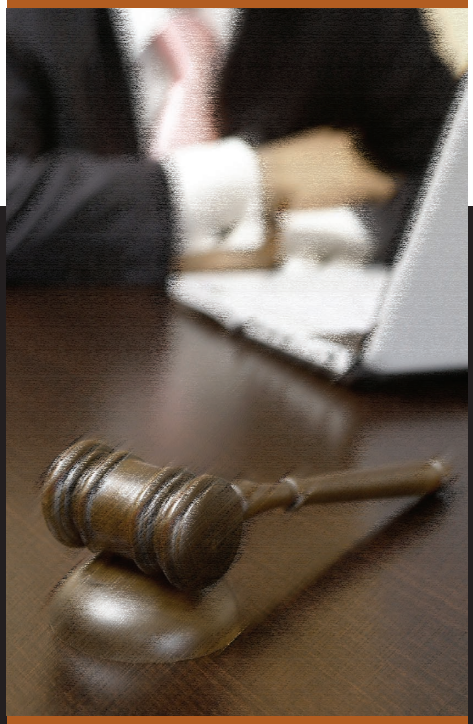

CIVIL LITIGATION SURVEY

of

Chief Legal Officers and General Counsel

belonging to the

ASSOCIATION OF CORPORATE COUNSEL

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.

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This Report sets forth the results of the Institute for the Advancement of the American Legal System's civil litigation survey of Chief Legal Officers and General Counsel belonging to the Association of Corporate Counsel ("General Counsel Survey").

EXECUTIVE SUMMARY

This survey explored the opinions of Chief Legal Officers and General Counsel – one per company – in an effort to capture how businesses experience the American civil justice process. The survey's goal was to achieve a better understanding of the litigant's perspective. While businesses are certainly a specific category of litigants, they are an important one, and their often repeat contact with the civil justice system is relevant to obtaining a complete picture of the status of that system.

Survey respondents represent a diverse group of companies whose legal departments have been involved in litigating at least five U.S. state or federal civil cases in the last five years. Industries range from "advertising" to "food distribution" to "property management," with no particular segment of the economy dominating. Exactly 30% of respondent companies have fewer than 500 employees, and exactly 30% have 5,000 or more employees. Just over half of the companies are multinational in scope, while almost 30% are national and almost 20% are regional or local. Of the companies headquartered in the U.S., they are geographically distributed across 43 states plus the District of Columbia and Puerto Rico. Highlights of the survey appear below.

In the last five years, most respondent companies have conducted discovery in the majority of their civil cases, and most respondent companies have experienced an increase in active cases and pretrial costs, without a corresponding increase in the number of trials.

On average, respondent companies were plaintiffs in 18% of their cases, defendants in 70% of cases, and non-party respondents in 12% of cases. The companies have most commonly litigated contract disputes (indicated by 54%), followed by "employment discrimination," "personal injury," "complex commercial," "product liability," and "intellectual property" cases. Two-thirds of respondents indicated that discovery was conducted in at least 70% of the company's cases, and a plurality indicated that discovery was conducted in at least 90% of cases.

A majority of respondents reported that active cases at their company have increased over the last five years, but only 16% reported that the number of trials has likewise increased. A majority of respondents also reported that pretrial litigation costs have increased, both in terms of the cost of a typical case and total yearly costs for the company. Those who indicated increasing costs most commonly cited discovery in general, and e-discovery in particular, as the basis for the trend. Respondents also pointed to rising attorney billing rates.

Those at the helm of respondent company legal departments perceive a need for changes to the American civil justice system.

A majority of respondents agreed that the American civil justice system is "too complex." In addition, 90% agreed that it takes "too long" and 97% agreed that it is "too expensive." Respondents find that litigation costs are commonly out of line with the stakes of the case. Approximately nine out of ten respondents disagreed with the statement that "litigation costs are generally proportionate to the value of the case." Furthermore, over 80% disagreed with the statement that "outcomes are driven more by the merits of the case than by litigation costs."

Respondents believe that notice pleading is an obstacle to the early identification of issues. Nearly 75% agreed with the statement that "notice pleading prevents the disputed issues from being identified early enough." Several respondents commented that requiring pleadings to include the facts known at the time of filing to support each legal theory would narrow the issues and allow for early discussions about the merits and the possibility of settlement.

When litigation is necessary, respondent companies tend to prefer federal court over state court. In addition to the quality of the judiciary, respondents cited greater adherence to the rules and the law in federal court, which results in more consistency and predictability in both the pretrial process and the outcome. With respect to state courts, respondents expressed a preference for business courts specializing in contract and commercial matters.

Discovery presents a significant challenge for respondent companies.

Respondents frequently advocated for curtailing "scorched earth" discovery and focusing its scope on the real issues in dispute. Suggestions included limiting the number of depositions and interrogatories, as well as having only one neutral expert. There were also suggestions for scaled or staged discovery, in accordance with the needs of the case. Many respondents envisioned a stronger role for judges in determining the parameters of discovery.

Respondents reported inconsistent communication and low levels of agreement between parties on discovery. According to respondents, parties are able to agree on the process for conducting discovery more frequently than they are able to agree on the scope of information to be exchanged. Nevertheless, for both issues, approximately 70% to 80% of respondents indicated an agreement no more than half the time.

In addition, respondents reported high levels of discovery misconduct. Nearly 40% indicated that parties frequently (often or almost always) "ignore or violate discovery rules." Over 60% indicated that parties frequently "harass or obstruct the opposition," by giving obviously inadequate answers or requesting information clearly not discoverable, for example. Over 70% indicated that parties "overuse permitted discovery procedures," by going beyond what is necessary or appropriate for the particular case. Such abuse was the most commonly cited justification for discovery cost-shifting.

