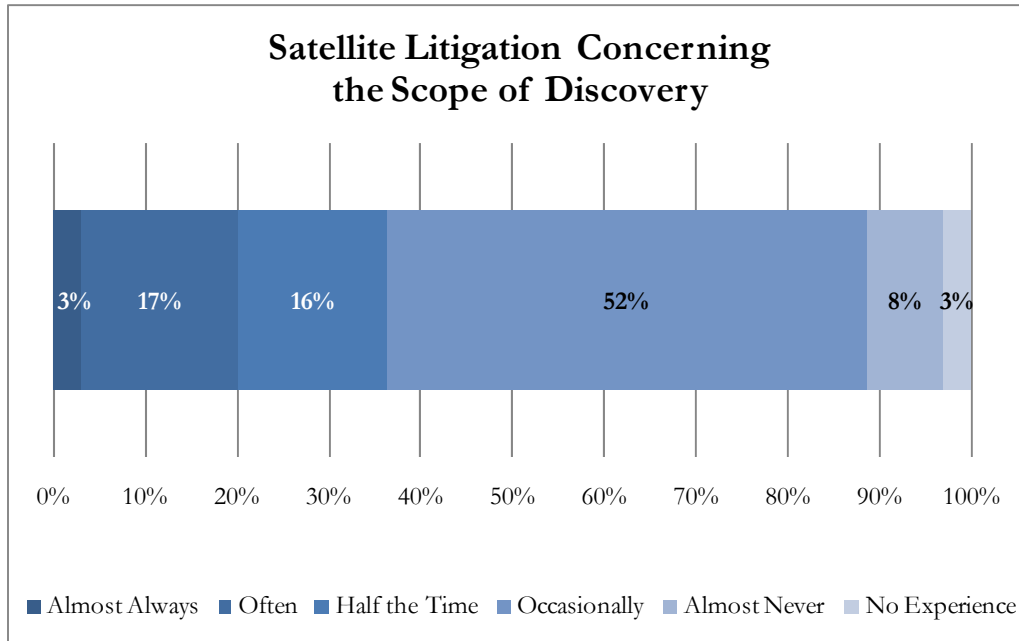
Figure 42 shows that, with respect to cooperation in discovery, nearly half of respondents (48%) indicated that parties disclose relevant information – even when not required to do so – at least half the time, with 28% indicating that such voluntary disclosure occurs “often” or “almost always.” Nevertheless, the other half (49%) of respondents indicated that voluntary disclosure occurs only “occasionally” or “almost never.” Separated by party represented, all respondent groups were split on the issue of voluntary disclosure.

Figure 42 (Survey Question 24b)
n = 446



A majority of respondents indicated that parties “almost never” or only “occasionally” engage in litigation about the scope of discovery. One-third of respondents believe that such satellite litigation occurs “about half the time” or “often.” Less than 5% of respondents believe that satellite litigation “almost always” occurs. See Figure 43.

Figure 43 (Survey Question 24a)
n = 447



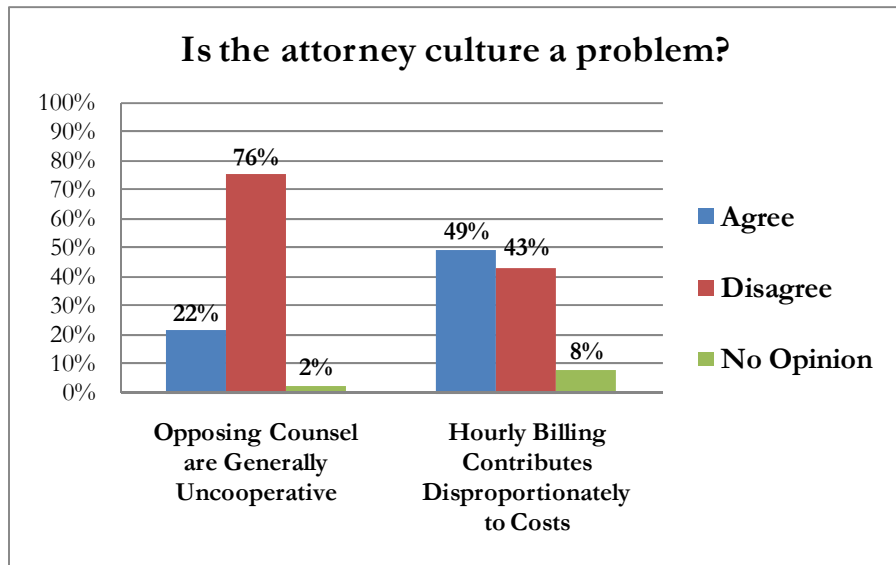
Separated by party represented, “occasionally” was the most common response within every group.

2. ATTORNEY AND JUDICIAL CULTURE

Oregon practitioners do not find lack of cooperation by opposing counsel to be an issue. Three out of four respondents disagreed with the premise that “opposing counsel are generally uncooperative.” Separated by party represented, a strong majority of all groups disagreed.

However, the practice of hourly billing may be a source of problems. A plurality of respondents agreed that “the system of hourly billing for attorneys contributes disproportionately to litigation costs,” with over 20% expressing strong agreement. Separated by party represented, all groups were fairly split on the issue, though a majority of those who primarily represent plaintiffs agreed with the statement. One respondent commented that the majority of “litigators” in large law firms around the country have never tried a case, but “generate a lot of billable hours” on discovery and motions “nonsense,” such as discovery responses that are “carefully and artfully worded” to say “a ton without really saying anything.” Figure 44 shows the distribution of responses for these two issues.

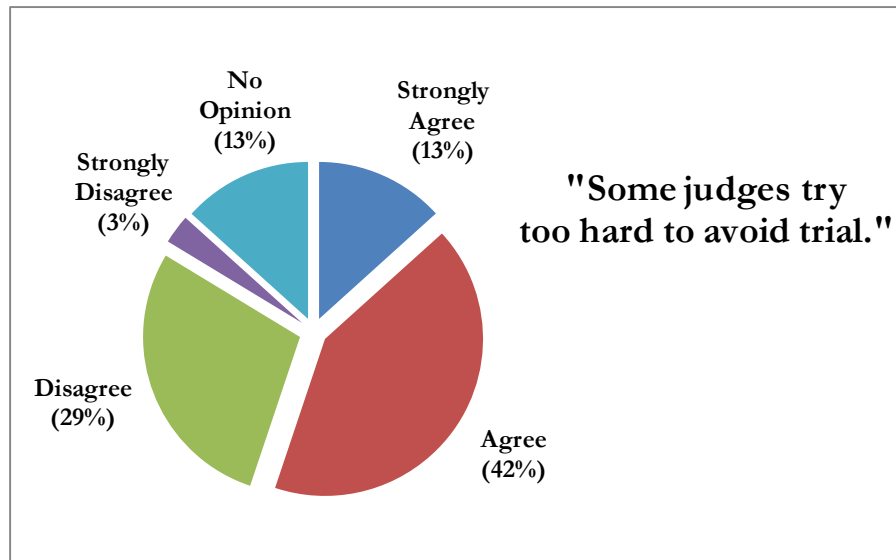
Figure 44 (Survey Questions 9d, 9e)
 n = 468; 471



The written comments on attorney culture were generally positive. One respondent stated: “We have an amazingly professional and ethical practice in Oregon, and I want it to stay that way as long as possible.” Another remarked: “Oregon is a great place to practice law. I have practiced in Colorado and Connecticut and prefer Oregon, primarily because of the camaraderie of the bar.” A third wrote that perhaps the Bar is civil because Oregon attorneys recognize that disputes only increase the time and costs of litigation. However, one respondent described the emphasis on professionalism as false, “to the extent that it encourages courtesy in the face of dishonesty,” such as intentionally misstating the law to inexperienced judges.

Regarding judicial culture, a majority of respondents (55%) agreed that “some judges try too hard to avoid trial,” while about one-third disagreed. See Figure 45.

