

SURVEY *of the* ARIZONA BENCH & BAR



ON THE ARIZONA
RULES OF CIVIL
PROCEDURE

INSTITUTE *for the*
ADVANCEMENT
of the AMERICAN
LEGAL SYSTEM

 UNIVERSITY OF
DENVER

INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

The Institute for the Advancement of the American Legal System (IAALS) is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Executive Director and former Colorado Supreme Court Justice Rebecca Love Kourlis leads a staff distinguished not only by their expertise but also by their diversity of ideas, backgrounds and beliefs.

IAALS provides principled leadership, conducts comprehensive and objective research, and develops innovative and practical solutions—all focused on serving the individuals and organizations who rely on the system to clarify rights and resolve disputes.

IAALS is part of the University of Denver, and it benefits from gifts donated to the University for its use. None of those gifts have conditions or requirements, other than accounting and fiduciary responsibility. All IAALS research and products are supported by pooled grants from individuals, businesses and private foundations.

Institute for the Advancement of the American Legal System

University of Denver
2044 E. Evans Avenue; HRTM Bldg., #307
Denver, CO 80208-2101
Phone: 303.871.6600; Fax: 303.871.6610
www.du.edu/legalinstitute

STAFF

Rebecca Love Kourlis, Executive Director

Pamela Gagel, Assistant Director

Jordan Singer, Director of Research

Corina Gerety, Research Analyst

Natalie Knowlton, Research Analyst

Dallas Jamison, Director of Marketing & Communications

Theresa Spahn, Director - O'Connor Judicial Selection Initiative

Jennifer Moe, Legal Assistant

Abigail McLane, Executive Assistant

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
I. INTRODUCTION	4
II. METHODOLOGY	6
A. SURVEY DEVELOPMENT	6
B. SURVEY DISTRIBUTION	6
C. SURVEY ADMINISTRATION	7
D. SURVEY RESPONSES	7
III. RESPONDENT DEMOGRAPHICS	8
A. LEGAL EXPERIENCE	8
B. ARIZONA SUPERIOR COURT EXPERIENCE	9
C. CURRENT POSITION	11
IV. THE SURVEY RESULTS	12
A. ARIZONA ATTORNEYS AND JUDGES ARE GENERALLY POSITIVE ABOUT THE ARIZONA STATE SYSTEM	12
1. STATE COURT V. FEDERAL COURT	12
2. THE EFFECTS OF THE 1992 AMENDMENTS	14
B. THE INNOVATIVE ASPECTS OF THE ARIZONA RULES AND THE GOALS OF EFFICIENCY, AFFORDABILITY, AND PROCEDURAL FAIRNESS	16
1. RULE 16(B) COMPREHENSIVE PRETRIAL CONFERENCES	16
2. EXTENSIVE DISCLOSURES	19
3. PRESUMPTIVE LIMITS	26
a. THE LIMIT ON THE NUMBER OF EXPERT WITNESSES	27

b.	THE LIMITS ON THE EXTENT OF DEPOSITION DISCOVERY	29
i.	DEPOSING ONLY CERTAIN INDIVIDUALS	29
ii.	DEPOSITION TIME LIMIT	30
iii.	DEPOSITION DISCOVERY GENERALLY	32
c.	THE LIMIT ON INTERROGATORIES	32
d.	THE LIMIT ON REQUESTS FOR PRODUCTION	34
e.	THE LIMIT ON REQUESTS FOR ADMISSION	35
f.	THE PRESUMPTIVE DISCOVERY LIMITS AS A WHOLE	36
g.	ADHERENCE TO THE PRESUMPTIVE LIMITS	39
C.	THE ROLE OF SANCTIONS	42
D.	SOURCES AND CAUSES OF DISCONTENT WITH THE SYSTEM	44
E.	THE ROLE OF COMPULSORY ARBITRATION: MOVING CASES OUT OF LITIGATION	46
1.	CASES QUALIFYING FOR COMPULSORY ARBITRATION	46
2.	CASES PROCEEDING THROUGH COMPULSORY ARBITRATION	49
F.	RESPONDENT SUGGESTIONS FOR A MORE TIMELY AND COST-EFFECTIVE PROCESS	51
V.	CONCLUSION	53
	APPENDIX: SURVEY INSTRUMENT	54

TABLE OF FIGURES

FIGURE	PAGE
FIGURE 1 (Q1): Years of Practice in Arizona	8
FIGURE 2 (Q5): Career Role by Party Represented	9
FIGURE 3 (Q2): Attorney of Record or Judge – Superior Court Civil Cases	10
FIGURE 4 (Q3): Trials – Superior Court Civil Cases	10
FIGURE 5 (Q7): Office Size – Number of Attorneys	11
FIGURE 6 (Q12): Preferred Forum for Civil Litigation in Arizona	12
FIGURE 7 (Q14): Effects of the 1992 Amendments on Stakeholders	14
FIGURE 8 (Q12, Q13): Pre- and Post-1992 Experience – Preferred Forum	15
FIGURE 9 (Q15A-E): Effects of Rule 16(b) Conferences	17
FIGURE 10 (Q16A): Rule 16(b) Conferences – Frequency	18
FIGURE 11 (Q20A-E): Effects of Disclosures	19
FIGURE 12 (Q20F-G): Effects of Disclosures on Costs	20
FIGURE 13 (Q25A): Timing of Initial Disclosures – Preferred Rule	21
FIGURE 14 (Q25B): Content of Mandatory Disclosures – Preferred Rule	22
FIGURE 15 (Q18A-B): Adherence to Disclosure Rules as Written	23
FIGURE 16 (Q21A-C): Disclosure Abuse – Frequency	24
FIGURE 17 (Q21C): Revealing Information Late – By Party	24
FIGURE 18 (Q21B): Withholding Information – By Party	25
FIGURE 19 (Q21A): Overproduction – By Party	25
FIGURE 20 (Q21D): Court Enforcement of Disclosure Rules	26
FIGURE 21 (Q24A): Modification of Limit on Expert Witnesses	27
FIGURE 22 (Q5, Q24A): Who Wants to Increase the Expert Witness Limit	28
FIGURE 23 (Q25C): Number of Expert Witnesses – Preferred Rule	28
FIGURE 24 (Q24B): Modification of Limit on Automatic Depositions	29
FIGURE 25 (Q5, Q24B): Who Wants to Increase the Automatic Depositions Limit	30
FIGURE 26 (Q24C): Modification of Deposition Time Limit	30
FIGURE 27 (Q5, Q24C): Who Wants to Increase the Deposition Time Limit	31
FIGURE 28 (Q25D): Extent of Deposition Discovery – Preferred Rule	32
FIGURE 29 (Q24D): Modification of Limit on Interrogatories	33
FIGURE 30 (Q5, Q24D): Who Wants to Increase the Limit on Interrogatories	33

FIGURE	PAGE
FIGURE 31 (Q24E): Modification of Limit on Requests for Production	34
FIGURE 32 (Q5, Q24E): Who Wants to Increase the Limit on Requests for Production	35
FIGURE 33 (Q24F): Modification of Limit on Requests for Admission	35
FIGURE 34 (Q5, Q24F): Who Wants to Increase the Limit on Requests for Admission	36
FIGURE 35 (Q22A-22F): Effects of Presumptive Limits on Litigation	37
FIGURE 36 (Q22G): Whether Presumptive Limits Favor Defendants	38
FIGURE 37 (Q5, Q22G): Whether Presumptive Limits Favor Defendants – By Party	38
FIGURE 38 (Q22H): Whether Limits Mean Insufficient Information at Trial	39
FIGURE 39 (Q18C-E, G, I, K): Adherence to Presumptive Limits – Amount of Discovery	40
FIGURE 40 (Q18F, H, J): Adherence to Presumptive Limits – Time to Complete	41
FIGURE 41 (Q23A): Court Enforcement of Presumptive Limits	41
FIGURE 42 (Q16B-D): Sanctions for Non-Compliance with Rule 16(b)	42
FIGURE 43 (Q19A-C): Sanctions for Discovery Misconduct	43
FIGURE 44 (Q9A-C): Civil Justice in Superior Court	44
FIGURE 45 (Q9D, F): Attorney Culture	45
FIGURE 46 (Q9E): Notice Pleading and Identification of Disputed Issues – By Party	46
FIGURE 47 (Q27A-B): Opt Out of Compulsory Arbitration – Frequency	47
FIGURE 48 (Q29): Ideal Jurisdictional Limit for Compulsory Arbitration	48
FIGURE 49 (Q5, 29): Ideal Limit for Compulsory Arbitration – By Party	48
FIGURE 50 (Q28, Q29): Desired Volume of Cases in Arbitration – Maricopa County	49
FIGURE 51 (Q31A-C): Compulsory Arbitration – Compared to Litigation	50
FIGURE 52 (Q27C, Q32B): Satellite Litigation on Compulsory Arbitration	51

This Report sets forth the results of the Institute for the Advancement of the American Legal System's Survey of the Arizona Bench and Bar on the Arizona Rules of Civil Procedure ("Arizona Rules Survey").

EXECUTIVE SUMMARY

The Arizona Rules Survey explored the views of members of the State Bar of Arizona concerning civil procedure in Arizona Superior Court ("Superior Court"), the state court of general jurisdiction. There are significant differences between the current Arizona Rules of Civil Procedure ("ARCP") and those used prior to 1992, as well as differences between the current ARCP and the Federal Rules of Civil Procedure ("FRCP"). 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 Arizona practitioners, representing a mix of newer and more experienced attorneys. Nearly 30% of respondents have 10 or fewer years of experience practicing law in Arizona, and over 30% have more than 25 years of experience. Respondents include both plaintiffs' and defense attorneys in fairly equal measure, as well as attorneys in private, government, and in-house practice. Judges also responded. Highlights of the survey appear below.

Arizona practitioners prefer the current Arizona Superior Court civil justice system to both the federal system and to the state system prior to the 1992 rules amendments.

A majority of survey respondents have relevant comparative experience. Over 70% of all survey respondents have litigated in the U.S. District Court for the District of Arizona, and over 50% litigated in Arizona Superior Court prior to the 1992 amendments to the state rules (which increased disclosure obligations and set lower presumptive limits on discovery).

Respondents with experience litigating in the U.S. District Court for the District of Arizona prefer litigation in Superior Court by a two-to-one ratio. These respondents frequently cited the state rules and procedures, particularly disclosure and discovery rules, as the basis for that preference. They stated that state court is faster, less costly, and more accessible. In addition, the vast majority of respondents with experience litigating in Superior Court prior to the 1992 amendments to the ARCP indicated that the amendments were a positive or neutral development for stakeholders (litigants, lawyers, judges, and the public).

Arizona practitioners find comprehensive pretrial conferences to be beneficial.

A majority of respondents indicated that ARCP 16(b) comprehensive pretrial conferences establish early judicial management of cases, improve trial preparation, and expedite case dispositions. Further, over 60% of respondents find the conferences to be "cost-effective," and exactly 60% believe that this conference should be mandated in every case. Respondents commented that, in order to fulfill their purposes, the conferences must be taken seriously and treated as more than an administrative formality. Further, the conferences must occur early enough to make a difference, but not so early as to preclude a good understanding of the case.

Arizona practitioners find the state system’s liberal disclosure standard to be beneficial.

In Superior Court, the parties are required to make full, mutual, and simultaneous disclosure of all relevant information known by or available to them at the outset of a case, and to supplement as new information is obtained. There is a consensus among respondents that disclosures reveal the pertinent facts early in the case, help to narrow the issues early in the case, and facilitate agreement on the scope and timing of discovery. Further, there is consensus that disclosures do not require excessive investment early in a case, do not substantially increase satellite litigation, and do not raise litigation costs. Respondents commented that the disclosure rule leads to more effective communication and decreases litigation tactics that detract from the merits. However, it was also noted that the standard imposes a greater burden on conscientious parties and counsel, as proper disclosures involve higher costs than simply providing useless generalizations or a flood of documents. Nevertheless, respondents with federal experience tend to prefer the state disclosure standard with respect to both the timing of initial disclosures and the substance of mandatory disclosures.

Arizona practitioners find the state system’s presumptive limits on expert witnesses and discovery to be beneficial.

In Superior Court, the number of independent expert witnesses is presumptively limited to one per side per issue. Given the opportunity to modify the presumptive expert witness limit, nearly 80% of respondents would either maintain or lower this limit. Moreover, respondents with federal experience prefer the Arizona rule on the number of expert witnesses by a three-to-one ratio.

Depositions in Superior Court are presumptively limited to four hours, and only certain individuals may be deposed automatically (parties, expert witnesses, and document custodians). Given the opportunity to modify the presumptive limit on deposition length, over three-quarters of respondents would either maintain or lower the limit. Given the opportunity to modify the presumptive limit on who may be deposed, over two-thirds of respondents would either maintain or lower the limit. Moreover, respondents with federal experience prefer the Arizona rules on the extent of deposition discovery by a two-to-one ratio.

There are also presumptive limits in Superior Court on the number of interrogatories, requests for admission, and requests for production. Given the opportunity to modify the presumptive limit of 40 interrogatories that may be served upon another party, exactly 70% of respondents would either maintain or lower the limit, while fewer than one-quarter would allow for more interrogatories. Given the opportunity to modify the presumptive limit of 25 requests for admission per case, nearly 70% of respondents would either maintain or lower the limit. Given the opportunity to modify the presumptive limit on requests for production to 10 distinct items or categories of items, a narrow plurality would either maintain or lower the limit, but a significant portion (46%) would allow for more requests.

A majority of respondents indicated that the presumptive discovery limits – considered collectively – require parties to focus their discovery efforts on the disputed issues and ultimately reduce the total volume of discovery. A plurality indicated that the limits reduce the total cost of litigation. Further, there is a general consensus that the limits do not favor defendants over plaintiffs, do not increase satellite litigation over whether to depart from the limits, and do not result in insufficient information at trial.

Arizona practitioners would generally like to see stronger rule enforcement.

The opinion that practitioners deviate from the letter and spirit of the rules was fairly widespread in the written comments. One respondent wrote: “If everyone does what they should, it is a good system.” Many respondents expressed a desire for more consistent rule enforcement, including more frequent sanctions for misconduct.

Respondents reported that sanctions are rarely requested or imposed, though they are utilized more often for discovery misconduct than for pretrial conference misconduct. Moreover, only about 20% of respondents reported that the sanctions rules consistently deter misconduct, while over 60% reported that the rules “almost never” or only “occasionally” serve as a deterrent.

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

While acknowledging that many aspects of the Superior Court system reduce litigation time and costs in comparison to other systems, exactly 70% of respondents still indicated that the system takes too long and nearly 85% indicated that it is too expensive.

A majority of respondents agreed that “the system of hourly billing for attorneys contributes disproportionately to litigation costs.” 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, one-third 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 of \$25,000).

While most respondents do not believe that notice pleading prevents early identification of issues, nearly one-third find that it does. More than one respondent commented on the relationship between the pleading standard and disclosures, as related to the need to narrow issues. Specifically, notice pleading can diminish the effectiveness of disclosures, as they are required before the legal theories and factual claims have sufficient definition.

Arizona practitioners find that the Superior Court compulsory arbitration program has some benefits but also some significant drawbacks.

In Superior Court, monetary actions with claims below a certain amount (set at the county level) are subject to compulsory arbitration. Three-quarters of respondents have had most of their qualifying cases filed in Maricopa County, which has a \$50,000 jurisdictional threshold.

A majority of respondents indicated that the arbitration process has a faster time to disposition and a lower cost than litigation. A majority of respondents also indicated that there is no difference in procedural fairness between arbitration and litigation. Significantly, however, 35% of respondents indicated that the arbitration process is less fair.

The written comments concerning compulsory arbitration were generally negative. Appeal of an arbitration award results in the case being tried *de novo*, which means increased delay and costs. Commenting respondents were also critical of the system for appointing arbitrators, stating that forcing unsuspecting, inexperienced, and untrained members of the bar to arbitrate leads to resentment and a poor process.

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 2009, IAALS conducted the Arizona Rules Survey to examine the innovative aspects of the Arizona Rules of Civil Procedure (“ARCP”). This survey was completed by judges and attorneys with civil litigation experience in Arizona Superior Court (“Superior Court”), the state trial court of general jurisdiction governed by the ARCP.¹

Originally modeled after the FRCP,² the ARCP “shall be construed to secure the just, speedy, and inexpensive determination of every action.”³ However, a 1988 citizen review of Arizona’s civil justice system concluded that it was becoming unaffordable, wasteful, and uncivilized.⁴ In early 1990, the Arizona Supreme Court and the State Bar of Arizona appointed a committee to consider and recommend amendments to the ARCP.⁵ The resulting amendments became effective on July 1, 1992.⁶ Intended to address a legal culture of “abusive, obstructive, and contentious behavior by members of the bar,”⁷ these changes introduced comprehensive pretrial conferences, extensive disclosures, and presumptive limits on discovery.

Given the intent of the 1992 amendments and the significant differences between the ARCP and the FRCP, IAALS determined that a survey of the Arizona 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 how it operates. Indeed, as then-Chief Justice Thomas Zlaket wrote shortly after the new Arizona rules became effective:

If the bench and bar are willing to give them a good faith try, the rules can succeed. Otherwise, they will likely fail. In any event, the rules surely will need some fine tuning as we gain experience and discover the mistakes that inevitably accompany such an effort.⁸

¹ ARIZ. CONST. art. VI, §14.

² In 1940, the Arizona Supreme Court became the first state to promulgate a procedural system replicating the Federal Rules. John B. Oakley & Arthur F. Coons, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1381 (1986); see also Daniel J. McAuliffe & Shirley J. Wahl, ARIZONA PRACTICE SERIES: CIVIL TRIAL PRACTICE §§ 2.4, 2.5 (2d ed. 2009)

³ ARIZ. R. CIV. P. 1.

⁴ Thomas A. Zlaket, *Encouraging Litigators to Be Lawyers: Arizona’s New Civil Rules*, 25 ARIZ. ST. L.R. 1, 1 (1993).

⁵ *Id.* at 2-3.

⁶ Supreme Court of Arizona, Order Amending Rules 4, 6, 16, 26.1, 30, 32, 33, 33.1, 34, 36, 43, Rules of Civil Procedure, and Rule VI, Uniform Rules of Practice of the Superior Court, 168 ARIZ. LXXXI (Dec. 20, 1991).

⁷ Zlaket, *supra* note 4, at 9.

⁸ *Id.*

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

- Do comprehensive pretrial conferences lead to more effective case management?
- Does mandatory disclosure of all relevant information advance the goals of efficiency, affordability, and procedural fairness?
- Do presumptive limits on discovery and expert witnesses advance the goals of efficiency and affordability, without sacrificing procedural fairness?
- To what extent are the ARCP followed, respected, and enforced?
- Does compulsory arbitration provide a satisfactory alternative to litigation?
- How could Arizona's system be further improved?

II. METHODOLOGY

The Arizona Rules Survey was created by IAALS, with the input of Arizona Supreme Court Justice Andrew Hurwitz and the help of the Butler Institute (“Butler”), an independent social science research organization at the University of Denver. The State Bar of Arizona (“SBA”), a mandatory organization established by the Arizona Supreme Court to govern the legal profession in the state,⁹ agreed to support the effort and distribute the survey to its membership.¹⁰

A. SURVEY DEVELOPMENT

The survey development process began with a series of hypotheses and research questions concerning the ARCP and practice in Superior 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.¹¹ IAALS created two versions of the Arizona 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, the survey instrument was pilot-tested by three diverse Arizona civil practitioners.¹² The volunteer pilot participants were first informed that their responses would not be eligible for inclusion in the final survey population, and were then 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 received feedback from an Arizona state court administrator.

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 all attorneys and judges with past or present civil litigation experience in Arizona Superior Court, regardless of status, position, or specialty. Accordingly, IAALS decided to cast a wide net within the SBA membership. Every active and inactive member with an e-mail address on file with the state bar received an e-mail invitation to participate, with the exclusion of attorneys categorized as “ineligible to practice” (deceased or disbarred). There were 17,779 e-mail addresses on file.¹³

The SBA sent three survey-related e-mails through its listserv. On August 31, 2009, an e-mail signed by SBA President Ray Hanna informed potential participants of the upcoming study.

⁹ See ARIZ. SUP. CT. R. 32; State Bar of Arizona, <http://www.azbar.org>.

¹⁰ This decision was made under the leadership of SBA President Ray Hanna and SBA Chief Executive Officer/Executive Director John Phelps.

¹¹ 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).

¹² The pilot group consisted of: a seasoned plaintiffs’ personal injury lawyer with experience as a Superior Court judge; a seasoned director of a non-profit constitutional litigation center; and a fifth-year associate at a national firm.

¹³ One day after the survey was launched, a rule requiring all members to provide the state bar office with a current e-mail address went into effect. Arizona Supreme Court, Order 23 (effective Sept. 3, 2009).

On September 2, 2009, an e-mail signed by Mr. Hanna and Justice Hurwitz explained the importance of the study and provided a universal link to the online version.¹⁴ This e-mail was distributed to a total of 16,438 addresses (1,341 were “undeliverable”). On the evening of September 15, 2009, an e-mail signed by Mr. Hanna reminded potential participants to complete the survey and again provided the survey link. This e-mail was distributed to a total of 16,332 addresses (1,447 were “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 2, 2009 until September 23, 2009. However, responses were accepted for six weeks, until October 14, 2009.

C. SURVEY ADMINISTRATION

Butler administered the survey. 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 Arizona attorneys with an e-mail address on the SBA roster, regardless of experience. The survey e-mails explicitly informed SBA members that this was a study of civil litigation in Superior Court. In addition, a threshold question asked whether the respondent had the requisite civil litigation experience in Superior Court. Due to the application of a different set of procedural rules for family law actions,¹⁵ “civil litigation” was defined to exclude domestic relations or family law.

The morning after the survey closed on October 14, 2009, the online link had been accessed 1,031 times, 947 individuals had given consent to participate in the study, and 834 had answered “yes” to the threshold question on the requisite experience. Although three individuals requested and received hard-copy versions, none were returned within the applicable time frame. After the data verification process, there were a total of 767 valid responses to the survey. At a 95% confidence level, the overall results are within $\pm 3.54\%$ of the reported percentages.

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%.

¹⁴ It was not possible to provide a unique link to each potential participant due to distribution through the SBA’s listserv rather than the online survey software.

¹⁵ See ARIZ. R. FAMILY LAW P. 1.