Electronic discovery, in particular, presents a challenge for respondent companies.

Nearly one-quarter of respondent companies had requests for electronically stored information in every case in the last five years. By contrast, only 5% reported solely traditional paper discovery in all cases.

The majority of respondent companies reported establishing important e-discovery policies – litigation hold policies and records retention/destruction policies. However, fewer companies have implemented structures to proactively understand and manage their electronic data. Moreover, many respondents acknowledged significant resource gaps with respect to e-discovery. Over 40% do not believe that their company has sufficient in-house or outside expertise and infrastructure to implement "an adequate but targeted [litigation] hold without undue cost and delay." Exactly 65% indicated that their company does not have sufficient in-house or outside expertise and infrastructure to conduct an e-discovery search "without undue cost and delay."

There is also a consensus that legal professionals have inadequate familiarity with e-discovery technologies, as exactly 70% of respondents disagreed that attorneys have sufficient knowledge to obtain necessary information without undue cost and delay, and exactly 70% of respondents disagreed that judges have sufficient knowledge to rule appropriately in discovery disputes.

In terms of the level of information provided by the opposing party, nearly 65% of respondents indicated that their company usually has sufficient information about the claim(s) to implement an adequate but targeted litigation hold. However, respondents are split on whether their company usually has sufficient information from an e-discovery request to conduct a reasonable search.

Respondents would like to see clear, streamlined, and binding e-discovery rules based on "reasonableness" rather than "technical feasibility." One respondent commented: "As a general matter, for commercial contract disputes, the costs and abuses generated by unlimited e-discovery eclipse any true value in the discovery obtained."

A majority of respondents (62%) believe that greater court involvement in "crafting an e-discovery plan prior to a dispute would improve the process." With respect to sanctions, a majority of respondents (56%) disagreed that "motions for sanctions are a useful tool in responding to e-discovery abuse." Nevertheless, a majority (53%) did agree that "the threat of sanctions is a significant consideration in my company's e-discovery decisions."

While acknowledging the benefits of alternative dispute resolution ("ADR"), respondents had mixed reactions on its overall utility.

For nearly 85% of respondent companies, less than one-third of the company's civil caseload has been handled exclusively through an ADR process rather than the courts in the last five years. On average, ADR was contractual or by agreement of the parties in 71% of a company's cases, and court-ordered in 29% of cases. On average, ADR consisted of mediation in 59% of a company's cases, arbitration in 39% of cases, and some other form of dispute resolution in 2% of cases.

Of respondents who reported that a percentage of their company's caseload was handled in mediation, a strong majority believe that mediation involves shorter disposition times (83%) and lower overall costs (80%) than litigation. Moreover, a majority (61%) believe that there is no difference in the fairness of the two processes.

Of respondents who reported that a percentage of their company's caseload was handled in arbitration, a weaker majority believe that arbitration involves shorter disposition times (63%) and lower overall costs (55%) than litigation. Moreover, a plurality (47%) believe that there is no difference in the fairness of the two processes, but a significant portion (37%) find arbitration to be less procedurally fair.

The comments on ADR varied. Some respondents noted that the marginal time and cost benefits of ADR are decreasing, as ADR has assumed many of the attributes of litigation. There are additional benefits, such as a non-public process and more limited exposure, but also additional drawbacks, such as inconsistencies in the quality of the decision-maker, the procedures employed, and the extent to which the law is followed.

I. INTRODUCTION

The Institute for the Advancement of the American Legal System ("IAALS") at the University of Denver 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.

IAALS conducted the General Counsel Survey from November 2009 to January 2010. IAALS sent the survey to individuals on the Chief Legal Officer/General Counsel list of the Association of Corporate Counsel ("ACC"). In order to accurately capture the company experience, only one survey was completed per company, either by the individual on the ACC list or by a high-level designee capable of speaking for the company's legal department.

The General Counsel Survey is a companion to the 2008 Survey of the Fellows of the American College of Trial Lawyers ("ACTL Fellows Survey"), which was completed as part of a joint project between IAALS and the American College of Trial Lawyers Task Force on Discovery and Civil Litigation.[1] The ACTL Fellows Survey sought to gain insight from attorneys with extensive trial experience into whether serious problems plague the American civil justice system and, if so, to determine the dimensions of those problems. "The results of the [ACTL Fellows Survey] reflect the fact that circumstances under which civil litigation is conducted have changed dramatically over the past seventy years since the current prevailing civil procedures were adopted."[2]

The inquiry could not end with the ACTL Fellows Survey, however informative and useful. IAALS determined that a survey of in-house counsel, a population not included in the original survey, would contribute to the current national dialogue on civil procedure reform. The role of in-house counsel is unique, as it involves both a professional understanding of the civil justice system and the point of view of a litigant. The ability to capture a litigant's perspective is important to any evaluation of the system, and individual clients are difficult to access. Recognizing that in-house counsel can speak only for a specific category of litigants, this category is an important one, as businesses are often repeat players in civil litigation. Also recognizing that an evaluative survey is necessarily subjective, IAALS nevertheless believes that in-house counsel can address the successes and failures of the civil justice process – and should have a stage on which to do so.

The General Counsel Survey explored the opinions of those who lead corporate legal departments regarding how businesses experience the American civil justice process. The global research questions included:

- What does civil litigation in U.S. courts currently look like for companies?
- Are there inefficiencies in the system that can or should be addressed?
- What are the benefits and drawbacks of the current discovery process?
- What is the impact of electronic discovery?

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[1] 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).

[2] Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, *Final Report*, 3 (Mar. 11, 2009, revised April 15, 2009).

- Does alternative dispute resolution provide a satisfactory alternative to litigation?
- How can the American civil justice system be improved?