Figure 45 (Survey Question 30f)
 n = 435

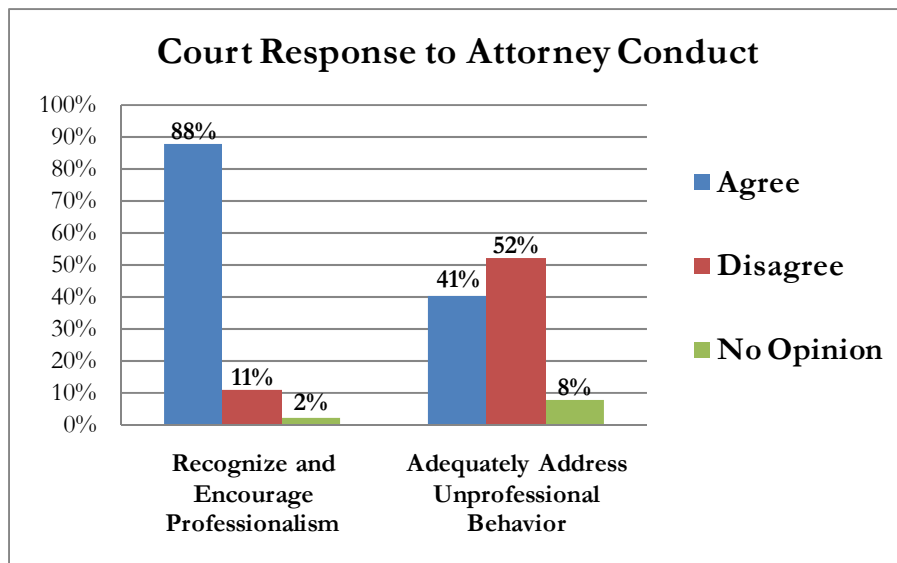


One respondent commented that the system would benefit from a requirement that judges have civil litigation experience before taking the bench, in order to more effectively adjudicate civil cases.

3. COURT REACTION TO ATTORNEY CONDUCT

The survey examined the judicial response to attorney conduct. As shown in Figure 46, Oregon practitioners overwhelmingly agreed that the state courts “recognize and encourage professionalism,” with a notable 37% expressing strong agreement with the statement. However, respondents were divided on whether courts “adequately address unprofessional behavior,” with a majority indicating disagreement with the statement.

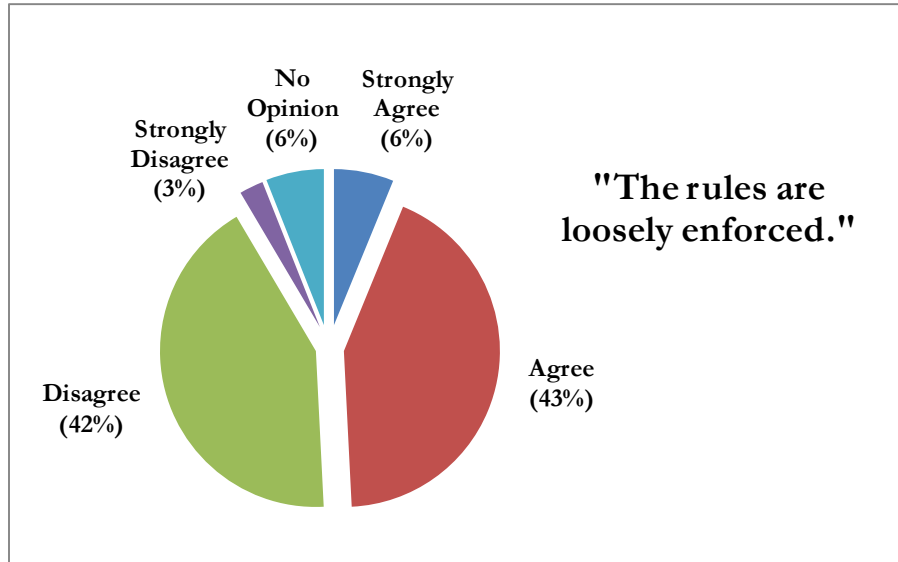
Figure 46 (Survey Questions 30c, 30d)
n = 432; 435



Separated by party represented, at least 75% of every respondent group agreed that courts recognize and encourage professionalism. On whether courts adequately address unprofessional behavior, every group was more split. All groups disagreed more often than agreed, except for those who represent plaintiffs more frequently, who were evenly divided on the issue.

There is no consensus within the Oregon Bar concerning whether procedural rules are “loosely enforced.” An approximately equal portion of respondents agreed as disagreed with the statement, and only a small percentage expressed a strong opinion either way. See Figure 47.

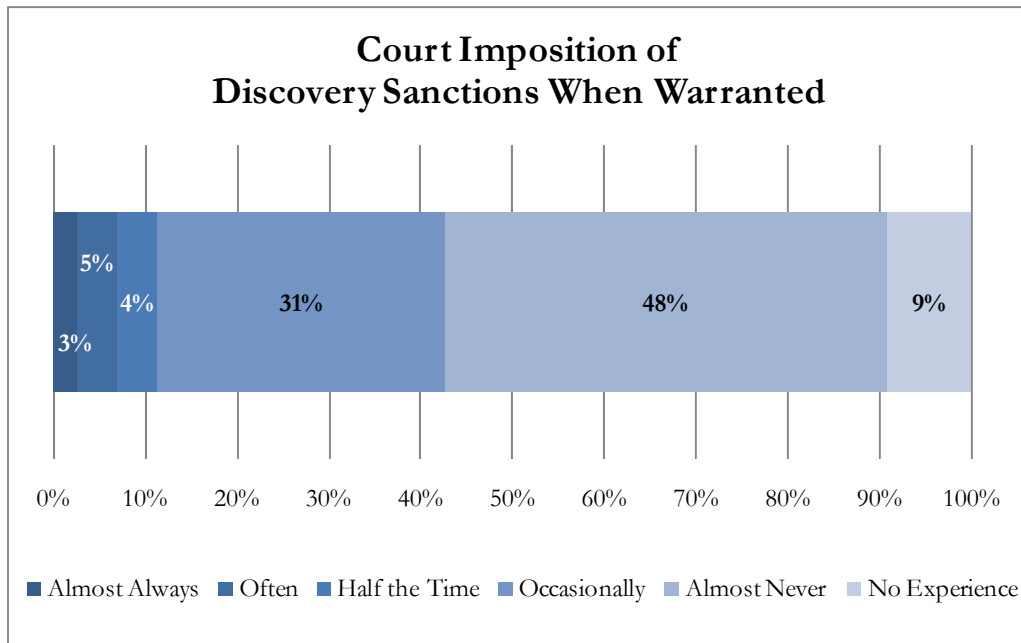
Figure 47 (Survey Question 30e)
n = 435



Separated by party represented, those who primarily represent plaintiffs were slightly more likely to disagree that the rules are loosely enforced, while those who primarily represent defendants were slightly more likely to agree. However, between 41% and 52% of those groups agreed, and between 41% and 52% of those groups disagreed. Those who represent both parties equally were the most likely to believe that the rules are loosely enforced (59% agreed; 33% disagreed).

There is a definite consensus that Oregon courts rarely utilize sanctions as a tool of enforcement. Nearly 80% of respondents reported that, when warranted, sanctions are imposed "almost never" or only "occasionally." An additional 9% indicated no experience with a situation warranting sanctions. See Figure 48.

Figure 48 (Survey Question 24c)
n = 447



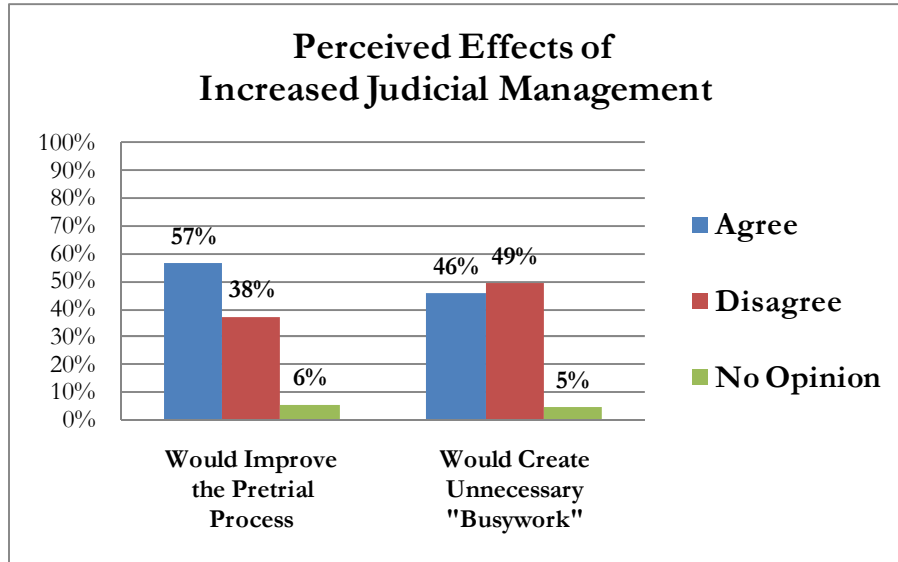
The opinion that courts should enforce the rules was widespread and unchallenged in the written comments. Respondents would like to see judges hold attorneys accountable to the expectations of the pleading and discovery rules, which would allow those rules to have their intended effects. One remarked: “I would like to see Oregon judges show more willingness to penalize litigants and lawyers who try to frustrate discovery.”