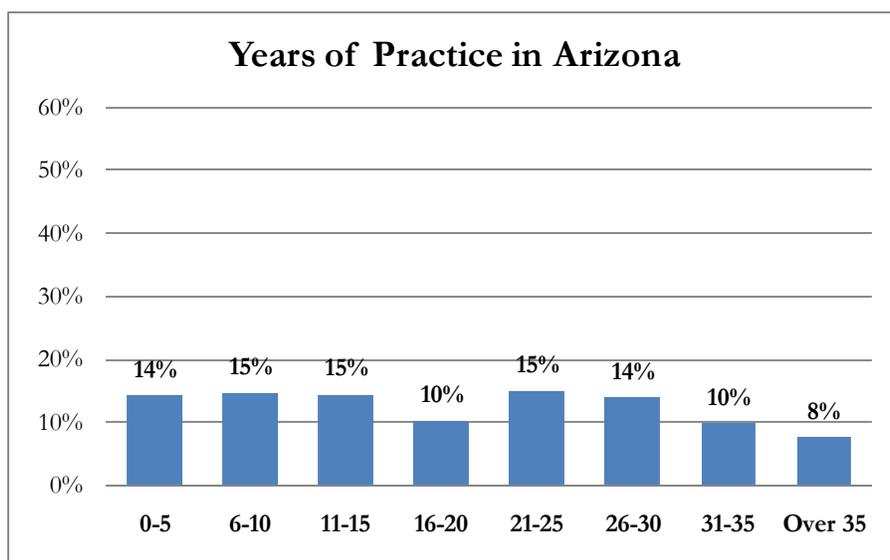
III. RESPONDENT DEMOGRAPHICS

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 Arizona for an average of 19 years. Figure 1 shows the relatively even distribution of respondents by years of legal experience in the state. Nearly 30% of respondents have 10 or fewer years of Arizona experience, and over 30% have more than 25 years of experience.

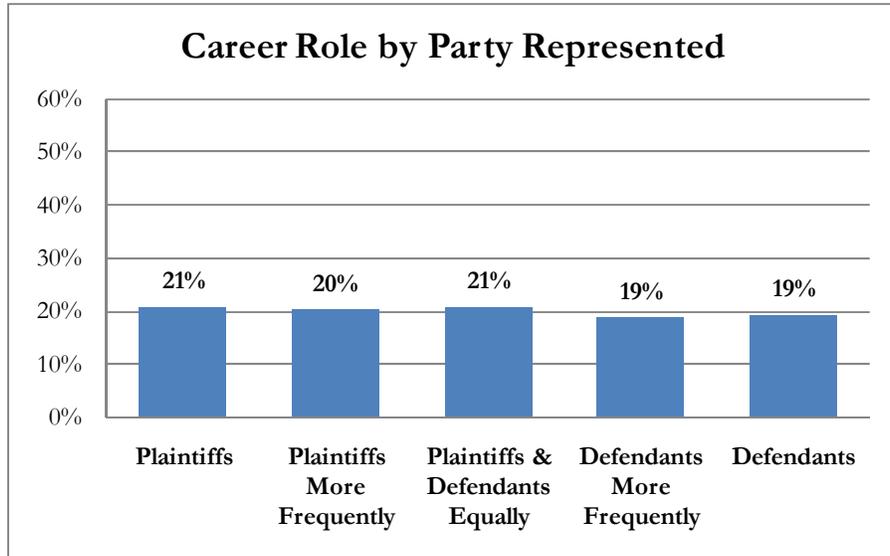
Figure 1 (Survey Question 1)



To obtain their overall perspective on civil litigation, respondents were asked to categorize their role over the course of their career, according to the type of party they have most frequently represented.¹⁶ 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 (2% of respondents), the distribution between plaintiffs’ and defense attorneys was uniform, as seen in Figure 2.

¹⁶ 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, 8% of respondents selected “neutral decision-maker.” Of those, 76% selected a second primary career role: 33% have primarily represented plaintiffs, 19% have represented both equally, and 48% have primarily represented defendants.

B. ARIZONA SUPERIOR COURT EXPERIENCE

Respondents were asked to indicate up to three case types with which they have had the most experience in Superior Court. Respondents reported having the most experience litigating contract disputes (selected by 42%) and personal injury cases (selected by 33%). Complex commercial and real property litigation were both reported by 17% of respondents, while construction and general tort cases were both reported by 16% of respondents.

Figure 3 shows the distribution of respondents by number of Superior 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)

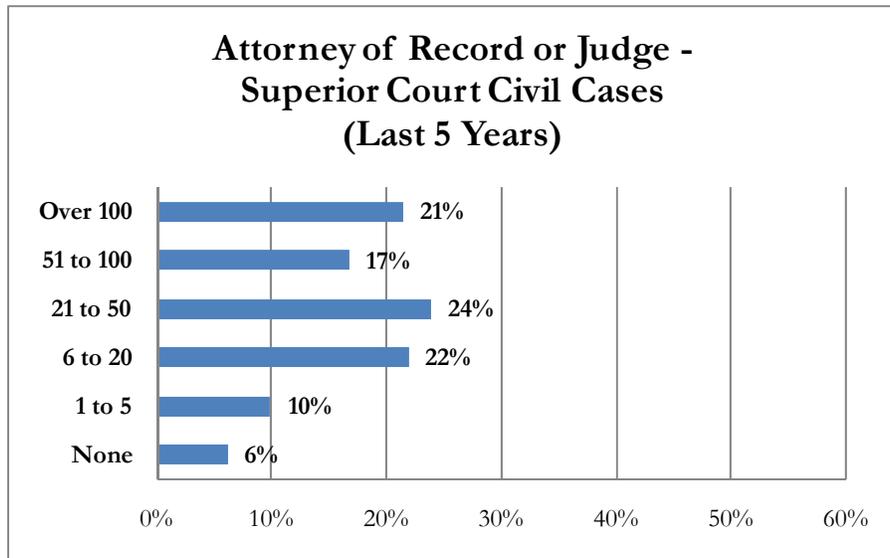
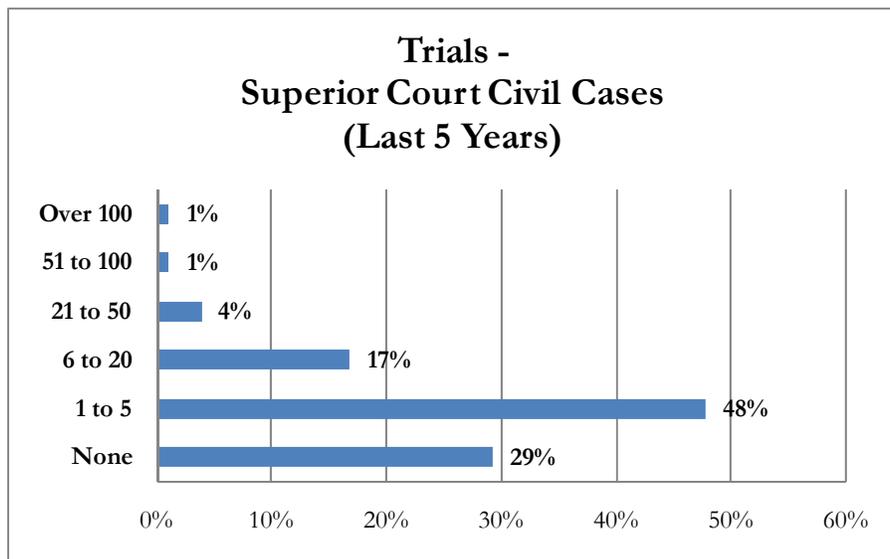


Figure 4 shows the distribution of respondents by number of Superior Court trials in the last five years. About three-quarters averaged less than one Superior Court civil trial per year, while about one-quarter averaged more than one trial per year.

Figure 4 (Survey Question 3)

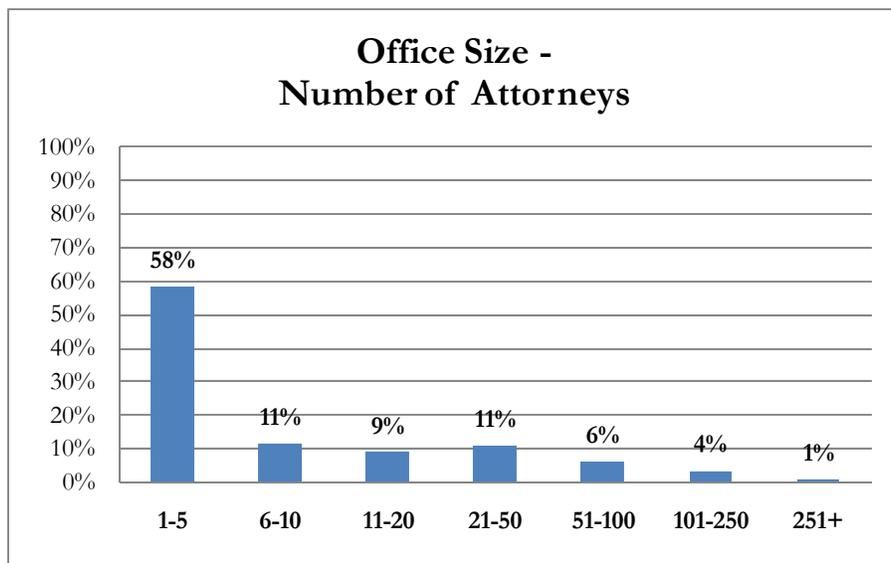


C. CURRENT POSITION

Three-quarters of respondents indicated that they are currently in private practice as a law firm attorney or solo practitioner. One respondent in ten indicated a current position as government counsel, while 4% indicated a current position as in-house counsel. Over 3% of respondents are currently judges. Less than 2% of respondents indicated retired status, and the same number reported inactive status.

Private practice, in-house, and government attorneys (89% of respondents) were asked the number of full- and part-time attorneys working for their organization in their office location. A majority work in offices with five or fewer attorneys, while only 5% 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 Arizona Superior Court, as well as more specific questions about the ARCP.

Respondents were not required to answer every question. Moreover, certain questions were not asked of respondents for whom the question would be inapplicable. 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*”.

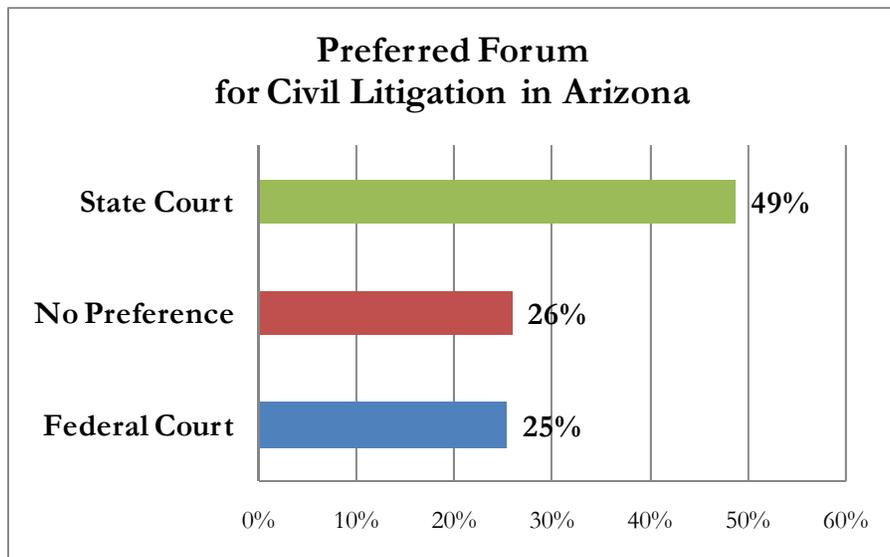
A. ARIZONA ATTORNEYS AND JUDGES ARE GENERALLY POSITIVE ABOUT THE ARIZONA STATE SYSTEM

Arizona practitioners generally prefer state court to federal court, and prefer the current state procedural rules to those of the past. First, this section will discuss respondents’ preferred forum for civil litigation in Arizona and the reasons therefor. Second, this section will discuss respondent opinions on the 1992 amendments, which implemented many of Arizona’s innovative rules.

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 Arizona. Those with federal experience prefer litigating in Arizona Superior Court over the federal court at a two-to-one ratio. In fact, nearly three-quarters of respondents either prefer the state forum or have no preference. Figure 6 shows the level of preference for each Arizona forum.

Figure 6 (Survey Question 12)
n = 548



Respondents who prefer Superior Court over the U.S. District of Arizona often cited the applicable rules and procedures, particularly the state disclosure and discovery rules. In terms of quantity, respondents indicated that state court is faster, less costly, and more accessible (for both litigants and small firm attorneys). In terms of quality, respondents indicated that state court is more relaxed, collegial, and user-friendly. According to these respondents, state court does not emphasize form over substance, which results in fewer technical dismissals and a greater likelihood of a decision on the merits. Other reasons given for preferring state court: partiality for state judges; court dedication to either civil or criminal cases; one decision-maker at a time (*i.e.*, no magistrate judge); the automatic right to a change of judge; less paperwork; non-unanimous verdicts; and more familiarity with state court.

Respondents who prefer the U.S. District of Arizona over Superior Court also cited the applicable rules and procedures, but there was a more specific focus on the consistent application and enforcement of the rules in federal court. For example, one respondent stated that federal judges are “far more willing to deal with counsel who will not comply with the rules.”¹⁷ Another wrote: “the timelines are clearer and adhered-to.” In terms of quantity, respondents indicated that the federal court has more resources in comparison to its caseload (including time, staff, facilities, and technology), which leads to improved preparation and better decisions. In terms of quality, respondents indicated that the federal court has higher levels of professionalism, decorum, and formality. Further, according to these respondents, judges are more proactive in managing and progressing cases, and are more available to resolve discovery disputes. Other reasons given for preferring federal court: partiality for federal judges; the fact that one judge generally handles a case from start to finish; unanimous verdicts; and higher quality juries.

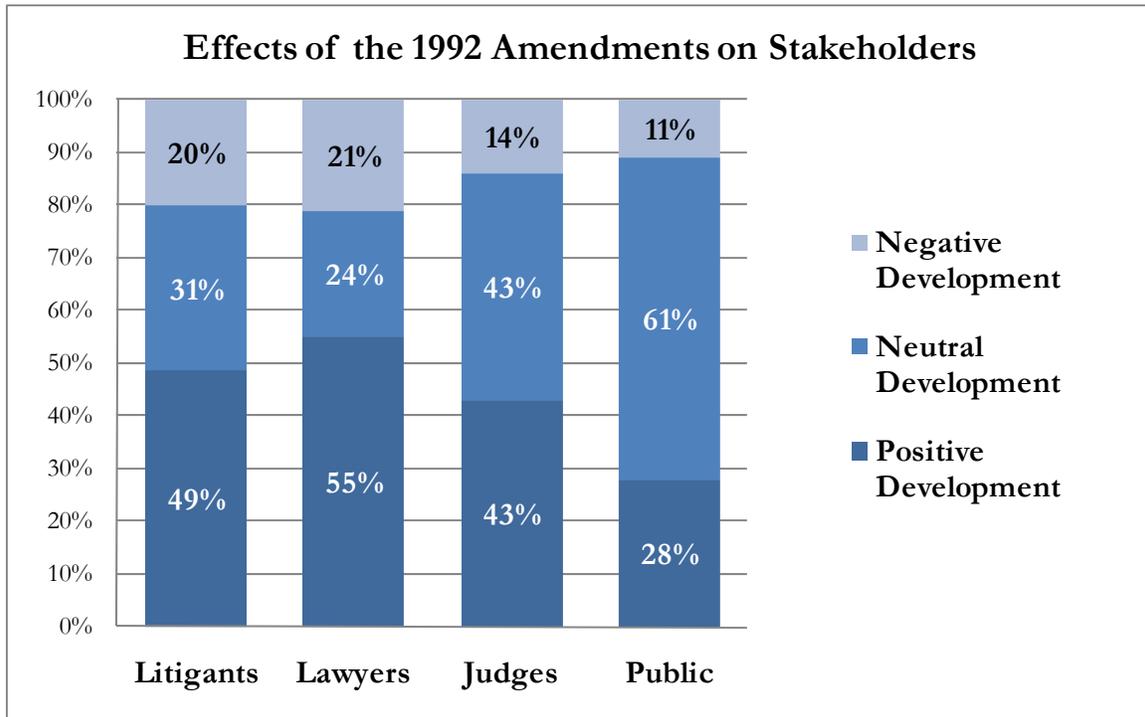
Many respondents who indicated “no preference” for either state or federal court cited the advantages (or disadvantages) of each forum, as described above. Some respondents indicated that the answer depends on the judge or the case, while others found both courts to be equally good or equally bad. One respondent wrote: “Good attorneys with good facts get good results in either forum.” Another wrote: “Both [courts] have their applicable rules, and so long as they are applied uniformly to all parties and [followed], I have no preference.” Other reasons given: being comfortable in both courts and enjoying the variety of two different systems.

¹⁷ Where quotation marks are utilized without a cited source, the language has been pulled directly from the written comments submitted by survey respondents.

2. THE EFFECTS OF THE 1992 AMENDMENTS

Over 50% of all survey respondents reported Superior Court experience prior to the 1992 amendments to the ARCP. As is apparent from Figure 7, the vast majority of respondents with pre-1992 experience indicated that the amendments were a positive or neutral development for stakeholders – litigants, lawyers, judges, and the public – rather than a negative development.

Figure 7 (Survey Question 14)
n = 398; 388; 372; 372



By and large, those who view the 1992 amendments positively and those who view them negatively came to different conclusions with respect to the following questions: Are the rules a tool for the effective management of the pretrial process, or are they another hurdle to clear? Do the rules focus energy on the merits, or do they detract from the merits? Do the rules decrease discovery disputes, or do they create additional issues to fight over? Do the rules ultimately make the process more or less efficient? Do the rules ultimately decrease or increase litigation costs?

Positive comments focused on the fact that the rules get to the heart of the case and require those involved to “face facts” sooner rather than later. Essentially, the rules require a beneficial evaluation of the case before the burden of discovery must be incurred. Moreover, less information is withheld due to discovery “wordsmithing,” resulting in a reduction of “trial by ambush.”

Generally, negative comments related to the implementation, rather than the substance, of the rules. As one respondent stated: “If everyone does what they should[,] it is a good system. That is a big ‘IF.’” The opinion that lawyers and judges do not follow the letter and spirit of the rules was fairly widespread in the written comments. Although no one admitted to personally contributing to problems,¹⁸ the Arizona Bar was particularly hard on itself.

¹⁸ One respondent did go so far as to say: “Everybody fudges, but everybody fudges to a different degree.”

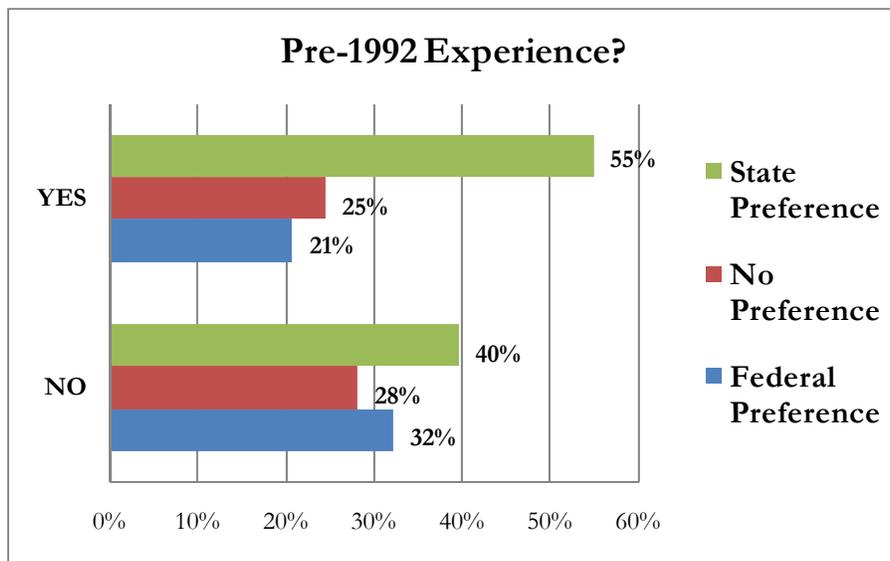
Respondents indicated that attorneys misuse the rules for “gamesmanship” purposes, fail to cooperate, and are suspicious that opposing counsel may be “hiding the ball.” One respondent stated that the 1992 amendments did not change the “culture of lying” among lawyers. Moreover, respondents indicated that judges do not enforce the rules effectively or consistently. Judges are also too reluctant to get involved in and resolve discovery disputes. The following comment is illustrative of the general sentiment contained in the written comments:

Where the “Zlaket” rules are followed in good faith, they provide a clearer exposition of the legal issues and the nature of the dispute that helps reach a more expeditious result, and one that is based more on the law than individual tactics. However, lawyers who choose to use obfuscation as a tactical weapon can do so with the “Zlaket” rules just as they could with the old discovery rules. Control over abuses of the rules, under either set, ultimately comes down to the level of supervision by judges, which is notoriously lacking.

There were an equal number of comments maintaining that the 1992 amendments favor plaintiffs, as there were comments maintaining that the amendments favor defendants. In addition, one respondent wrote that, when enforced, the “rules allow everyone to be on a somewhat level playing field.”

Those who have pre-1992 experience tend to prefer state court at a higher rate than those who do not have such experience, as shown in Figure 8.

Figure 8 (Questions 12, 13)
n = 319; 227



B. THE INNOVATIVE ASPECTS OF THE ARIZONA RULES AND THE GOALS OF EFFICIENCY, AFFORDABILITY, AND PROCEDURAL FAIRNESS

In the aggregate, Arizona practitioners overwhelmingly believe that the innovative aspects of the ARCP are beneficial. This section will discuss respondent reactions to those rules, including comprehensive pretrial conferences, extensive disclosures, and presumptive limits on expert witnesses and discovery.