II. METHODOLOGY

IAALS created the General Counsel Survey with the help of the Butler Institute ("Butler"), an independent social science research organization at the University of Denver. The Association of Corporate Counsel, a membership organization of attorneys practicing in the legal departments of private-sector organizations, agreed to support the effort and provided IAALS with its list of Chief Legal Officers and General Counsel.[3]

A. SURVEY DEVELOPMENT

The survey development process began with a series of hypotheses and research questions concerning civil litigation, discovery, and alternative dispute resolution. The survey instrument was then shaped over the course of several months in an iterative process of review and revisions, informed by the previous survey of the ACTL Fellows. IAALS created two versions of the General Counsel Survey, which were identical in content. A computerized version was produced using Qualtrics online survey software, while a paper version was produced using Adobe PDF.

Once completed, three leaders of legal departments in diverse companies reviewed and provided comments on the survey.[4] As a result, IAALS obtained invaluable feedback on the presentation and substance of the survey questions. Upon conclusion of the feedback 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's intent was to capture both the experience of companies as civil litigants and the opinions of those at the helm of their legal departments. Accordingly, IAALS designed the survey to be completed by one Chief Legal Officer or General Counsel per company. ACC provided IAALS with its Chief Legal Officer/General Counsel list. Where the list contained multiple individuals from the same company, an IAALS research analyst determined which individual held the highest level position, and removed the others from the list. Once the list was ready for survey administration, it contained 5,257 individual email addresses.

Butler administered the survey. Using the Qualtrics survey software, Butler sent four survey-related e-mails. On November 23, 2009, an email signed by Charles E.M. Kolb, President of the Committee for Economic Development, and Thomas A. Gottschalk, Of Counsel at Kirkland and Ellis, LLP, explained the importance of the study and provided each potential participant with a unique link to the online version. The e-mail was distributed to the entire list of 5,257 (with fewer than 105 returned as "undeliverable"). On November 25, 2009, The Metropolitan Corporate

[3] This decision was made under the leadership of Susan Hackett, ACC Senior Vice President and General Counsel. The organization describes itself as promoting "the common professional and business interests of in-house counsel who work for corporations, associations and other private-sector organizations through information, education, networking opportunities, and advocacy initiatives." Assoc. of Corporate Counsel, *Mission and Vision*, http://www.acc.com/aboutacc/missionandvision.cfm.

[4] This group consisted of: Chief Legal Officer of a national restaurant chain; Associate General Counsel of a large financial services company; and General Counsel of a small real estate investment, development, and management company.

Counsel, a monthly professional publication, posted a message in its December print issue and on its website, encouraging participation by those who had received an email invitation to do so.[5]

On December 8, 2009, an e-mail signed by Mr. Gottschalk reminded potential participants to complete the survey. This email was sent to those on the list who had not already participated. On December 16, 2009, an email signed by Rich Baer, Executive Vice President, General Counsel, and Chief Administrative Officer of Qwest, informed potential participants that the survey completion deadline had been extended to obtain additional responses. On January 13, 2010, potential participants received a final reminder email signed by IAALS Executive Director Rebecca Love Kourlis.

All four e-mails contained instructions for requesting a hard-copy version of the survey. In addition, the emails emphasized that only one survey should be completed per company. If the recipient could not complete the survey, the e-mails requested that the recipient designate a high-level individual – capable of speaking for the company concerning its civil litigation – to complete the survey instead. The survey was officially in the field for approximately eight weeks, from November 23, 2009 until January 15, 2010. However, responses were accepted for 12 additional days, until January 27, 2010.

C. SURVEY ADMINISTRATION

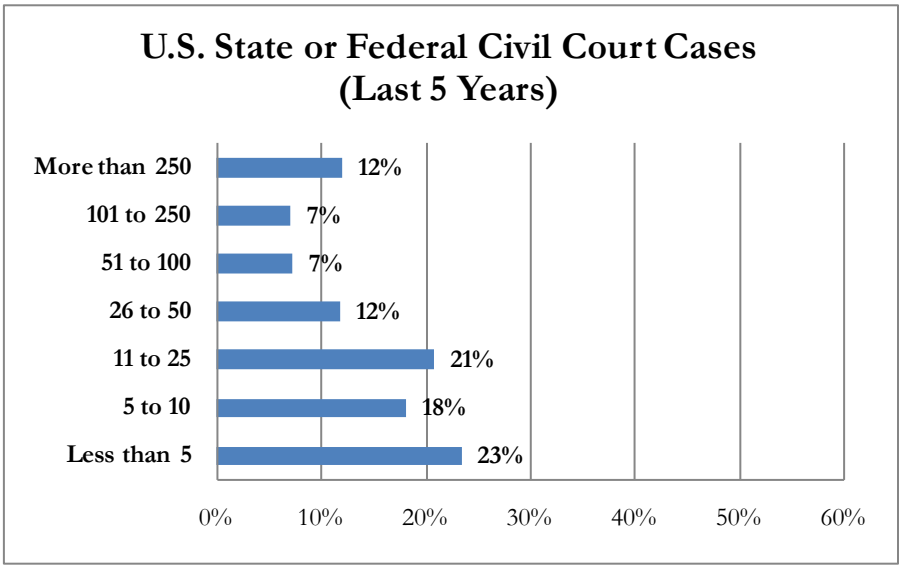
In order to preserve the confidentiality of responses, a Butler researcher served as the point of contact for survey participants. While the survey was in the field, Butler monitored operation of the online version, responded to requests for hard-copy versions, and collected the data in a password-protected environment. Upon conclusion of the survey period, Butler exported the data into an analytical software program in a password-protected file. Thereafter, Butler conducted a data verification process, eliminating respondents who did not provide an answer to any 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.

[5] Editor Albert Driver made the offer to dedicate publication space to the survey.