Commenting respondents suggested that strict enforcement of the rules and real consequences for failing to comply would decrease “shenanigans” by counsel, keep discovery moving, and reduce motions practice. Further, more frequent imposition of sanctions, in particular, would prevent discovery abuses, such as failing to adhere to timelines, providing inadequate discovery responses, or refusing to admit when clearly appropriate.

4. VIEWS ON INCREASED JUDICIAL MANAGEMENT

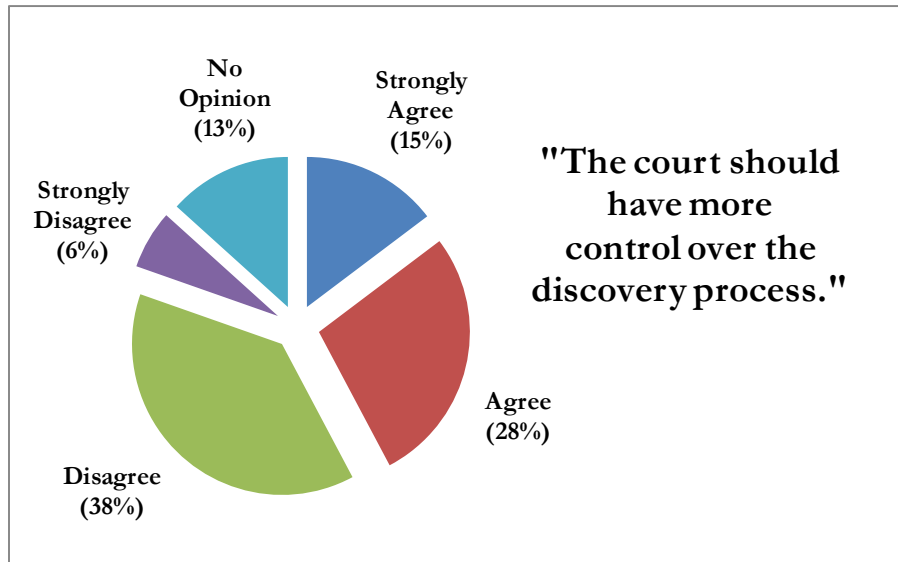
The survey probed opinions on the idea of increased judicial management generally. As shown in Figure 49, a majority of respondents agreed that more management would improve the pretrial process, while fewer than 40% disagreed. Moreover, a plurality of respondents disagreed that more management would create unnecessary “busywork,” although respondents divided fairly evenly on that issue. Of those who indicated that increased judicial management would create unnecessary “busywork” (*n* = 191), over 20% indicated that it would nevertheless improve the pretrial process (*n* = 41).

Figure 49 (Survey Questions 29a, 29b)
 n = 435; 433



There is no consensus within the Oregon Bar concerning whether the court should have more control over the discovery process specifically. As Figure 50 demonstrates, the portion of respondents in favor of more court control (43%) is nearly the same as the portion who disapprove of more court control (44%).

Figure 50 (Survey Question 23i)
 n = 443



Separated by party represented, there was no consensus on court control over the discovery process within those who primarily represent plaintiffs (37% agreed; 45% disagreed), those who primarily represent defendants (43% agreed; 46% disagreed), or those who represent both parties equally (43% agreed; 45% disagreed).

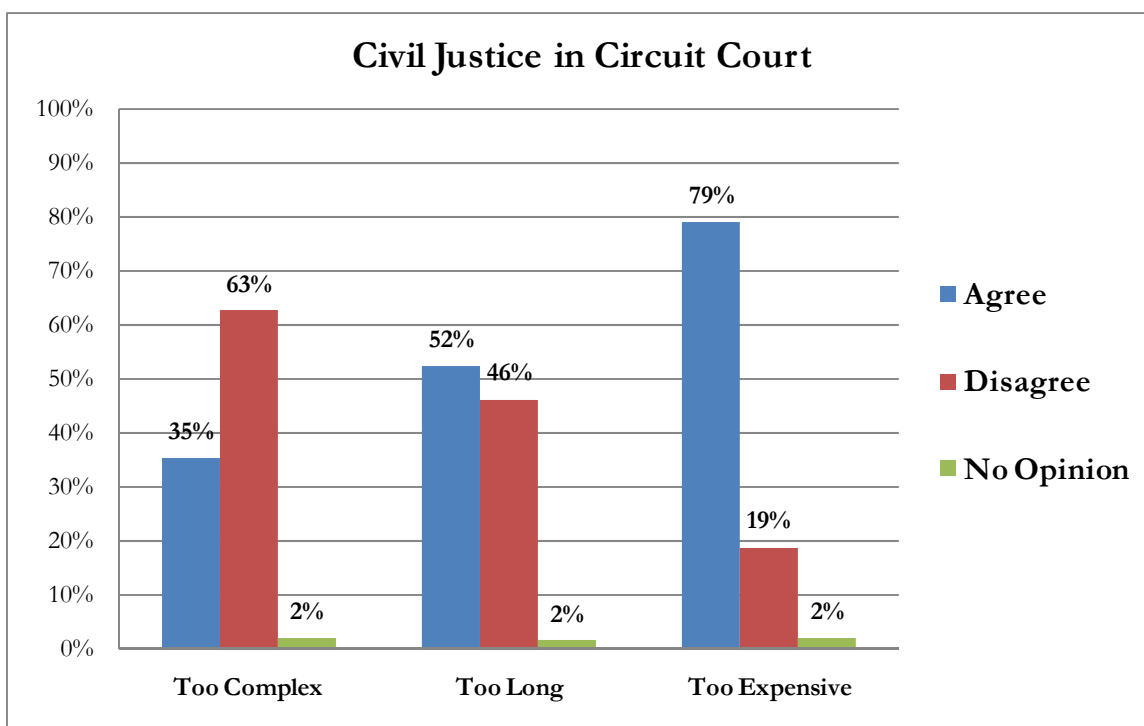
Sentiment expressed in the written comments was generally in favor of more active judicial management of cases. Commenting respondents believe that increased court involvement in and oversight over the pretrial process, discovery in particular, would focus the case to the issues and discourage abuses (such as “fishing expeditions through requests for production of documents”). However, one respondent did write that courts should trust and defer to responsible counsel.

D. SOURCES AND CAUSES OF DISCONTENT WITH THE SYSTEM

The survey asked the extent to which “common complaints” about the American civil justice system apply to litigation in Circuit Court.

Almost two-thirds of respondents disagreed that the Circuit Court civil justice system is “too complex,” while over one-third agreed with the statement. Respondents were more evenly split on whether the system takes “too long” (52% agreed; 46% disagreed). Moreover, they overwhelmingly responded that the system is “too expensive,” with a significant portion (39%) expressing strong agreement. Figure 51 shows the distribution of Oregon responses for these three issues.

Figure 51 (Survey Questions 9a-9c)
n = 470; 472; 469



One respondent provided a possible explanation for the persistence of high costs: Perhaps the efficiencies gained by the absence of interrogatories and the limits on requests for admission are offset by increases in requests for production and deposition time. Another stated that “[a]s Oregon trial courts slip toward the ‘Federal System’[,] expenses are mounting.”

With respect to access, a majority (61%) of Oregon attorneys in private practice reported belonging to a firm that will not refuse a case based on the amount in controversy. However, almost one-quarter (24%) stated that, as a general matter, their firm will not file or defend a case unless the amount in controversy exceeds a certain dollar amount. The dollar limits ranged from

\$900 to \$1 million, with a median of \$37,500 and a mean of \$89,525. One respondent wrote: “Whether [my] firm accepts small cases for litigation depends on whether attorney fees are allowed upon prevailing. If not, small cases [are] rejected on a contingent basis.”