1. RULE 16(b) COMPREHENSIVE PRETRIAL CONFERENCES

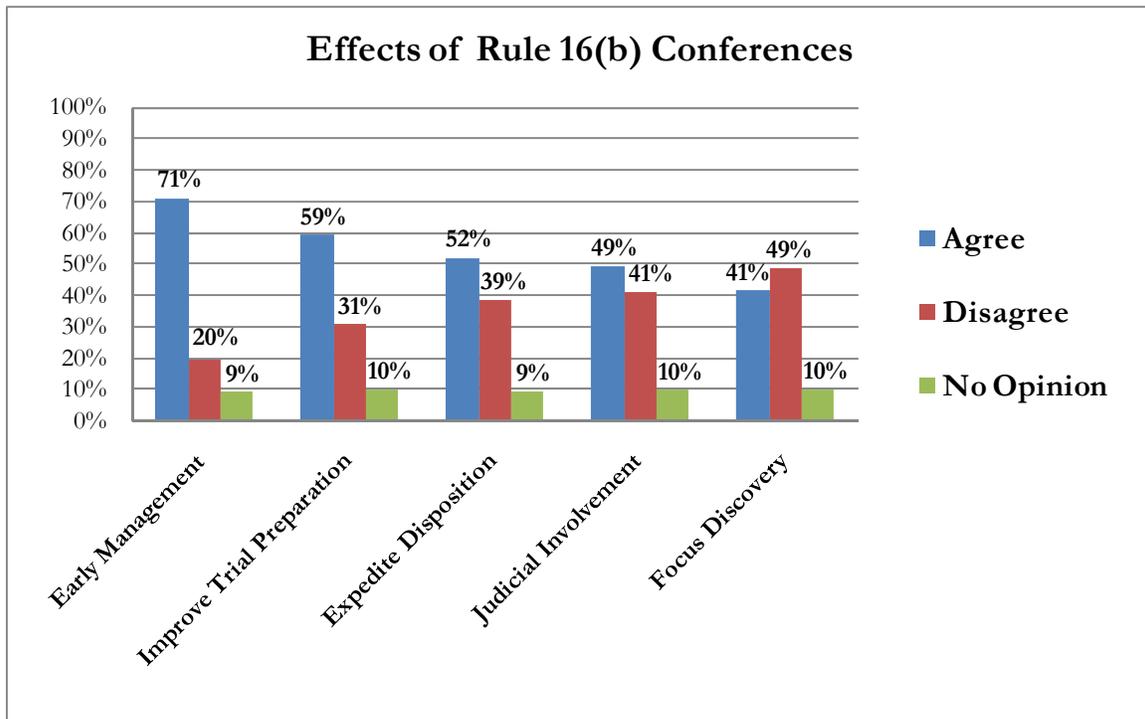
ARCP 16(b) provides that, “upon written request of any party the court shall, or upon its own motion the court may, schedule a comprehensive pretrial conference.”¹⁹ The rule then enumerates 19 (non-exclusive) topics that may be addressed by the court at the conference. This portion of the survey sought to determine the effects of Rule 16 conferences and the frequency with which they are employed.

Figure 9 shows what Arizona practitioners perceive to be the effects of Rule 16(b) conferences when they occur.²⁰ The most profound effect is the establishment of early judicial management of cases (indicated by 71%). The conferences also improve trial preparation for most respondents (59%), and expedite case dispositions for the majority (52%). However, practitioners are more evenly split on whether the conferences encourage judges to stay involved throughout the case (49% agreed; 41% disagreed) and whether Rule 16(b) conferences “focus discovery to the disputed issues” (41% agreed; 49% disagreed). These figures do not add up to 100% because of the “no opinion” response option.

¹⁹ Medical malpractice cases are specifically excluded from this provision.

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

Figure 9 (Survey Questions 15a-15e)
 n = 728; 726; 727; 728; 727



The less than clear ability to focus discovery on the disputed issues is surprising, as the rule explicitly encourages use of the conferences to set disclosure and discovery parameters, eliminate non-meritorious claims or defenses, permit amendment of the pleadings, assist in identifying disputed issues of fact, and obtain stipulations on the admissibility of evidence.²¹ Considering *only* respondents who expressed an opinion on the issue, those who primarily represent plaintiffs were more evenly split (51% agreed; 49% disagreed) than those who primarily represent defendants (40% agreed; 60% disagreed) and those who represent both equally (43% agreed; 57% disagreed).²² However, no more than 13% of any respondent group felt strongly about the issue either way.

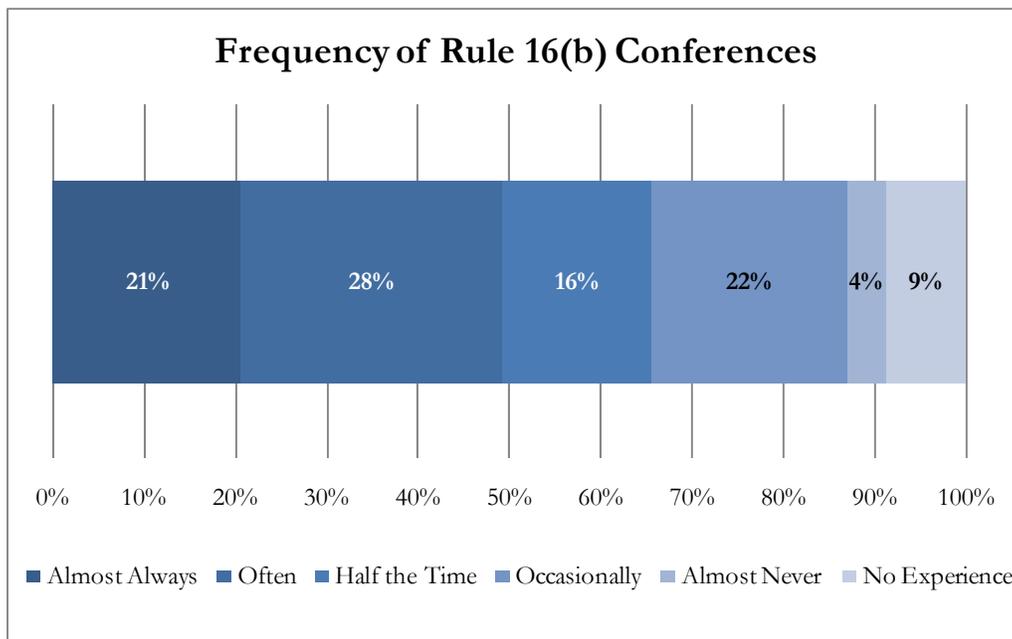
Regardless of the specific effects, the Arizona Bar generally believes that “Rule 16(b) conferences are cost-effective” (62% agreed; 24% disagreed).

As Rule 16(b) conferences are not mandatory unless requested by a party or sought by the court, the survey asked the extent to which the conferences are actually held in Superior Court, in the experience of respondents. Nearly 50% of respondents indicated that they occur “often” or “almost always,” and nearly two-thirds of respondents indicated that these conferences take place at least half of the time. However, about one-quarter indicated only infrequent experience with the conferences. See Figure 10.

²¹ ARIZ. R. CIV. P. 16(b)(1)-(9).

²² 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 10 (Survey Question 16a)
n = 729



A majority (60%) of respondents believe that a Rule 16(b) conference should be mandated in every case. These respondents cited the fact that the conferences set reasonable ground rules, expectations, deadlines, and benchmarks for efficient case resolution, while preventing languish and inadvertent dismissal. Respondents also indicated that the conferences force both the judge and counsel to become familiar with the case, engage in a realistic evaluation, communicate with one another, and reach agreements. However, many comments were qualified. The timing appears to be crucial, as it was indicated that the conferences must occur early enough to make a difference, but not so early as to preclude a good understanding of the case and an appropriate timeline. Further, one respondent wrote: “I think the courts need to do more than simply tell the parties to discuss and submit a proposed form of order.” Finally, another respondent stated that judges have to be “willing to enforce the discovery orders and police discovery disputes.”

Respondents who favor discretionary Rule 16(b) conferences indicated that, depending on the case, the circumstances, and the attorneys, this additional court appearance may not be necessary and may simply add an unnecessary step for counsel, increase costs for the parties, and further congest the court’s calendar. Many of these respondents described the conferences as an administrative formality that does not truly accomplish its goals, due to arbitrary deadlines, inappropriate conduct of counsel, or inapt enforcement by the court. Some respondents indicated that attorneys should be trusted and empowered to manage cases, with dispute resolution by the court only as required. Others believe that Rule 26.1 disclosures (discussed below) render these conferences superfluous. It was also noted that such conferences should not be mandatory for cases diverted to compulsory arbitration.

2. EXTENSIVE DISCLOSURES

ARCP 26.1 “basically states that at the outset of a case the parties must make a full, mutual and simultaneous disclosure of all relevant information known by or available to them and their lawyers.”²³ This portion of the survey sought to determine the effects and operation of Rule 26.1 disclosures.

Figure 11 shows what Arizona practitioners perceive to be the effects of Rule 26.1 disclosures on discovery, when made as provided in the rule. There is a strong consensus that disclosures “reveal the pertinent facts early in the case” (76% agreed; 23% disagreed) and “help narrow the issues early in the case” (70% agreed; 28% disagreed). In addition, a majority of the Bar believes that disclosures facilitate agreement on the scope and timing of discovery (54% agreed; 41% disagreed). For all three of these statements, the responses were similar among plaintiffs’ and defense attorneys. Despite the positive effects of disclosures noted by respondents, however, there is no consensus within the Arizona Bar concerning whether disclosures ultimately reduce the total volume of discovery (49% agreed; 48% disagreed) or reduce the total time required to conduct discovery (46% agreed; 50% disagreed).

Figure 11 (Survey Questions 20a – 20e)
n = 692; 690; 690; 689; 689

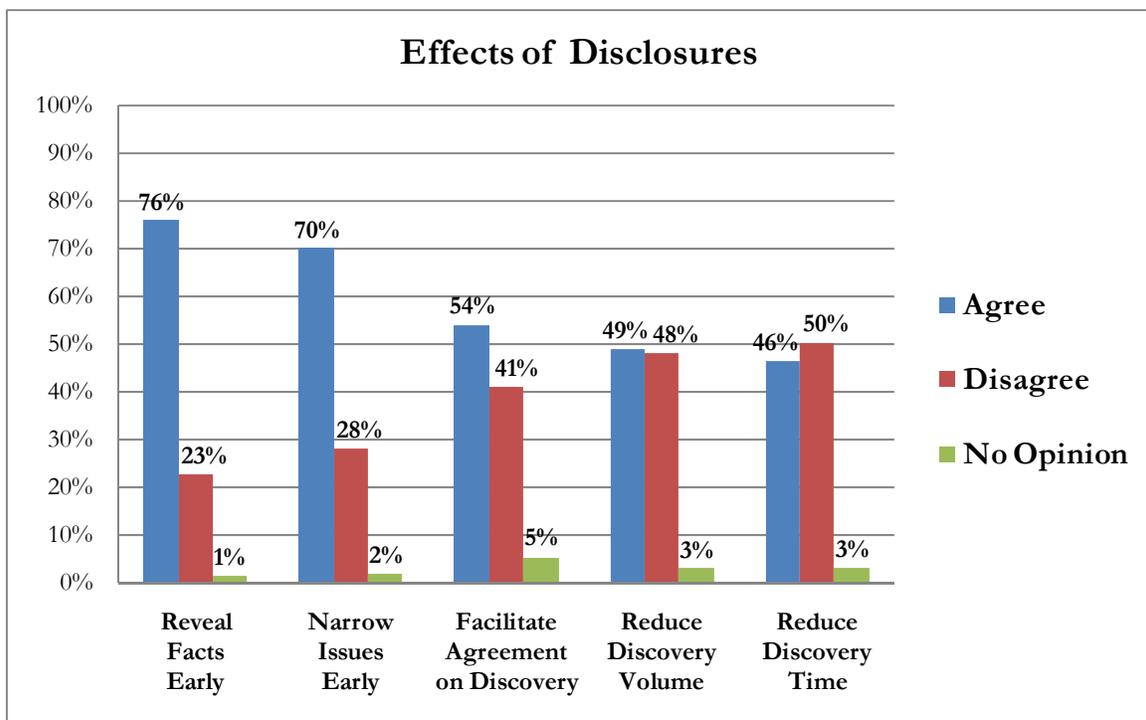
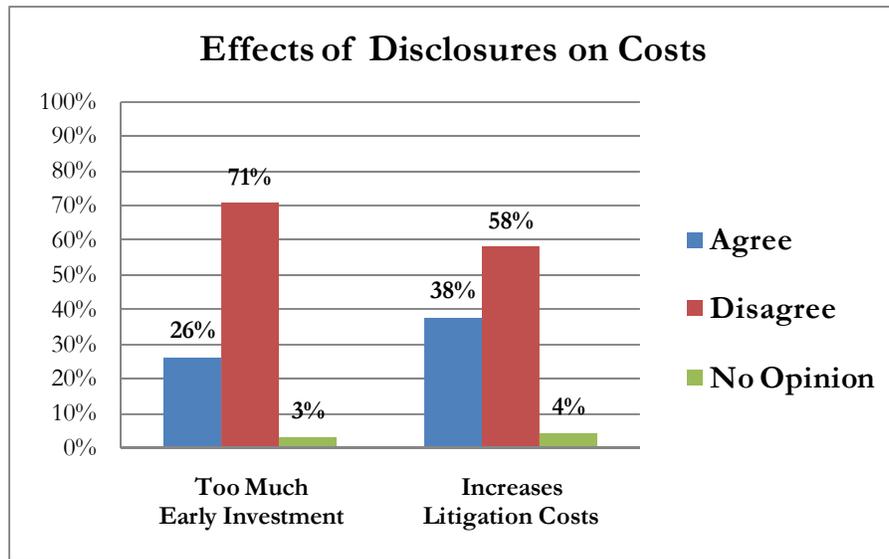


Figure 12 shows Arizona practitioners’ perception of whether Rule 26.1 disclosures have negative effects when made as provided in the rule, by either front-loading or increasing costs. The Bar generally does not believe that disclosures “require too much investment early in the case” (26% agreed; 71% disagreed) or that disclosures increase the cost of litigation (38% agreed; 58% disagreed). On both issues, the most frequent answer among both plaintiffs’ and defense attorneys was “disagree.”

²³ Zlaket, *supra* note 4, at 5.

Figure 12 (Survey Questions 20f, 20g)
n = 688; 690



Moreover, disclosures do not appear to substantially increase satellite litigation, as 64% of respondents indicated that parties litigate the scope and adequacy of disclosures only “occasionally” or “almost never.” This data challenges the belief that the 1992 amendments have increased the number of pretrial disputes.

In describing their preference for Superior Court generally, respondents cited the state rule on disclosures more than any other specific rule. One respondent described the system of disclosures as “superior.” Other comments include:

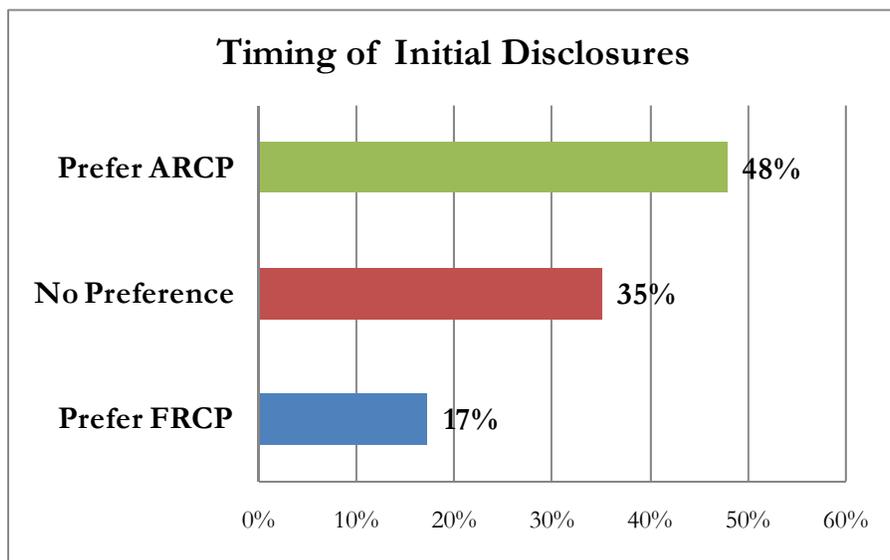
- “The disclosure rules permit early identification of issues and facts.”
- “Rule 26.1 prevents a lot of gamesmanship and trial by ambush.”
- “Superior Court rules require parties to disclose early and often in an attempt to do away with trial by fire and other litigation tactics that are not conducive to reaching a decision on the merits.”
- “Arizona’s disclosure rules are stronger and lead to more effective communication between parties and support settlement.”

One concern expressed was that Rule 26.1 imposes a greater burden on conscientious attorneys. Respondents stated that proper disclosures involve higher costs (for the client if the fee is hourly and for the attorney if the fee is contingent) than simply providing “simplistic generalizations” or flooding the other party with disorganized and mostly irrelevant documents. In addition, one respondent indicated that clients lose faith in counsel when forced to reveal information voluntarily. Nevertheless, by and large, Arizona practitioners prefer the Arizona rules to the federal rules on both the timing of initial disclosures under ARCP 26.1(b) and the substance of mandatory disclosures under ARCP 26.1(a).

The Arizona rules provide that initial disclosures shall occur “within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause.”²⁴ As seen in Figure 13, about two in three respondents either prefer the ARCP or have no preference concerning the timing of initial disclosures.

Figure 13 (Survey Question 25a)

n = 494



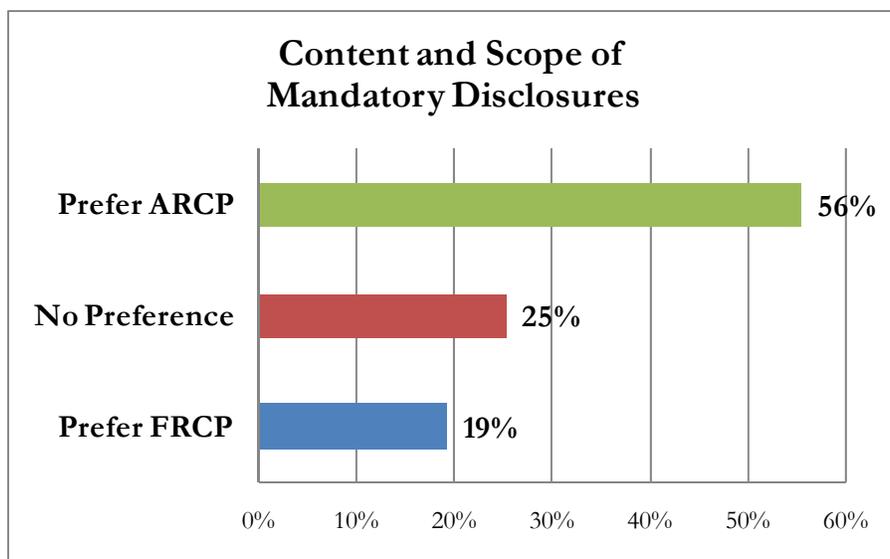
Considering *only* those who expressed a preference between the state and federal rules, the ARCP standard for the timing of initial disclosures received majority support from all respondent groups. When broken out by party represented, at least 72% of all groups prefer the ARCP, with the exception of those who represent defendants in all or nearly all cases. However, even that group expressed majority support for the state rule (56%). When broken out by those who have pre-1992 experience and those who do not have such experience, more than two-thirds of each group prefers the ARCP.

The written comments reflect a belief that the timing of disclosures is important to their efficacy, although there is disagreement concerning the most beneficial time. Some respondents are in favor of providing initial disclosures along with the pleadings, in order to have the fullest information concerning the dispute as soon as possible. Others expressed concern that disclosures can be a wasted effort if they occur before the real issues have been identified. Further, disputes often “cool down” with time, so it is not always beneficial to incur costs during the early stages. One respondent suggested: “Change the disclosures to be 40 days after the *first* responsive pleading. How do you ever get to disclosures if the pleadings never end because not all the parties are ever served, etc.?” Another respondent suggested that disclosures should be made before the Rule 16 pretrial conference is held.

²⁴ ARIZ. R. CIV. P. 26.1(b)(1).

As seen in Figure 14, fully 75% of respondents either prefer the ARCP or have no preference concerning the content and scope of mandatory disclosures.

Figure 14 (Survey Question 25b)
n = 494



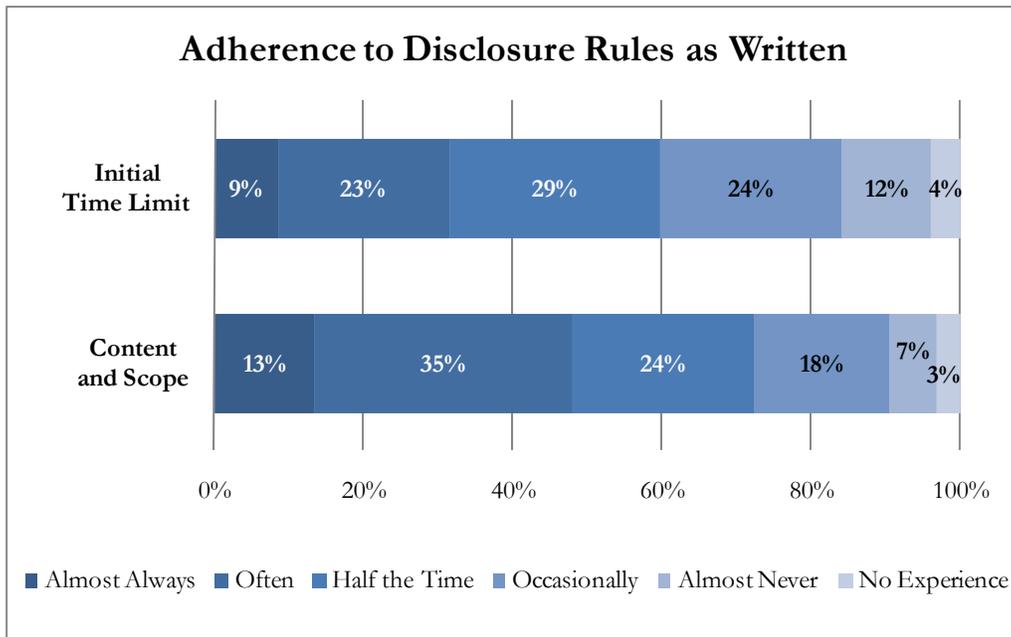
Considering *only* those who expressed a preference between the state and federal rules, the ARCP standard for the substance of mandatory disclosures received majority support from all respondent groups. Separated by party represented, more than 60% of all respondent groups prefer the ARCP. Separated by whether the respondent has pre-1992 experience or not, more than 70% of each group prefers the ARCP.

One respondent who also practices in New Mexico (where such disclosure is lacking outside of the domestic relations context),²⁵ contrasted the two systems and stated that New Mexico defendants consider early negotiations a sign of weakness. “It appears that they perceive a willingness to assess the facts facing all parties honestly (pseudo disclosure), to come to a mutually acceptable resolution, indicates that I know something devastatingly damaging about my case and don’t want to enter discovery.”