D. SURVEY RESPONSES

After the data verification process, there were a total of 485 valid responses to the survey. The first six questions probed company demographics. The seventh question asked for the number of U.S. state and federal civil court cases that the company's legal department had been involved in litigating in the last five years, either as a party or as a non-party respondent to a subpoena. See Figure 1 for the distribution of responses.

Figure 1 (Survey Question 7)



In total, 112 respondents (almost one-quarter) indicated that their company had "less than 5" state or federal civil cases in the last five years – less than one per year, on average. Due to low litigation levels, the survey then ended for this group, and these respondents did not answer any of the substantive questions concerning the legal system and process. In total, 367 respondents (over three-quarters), indicated that their company had five or more U.S. civil court cases in the last five years. This is the group that answered the survey's substantive questions, and will be referred to as "respondent companies."

With 367 valid responses and at a 90% confidence level, the overall substantive results are within +/– 4.14%. For this calculation, the population is defined as the 5,257 companies with an individual on ACC's Chief Legal Officer/General Counsel list in November 2009. ACC is a voluntary membership organization of attorneys practicing in private-sector organizations, with annual dues of up to $260 per person.[6]

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. As a result of rounding, the sum of reported percentages may not equal exactly 100%. IAALS did not make any adjustments to the survey data.

[6] Assoc. of Corporate Counsel, *Membership*, http://www.acc.com/aboutacc/membership/index.cfm. Annual dues can be as low as $125 per person with a law department or company membership, and may be waived or reduced for individuals who are "in transition" or retired.

III. DEMOGRAPHICS OF RESPONDENT COMPANIES AVERAGING ONE OR MORE U.S. CIVIL COURT CASES PER YEAR

The survey's substantive questions were answered by representatives of companies handling an average of one or more civil court cases per year. To put the responses into context, the survey gathered background information on these companies.

A. COMPANY INDUSTRY

The survey contained a place for respondents to specify their company's "primary industry." Respondent companies represent a wide variety of industries. Examples of the diverse responses include: "aerospace manufacturing," "advertising," "amusement parks," "dietary supplements," "education," "engineering," "food distribution," "funeral services," "health care," "navigation devices," "oil and gas," "property management," "reproductive biology – livestock," and "retail apparel."

Classifying the open-ended responses according to the broadest categories of the 2007 North American Industry Classification System ("NAICS"),[7] Figure 2 shows the portion of respondents in each designated industry.[8] It is clear that the survey was not dominated by any particular segment of the economy.

[7] "The North American Industry Classification System (NAICS) is the standard used by [f]ederal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy." U.S. Census Bureau, *NAICS Main Page*, http://www.census.gov/eos/www/naics/index.html.

[8] In classifying the responses, an IAALS research analyst made the following judgment calls: 1) "energy" was classified as a utility; 2) "outsourcing" was classified as an administrative and support service; 3) "distribution," "supplier," and "importer" were classified as wholesale trade; 4) "information technology," "software," "technology," and "information services" were classified as professional and technical services; and 5) "e-discovery" was classified as an information industry. If a respondent listed more than one industry, only the first listed was classified and counted.

Figure 2 (Survey Questions 1, 7)

Industry: North American Industry Classification System	
Manufacturing	16%
Finance and Insurance	14%
Other[9]	11%
Professional, Scientific, and Technical Services ("Professional Services")	11%
Construction	6%
Utilities	5%
Retail Trade	5%
Wholesale Trade	4%
Health Care and Social Assistance	4%
Accommodation and Food Services	4%
Administrative and Support Services	4%
Real Estate and Rental and Leasing	4%
Information	3%
Mining, Quarrying, and Oil and Gas Extraction	2%
Transportation and Warehousing	2%
Public Administration	2%
Educational Services	1%
Other Services (not Public Administration)	1%
Agriculture, Forestry, Fishing and Hunting	1%
Arts, Entertainment, and Recreation	1%

B. COMPANY LOCATION

The vast majority (92%) of respondent companies are headquartered in the United States. However, respondent companies are also located in the following regions: Canada (1%); Caribbean (2%); Western Europe (3%); Central Europe (<1%); South and Central Asia (1%); East Asia (1%); Australia and the Pacific (1%).

With the exceptions of Maine, Mississippi, New Mexico, North Dakota, South Dakota, West Virginia, and Wyoming, every American state and Puerto Rico is home to at least one respondent company. Of those headquartered in the United States, Figure 3 shows the portion of respondent companies per state.

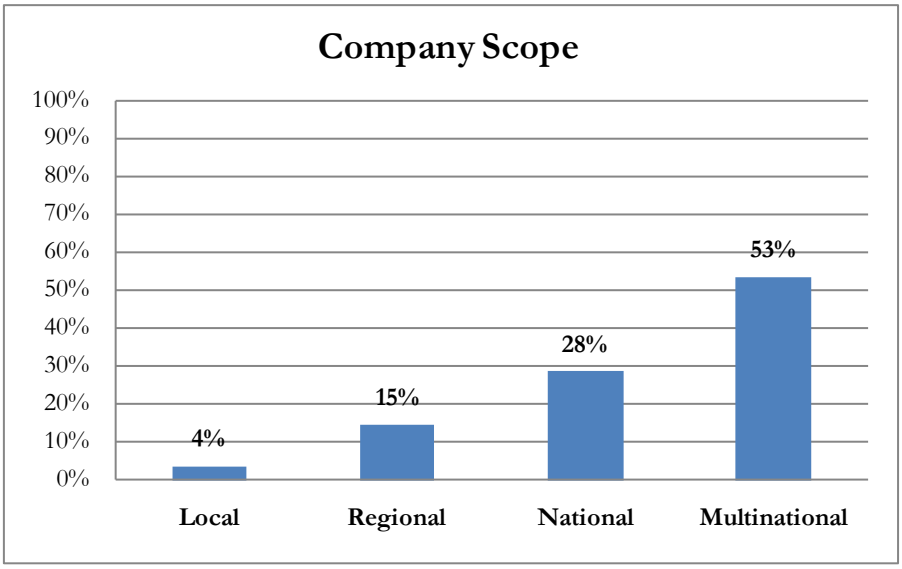
[9] If the research analyst could not properly classify the industry based on the information provided, the response was put into an "other" category. Examples of responses that could not be classified include: "business products," "family office," "food," and "natural resources."