Other respondents provided lengthy comments on the access issue:

- “Often the manner in which a case can be handled and [the] effectiveness [of the] resolution is directly related to the resources a client has to spend. Consequently, if the client has resources to spend then the rules affecting the speed of litigation [have] little or no impact.”
- “The civil firms have sucked the life out of the civil trial by litigating to death the pretrial process. Until we remove the fear of pointless and prohibitive costs associated with the mere filing of a claim, I’m afraid that no reasonable person will look to the courts for redress.”
- The “judicial system is seriously flawed. It’s so expensive that it’s essentially unavailable for anyone other than large corporations and extremely wealthy individuals. The root of the problem is that we place too high a priority on discovery and motion practice. The system is about to price itself out of existence, if it hasn’t already. We’re desperately in need of some radical changes.”
- “The cost savings to litigants in state court in Oregon is enormous compared to federal court. I wish I never had to litigate in federal court. I strongly believe that the discovery costs and limits on the number of jurors (and requirement of unanimity) in federal courts presents a troubling threat to equal access to justice and potentially runs afoul of the Seventh Amendment.”
- “[T]o true litigators[,] ours is the best system in the country...results are fair, consistent with other jurisdictions and allow greater access to our society because we try our bigger cases for one-quarter to one-third the cost expended elsewhere...the best ‘fix’ for the vanishing trial and the cost of our justice system would be to model the national system after Oregon’s.”

E. THE ROLE OF MANDATORY ARBITRATION: MOVING CASES OUT OF LITIGATION

Under ORS §§ 36.400-36.425, Circuit Court claims involving only requests for monetary relief of \$50,000 or less are subject to mandatory arbitration. The arbitrator’s decision may be appealed to the Circuit Court, which then holds a trial *de novo*.

1. CASES QUALIFYING FOR MANDATORY ARBITRATION

Considering all respondents to the survey, nearly 70% indicated that they have had a Circuit Court case qualify for compulsory arbitration. Considering only those respondents who provided an answer to the question on whether they have had a qualifying case, over 75% answered in the affirmative.

Figure 52 depicts the frequency with which qualifying cases bypass the mandatory arbitration process. A strong majority of respondents indicated that this “almost never” or only “occasionally” occurs. However, it appears that parties opt out in favor of an established court mediation program more often than courts exempt or remove cases from the process.³⁵

Figure 52 (Survey Questions 32a, 32b)
n = 328; 328

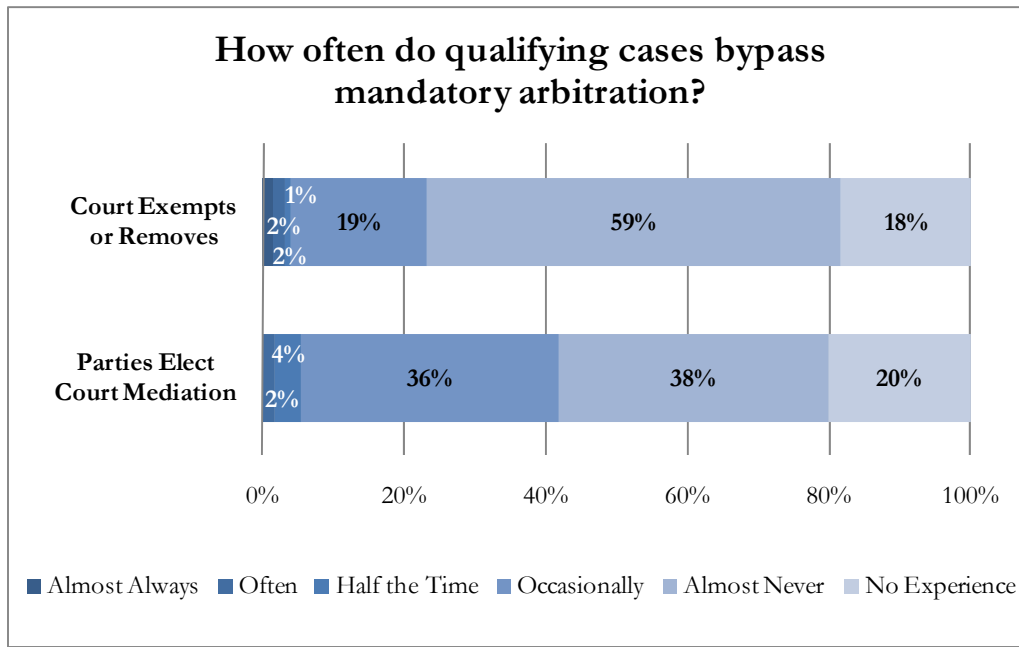
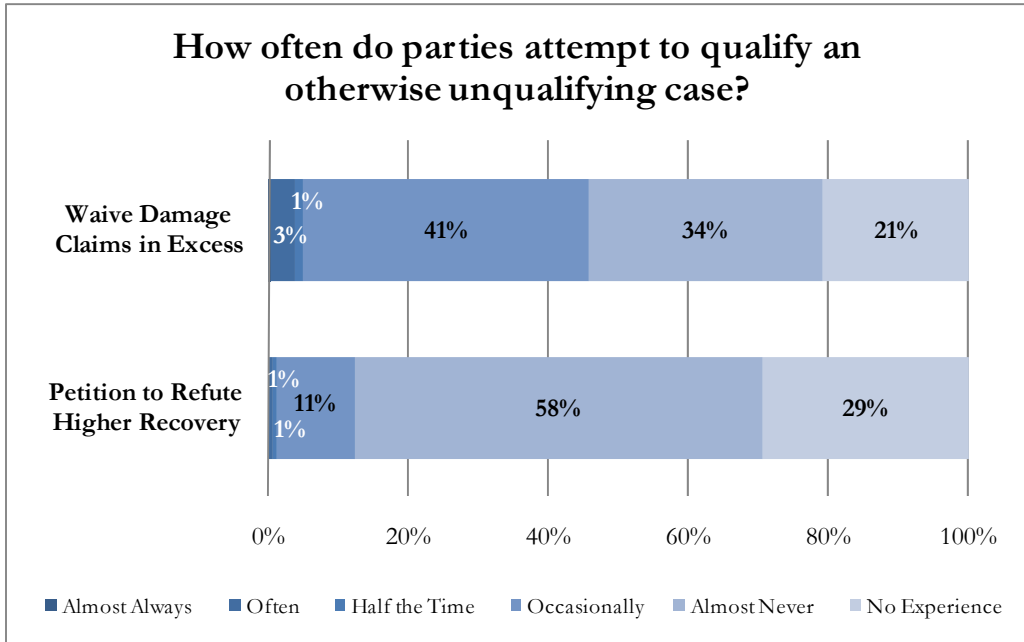


Figure 53 depicts the frequency with which parties attempt to qualify a case for mandatory arbitration, although the asserted damages are above the jurisdictional limit. A strong majority of respondents indicated that this occurs “almost never” or only “occasionally.” However, it appears that claimants waive damages in excess of \$50,000 for arbitration purposes more often than defending parties petition for arbitration by attempting to show that no objectively reasonable juror could return a verdict in excess of \$50,000.³⁶

³⁵ See O.R.S. § 36.405(2), (3). Courts are not required to establish mediation programs for civil actions that would otherwise be subject to mandatory arbitration.