Respondents were asked the extent to which, in their experience, Arizona litigants adhere to the rules on the timing and substance of disclosures. As seen in Figure 15, parties diverge from the rules regarding the timing of initial disclosures more frequently than the rules on the substance of disclosures. Regarding the time limit, a majority of respondents indicated that the parties follow the rule at least half the time, with about one-third indicating adherence to the rule “often” or “almost always.” Significantly, however, more than one in three respondents indicated infrequent adherence to the time limit. Regarding the content and scope of disclosures, nearly three-quarters of respondents indicated that parties follow the rule at least half of the time, with a plurality (48%) indicating adherence to the rule “often” or “almost always.” Nevertheless, one in four respondents indicated infrequent adherence on the substance of disclosures.

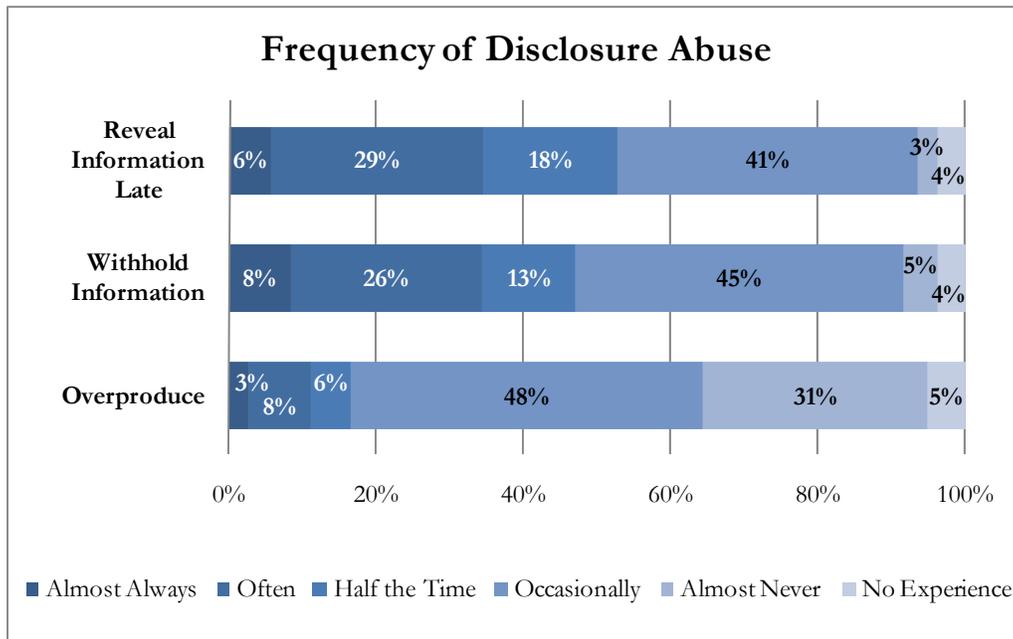
²⁵ See N.M. R. CIV. P. FOR DIST. CT. 1-123.

Figure 15 (Survey Questions 18a, 18b)
n = 708; 709



Respondents were also asked about the frequency of certain types of disclosure “abuse.” The responses are shown in Figure 16. The most commonly reported type of abuse was “revealing information late,” as over 50% of respondents reported that abusive late disclosures occur at least half of the time, with over one in three reporting this behavior “often” or “almost always.” The second most commonly reported type of abuse was “withholding information,” as over 45% of respondents reported that information is abusively withheld at least half of the time, with approximately one in three reporting this behavior “often” or “almost always.” Abusive “overproduction” seems to be less common, as nearly 80% of respondents reported that it only “occasionally” or “almost never” occurs.

Figure 16 (Survey Questions 21a, 21b, 21c)
n = 692; 690; 690



Of those who expressed an opinion on the frequency of disclosure abuse, the most popular response was “occasionally,” regardless of the party represented. Figures 17, 18, and 19 compare the respondent groups for the three types of disclosure abuse.

Figure 17 (Survey Question 21c)
n = 124; 141; 134; 124; 129

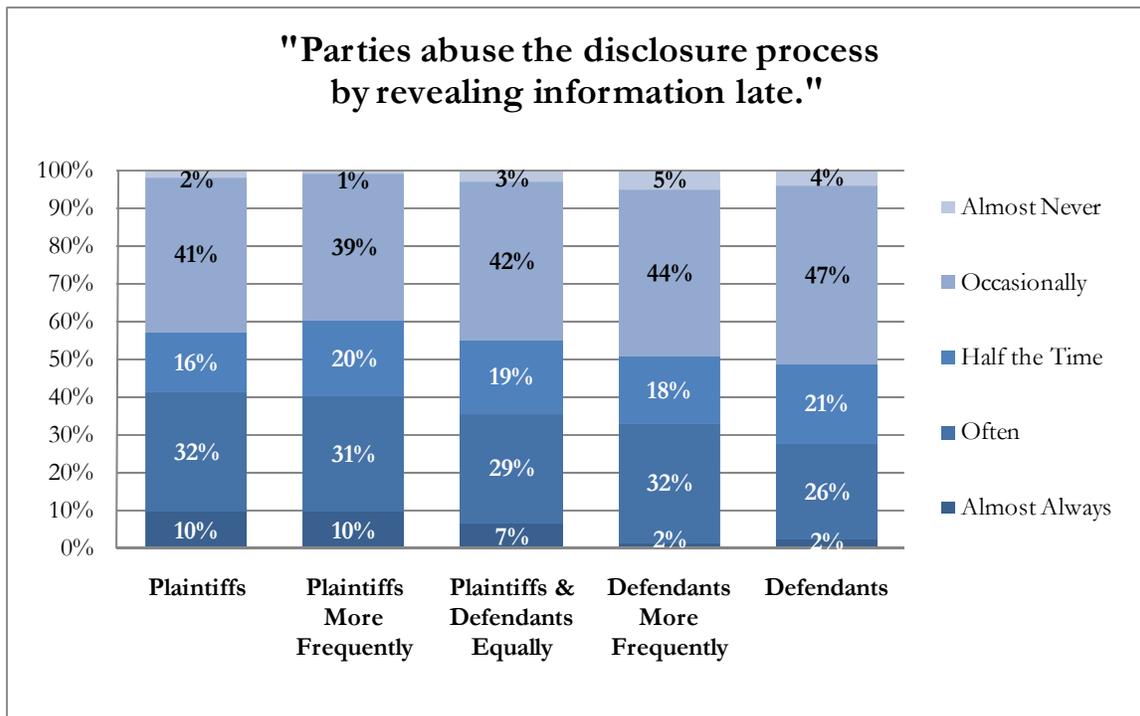


Figure 18 (Survey Question 21b)
 n = 124; 143; 133; 125; 128

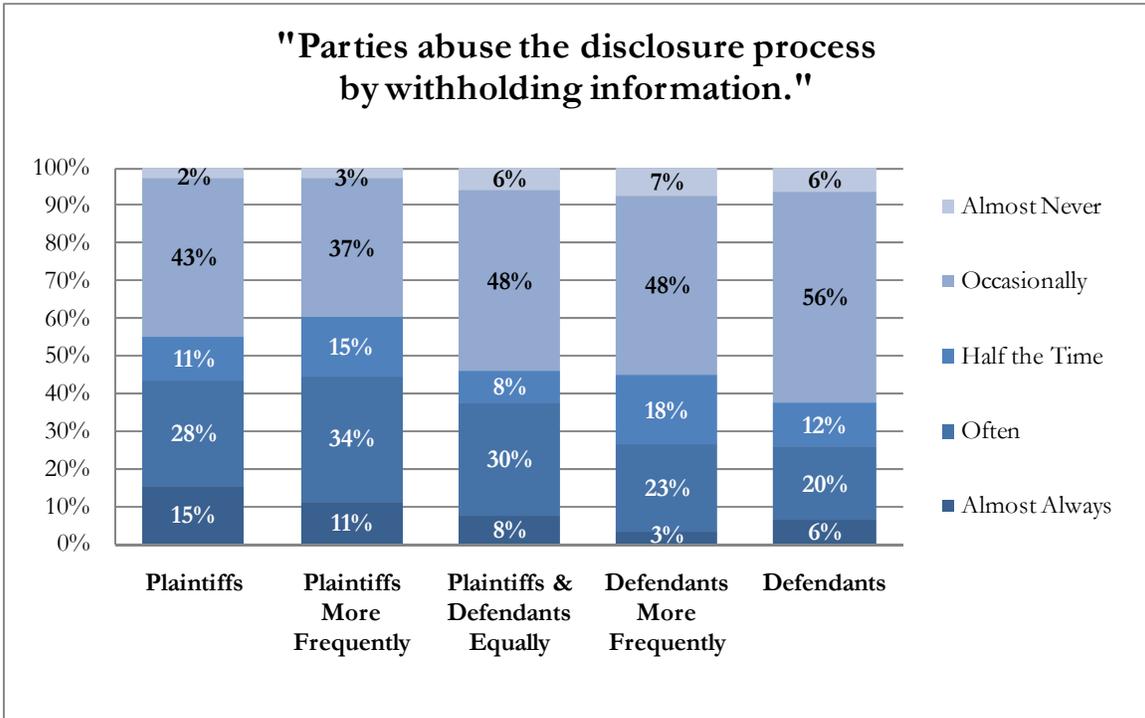
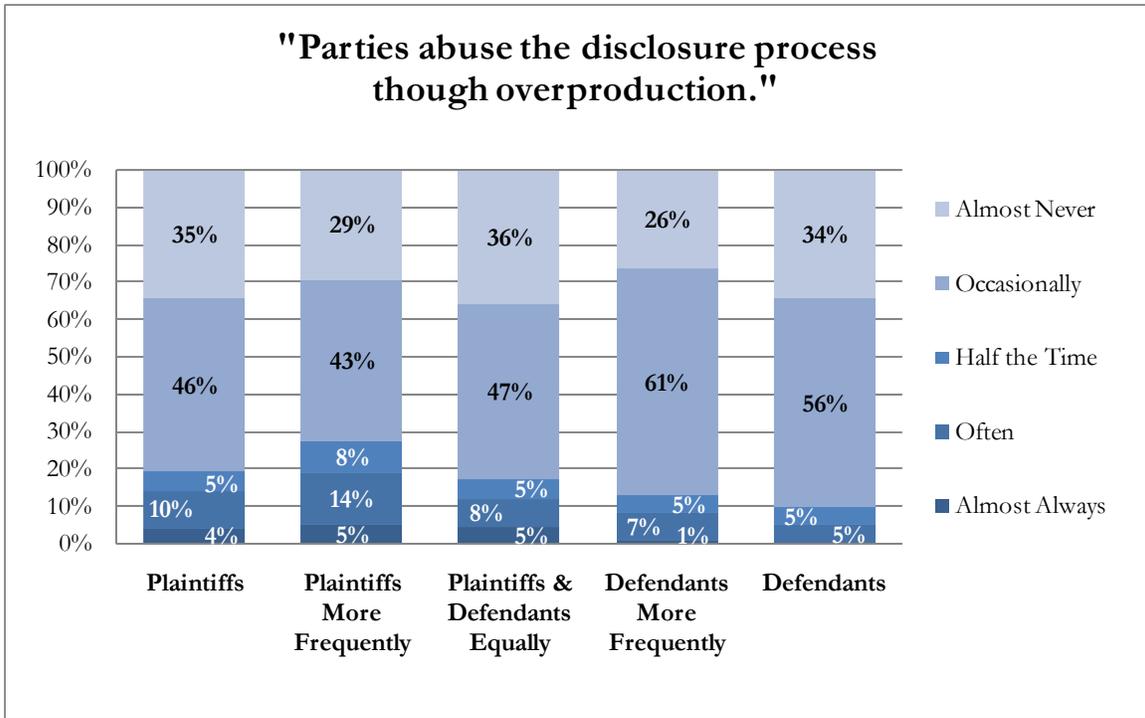
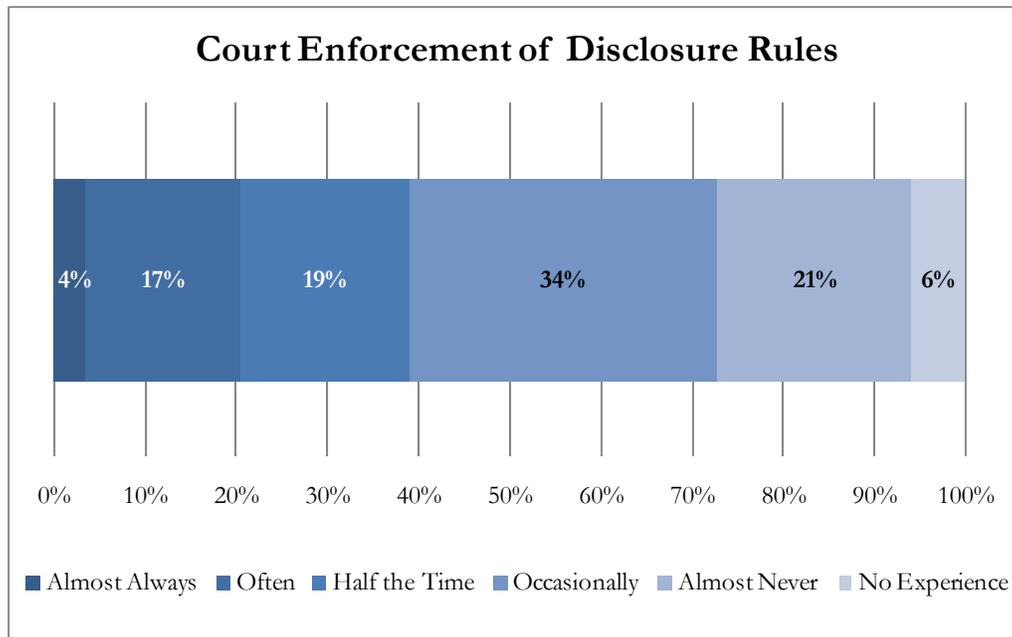


Figure 19 (Survey Question 21a)
 n = 119; 143; 134; 125; 125



According to Arizona practitioners, courts do not routinely enforce disclosure rules. Almost three-quarters of respondents indicated that courts enforce disclosure requirements only half the time or less. Figure 20 shows the distribution of responses.

Figure 20 (Survey Question 21d)
n = 691



It appears that Arizona practitioners would welcome more strict enforcement of the most common offense – revealing information late. Fully 80% of respondents agreed that parties “should be prevented from introducing supporting evidence that was not timely disclosed,” and nearly 40% expressed strong agreement with the statement.

The written comments also show a desire for stronger judicial enforcement of the disclosure rules. As one respondent wrote:

I wouldn’t change any rule; I would enforce [Rule 26.1] to require parties that have information or experts to disclose them within 60 days of receiving the information and that failing to do so . . . would result in exclusion. I would get rid of the “hold everything until the last day” philosophy.

Another respondent stated: “Trial judges are too lenient with parties who wrongfully withhold damning information. I have never had the experience where the judge would exclude certain evidence for failure to timely disclose.”

3. PRESUMPTIVE LIMITS

Overall, the Arizona Bar has a favorable opinion of the ARCP’s presumptive limits on expert witnesses and discovery. This section includes discussion of: the limit on the number of expert witnesses; the limits on deposition discovery (who may be deposed and the time limits for doing so); the limit on interrogatories; the limit on requests for production; and the limit on requests

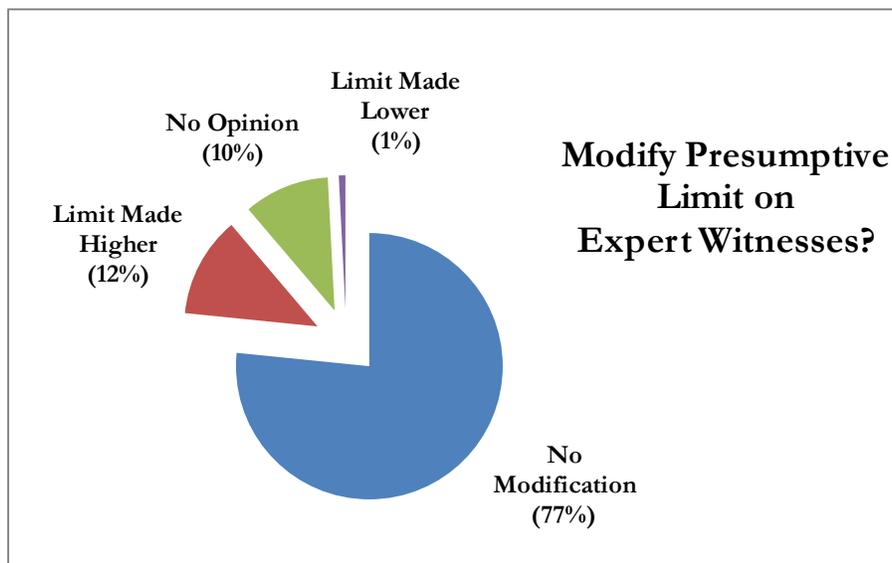
for admission. This section also discusses the collective effects of the presumptive discovery limits, as well as the extent to which the limits are followed.

a. The Limit on the Number of Expert Witnesses

Under ARCP 26(b)(4)(D), each side is entitled to only one independent expert witness per issue. Multiple parties on the same side must agree on the expert, or the court will designate the witness. Additional experts require a court order.

As demonstrated in Figure 21, over 75% of respondents would maintain the presumptive limit, while fewer than 15% of respondents would raise the limit to allow for more expert witnesses.

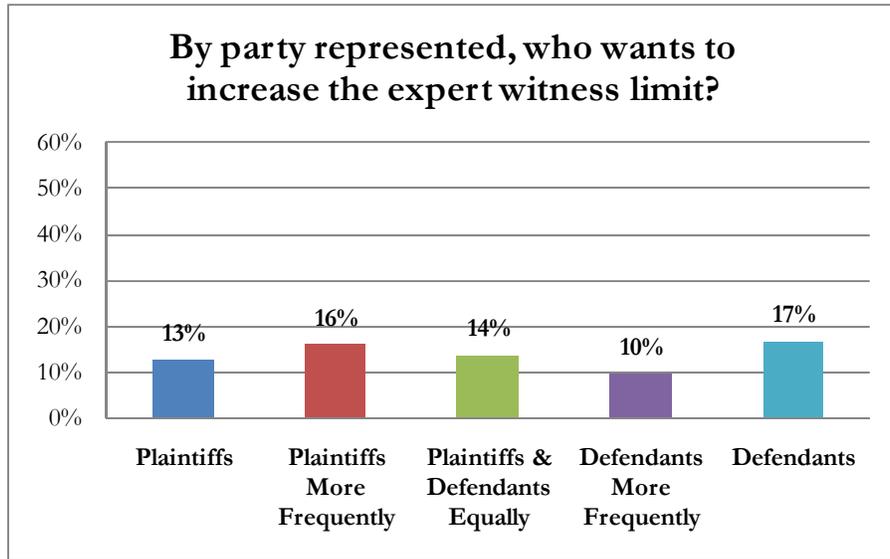
Figure 21 (Survey Question 24a)
n = 663



Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification to the expert witness limit. Whether divided by party represented or by experience, over 80% of all groups believe the current limit should be maintained.

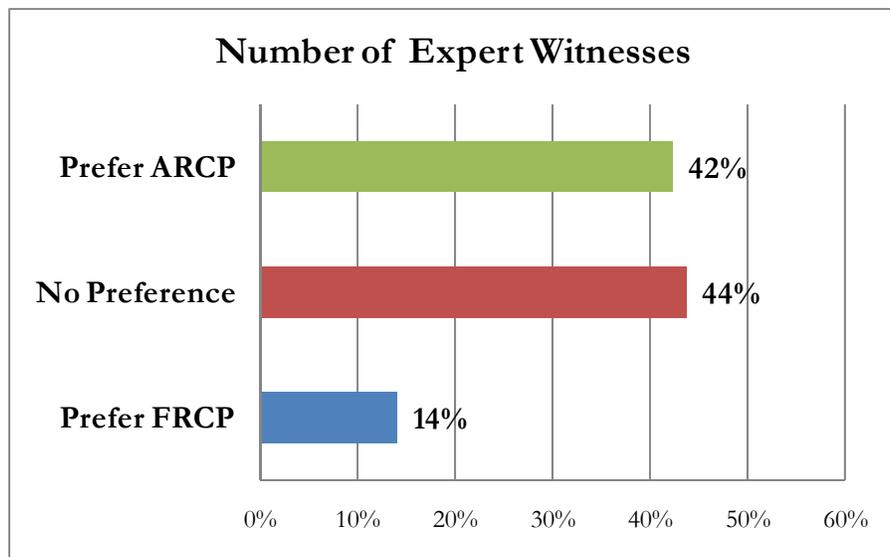
One interesting question is whether respondents who primarily represent plaintiffs or defendants would like to raise the limit more than those who represent the other party. Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit does not differ across parties, as seen in Figure 22.

Figure 22 (Survey Questions 5, 24a)
n = 155; 151; 155; 140; 143



By a three-to-one ratio, respondents with federal experience prefer the ARCP over the FRCP on the number of expert witnesses. In fact, over 85% either prefer the state rule or have no preference. See Figure 23.

Figure 23 (Survey Question 25c)
n = 494



Considering *only* those who expressed a preference between the state and federal rules, the ARCP standard on the number of experts received majority support from all respondent groups. Separated by party represented, over 60% of all groups prefer the ARCP. Separated by whether the respondent has pre-1992 experience or not, over 70% of each group prefers the ARCP.