Figure 3 (Questions 3, 7)

Headquarters by State: U.S. Respondents	
California	11%
New York	7%
Illinois, Ohio, Texas – each	6%
Colorado	5%
Massachusetts	4%
Georgia, Florida, Maryland, Michigan, Missouri, New Jersey, Pennsylvania, Wisconsin – each	3%
Connecticut, Indiana, Iowa, Minnesota, North Carolina, Oklahoma, Tennessee, Virginia, Washington – each	2%
Alabama, Arizona, Delaware, Kansas, Kentucky, Louisiana, Montana, Nebraska, Nevada, New Hampshire, Puerto Rico, Rhode Island, South Carolina, Utah – each	1%
Alaska, Arkansas, District of Columbia, Hawaii, Idaho, Oregon, Vermont – each	<1%

Figure 4 shows the distribution of respondent companies by geographical scope. The majority are multinational, while almost 30% are national and almost 20% are regional or local.

Figure 4 (Questions 2, 7)



C. COMPANY SIZE

Figure 5 shows the wide distribution of respondent companies by number of employees. Exactly 30% have fewer than 500 employees, and exactly 30% have 5,000 or more employees.

Figure 5 (Survey Questions 5, 7)

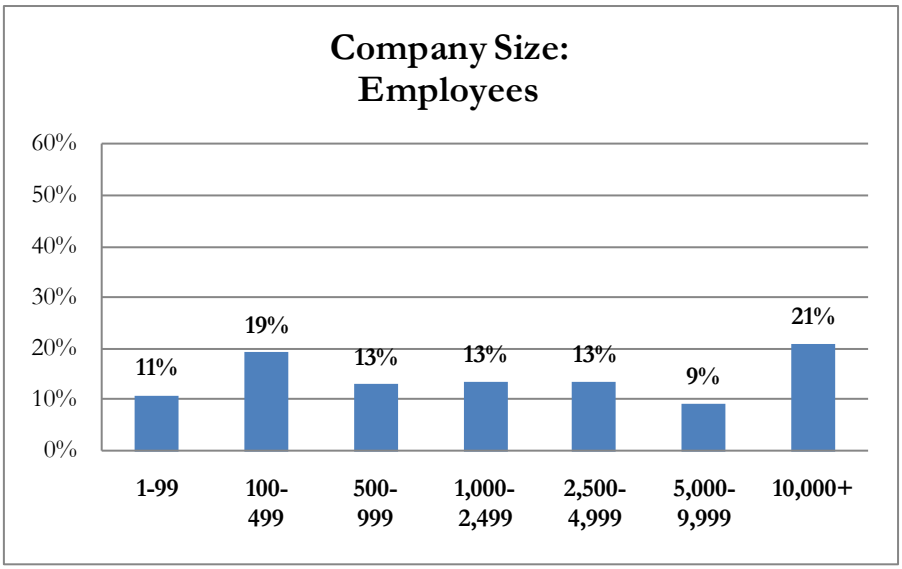
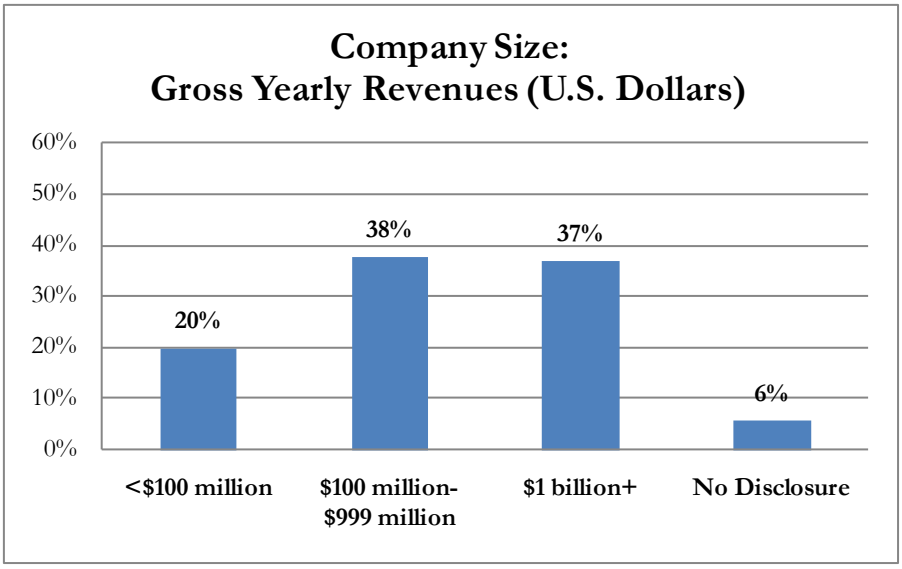


Figure 6 shows the distribution of respondent companies by gross revenues in the last fiscal year. While the categories are broad, the survey was not dominated by any particular income level.

Figure 6 (Survey Questions 4, 7)



IV. THE SURVEY RESULTS

This survey asked general questions about civil litigation, as well as more specific questions about the discovery process and alternative dispute resolution. Respondents were informed that the survey focused on civil litigation in United States federal and state courts, and therefore responses should reflect the company's experience with American court proceedings. Respondents were instructed not to consider internal investigations or the broader universe of administrative or regulatory proceedings that might precede or replace the filing of a complaint.