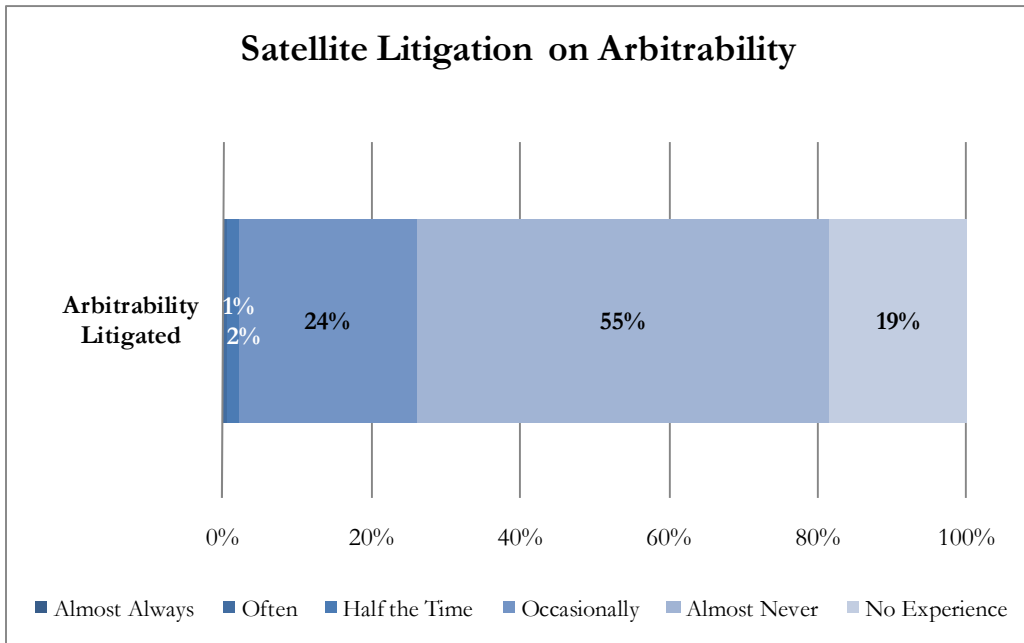
³⁶ See O.R.S. § 36.415.

Figure 53 (Survey Questions 32c, 32d)
 n = 327; 327



As shown in Figure 54, mandatory arbitration is not perceived to generate much satellite litigation. Fully 79% of respondents indicated that parties “almost never” or only “occasionally” litigate arbitrability, and another 19% indicated no experience with the issue.

Figure 54 (Survey Question 32e)
 n = 325

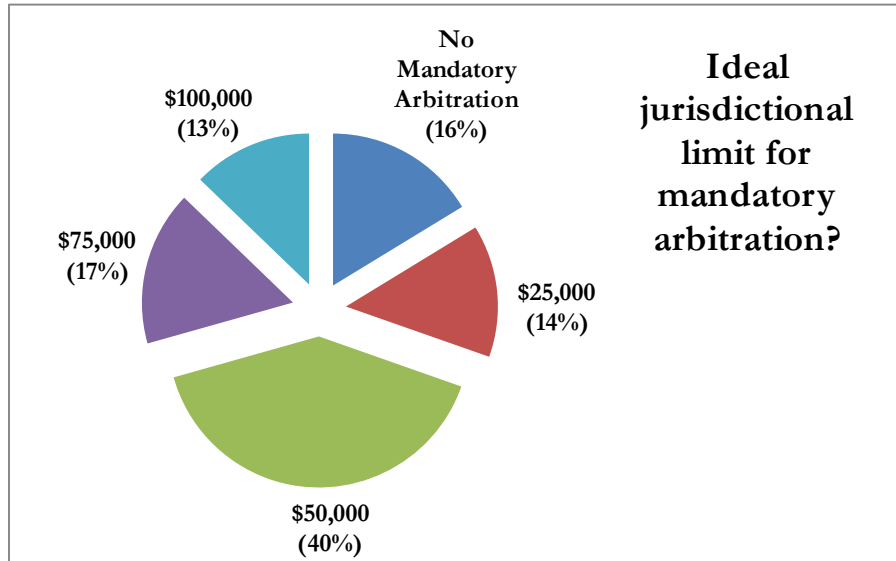


The survey asked what the jurisdictional limit for mandatory arbitration should be, in the best interest of litigants. A plurality of respondents felt that \$50,000 was the right limit. About 30% felt that the limit should be higher, which would increase the number of qualifying cases. About

30% felt that the limit should be lower or the program should not exist, which would decrease or eliminate qualifying cases. Significantly, over 15% indicated that “[t]here should not be a mandatory arbitration program in Circuit Court.” See Figure 55.

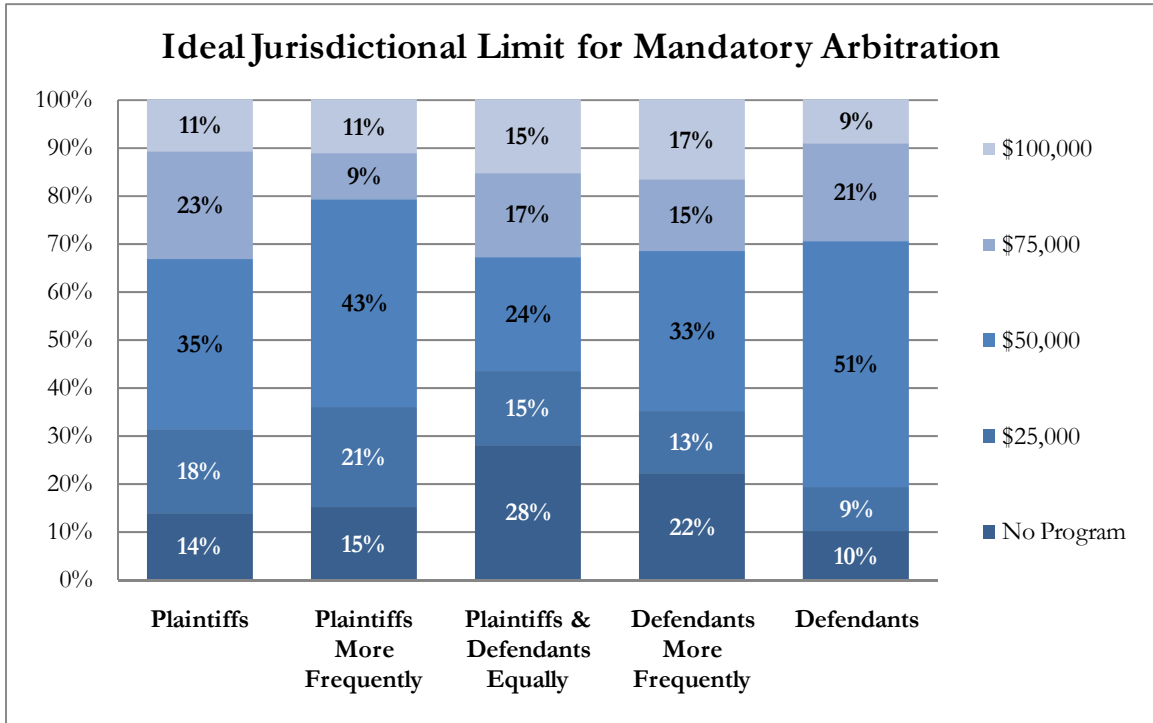
Figure 55 (Survey Question 33)

n = 320



With respect to the ideal limit for mandatory arbitration, Figure 56 shows the distribution of responses by party (for those who have had a qualifying case and indicated a party most frequently represented). Respondents who represent plaintiffs and defendants equally are most likely to be in favor of eliminating the program or decreasing the limit, while those who solely represent plaintiffs or defendants are least likely. The likelihood of being in favor of an increased limit does not appear to vary widely by party represented.