One respondent commented: “The ‘one expert rule’ is generally a reasonable limitation, but there has to be some ability to define an ‘issue’ in a way that makes this more flexible in some types of complex litigation cases.”

b. The Limits on the Extent of Deposition Discovery

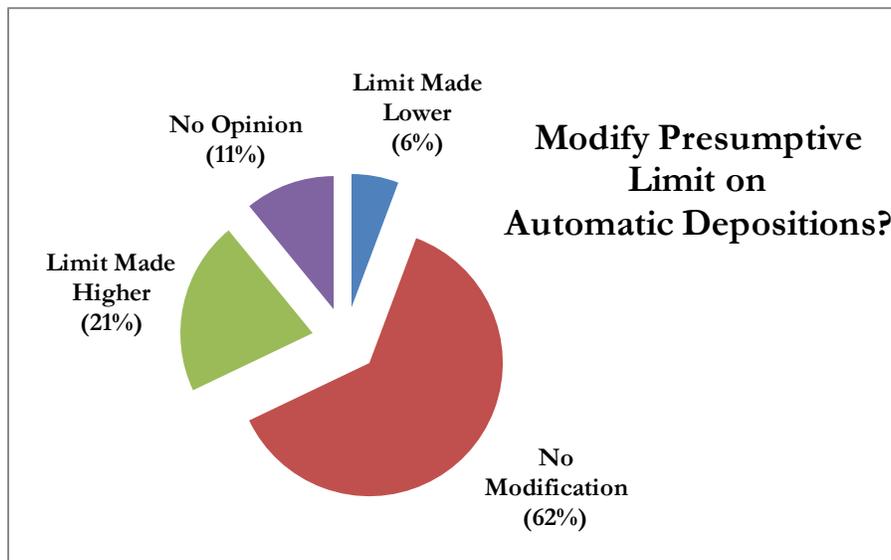
Arizona practitioners strongly support the ARCP’s limits on deposition discovery, including who may be deposed and the time limit for doing so.

i. Depositing Only Certain Individuals

Under ARCP 30(a), only parties, expert witnesses, and document custodians may be deposed automatically. The deposition of other individuals requires either a stipulation or a court order.

As demonstrated in Figure 24, over two-thirds of respondents would either maintain or lower the presumptive limit, while only one in five respondents would raise the limit to allow for more automatic depositions.

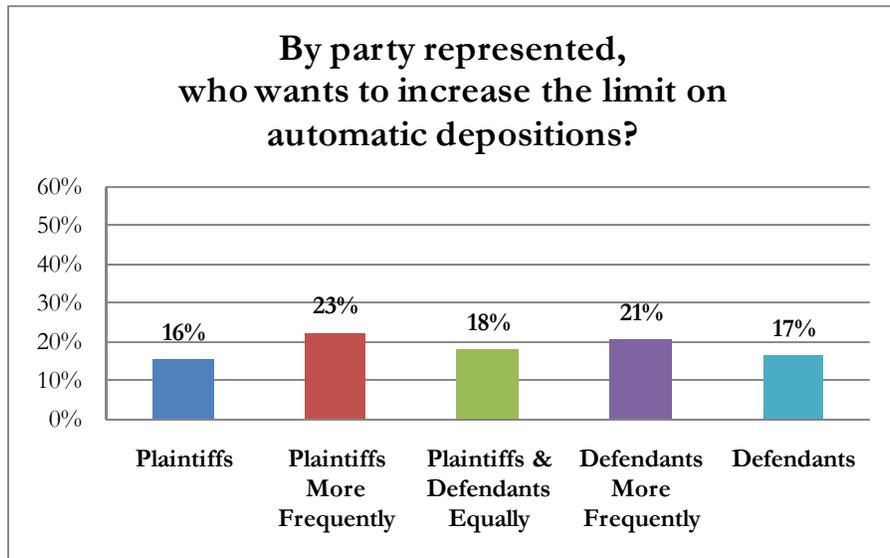
Figure 24 (Survey Question 24b)
n = 661



Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification to the presumptive limits on automatic depositions. Separated by party represented, over 60% of all groups believe the current limit should be maintained. Separated by whether the respondent has pre-1992 experience or not, over 65% of each group believes the current limit should be maintained.

Considering *all* respondents who indicated a party most frequently represented, the extent of the desire to raise the limit does not correspond with the party represented, as seen in Figure 25.

Figure 25 (Survey Questions 5, 24b)
n = 155; 151; 155; 151; 140

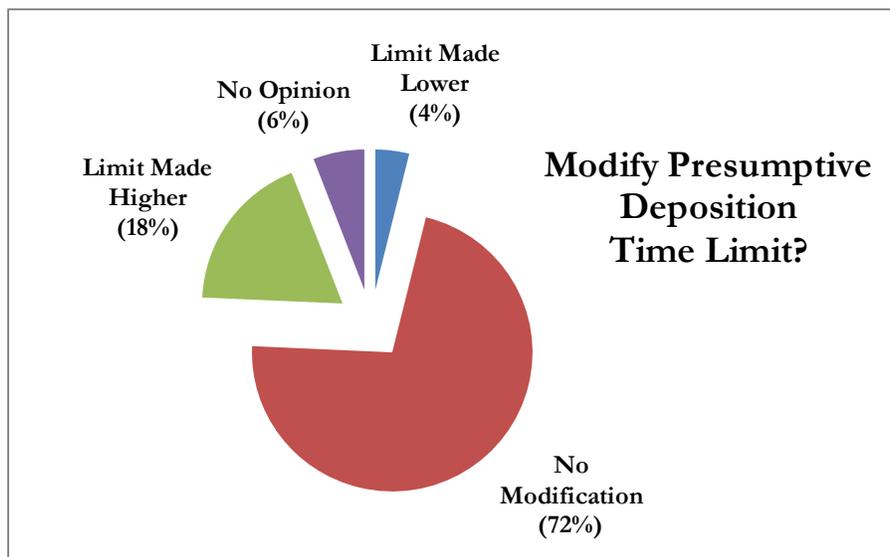


ii. *Deposition Time Limit*

Under ARCP 30(d), depositions must be reasonable in length and shall not exceed four hours. Longer depositions require either a stipulation or a court order.

As demonstrated in Figure 26, over three-quarters of respondents would either maintain or lower the presumptive time limit, while fewer than one in five respondents would raise the limit to allow for longer depositions.

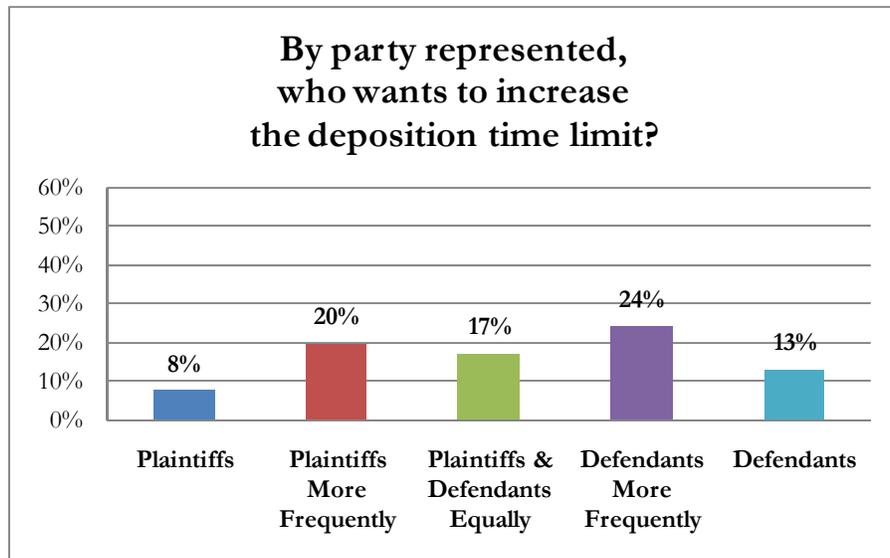
Figure 26 (Survey Question 24c)
n = 662



Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification to the deposition time limit. Separated by party represented, over 60% of all groups believe the current limit should be maintained. Separated by whether the respondent has pre-1992 experience or not, at least 75% of each group believes the current limit should be maintained.

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit does not necessarily differ across parties, as seen in Figure 27.

Figure 27 (Survey Questions 5, 24c)
n = 155; 151; 155; 140; 143

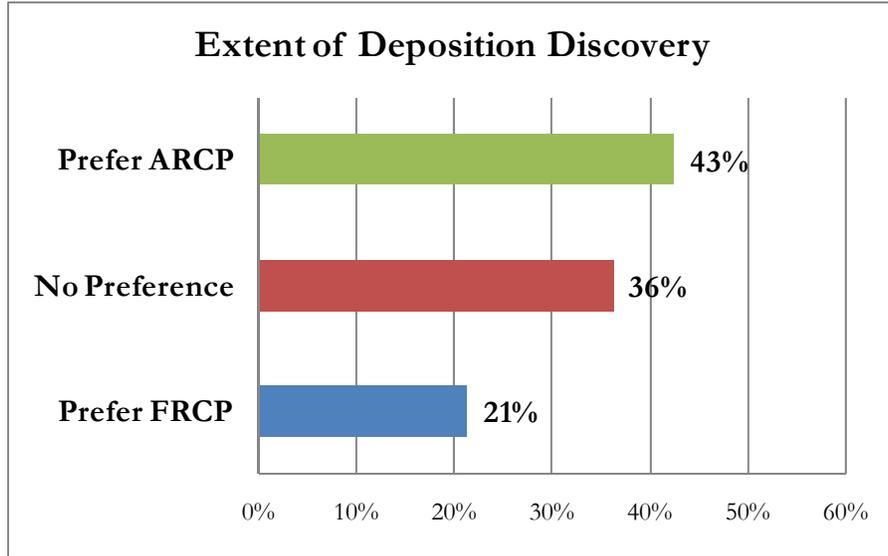


One respondent commented: “I believe that any deposition worth taking can be finished in four hours, and I am grateful for that rule because it has saved my clients considerable expense over the years since it was adopted.”

iii. *Deposition Discovery Generally*

By a two-to-one ratio, respondents with federal experience prefer the ARCP over the FRCP on the extent of deposition discovery. In fact, close to 80% either prefer the state rules or have no preference. See Figure 28.

Figure 28 (Survey Question 25d)
n = 492



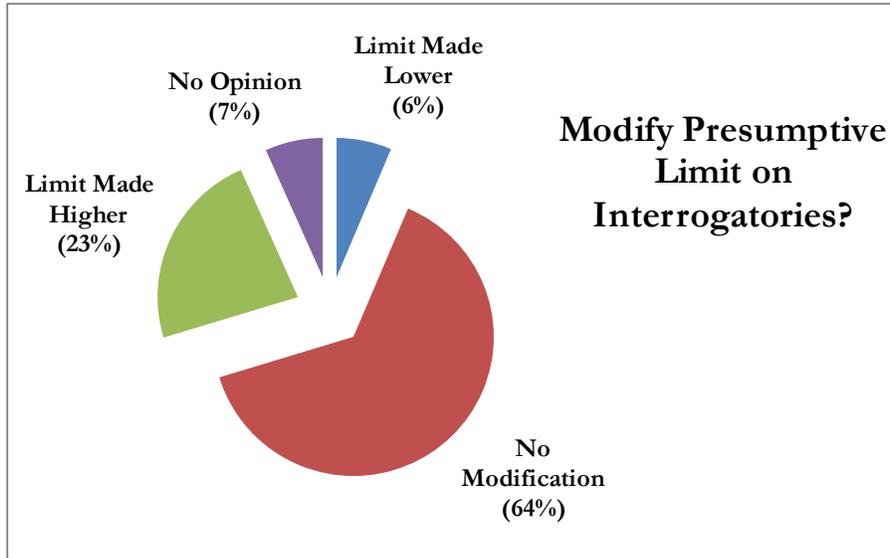
Considering *only* those who expressed a preference between the state and federal rules, the ARCP standards for deposition discovery received majority support from all respondent groups. Separated by party represented, over 55% of all groups prefer the ARCP. Separated by whether the respondent has pre-1992 experience or not, at least 60% of each group prefers the ARCP.

c. The Limit on Interrogatories

Under ARCP 33.1(a), a party shall not serve more than 40 interrogatories (uniform or non-uniform) upon any other party. Additional interrogatories require either a stipulation or a court order.

As demonstrated in Figure 29, 70% of respondents would either maintain or lower the presumptive limit, while fewer than one in four respondents would raise the limit to allow for more interrogatories.

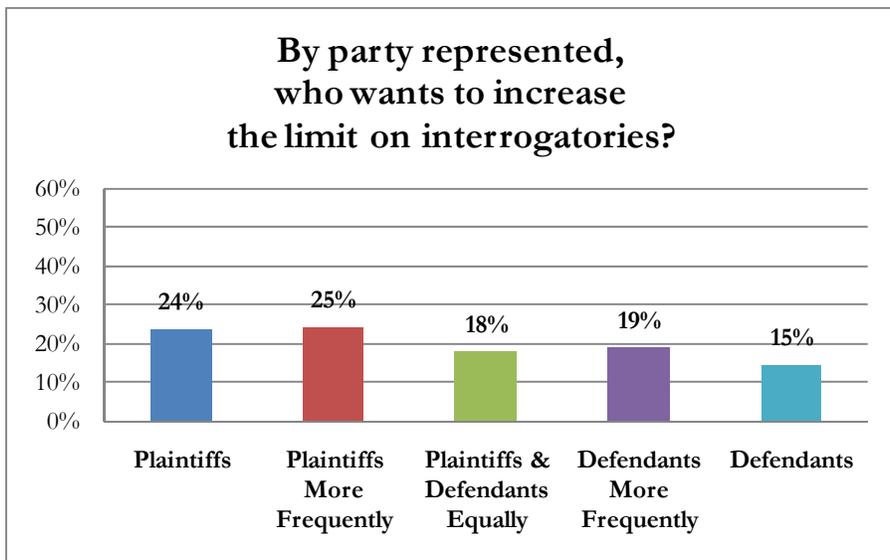
Figure 29 (Survey Question 24d)
 n = 661



Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification of the interrogatory limit. Whether divided by party represented or by experience, over 65% of all groups believe the current limit should be maintained.

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit tends to be slightly higher for those who primarily represent plaintiffs, as seen in Figure 30.

Figure 30 (Survey Questions 5, 24d)
 n = 155; 151; 155; 140; 143



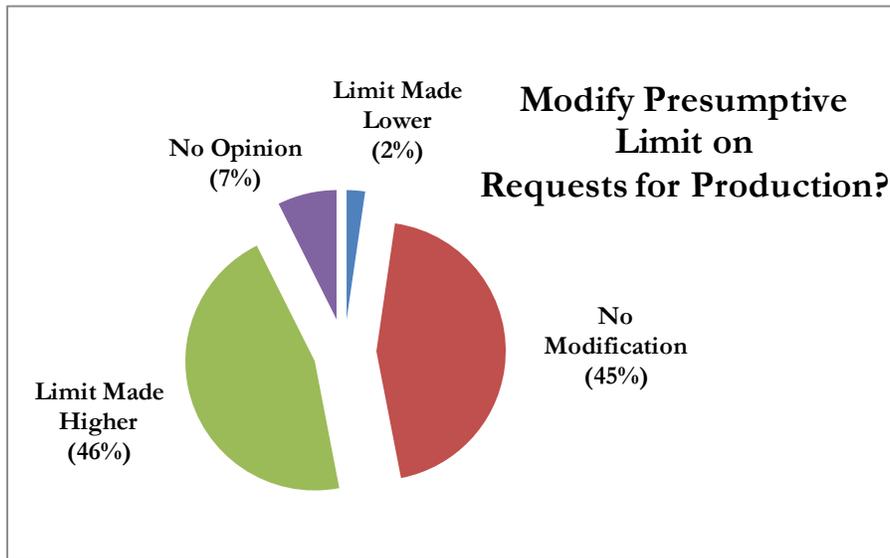
One respondent suggested that answers to all uniform interrogatories (as well as initial disclosures) be produced simultaneously with the pleadings.

d. The Limit on Requests for Production

ARCP 34 limits requests for production to 10 distinct items or categories of items. Items include “documents, electronically stored information, and things and entry upon land for inspection and other purposes.” Additional requests require a stipulation or a court order.

As demonstrated in Figure 31, a narrow plurality (47%) of respondents would either maintain or lower the presumptive limit. However, nearly that number (46%) would raise the limit to allow for more requests for production.

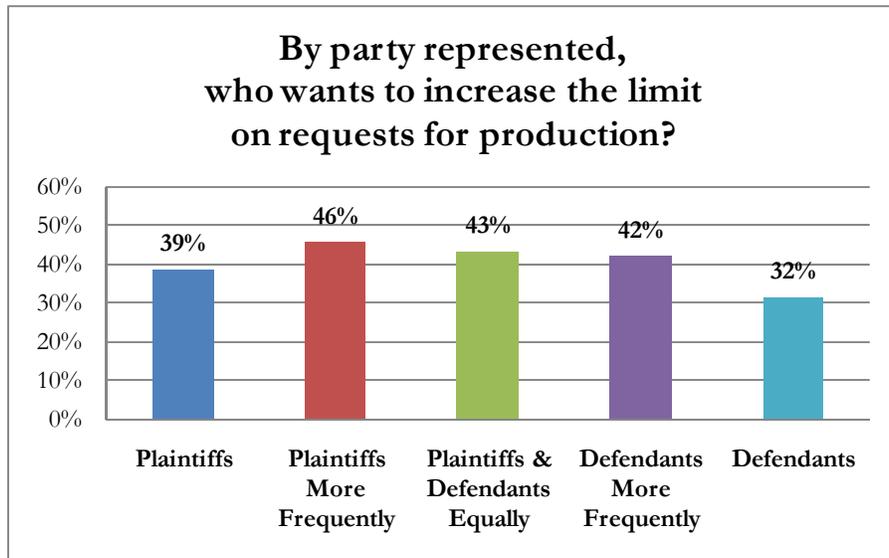
Figure 31 (Survey Question 24e)
 $n = 665$



Considering *only* those who expressed an opinion on the issue, all respondent groups were split. Separated by party represented, all groups had a slightly higher percentage of respondents who believe that the limit should be raised, with the exception of those who represent defendants in all or nearly all cases. Separated by experience, those with pre-1992 experience were more likely to believe the current limit should be maintained (53% for no modification; 45% for raising the limit), while those without pre-1992 experience were more likely to believe that the limit should be raised (43% for no modification; 54% for raising the limit).

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit does not necessarily differ across parties, as seen in Figure 32.

Figure 32 (Survey Questions 5, 24e)
n = 155; 151; 155; 140; 143

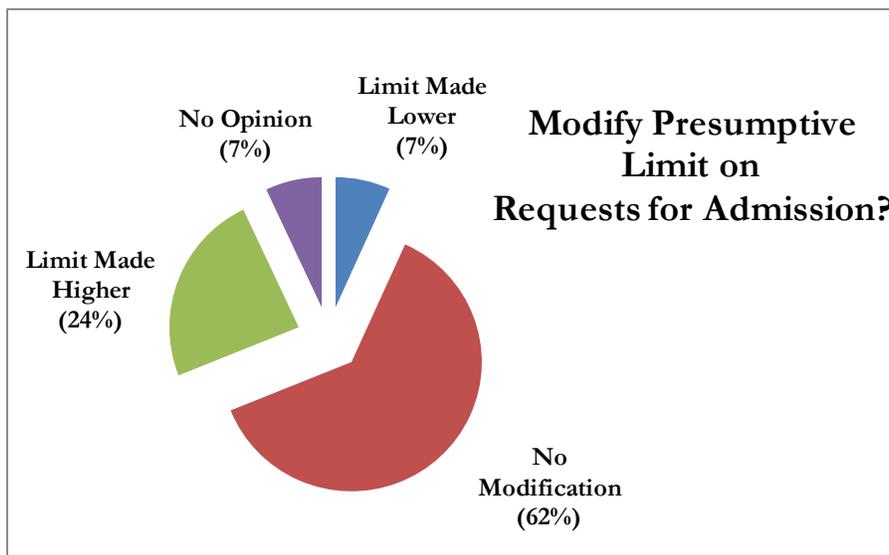


e. The Limit on Requests for Admission

Under ARCP 36(b), each party can issue up to 25 requests for admission per case. Additional requests require a stipulation or a court order.

As demonstrated in Figure 33, nearly 70% of respondents would either maintain or lower the presumptive limit, while fewer than one in four respondents would raise the limit to allow for more requests for admission.

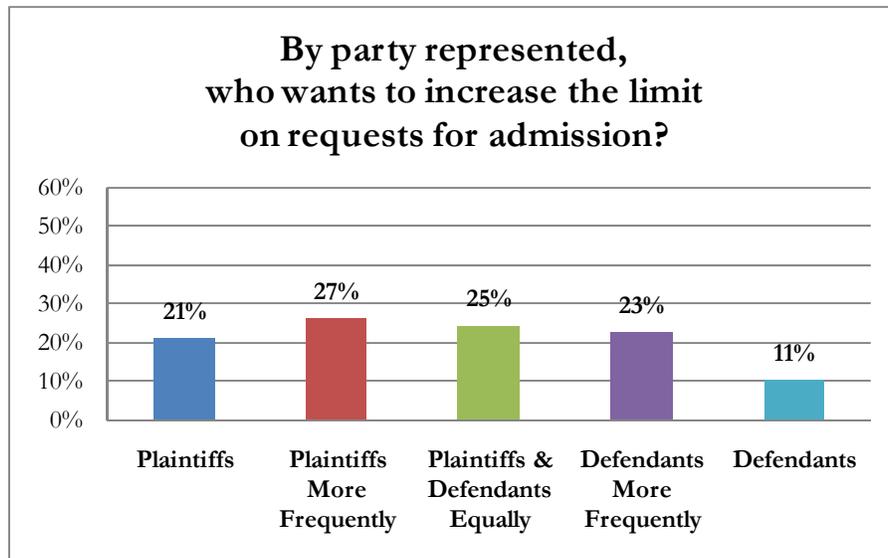
Figure 33 (Survey Question 24f)
n = 661



Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification of the limit on requests for admission. Whether divided by party represented or by experience, over 60% of each group believes the current limit should be maintained.

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit is lower for those who represent defendants in all or nearly all cases, but otherwise does not differ much across parties, as seen in Figure 34.