Respondents were not required to answer every question, and 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*".

Noteworthy differences in responses between companies – by industry, size, and scope – are mentioned.

A. CIVIL LITIGATION IN THE LAST FIVE YEARS

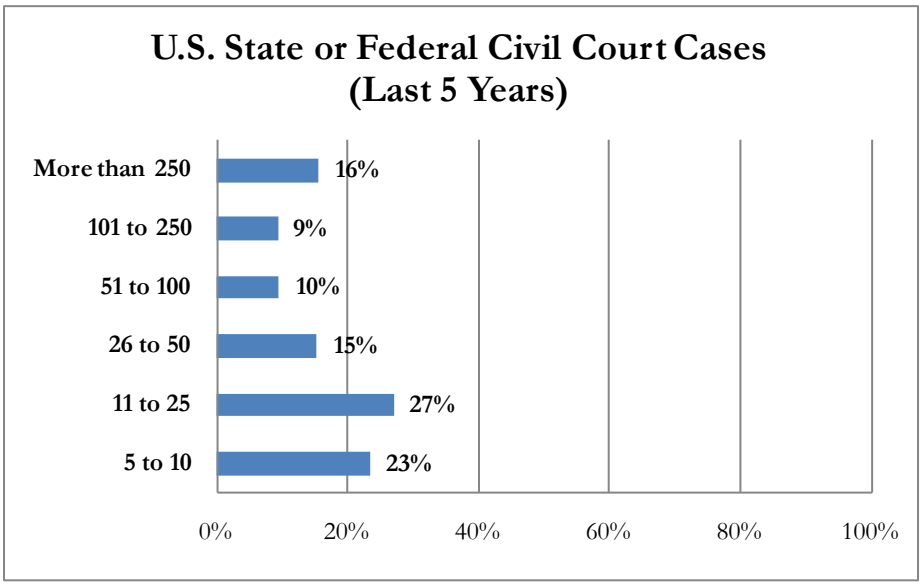
The survey sought to capture a picture of civil litigation for respondent companies. For all questions in this section, the applicable time frame is limited to the last five years.

1. COMPANY LITIGATION GENERALLY

With respect to U.S. civil caseload, exactly one-quarter of respondent companies averaged more than 100 cases per year, over one-third (35%) averaged more than 50 cases per year, and exactly half of respondent companies averaged more than 25 cases per year[10]. See Figure 7.

[10] The values presented here were updated in May 2013.

Figure 7 (Survey Question 7)
n = 367



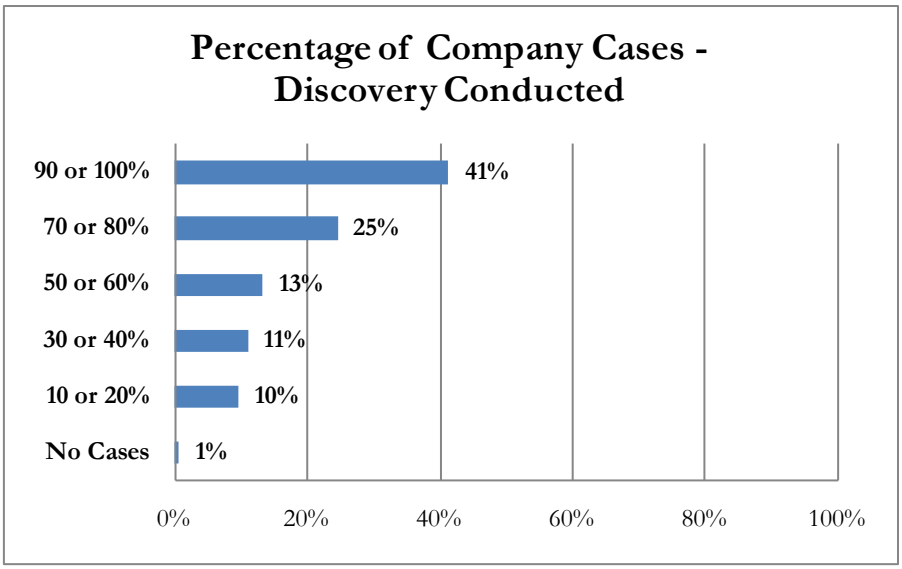
Of the top three industries – manufacturing, finance and insurance, and professional services – finance and insurance had the most respondent companies with more than 250 cases (25%), while professional services had the most respondent companies with 10 or fewer cases (49%).

On average, respondent companies were plaintiffs in 18% of their cases, defendants in 70% of cases, and non-party respondents in 12% of cases. On average, two-thirds of company cases were in state court (66%), while one-third (34%) were in federal court.

Respondents were asked to indicate up to three types of cases most commonly litigated by the company. The most frequently selected case types were "contract disputes" (54%), "employment discrimination" (41%), and "personal injury" (26%). In addition, "complex commercial," "product liability," and "intellectual property" were reported by 19%, 18%, and 17% of respondents, respectively. No other case type was indicated by more than 13% of respondents.