Figure 56 (Survey Questions 5, 33)
n = 57; 53; 46; 54; 88

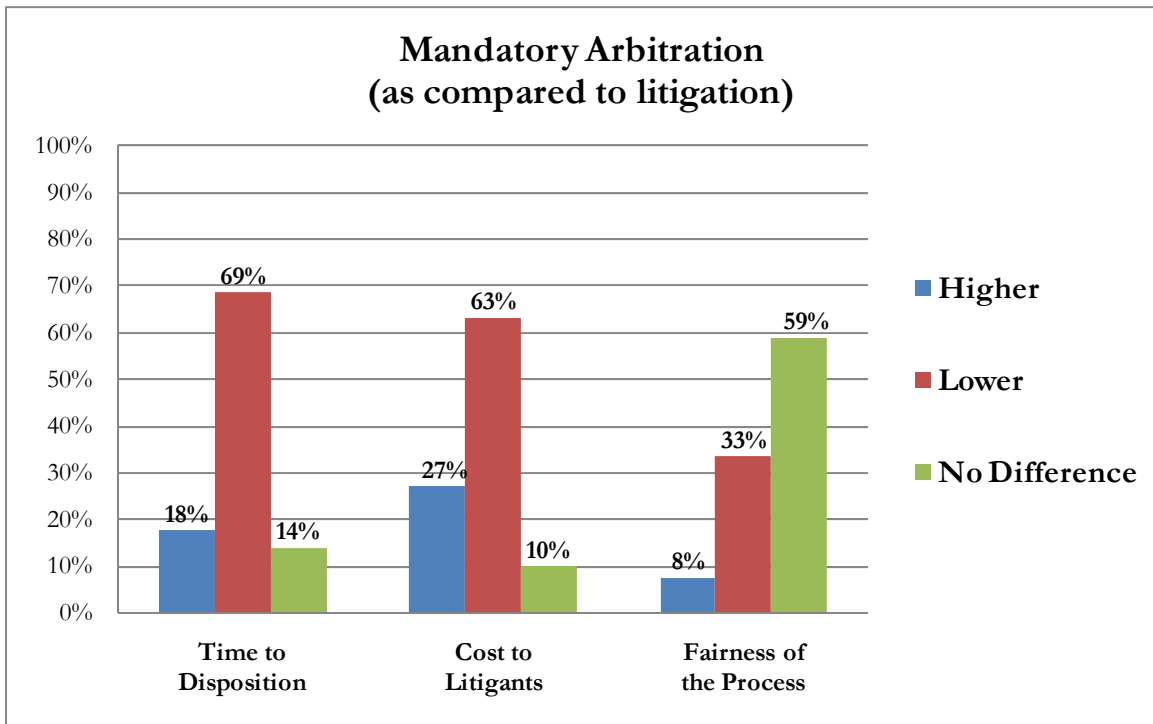


2. CASES PROCEEDING THROUGH MANDATORY ARBITRATION

Over 90% of respondents who had a case qualifying for arbitration have also had a case proceed through the arbitration process (61% of total respondents).

As shown in Figure 57, according to Oregon practitioners, mandatory arbitration has a faster time to disposition and a lower cost than litigation. However, it does not compare favorably to litigation on the issue of procedural fairness.

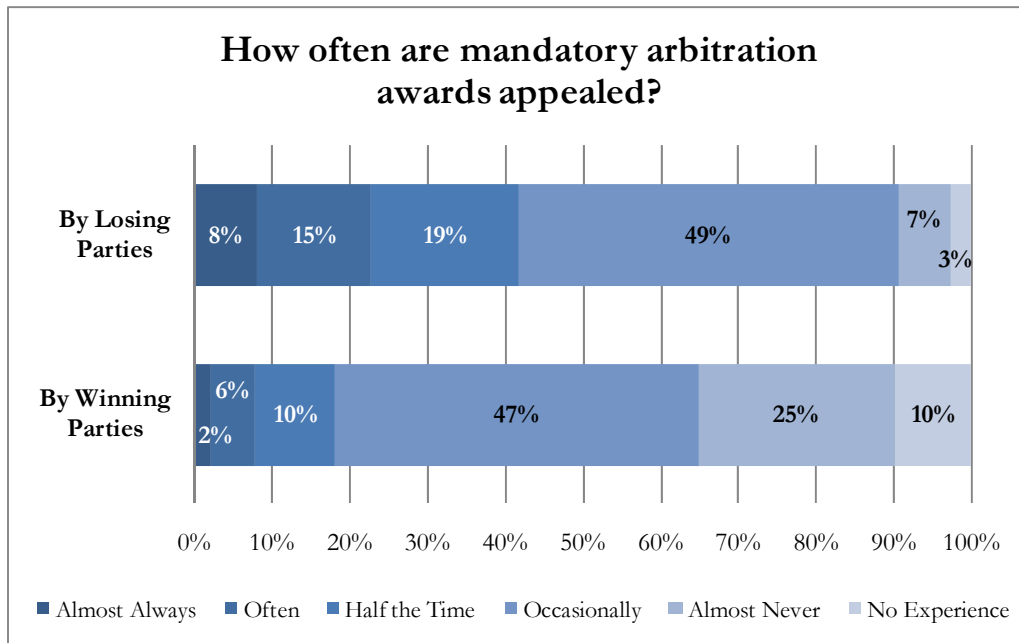
Figure 57 (Survey Question 35)
n = 296; 293; 293



The survey asked respondents to indicate, in their experience, how frequently losing parties appeal the arbitration award and how frequently winning parties who recover less than requested appeal the arbitration award.³⁷ Not surprisingly, losing parties tend to appeal more often than winning parties. For both losing and winning parties, most respondents reported that appeal occurs “occasionally or “almost never.” Notably, however, over 40% of respondents indicated that losing parties appeal at least half of the time. See Figure 58.

³⁷ See O.R.S. § 36.425(2)(a).

Figure 58 (Question 36)
 n = 295; 291



3. RESPONDENT COMMENTS

The written comments concerning mandatory arbitration were overwhelmingly negative, with many suggesting elimination of the program. Due to the rules concerning appeal, these respondents characterized the program as wasting time, causing delay, and increasing costs (by 75% according to one respondent’s estimate). Respondents complained that the poor quality of arbitrators and the uneven results render appeal likely, while the fee provisions make appeal risky. Moreover, respondents reported that some parties use the process simply to access the other party’s case, with the ultimate intent of appealing the result and forcing settlement or going to trial. One respondent stated that the threat of appeal and the associated costs are “very difficult for clients with limited resources.” Other comments were that the program “is a reflection of judicial laziness” and deprives attorneys of litigation experience.

Those who did not advocate abolishment of mandatory arbitration offered some suggestions for a fairer process: make arbitration optional; reduce the jurisdictional limit; establish consistent timelines and procedural rules; expand the preparation time to 90 days; hear appeals on the record rather than *de novo*. More than one respondent commented that arbitration “should be mandatory for the larger cases, rather than required for the litigant who cannot afford it.”

Some respondents acknowledged that mandatory arbitration generally reduces the cost and time associated with a case if the result is not appealed. The few who advocated for expanding the program suggested doing so due to the high cost of litigation. Another proposed solution: Create an optional “track” with streamlined and reduced pretrial activities for cases under a certain dollar value, which would reduce costs and “yet preserve the right to a jury trial for parties who are reluctant to accept the ruling of an arbitrator.”

F. RESPONDENT SUGGESTIONS FOR A MORE TIMELY AND COST-EFFECTIVE PROCESS

While respondents generally view Oregon's civil litigation process in a positive light, the survey asked respondents to name one rule or procedure they would change to achieve a more timely and cost-effective process for litigants. Suggestions not incorporated into the previous discussion are set forth below.

The single most suggested change (outside of those discussed above) was for one judge to be assigned to a case, to hear all matters from inception to resolution. Respondents expressed frustration with having to educate a different decision maker on the facts and issues at every appearance, a waste of resources for both litigants and the court. Having one well-educated judge on a case would result in a more efficient process, better case management, and more careful rulings on dispositive motions. According to respondents, it would also help prevent inconsistent rulings and trial postponements due to lack of a judge. "Involvement of multiple judges in cases results in confusion, delay and inconsistent handling."

Respondents also frequently suggested implementing a disclosure system. There are certain basic and limited items, such as witness and document lists, that would improve litigation if exchanged prior to trial. Other information that some respondents suggested should be disclosed: expert reports; pertinent records (such as medical or employment); a short summary of the topics to be addressed by each witness; and proposed jury instructions. It was also suggested that a joint pretrial order would be helpful.

Other common suggestions: limit the number, length, and scope of depositions; conduct a mandatory judicial settlement conference; have more frequent status conferences; implement a more meaningful summary judgment procedure or eliminate it completely; establish a discovery cut-off date; adopt a fee-shifting rule for attorney fees.

More than one respondent suggested implementing multiple tracks with the amount of discovery proportionate to the dispute. Early judicial management would put cases on the right track, with the option to change tracks if necessary. Another respondent suggested implementing a practice employed in Cook County, Illinois: the parties draft orders relating to a motion while in the courtroom during the hearing; the judge takes both drafts and crafts the court's version while still in the courtroom; the parties immediately raise any objections; the court addresses the objections and issues a final ruling the same day. This would prevent multiple appearances and delays.