Figure 34 (Survey Questions 5, 24f)
n = 155; 151; 155; 140; 143

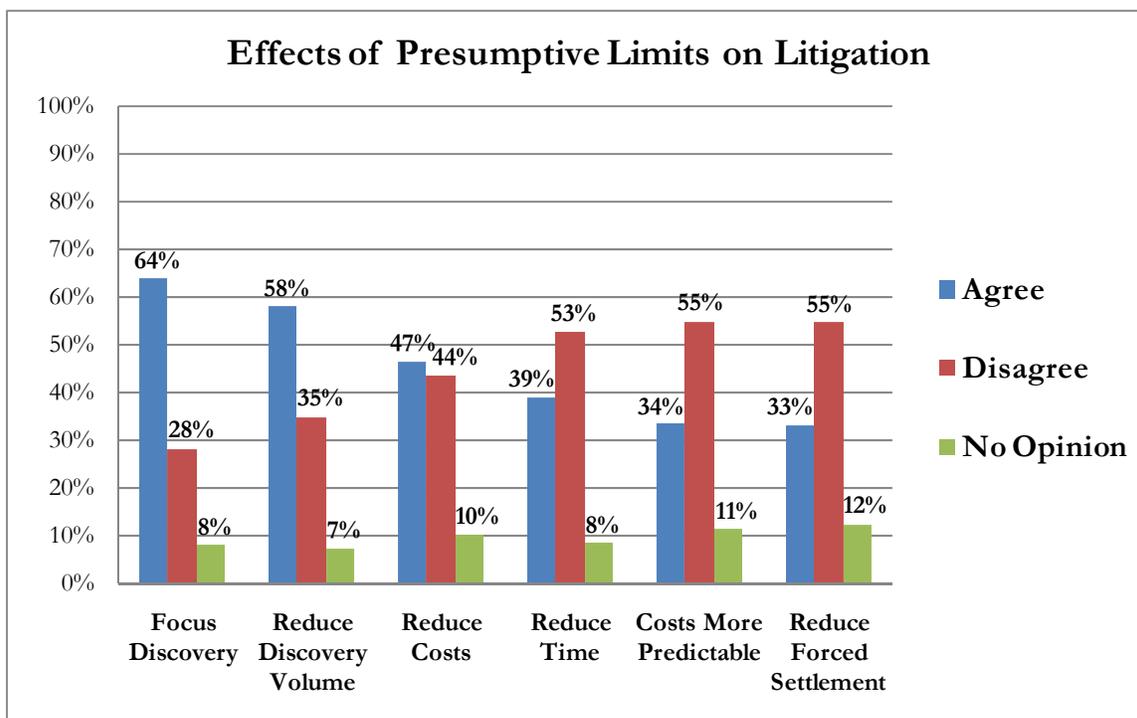


However, in the written comments, two respondents pointed out that requests for admission are designed to focus the issues and streamline the litigation process, so there is no “legitimate” need to limit them.

f. The Presumptive Discovery Limits as a Whole

Figure 35 shows what Arizona practitioners perceive to be the effects of the presumptive discovery limits, collectively, on litigation. There is a consensus that the limits require parties to “focus their discovery efforts to the disputed issues” (64% agreed; 28% disagreed) and reduce the total volume of discovery (58% agreed; 35% disagreed). In addition, a plurality of the Bar believes that the limits reduce the total cost of litigation (47% agreed; 44% disagreed). Overall, however, the Bar indicated that the presumptive limits do not reduce the total time required for litigation (39% agreed; 53% disagreed), do not make litigation costs “more predicable” (34% agreed; 55% disagreed), and do not “reduce the use of discovery as a tool to force settlement” (33% agreed; 55% disagreed).

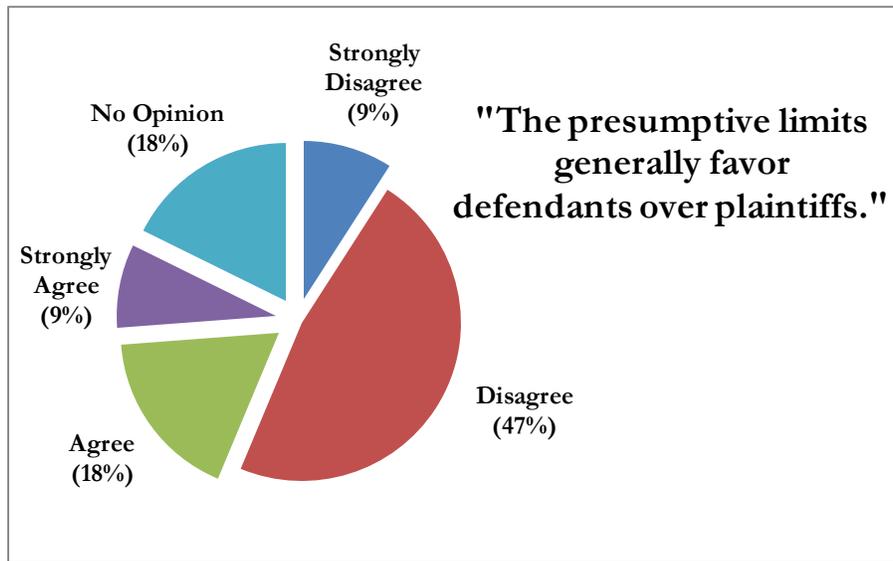
Figure 35 (Survey Questions 22a-22f)
 n = 665; 665; 665; 665; 664; 661



Considering *only* those who expressed an opinion on the effects of the presumptive limits, all respondent groups tended to answer in the same way, regardless of party represented. The majority of all groups expressed agreement that the limits focus discovery and reduce the volume of discovery. Every group was split on the issue of whether the limits reduce litigation costs, but a notable majority of those who primarily represent plaintiffs agreed that the limits reduce costs. Between 55% and 60% of every group disagreed that the limits reduce litigation time, while between 40% and 45% of every group agreed. A majority of all groups also disagreed that the limits increase the predictability of costs, with approximately one in ten in each group expressing strong disagreement. On whether the limits reduce the use of discovery to force settlement, the most common choice of all respondent groups was “disagree,” the second most common choice was “agree,” and the third most common choice was “strongly disagree.”

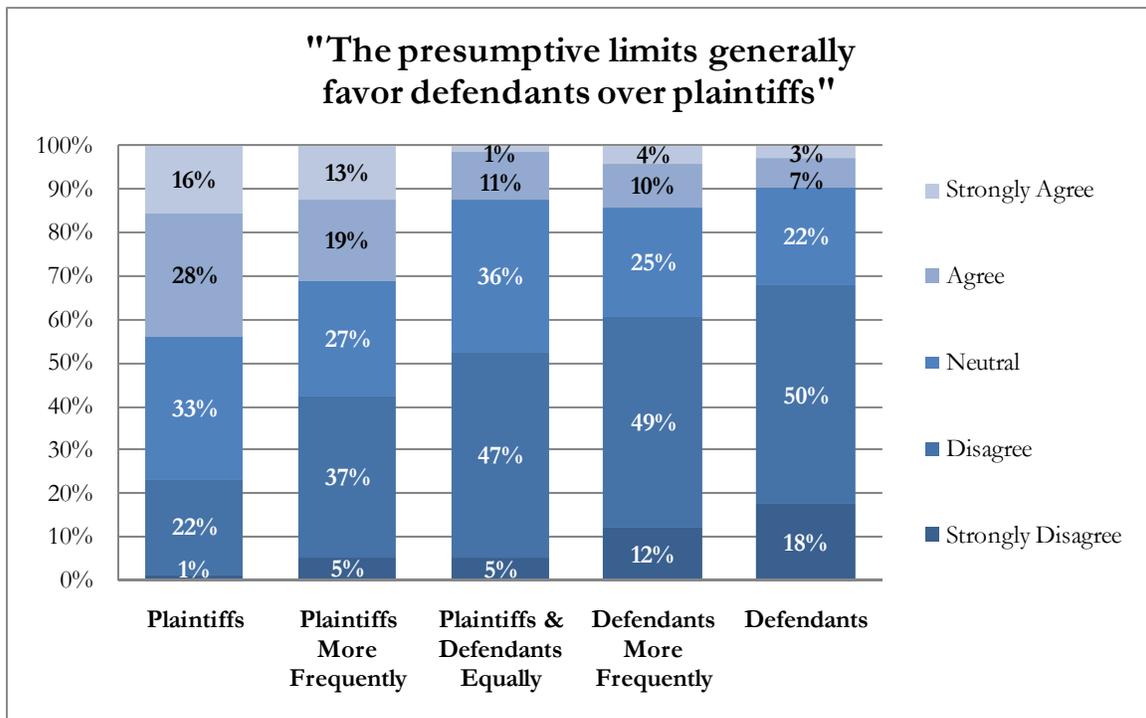
When faced with the statement that “presumptive limits favor defendants over plaintiffs,” a majority (56%) of those who provided a response disagreed or strongly disagreed with the statement. See Figure 36.

Figure 36 (Survey Question 22g)
 n = 657



Considering *all* respondents who indicated a party most frequently represented, Figure 37 shows the differences across parties. Although those who primarily represent plaintiffs were more likely to agree that the presumptive limits favor defendants, a majority of all groups disagreed or were neutral on the issue.²⁶

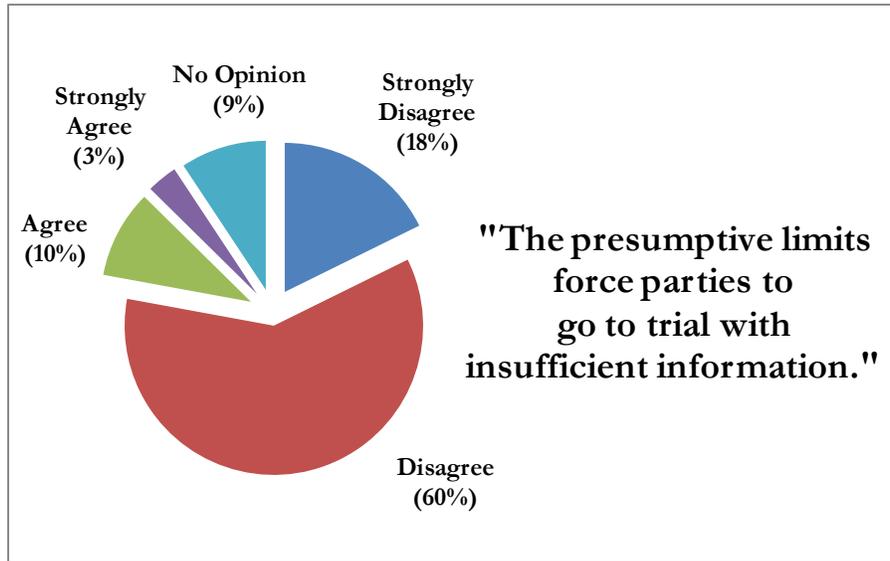
Figure 37 (Survey Questions 5, 22g)
 n = 155; 151; 155; 140; 143



²⁶ In Figure 37, the "neutral" category includes both those who selected "no opinion" and those who declined to answer the question.

When faced with the statement that “presumptive limits force parties to go to trial with insufficient information,” more than three out of four respondents (78%) expressed some level of disagreement with the statement. See Figure 38 for the distribution of answers.

Figure 38 (Survey Question 22h)
n = 665



Moreover, a majority of all respondent groups do not find that the presumptive limits result in insufficient information at trial. Whether divided by party represented or by experience, about 60% or more of all groups disagree that the presumptive limits result in insufficient information at trial.

g. Adherence to the Presumptive Limits

The survey asked the extent to which litigants actually adhere to the ARCP’s presumptive limits on the amount of and time for discovery, in the experience of respondents. Whether divided by party represented or by experience, all respondent groups were quite consistent.

Figure 39 shows the frequency of adherence to the presumptive limits on the amount of discovery conducted. Litigants are most likely to follow the four-hour deposition rule, and least likely to follow the rule on the types of individuals that may be deposed. Approximately 70% of respondents reported frequent adherence to the deposition time limit, the limit on requests for admission, and the limit on interrogatories. In addition, nearly 65% of respondents reported frequent adherence to the number of expert witnesses. Given that respondents are split on whether to increase the limit on requests for production, it is not surprising that there is less frequent adherence to that rule. However, the level of divergence from the rule on which individuals may be automatically deposed is surprising, given that a strong majority believes the current rule is appropriate.

Figure 39 (Survey Questions 18c-18e, 18g, 18i, 18k)
 n = 708; 701; 706; 705; 703; 708

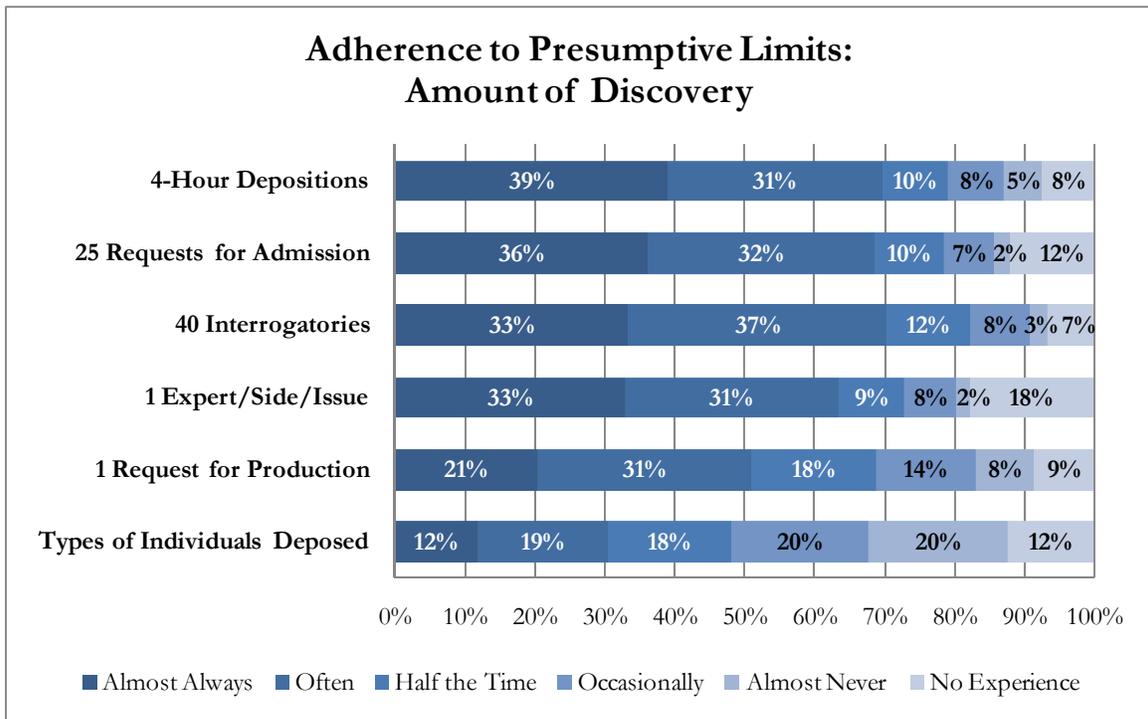
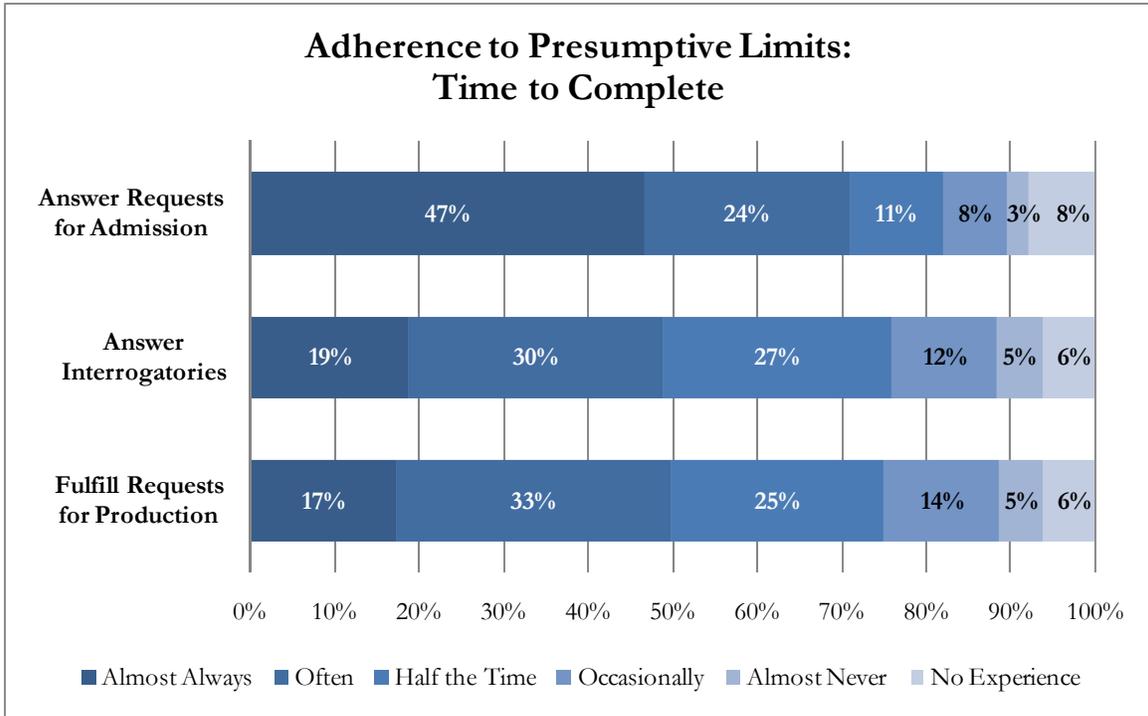


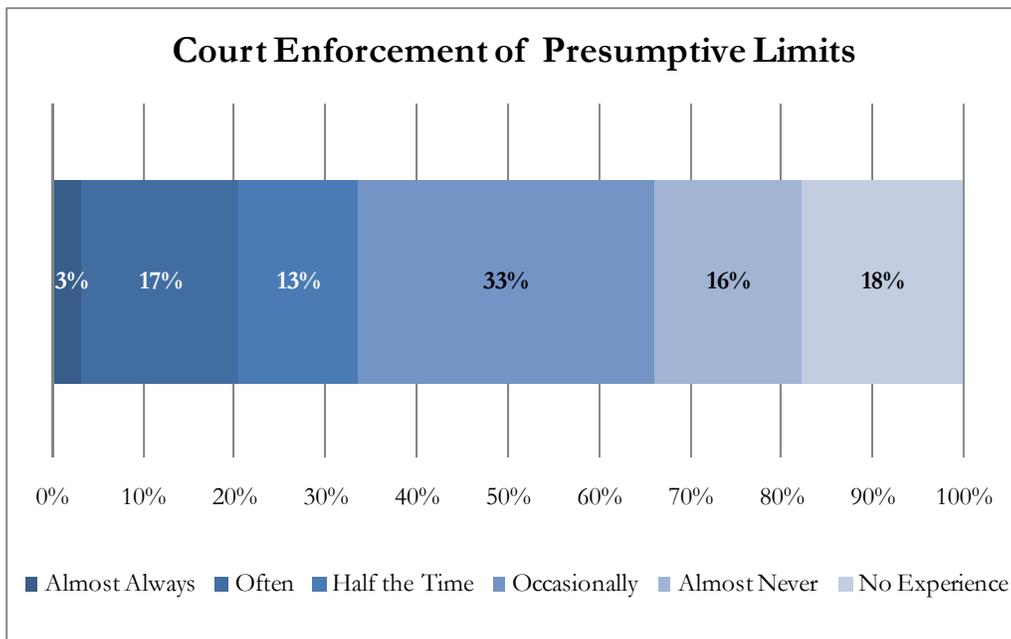
Figure 40 shows the frequency of adherence to the presumptive 40- and 60-day time limits for completing certain discovery. Litigants are most likely to follow the time for answering requests for admission under ARCP 36(a), as about 70% of respondents indicated that this occurs “almost always” or “often.” Litigants are equally likely to follow the time for answering interrogatories and fulfilling requests for admission, as about 50% of respondents selected “almost always” or “often.”

Figure 40 (Survey Questions 18f, 18h, 18j)
 n = 703; 703; 705



Only one-third of respondents reported that the court enforces presumptive discovery limits half the time or more, while nearly half of respondents reported infrequent enforcement of the limits. Notably, approximately 18% selected “no experience.” See Figure 41.

Figure 41 (Survey Question 23a):
 n = 662



Arizona practitioners are evenly split on the issue of whether the courts should have more control over the discovery process. About the same portion of respondents were in favor of more court control (44.3%) as against it (44.6%). Further, separated by party represented, none of the respondent groups expressed strong sentiment either way.

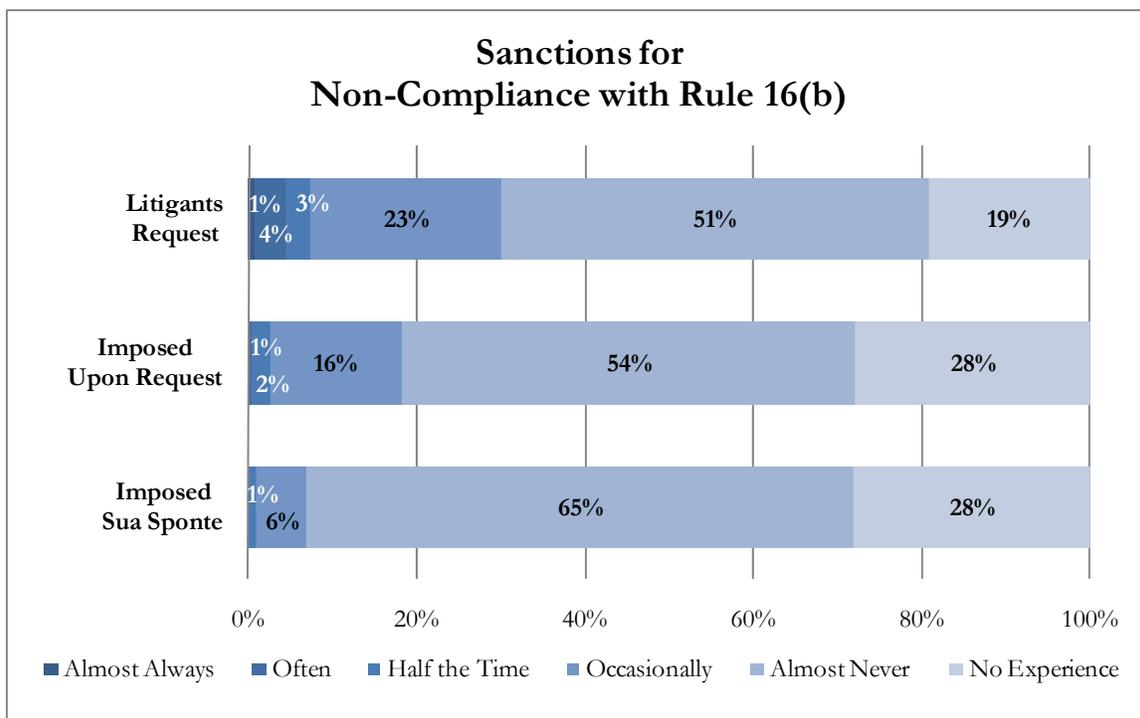
The presumptive limits do not appear to increase satellite litigation, as about 30% of respondents indicated that parties “almost never” litigate whether to depart from the limits and over 40% indicated that parties do so only “occasionally.” An additional 17% indicated “no experience” with the issue.