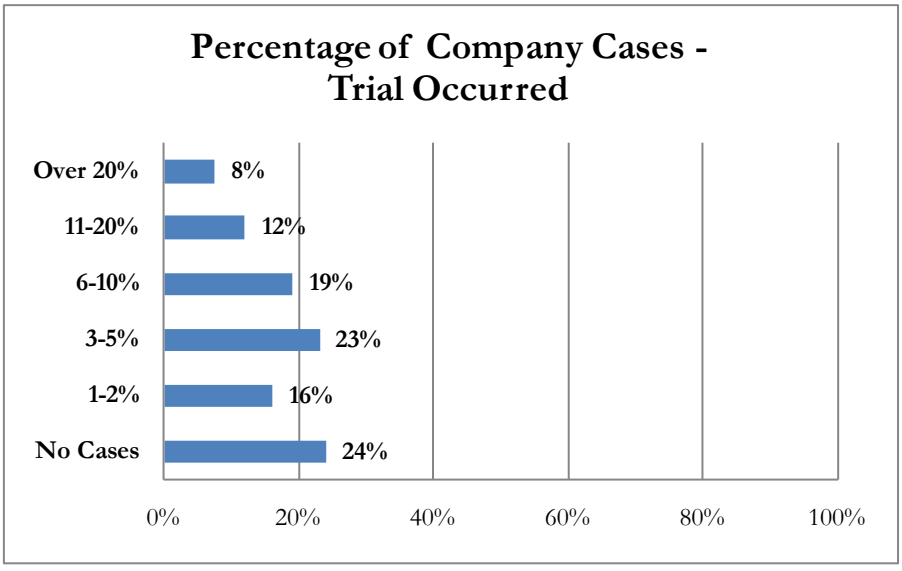
As shown in Figure 8, two-thirds of respondent companies (66%) reported that discovery was conducted in at least 70% of the company's cases, and a plurality reported that discovery was conducted in at least 90% of cases.

Figure 8 (Survey Question 12)
n = 347



Nearly one-quarter of respondent companies did not have any cases make it to trial in the last five years. However, a surprising 39% reported that more than 5% of the company's cases proceeded to trial. See Figure 9 for the distribution of responses.

Figure 9 (Survey Question 13)
n = 345



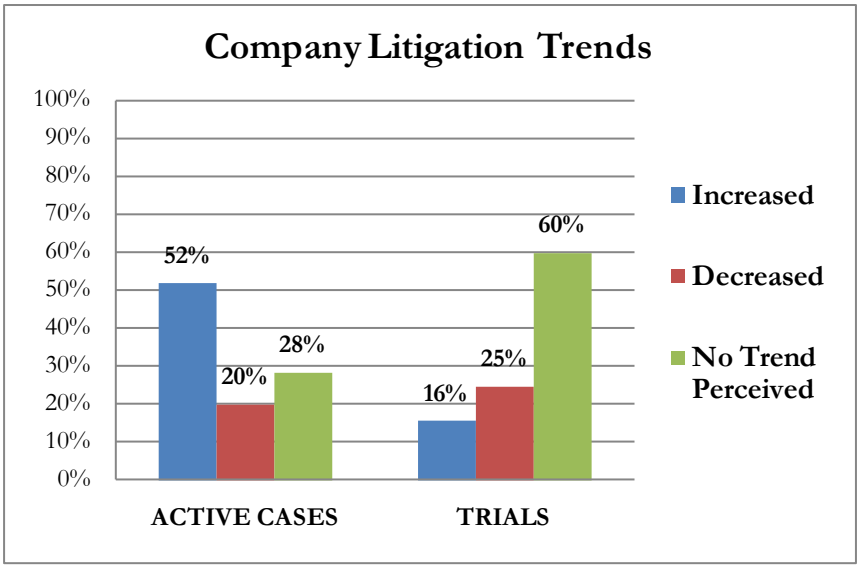
2. COMPANY LITIGATION TRENDS

The survey sought to capture a picture of litigation trends at respondent companies. Again, the applicable time frame is the last five years.

a. Volume

Figure 10 shows respondent assessments of how litigation levels at their company have changed over the last five years. A majority reported that active cases have increased, but only 16% reported that the number of trials has likewise increased.

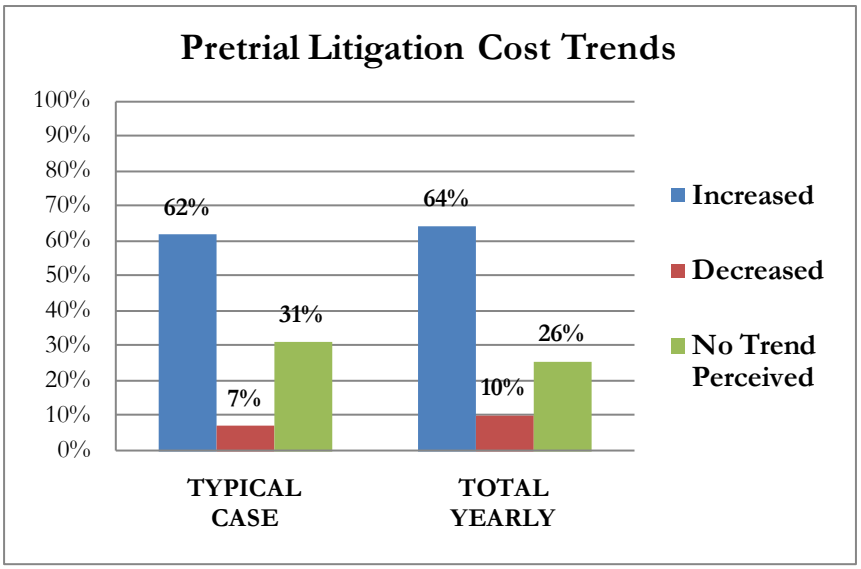
Figure 10 (Survey Questions 14, 15)
n = 343; 342



b. Cost

Figure 11 shows respondent assessments of how pretrial litigation costs at their company have changed over the last five years. A majority reported that the cost of pretrial litigation for a typical company case has increased, and a majority reported that the total yearly cost of pretrial litigation has increased. By either measure, only a small portion of respondents indicated a decrease in costs.