A number of respondents suggested moving to electronic filing and records management systems, and one suggested that making court rulings available online would be helpful to firms with limited resources. Several respondents implored for the judicial system to be provided with more adequate resources:

- "The state court system is under-funded. We lost court reporters years ago. Parties have to pay for their own court reporters which makes going to trial more expensive. If a court reporter is not paid for, the trial is tape recorded. The quality of the tape recording varies and an attorney risks not having the necessary record for appeal. The way the cases are assigned, judges do not have an adequate opportunity to fairly consider the matters they are trying. The feel is that you are on a conveyor belt, and that providing justice is not the mission. Rather, the mission is to get rid of cases as fast as possible."

- “Pay the judges more money, build all of the badly needed new courthouses, [and] afford civil actions their rightful place on the docket...”
- “[The] absence of needed judicial resources allows Oregon’s ‘limited discovery’ to be abused.”
- “With proper funding, the Oregon state system is more often preferable for the ‘normal’ civil case.”

V. CONCLUSION

IAALS sincerely thanks all of the individuals and organizations who dedicated precious time, effort, and energy to make the Oregon Rules Survey possible. It is our hope that this study will make a valuable contribution to the national dialogue on civil justice reform. We look forward to processing this information in conjunction with other efforts to understand and improve the American civil justice system.

APPENDIX: SURVEY INSTRUMENT

Are you an attorney or judge with past or present CIVIL LITIGATION experience in the CIRCUIT COURTS of Oregon? For this survey, civil litigation does not include domestic relations or family law.

- Yes
- No

If you answered "Yes," please proceed to Question 1. If you answered "No," you may stop here. The Institute for the Advancement of the American Legal System thanks you for your time. We encourage you to learn more about our work by visiting www.du.edu/legalinstitute.

I. ATTORNEY BACKGROUND

1. Number of years you have practiced law in Oregon, rounded to the nearest year:

2. Estimated number of Oregon Circuit Court civil cases in which you have been an attorney of record (entered an appearance) or a judge within the last five years:

- None
- 1 to 5
- 6 to 20
- 21 to 50
- 51 to 100
- Over 100

3. Estimated number of your Oregon Circuit Court civil cases that have gone to trial over the last five years (judges, please include cases over which you have presided at trial):

- None
- 1 to 5
- 6 to 20
- 21 to 50
- 51 to 100
- Over 100

4. Types of civil cases with which you have the most experience in Oregon Circuit Court:

Select up to three areas, but do not include areas of minimal involvement.

- | | |
|--|---|
| <input type="checkbox"/> Administrative law | <input type="checkbox"/> Personal injury |
| <input type="checkbox"/> Breach of fiduciary duty | <input type="checkbox"/> Probate |
| <input type="checkbox"/> Civil rights | <input type="checkbox"/> Product liability |
| <input type="checkbox"/> Complex commercial | <input type="checkbox"/> Professional malpractice (generally) |
| <input type="checkbox"/> Construction | <input type="checkbox"/> Property damage |
| <input type="checkbox"/> Consumer fraud | <input type="checkbox"/> Real property |
| <input type="checkbox"/> Contract disputes | <input type="checkbox"/> Torts (generally) |
| <input type="checkbox"/> Domestic relations | <input type="checkbox"/> Mass torts |
| <input type="checkbox"/> Employment discrimination | <input type="checkbox"/> Medical malpractice |
| <input type="checkbox"/> Insurance disputes | <input type="checkbox"/> Other _____ |
| <input type="checkbox"/> Labor law | <input type="checkbox"/> Other _____ |
| | <input type="checkbox"/> Other _____ |

5. Your civil litigation role over the course of your career:

If applicable, you may check "neutral decision-maker" in addition to any other box.

- Represent plaintiffs in all or nearly all cases
- Represent defendants in all or nearly all cases
- Represent plaintiffs and defendants, but plaintiffs more frequently
- Represent plaintiffs and defendants, but defendants more frequently
- Represent plaintiffs and defendants equally
- Neutral decision-maker

6. Your current position:

- | | |
|---|---|
| <input type="checkbox"/> Law firm lawyer or solo practitioner | <input type="checkbox"/> ADR provider |
| <input type="checkbox"/> In-house counsel | <input type="checkbox"/> Academician or researcher |
| <input type="checkbox"/> Government lawyer | <input type="checkbox"/> Retired, last year of practice: _____ |
| <input type="checkbox"/> Judge | <input type="checkbox"/> Inactive, last year of practice in Oregon: _____ |
| <input type="checkbox"/> Law clerk | <input type="checkbox"/> Other, please specify: _____ |

If your current position as indicated in Question 6 is "Law firm lawyer or solo practitioner," "In-house counsel," or "Government lawyer," please answer Questions 7 and 8. If you do not hold one of these positions, please skip to Question 9.

7. Current number of full- and part-time attorneys at your organization who work in YOUR office

location:

- 1 to 5
- 6 to 10
- 11 to 20
- 21 to 50
- 51 to 100
- 101 to 250
- 251 to 500
- Over 500

8. Current number of full- and part-time attorneys at your organization who work in ALL office

locations:

- 1 to 5
- 6 to 10
- 11 to 20
- 21 to 50
- 51 to 100
- 101 to 250
- 251 to 500
- Over 500

II. CIVIL LITIGATION GENERALLY

9. Below is a list of common complaints about the American civil justice system. Please indicate your level of agreement with each statement as a whole, as it relates specifically to OREGON CIRCUIT COURT.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. The civil justice system is too complex.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. The civil justice system takes too long.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. The civil justice system is too expensive.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Opposing counsel are generally uncooperative.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. The system of hourly billing for attorneys contributes disproportionately to litigation costs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If your current position as indicated in Question 6 is "Law firm lawyer or solo practitioner," please answer Question 10. If not, please skip to Question 11.

10. As a general matter, your firm will not file or defend a case unless the amount in controversy exceeds:
 \$ _____
 My firm will not refuse a case based on the amount in controversy
 Don't know

III. COMPARATIVE QUESTIONS

11. Do you have experience litigating in FEDERAL court in the District of Oregon?
 Yes
 No

If you answered "Yes" to Question 11, please answer Question 12. If you answered "No," please skip to Question 13.

12. Between Oregon Circuit Court and the U.S. District Court for the District of Oregon:
 I prefer litigating in the Oregon state court.
 Reason: _____
 I prefer litigating in the Oregon federal court.
 Reason: _____
 No preference.
 Reason: _____

13. Do you have experience practicing in neighboring states?
 Yes, please specify the state(s): _____
 No

If you answered "Yes" to Question 13, please answer Question 14. If you answered "No," please skip to Question 15.

14. Between Oregon Circuit Court and neighboring state courts (generally):
 I prefer litigating in the Oregon state court.
 Reason: _____
 I prefer litigating in neighboring state courts.
 Reason: _____
 No preference.
 Reason: _____

IV. OREGON RULES OF CIVIL PROCEDURE ("ORCP") AND UNIFORM TRIAL COURT RULES ("UTCRC")

A. Trial Time Limits

15. Consider the rule that trial will take place within one year of filing (normally) or within two years of filing (for "complex" cases), absent a showing of good cause. Please indicate your level of agreement with the following statement.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. The trial time requirement provides adequate time for trial preparation in the majority of cases.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered "Yes" to either Question 11 or Question 13, indicating experience litigating in federal or neighboring state courts, please answer Question 16. If you answered "No," please skip to Question 17.

16. Please evaluate the effects of the requirement that trial take place within one or two years of filing.

	Decreases	No Effect	Increases	No Opinion
a. How does the time requirement affect the COST to litigants?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. How does the time requirement affect the actual TIME to resolution?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. How does the time requirement affect the EFFICIENCY of the litigation process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. How does the time requirement affect the FAIRNESS of the litigation PROCESS?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. How does the time requirement affect the FAIRNESS of the OUTCOME?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

17. Estimated percentage of your “normal” cases in which an exception to the one-year trial time limit has been granted:

- 0%
- 1 to 25%
- 26 to 50%
- 51 to 75%
- 76 to 100%
- All of my Circuit Court cases have been deemed “complex”

18. Estimated percentage of your “complex” cases in which an exception to the two-year trial time limit has been granted:

- 0%
- 1 to 25%
- 26 to 50%
- 51 to 75%
- 76 to 100%
- None of my Circuit Court cases have been deemed “complex”

B. Fact Pleading

19. Consider the rule that pleadings contain “a plain and concise statement of the ultimate facts constituting the claim for relief” (ORCP 18). Please indicate your level of agreement with each of the following statements.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. Fact pleading reveals the pertinent facts early in the case.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Fact pleading helps narrow the issues early in the case.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Fact pleading reduces the total volume of discovery.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Fact pleading generally favors defendants over plaintiffs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

20. Please indicate how often the following occur, in your experience. If you have no personal experience with the topic, please select "No Experience."