C. THE ROLE OF SANCTIONS

ARCP 16(f) gives judges the power to sanction parties for non-compliance with Rule 16, including ordering the payment of “reasonable expenses incurred.”²⁷ Non-compliance encompasses failure to prepare for or participate in the pretrial conference, as well as failure to obey a scheduling or pretrial order.

As shown in Figure 42, in the experience of a significant majority of respondents, sanctions for non-compliance with the letter and spirit of Rule 16(b) are only rarely requested or imposed. In fact, a majority indicated that they are “almost never” requested or imposed. Notably, between 19% and 28% of respondents have “no experience” with a failure to comply with Rule 16(b).

Figure 42 (Survey Questions 16b-16d)
n = 731; 730; 730



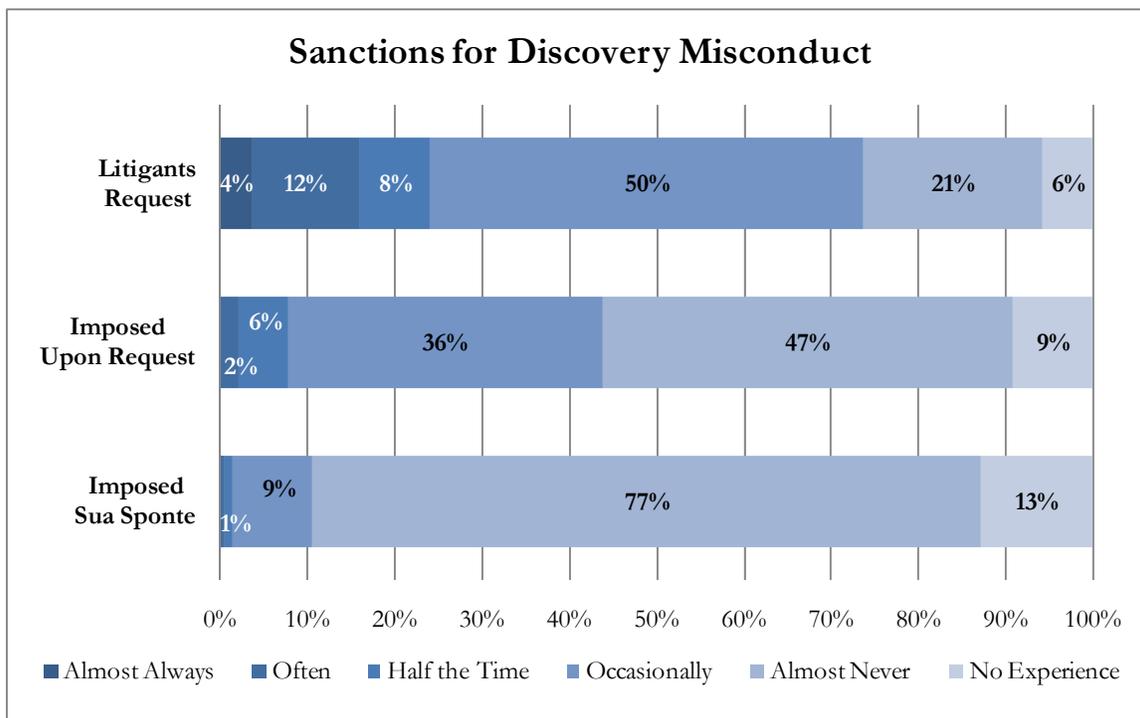
ARCP 37 specifically provides for sanctions for misconduct related to disclosure and discovery. As shown in Figure 43, sanctions are more often imposed for discovery misconduct than

²⁷ Such expenses include attorneys’ fees and/or an assessment by the court clerk.

for pretrial conference misconduct, although it is still quite rare for the majority of respondents. In fact, at least 70% of respondents indicated that sanctions are “almost never” or only “occasionally” requested or imposed. One respondent commented: “[A]lmost never will a judge impose sanctions against a party for failing to comply with discovery rules and enforce the payment when the violation occurs.” Notably, only between 6% and 13% of respondents have “no experience” with discovery misconduct.

Figure 43 (Survey Questions 19a-19c)

n = 696; 698; 696



According to over 60% of respondents, the sanctions rules “almost never” (30%) or only “occasionally” (31%) deter discovery misconduct. Only about 20% of respondents reported that the rules consistently deter misconduct.

Many respondents expressed a desire for the imposition of sanctions with greater consistency and frequency. For example:

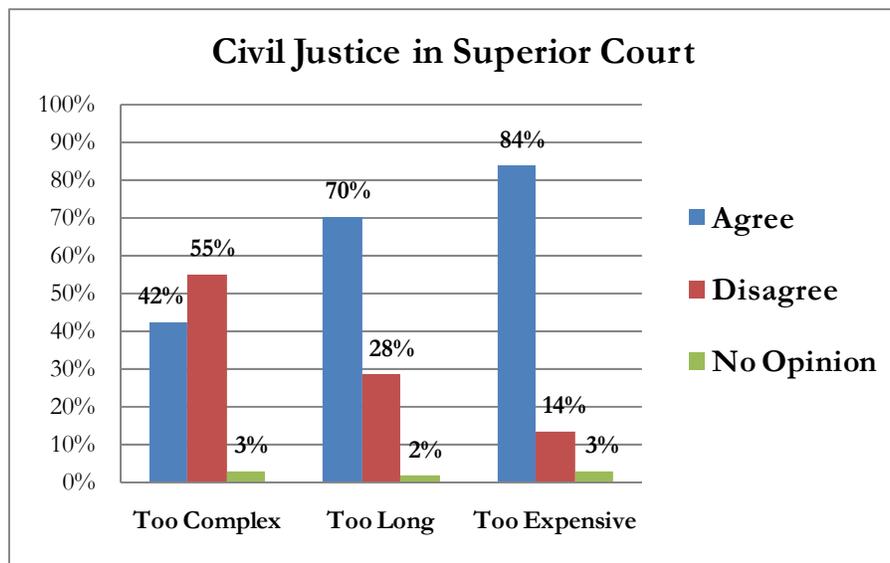
- “Make sanctions for non-compliance tougher and apply them more often.”
- “Why have sanctions when judges never enforce them?”
- “Courts are too reluctant to sanction, in a meaningful way, the nonsense that sometimes occurs when people violate the rules for no good reason or unduly complicate the case and play lawyer games.”
- “[O]bstructionist attorneys and judges’ unwillingness to impose meaningful sanctions on them for discovery, particularly deposition, abuses were the most frustrating part of litigation.”

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 Superior Court.

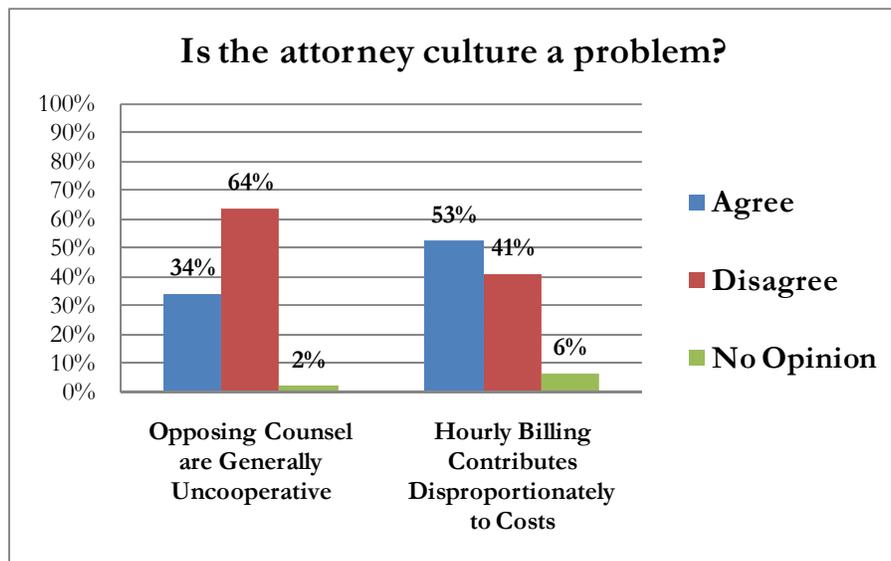
A majority (55%) of respondents disagreed that the Superior Court civil justice system is “too complex,” though a significant portion (42%) agreed with the statement. Moreover, a strong majority (70%) agreed that the system takes “too long,” with over one-quarter (28%) expressing strong agreement. In addition, Arizona practitioners overwhelmingly (84%) responded that the Superior Court system is “too expensive,” with a plurality (44%) expressing strong agreement. Figure 44 shows the distribution of Arizona responses for these three issues.

Figure 44 (Survey Questions 9a-9c)
n = 756; 755; 756



On the extent to which the attorney culture contributes to problems, Arizona practitioners do not generally find lack of cooperation by opposing counsel to be an issue. Almost two-thirds of respondents disagreed that “opposing counsel are generally uncooperative.” However, the practice of hourly billing was identified as a problem. A majority of respondents agreed that “the system of hourly billing for attorneys contributes disproportionately to litigation costs,” with nearly one-quarter (24%) expressing strong agreement. Figure 45 shows the distribution of Arizona responses.

Figure 45 (Survey Questions 9d, 9f)
 n = 755; 754



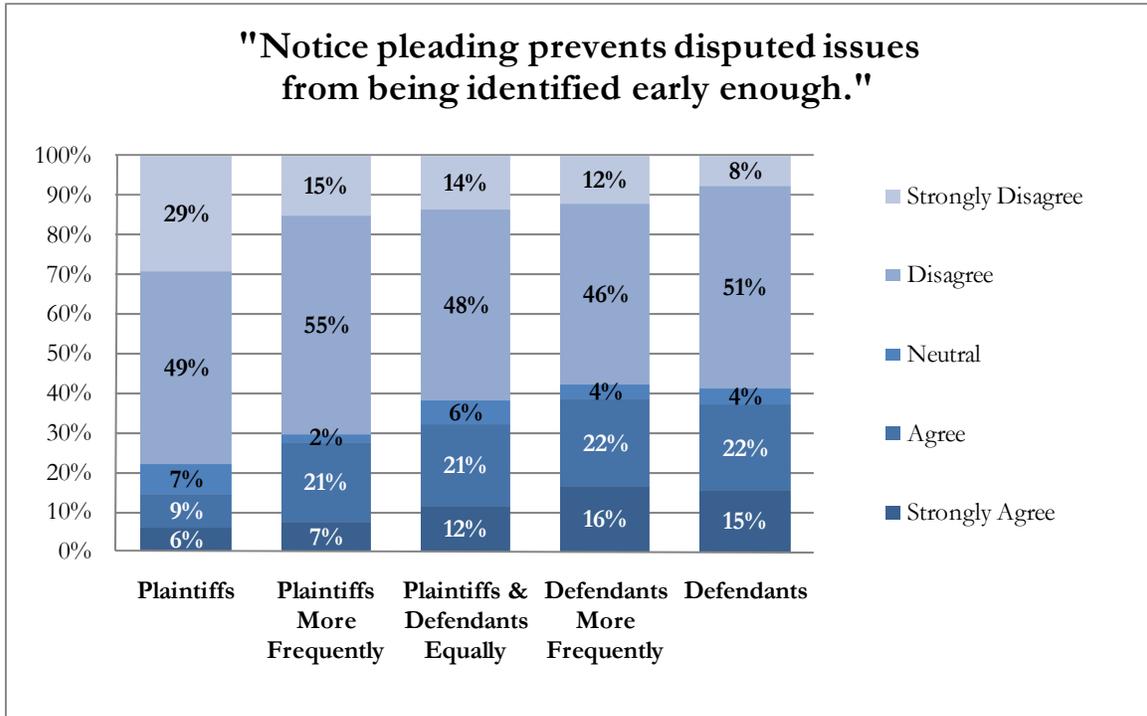
The written comments reflect significant concerns about the legal culture and contain a call for increased civility and reduced gamesmanship. There was a sentiment expressed by those who commented that attorneys “know they can get away with practically anything, and some do.” One respondent stated: “Litigation is difficult enough and I would appreciate dealing with more professional attorneys.”

With respect to access, a slim majority (52%) of Arizona attorneys in private practice reported belonging to a firm that will not refuse a case based on the amount in controversy. However, one-third (33%) 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 \$250 to \$20 million, with a median of \$25,000 and a mean of \$296,640.

While most do not view notice pleading as preventing the early identification of issues, nearly one-third agreed that “notice pleading prevents disputed issues from being identified early enough” (30% agreed; 66% disagreed). Considering *all* respondents who indicated a party most frequently represented, Figure 46 shows the differences across parties. “Disagree” was the most common answer, regardless of the party represented. However, those who represent plaintiffs in almost all cases were more likely to “strongly disagree.”²⁸

²⁸ In Figure 46, the “neutral” category includes both those who selected “no opinion” and those who declined to answer the question.

Figure 46 (Survey Question 9e)
 n = 155; 151; 155; 140; 143



In the written comments, two respondents expressed support for notice pleading, while two respondents called for pleading the specific factual and legal basis of claims and damages calculations. There were also comments on the relationship between the pleading standard and disclosures, as related to the need to narrow the issues. One respondent suggested that the system of notice pleading followed by disclosures is not effective because disclosures are required to occur “too early to assess legal theories and factual claims, and it becomes a cat and mouse game.” Another respondent suggested: “If you continue notice pleadings, consider making Plaintiff’s first Rule 26.1 disclosure due *prior* to the Answer...it will force some focus and allow an answer to be meaningful rather than a form denial or vague allegations.”

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

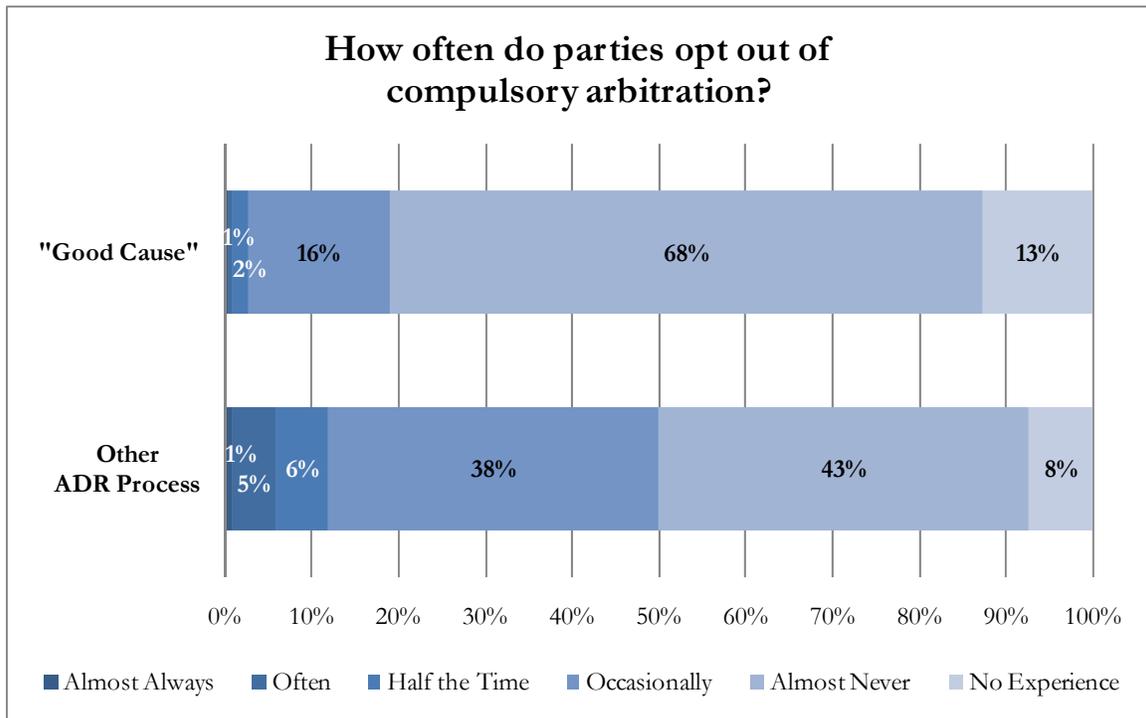
Under ARCP 72-77 and A.R.S. § 12-133, Superior Court claims involving only requests for monetary relief that do not exceed a certain jurisdictional limit qualify for compulsory arbitration. The jurisdictional amount for arbitration varies by county. The arbitrator’s decision may be appealed to the Superior Court, which then holds a trial *de novo*.

1. CASES QUALIFYING FOR COMPULSORY ARBITRATION

Considering *all* respondents to the survey, almost 65% indicated that they have had a Superior 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, nearly 75% answered in the affirmative.

Figure 47 depicts the frequency with which parties opt out of the compulsory arbitration process in qualifying cases. The vast majority of respondents indicated that opt-out occurs only “occasionally” or “almost never.” However, it appears that parties opt out for another alternative dispute resolution process more frequently than by showing “other good cause” for avoiding compulsory arbitration.

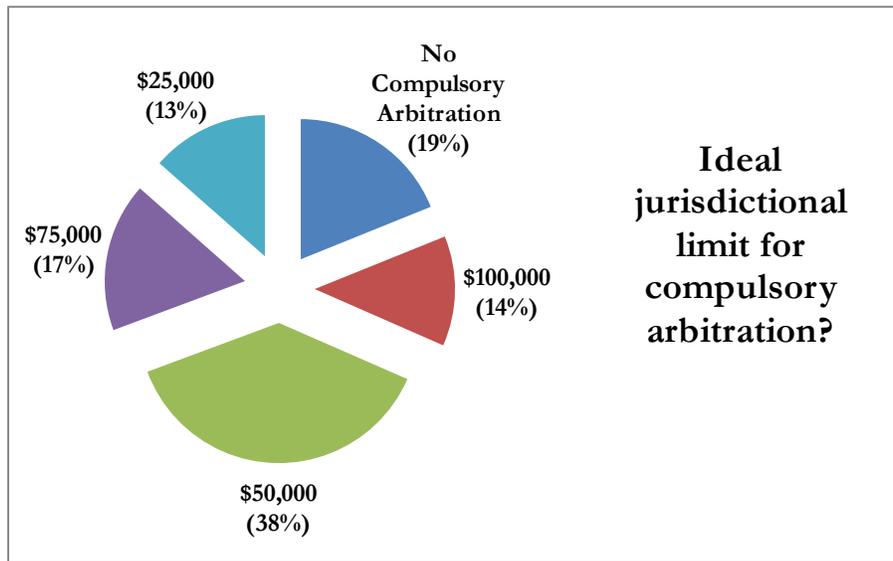
Figure 47 (Survey Questions 27a, 27b)
 n = 482; 480



In Arizona, most people reside in counties with a \$50,000 jurisdictional limit for compulsory arbitration (including Maricopa, Pima, Yuma, and Cochise Counties).²⁹ The survey asked what the limit should be, in the best interest of litigants. Approximately one-third of respondents in all counties felt that \$50,000 was the right limit. Approximately one-third felt that the limit should be at a higher level, which would increase the number of qualifying cases. Approximately one-third felt that the limit should be lower or the program should not exist, which would decrease or eliminate qualifying cases. Significantly, almost 20% indicated that “[t]here should not be a compulsory arbitration program in Superior Court.” See Figure 48.

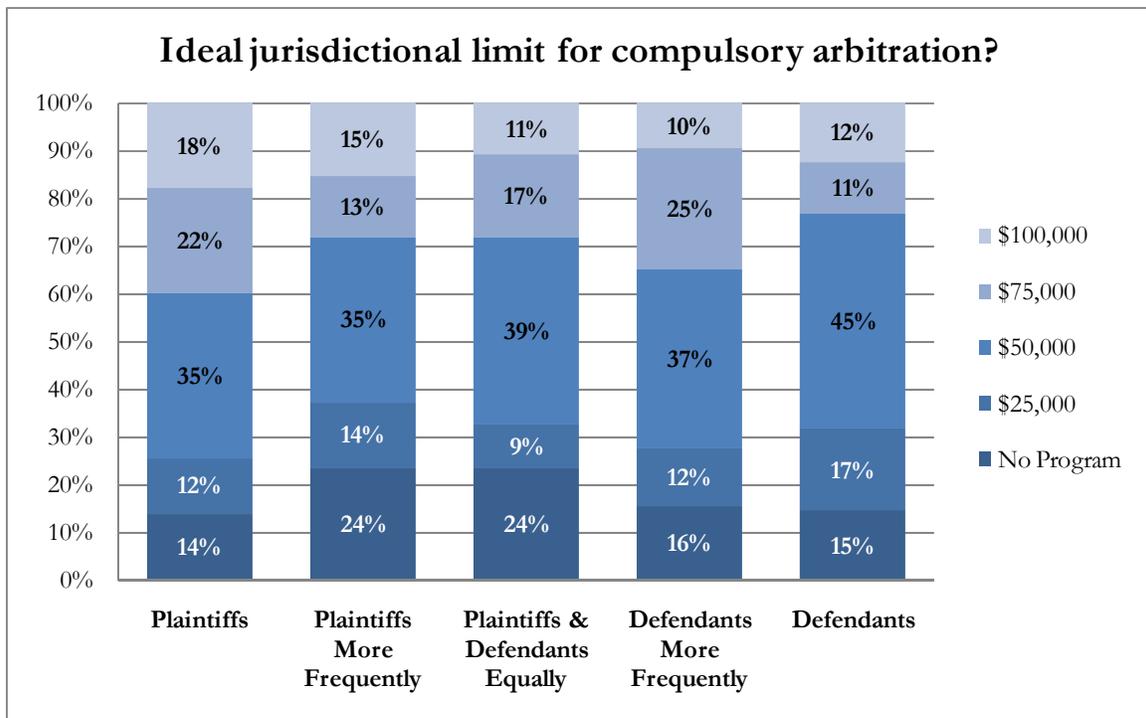
²⁹ U.S. Census Bureau, *State and County QuickFacts, Arizona*, <http://quickfacts.census.gov/qfd/states/04000.html> (2008 estimate; each county must be selected separately in the drop-down menu).

Figure 48 (Survey Question 29)
 n = 482



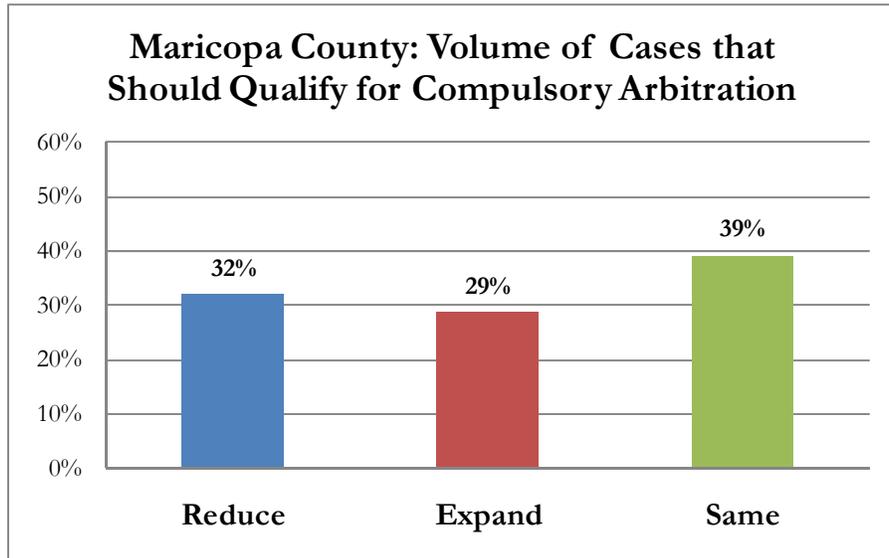
For the ideal limit for compulsory arbitration, Figure 49 shows the distribution of responses by party (for those who have had a qualifying case and indicated a party most frequently represented). The responses do not vary widely by group.

Figure 49 (Questions 5, 29)
 n = 78; 118; 110; 83; 82



Three-quarters of respondents (76%) have had the most cases qualify for arbitration in Maricopa County, which has a \$50,000 jurisdictional limit. Using respondents' ideal jurisdictional limit as an indication of whether the number of cases that proceed through compulsory arbitration should remain the same, be reduced, or be expanded, it is clear that there is not a consensus in that County.³⁰ See Figure 50.

Figure 50 (Questions 28, 29)
n = 362



2. CASES PROCEEDING THROUGH COMPULSORY ARBITRATION

Almost 90% of respondents who had a case qualify for arbitration have also had a case proceed through the arbitration process (56% of total respondents).

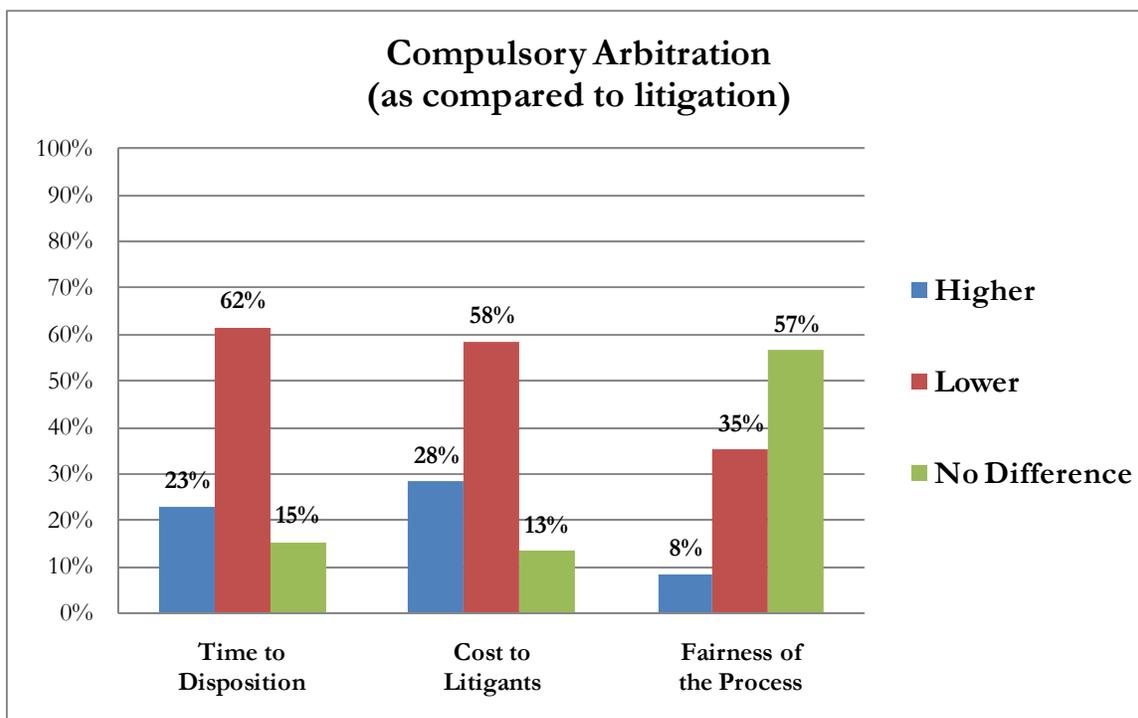
As shown in Figure 51, according to Arizona practitioners, compulsory arbitration has a faster time to disposition³¹ and a lower cost than litigation. However, it does not compare favorably to litigation on the issue of procedural fairness.

³⁰ The “reduce” category includes those who wish to eliminate compulsory arbitration completely.

³¹ According to court data collected in a 2004-2005 study, cases in Maricopa and Pima Counties that were *subject to* compulsory arbitration were resolved more quickly than cases not subject to arbitration (by three to five months, on average). However, “the faster resolution can not necessarily be attributed to the arbitration process,” due to differences in the amount in controversy and associated differences in complexity and the amount of discovery. Moreover, tort and contract cases subject to arbitration still did not meet the Arizona Supreme Court’s time processing standards (90% resolved within 9 months). Finally, the time to disposition was longer for the subset of cases actually *assigned to* arbitration. In Maricopa and Pima Counties, only 50% of cases assigned to arbitration concluded within 10-14 months of the complaint. Roselle L. Wissler & Bob Dauber, *A Study of Court-Connected Arbitration in the Superior Courts of Arizona*, SUBMITTED TO THE SUP. CT. OF ARIZ. ADMIN. OFFICE OF THE CTS., <http://www.law.asu.edu/?id=607>, Executive Summary, vi (July 13, 2005).

Figure 51 (Survey Questions 31a-31c)

n = 422; 421; 422



By and large, the written comments concerning compulsory arbitration were negative. Due to appeal provisions resulting in trial *de novo*,³² those respondents characterized the program as wasting time, causing delay, and increasing costs. Commenting respondents were also critical of the system for appointing arbitrators. They believe that randomly selecting an “unsuspecting” member of the bar – who may not have any litigation experience or any familiarity with the substantive area – and requiring service without proper training or compensation leads only to resentment and a poor process. As one respondent stated:

All that mandatory arbitration accomplishes in Maricopa County is to relieve the [court] for a time from having to do anything on a civil case, hoping that one or more of the parties will abandon the case before it emerges from arbitration. Forcing an outside member of the Bar to perform unfamiliar legal work whilst the court waits for the natural effects of attrition to reduce its civil caseload is not good public policy.

Also, a respondent indicated that in small counties where the attorneys know each other well, it is difficult for an arbitrator to be fair knowing that the roles will soon be reversed.

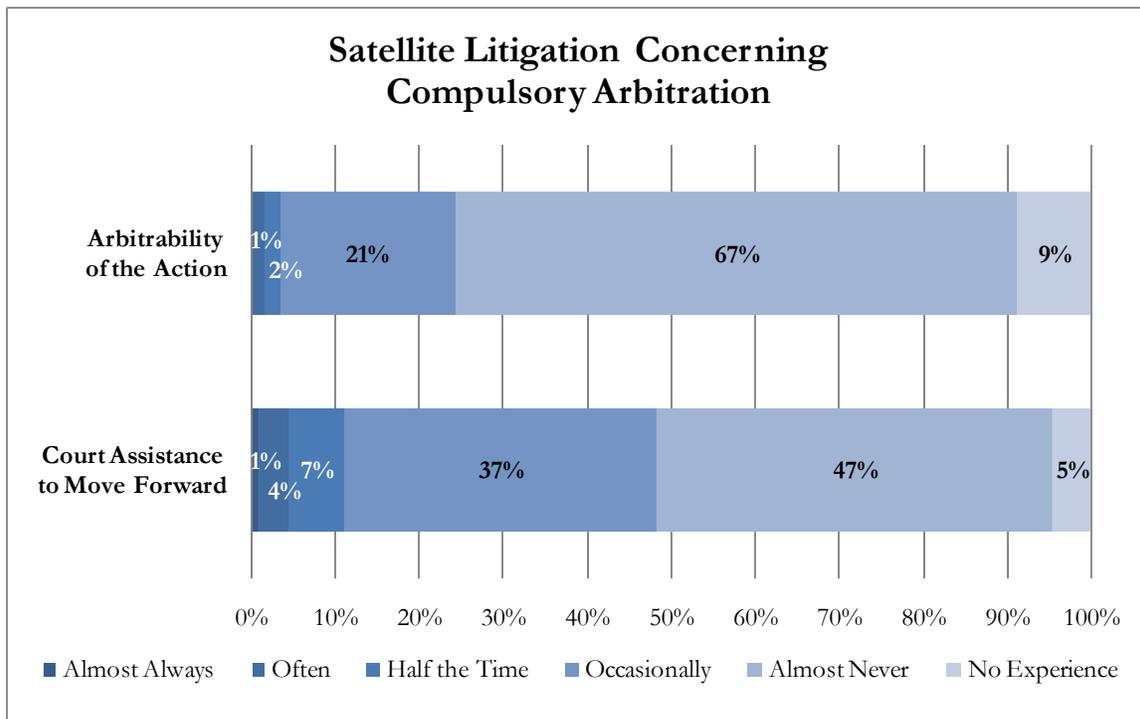
A majority (57%) of respondents with experience in compulsory arbitration indicated that arbitrators “almost never” limit discovery during the arbitration process to ensure an efficient and inexpensive resolution. An additional 22% believe that discovery is limited in arbitration only “occasionally.” Only 12% of respondents indicated that arbitrators limit discovery half the time or

³² According to the 2004-2005 study of court data, the frequency of appeal in cases with an arbitration award ranged from 17% to 46%, and was 22% in both Maricopa and Pima Counties. *Id.* at v.

more. One respondent wrote: “[T]he person who will ultimately be deciding the matter often has little or no interest in hearing arguments regarding discovery prior to arbitration.”

As shown in Figure 52, compulsory arbitration does not seem to generate much satellite litigation. Two-thirds of respondents (67%) with a qualifying case indicated that parties “almost never” litigate the issue of arbitrability and another 20% or so indicated that the issue is litigated only “occasionally.” Notably, however, over 10% of respondents with experience in compulsory arbitration indicated that parties have to seek assistance from the court at least half of the time in order to move cases forward in arbitration.

Figure 52 (Survey Questions 27c, 32b)
n = 477; 422



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

While respondents generally view Arizona’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.

A number of respondents would like to see early involvement in and monitoring of the case by the judge, though one respondent qualified the suggestion with a plea for attorneys to generally maintain control over case management. Respondents believe that judges should be more consistent in enforcing the existing rules. Respondents also expressed a preference for setting the trial date early in the litigation.

A number of respondents would like to see a faster and better mechanism for handling disclosure and discovery disputes. It was proposed that a discovery “master” or “proctor” dedicated

to such issues could be appointed and readily available to resolve disputes and enforce the rules. An alternative proposal: have sitting judges reserve a couple of hours each afternoon for immediate hearings in a “mass-docket” setting.

A number of respondents would like to see a system of mandatory settlement conferences after initial disclosures, for the purpose of obtaining a third-party assessment of the case at an early stage in the litigation. Some specifically stated that this should occur in lieu of arbitration.

Several respondents suggested adopting the British “loser pays” system of fee shifting. Two respondents suggested allowing attorneys to appear by telephone. One respondent suggested limiting motions for reconsideration to situations involving the discovery of new facts or a change in the law.

Finally, there is the issue of increasing funding for Arizona courts. As one respondent commented, state courts can only be an “engine of justice” if they are adequately resourced to meet that mission.

V. CONCLUSION

IAALS sincerely thanks all of the individuals and organizations who dedicated precious time, effort, and energy to make the Arizona 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 SUPERIOR COURTS of Arizona? 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 Arizona, rounded to the nearest year:

2. Estimated number of Arizona Superior 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 Arizona Superior 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 Arizona Superior Court:

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

- | | |
|--|---|
| <input type="checkbox"/> Administrative law | <input type="checkbox"/> Probate |
| <input type="checkbox"/> Breach of fiduciary duty | <input type="checkbox"/> Product liability |
| <input type="checkbox"/> Civil rights | <input type="checkbox"/> Professional malpractice (generally) |
| <input type="checkbox"/> Complex commercial | <input type="checkbox"/> Property damage |
| <input type="checkbox"/> Construction | <input type="checkbox"/> Real property |
| <input type="checkbox"/> Consumer fraud | <input type="checkbox"/> Tax |
| <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"/> Personal injury | <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:

- Law firm lawyer or solo practitioner
- In-house counsel
- Government lawyer
- Judge
- Law clerk
- ADR provider
- Academician or researcher
- Retired, last year of practice: _____
- Inactive, last year of practice in Arizona: _____
- 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 ARIZONA SUPERIOR COURT.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. The civil justice system is too complex.	<input type="checkbox"/>				
b. The civil justice system takes too long.	<input type="checkbox"/>				
c. The civil justice system is too expensive.	<input type="checkbox"/>				
d. Opposing counsel are generally uncooperative.	<input type="checkbox"/>				
e. Notice pleading prevents disputed issues from being identified early enough.	<input type="checkbox"/>				
f. The system of hourly billing for attorneys contributes disproportionately to litigation costs.	<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:
 \$ _____
 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 Arizona?
 Yes
 No

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

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

13. Do you have Superior Court civil litigation experience prior to the July 1, 1992 amendments to the Arizona rules ("Zlaket" amendments)?
 Yes
 No

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

14. Please indicate your opinion as to the effect of the "Zlaket" amendments on the following groups and state the reason for your answer.

	Negative Development	Neutral Development	Positive Development	Reason
a. Litigants	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Lawyers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Judges	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
d. Public	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

IV. RULES OF CIVIL PROCEDURE FOR THE SUPERIOR COURTS OF ARIZONA

A. Rule 16(b) Comprehensive Pretrial Conferences

15. Below is a list of statements about Arizona Rule 16(b) comprehensive pretrial conferences. Assuming that a conference takes place, please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. Rule 16(b) conferences establish early judicial management of cases.	<input type="checkbox"/>				
b. Rule 16(b) conferences encourage judges to stay involved throughout the case.	<input type="checkbox"/>				
c. Rule 16(b) conferences focus discovery to the disputed issues.	<input type="checkbox"/>				
d. Rule 16(b) conferences improve trial preparation.	<input type="checkbox"/>				
e. Rule 16(b) conferences expedite case dispositions.	<input type="checkbox"/>				
f. Rule 16(b) conferences are cost-effective.	<input type="checkbox"/>				

16. 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	Occasionally	About Half the Time	Often	Almost Always	No Experience
a. Rule 16(b) conferences are held.	<input type="checkbox"/>					
b. Litigants request sanctions for noncompliance with the letter and spirit of Rule 16(b).	<input type="checkbox"/>					
c. Upon request, courts impose sanctions for noncompliance with the letter and spirit of Rule 16(b).	<input type="checkbox"/>					
d. Courts <i>sua sponte</i> impose sanctions for noncompliance with the letter and spirit of Rule 16(b).	<input type="checkbox"/>					

17. Should a Rule 16(b) conference be mandated in every case?

Yes

Reason: _____

No

Reason: _____

B. Initial Disclosures And Presumptive Discovery Limits

18. Please indicate the extent to which, in your experience, litigants ADHERE to the following Arizona discovery rules AS WRITTEN.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Experience
a. The content and scope of initial disclosures under Rule 26.1(a)	<input type="checkbox"/>					
b. The 40-day time limit for initial disclosures under Rule 26.1(b)	<input type="checkbox"/>					
c. The presumptive limit of one expert per side per issue under Rule 26(b)(4)(D)	<input type="checkbox"/>					
d. The presumption against deposing individuals who are not parties, testifying expert witnesses, or document custodians under Rule 30(a)	<input type="checkbox"/>					
e. The presumptive limit of four hour depositions under Rule 30(d)	<input type="checkbox"/>					
f. The 40- and 60-day time limits for answering interrogatories under Rule 33(a)	<input type="checkbox"/>					
g. The presumptive limit of 40 interrogatories per party under Rule 33.1(a)	<input type="checkbox"/>					
h. The 40- and 60-day time limits for fulfilling requests for production under Rule 34	<input type="checkbox"/>					
i. The presumptive limit of one request for production of not more than 10 distinct items or categories of items under Rule 34	<input type="checkbox"/>					
j. The 40- and 60-day time limits for answering requests for admission under Rule 36(a)	<input type="checkbox"/>					
k. The presumptive limit of 25 requests for admission of one factual matter under Rule 36(b)	<input type="checkbox"/>					

19. In Arizona, discovery misconduct is defined as “unreasonable, groundless, abusive, or obstructionist conduct.” Please indicate how often the following occur, in your experience.

	Almost Never	Occasionally	About Half the Time	Often	Almost Always	No Experience
a. Litigants request sanctions for discovery misconduct.	<input type="checkbox"/>					
b. Upon request, courts impose sanctions for discovery misconduct.	<input type="checkbox"/>					
c. Courts <i>sua sponte</i> impose sanctions for discovery misconduct.	<input type="checkbox"/>					
d. The rules providing for sanctions deter discovery misconduct.	<input type="checkbox"/>					

20. Below is a list of statements about Arizona Rule 26.1 DISCLOSURES. Assuming adherence to the rule AS WRITTEN, please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. Disclosures reveal the pertinent facts early in the case.	<input type="checkbox"/>				
b. Disclosures help narrow the issues early in the case.	<input type="checkbox"/>				
c. Disclosures facilitate agreement on the scope and timing of discovery.	<input type="checkbox"/>				
d. Disclosures reduce the total volume of discovery.	<input type="checkbox"/>				
e. Disclosures reduce the total time required to conduct discovery.	<input type="checkbox"/>				
f. Disclosures require too much investment early in the case.	<input type="checkbox"/>				
g. Disclosures increase the cost of litigation.	<input type="checkbox"/>				
h. Parties should be prevented from introducing supporting evidence that was not timely disclosed.	<input type="checkbox"/>				

21. Please indicate how often the following occur with respect to Rule 26.1 DISCLOSURES, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Experi-ence
a. Parties abuse the disclosure process through overproduction.	<input type="checkbox"/>					
b. Parties abuse the disclosure process by withholding information.	<input type="checkbox"/>					
c. Parties abuse the disclosure process by revealing information late.	<input type="checkbox"/>					
d. Courts enforce disclosure requirements.	<input type="checkbox"/>					
e. Parties litigate the scope and adequacy of disclosures.	<input type="checkbox"/>					

22. Below is a list of statements about Arizona's PRESUMPTIVE LIMITS ON DISCOVERY. Assuming adherence to the rules AS WRITTEN, please indicate your level of agreement with each statement as a whole.

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

23. Please indicate how often the following occur with respect to **PRESUMPTIVE LIMITS**, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Courts enforce presumptive limits on discovery.	<input type="checkbox"/>					
b. Parties litigate whether to depart from the presumptive limits.	<input type="checkbox"/>					

24. In the best interest of litigants, presumptive limits should be modified – if at all – in the following way:

	Limit Made Lower	No Modification	Limit Made Higher	No Opinion
a. One expert per side per issue	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Automatic depositions only for parties, experts, and custodians	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Depositions limited to four hours	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Interrogatories limited to 40 per party	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Requests for production limited to one request for not more than 10 items	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Requests for admission limited to 25 requests for one factual matter	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered “Yes” to Question 11, indicating that you have experience litigating in federal court, please answer Question 25. If you answered “No,” please skip to Question 26.

25. Please indicate whether you prefer the **Arizona Rules of Civil Procedure** or the **Federal Rules of Civil Procedure** with respect to each of the following:

	State Court	Federal Court	No Preference
a. Timing of initial disclosures	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Content and scope of mandatory disclosures	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Number of expert witnesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Extent of deposition discovery	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

C. Compulsory Arbitration

26. Have any of your **SUPERIOR COURT** cases **QUALIFIED FOR** Arizona’s compulsory arbitration program (A.R.S. § 12-133 and Rules 72-77)?

Superior Court claims involving only requests for monetary relief that do not exceed a certain jurisdictional limit qualify for compulsory arbitration. The jurisdictional amount for arbitration varies by county.

- Yes
- No

If you answered “Yes” to Question 26, please answer Questions 27-30. If you answered “No,” please skip to Question 33.

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

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Experience
a. In cases qualifying for compulsory arbitration, parties opt out in favor of some other alternative dispute resolution process.	<input type="checkbox"/>					
b. In cases qualifying for compulsory arbitration, parties opt out for "other good cause."	<input type="checkbox"/>					
c. Parties litigate the issue of arbitrability.	<input type="checkbox"/>					

28. County in which you have had the most cases qualify for compulsory arbitration:

- | | |
|--|---|
| <input type="checkbox"/> Cochise - \$50,000 limit | <input type="checkbox"/> Mohave - \$25,000 limit |
| <input type="checkbox"/> Coconino - \$65,000 limit | <input type="checkbox"/> Navajo - \$25,000 limit |
| <input type="checkbox"/> Gila - \$25,000 limit | <input type="checkbox"/> Pima - \$50,000 limit |
| <input type="checkbox"/> Graham - \$30,000 limit | <input type="checkbox"/> Pinal - \$40,000 limit |
| <input type="checkbox"/> La Paz - \$25,000 limit | <input type="checkbox"/> Yavapai - \$65,000 limit |
| <input type="checkbox"/> Maricopa - \$50,000 limit | <input type="checkbox"/> Yuma - \$50,000 limit |

29. In the best interest of litigants, the jurisdictional limit for compulsory arbitration in Superior Court should be:

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

30. Have any of your SUPERIOR COURT cases PROCEEDED THROUGH compulsory arbitration?

- Yes
- No

If you answered "Yes" to Question 30, please answer Questions 31-32. If you answered "No," please skip to Question 33.

31. Compulsory 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

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

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Experience
a. Arbitrators limit discovery to ensure an efficient and inexpensive resolution.	<input type="checkbox"/>					
b. Parties have to seek assistance from the court to move the case forward in arbitration.	<input type="checkbox"/>					

V. CONCLUSION

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

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

35. Are you willing to be contacted to participate in further studies concerning civil litigation in Arizona? 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