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Parties litigate the scope and adequacy of the pleadings.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Parties seek to amend the pleadings.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Courts allow amendments to insufficient pleadings.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Parties are bound by the content of their pleadings at trial.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered "Yes" to either Question 11 or Question 13, indicating experience litigating in federal or neighboring state courts, please answer Question 21. If you answered "No," please skip to Question 23.

21. Please evaluate the effects of fact pleading.

	Decreases	No Effect	Increases	No Opinion
a. How does fact pleading affect the COST to litigants?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. How does fact pleading affect the actual TIME to resolution?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. How does fact pleading affect the EFFICIENCY of the litigation process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. How does fact pleading affect the FAIRNESS of the litigation PROCESS?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. How does fact pleading affect the FAIRNESS of the OUTCOME?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. How does fact pleading affect counsel's ABILITY to prepare the case for trial?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered "Yes" to Question 11, indicating experience litigating in federal court, please answer Question 22. If you answered "No," please skip to Question 23.

22. There are different standards and time frames applicable to the pleading of punitive damages in Oregon state court and federal court. Please indicate whether you prefer the Oregon state procedure (O.R.S. § 31.725) or the federal procedure.

- I prefer the state procedure.
Reason: _____
- I prefer the federal procedure.
Reason: _____
- No preference.
Reason: _____
- No experience with punitive damages.

Discovery Limits

23. Consider that, under Oregon’s rules, requests for admission are limited to 30 (absent a court order) and there are no provisions for interrogatories or disclosure/discovery of independent experts. Collectively, we refer to these as “limits on discovery.” Please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. The limits on discovery require parties to focus their discovery efforts to the disputed issues.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. The limits on discovery reduce the total volume of discovery.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. The limits on discovery make litigation costs more predictable.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. The limits on discovery reduce the total cost of litigation.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. The limits on discovery reduce the total time required for litigation.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. The limits on discovery reduce the use of discovery as a tool to force settlement.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. The limits on discovery generally favor defendants over plaintiffs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. The limits on discovery force parties to go to trial with insufficient information.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. The court should have more control over the discovery process.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

24. Please indicate how often the following occur, in your experience.

	Almost Never	Occasionally	About Half the Time	Often	Almost Always	No Experience
a. Parties engage in litigation about the scope of discovery.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Even without being required, parties disclose relevant information.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Courts impose discovery sanctions when warranted.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered "Yes" to either Question 11 or Question 13, indicating experience litigating in federal or neighboring state courts, please answer Questions 25-27. If you answered "No," please skip to Question 28.

25. Please evaluate the effects of the absence of discovery for INDEPENDENT EXPERTS (no disclosure, depositions, or reports).

	Decreases	No Effect	Increases	No Opinion
a. How does the lack of expert discovery affect the COST to litigants?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. How does the lack of expert discovery affect the actual TIME to resolution?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. How does the lack of expert discovery affect the EFFICIENCY of the litigation process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. How does the lack of expert discovery affect the FAIRNESS of the litigation PROCESS?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. How does the lack of expert discovery affect the FAIRNESS of the OUTCOME?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. How does the lack of expert discovery affect counsel's ABILITY to prepare the case for trial?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

26. Please evaluate the effects of the absence of INTERROGATORIES as a discovery tool.

	Decreases	No Effect	Increases	No Opinion
a. How does the lack of interrogatories affect the COST to litigants?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. How does the lack of interrogatories affect the actual TIME to resolution?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. How does the lack of interrogatories affect the EFFICIENCY of the litigation process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. How does the lack of interrogatories affect the FAIRNESS of the litigation PROCESS?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. How does the lack of interrogatories affect the FAIRNESS of the OUTCOME?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. How does the lack of interrogatories affect counsel's ABILITY to prepare the case for trial?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

27. Please evaluate the effects of the limit of 30 REQUESTS FOR ADMISSION, absent a court order.

	Decreases	No Effect	Increases	No Opinion
a. How does the limit on requests for admission affect the COST to litigants?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. How does the limit on requests for admission affect the actual TIME to resolution?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. How does the limit on requests for admission affect the EFFICIENCY of the litigation process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. How does the limit on requests for admission affect the FAIRNESS of the litigation PROCESS?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. How does the limit on requests for admission affect the FAIRNESS of the OUTCOME?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

f. How does the limit on requests for admission affect counsel's ABILITY to prepare the case for trial?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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28. Estimated percentage of your cases in which more than 30 requests for admission have been allowed:

- 0%
- 1 to 25%
- 26 to 50%
- 51 to 75%
- 76% to 100%

C. Pretrial Process Generally

29. Below is a list of statements about the pretrial process. For each, please indicate your level of agreement with the statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. Increased judicial management would improve the pretrial process.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Increased judicial management would create unnecessary "busywork."	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Courts should diverge from the ORCP and UTCR if all parties request to do so.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

30. Below is a list of statements about the culture in Oregon state court. For each, please indicate your level of agreement with the statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. The ORCP and UTCR enhance the civility of litigation.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. The culture of the Oregon bar enhances the civility of litigation.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Oregon courts recognize and encourage professionalism.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Oregon courts adequately address unprofessional behavior.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. The rules are loosely enforced.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Some judges try too hard to avoid trial.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Oregon courts are friendly to plaintiffs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. Oregon courts are friendly to defendants.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

D. Mandatory Arbitration

31. Have any of your CIRCUIT COURT cases QUALIFIED FOR Oregon’s mandatory arbitration program (O.R.S. §§ 36.400-36.425)?

Circuit Court claims involving only requests for monetary relief of \$50,000 or less qualify for mandatory arbitration.

- Yes
- No

If you answered “Yes” to Question 31, please answer Questions 32-34. If you answered “No,” please skip to Question 37.

32. Please indicate how often the following occur, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. The court exempts or removes a qualifying case from the arbitration process.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Parties to a qualifying case opt out of arbitration in favor of an established court mediation program.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Parties asserting more than \$50,000 in damages waive the excess amount for arbitration purposes.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Defending parties petition for arbitration by attempting to show that no reasonably objective juror would award over \$50,000.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Parties litigate the issue of arbitrability.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

33. In the best interest of litigants, the jurisdictional limit for mandatory arbitration in Circuit Court should be:

- \$25,000
- \$50,000
- \$75,000
- \$100,000
- There should not be a mandatory arbitration program in Circuit Court.

34. Have any of your CIRCUIT COURT cases PROCEEDED THROUGH mandatory arbitration?

- Yes
- No

If you answered “Yes” to Question 34, please answer Questions 35 and 36. If you answered “No,” please skip to Question 37.

35. Mandatory arbitration (generally), as compared to litigation (generally):

a. Time	b. Cost to Litigants	c. Fairness of the Process
<input type="checkbox"/> Shortens time to disposition	<input type="checkbox"/> Decreases cost	<input type="checkbox"/> Less fair
<input type="checkbox"/> No difference in time	<input type="checkbox"/> No difference in cost	<input type="checkbox"/> No difference in fairness
<input type="checkbox"/> Lengthens time to disposition	<input type="checkbox"/> Increases cost	<input type="checkbox"/> More fair

36. Please indicate how often the following occur, in your experience.

	Almost Never	Occasion- ally	About Half the Time	Often	Almost Always	No Exper- ience
a. Losing parties appeal the arbitration award.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Winning parties who recover less than requested appeal the arbitration award.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

V. CONCLUSION

37. If you could change any one rule or procedure in Oregon Circuit Court to achieve a more timely and cost-effective process for litigants, what would it be and why?

38. Please include any information, clarification, or comment you would like to add:

39. Are you willing to be contacted to participate in further studies concerning civil litigation in Oregon? By selecting “yes,” your contact information will not be associated with your responses to this survey, which remain confidential. Contact information will be used only for the purpose indicated above, and will not be shared or distributed.

Yes

First name: _____

Last name: _____

Email: _____

Phone: _____

How would you prefer to be contacted? By email

By phone

No