Figure 11 (Survey Questions 26, 27)
n = 309; 308



Respondent companies in professional services were less likely to report an increase in typical case costs (48%) and total yearly costs (52%) than those in manufacturing (63% typical case; 71% total yearly) or finance and insurance (69% typical case; 72% total yearly). In addition, the higher the gross yearly revenues of the respondent company and the wider its scope, the greater the likelihood of a reported increase in both typical case and total yearly costs.

i. *Respondent Comments: Typical Case Costs*

Respondents who reported an increase in pretrial litigation costs for the typical case most commonly cited discovery in general, and e-discovery in particular, as the basis for the trend. They noted that the burden of discovery has increased due to an increase in its scope and costs, as well as an increase in the volume of documents and data the company maintains. An increase in attorney billing rates was the next most common reason provided. One respondent stated that the "[l]egal system is perpetuating itself as a business, not as a profession."

Respondents who reported a decrease in pretrial litigation costs for the typical case most commonly cited changes to in-house processes, such as the creation of a litigation team, more efficient data collection, better technology, better management of outside counsel, and increased use of paralegals. They also indicated an increased emphasis on early resolution and settlement. A couple of respondents mentioned moving their company's legal business to smaller firms.

ii. *Respondent Comments: Total Yearly Costs*

For respondents who reported an increase in the company's total yearly pretrial litigation costs, the cost of discovery was by far the most common reason provided. In particular, respondents cited the cost of e-discovery and issues related to electronically stored information, and expressed concern that the scope of discovery is too broad. A considerable portion of this group indicated an increase in attorney billing rates, and a considerable portion indicated an increase in the number of cases. Several respondents noted that procedures are more frequently abused, and several noted that cases have become larger and/or more complex.

Respondents who noted a decrease in the company's total yearly pretrial litigation costs most commonly cited fewer cases and less litigation. Several respondents mentioned more aggressive settlement, while another mentioned an "increased emphasis on claim avoidance." Respondents also indicated internal cost-cutting measures, such as moving to a smaller firm for outside counsel, more or better in-house lawyering, and increased use of paralegals.

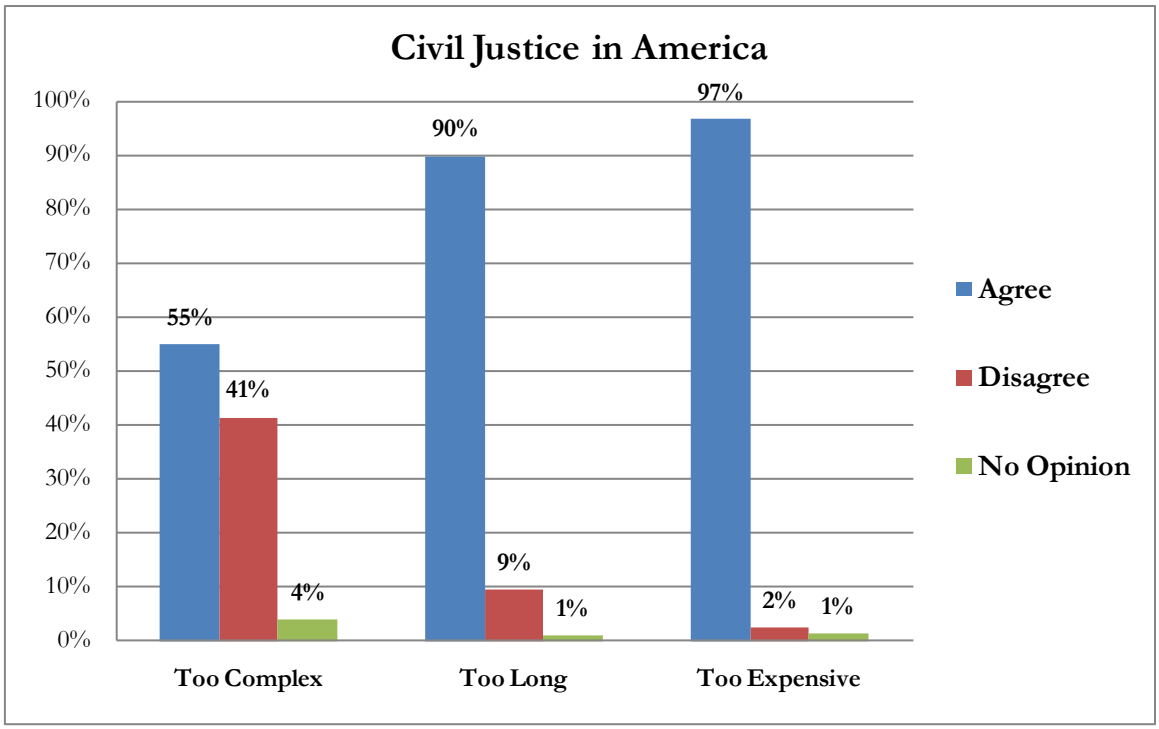
B. THE CIVIL LITIGATION SYSTEM GENERALLY

The survey asked the extent to which respondents agree or disagree with "common complaints" about the American civil justice system, as a general matter.[11] With respect to delay and cost, the numbers are overwhelming.

A majority (55%) of respondents agreed that the civil justice system is "too complex," with over 20% expressing strong agreement. Moreover, a solid majority (90%) agreed that the system takes "too long," with a majority (57%) expressing strong agreement. In addition, an astonishing 97% of respondents responded that the system is "too expensive," with 78% expressing strong agreement. Figure 12 shows the distribution of responses for these three issues.

[11] The categories "agree" and "strongly agree" are collapsed into one category unless otherwise noted. The same is true for the "disagree" and "strongly disagree" categories.

Figure 12 (Survey Questions 16a-16c)
n = 341; 345; 345



Of those who expressed an opinion, agreement that the system is too expensive tended to become stronger as the geographic scope of the respondent company increased, from 92% for local companies to 98% for multinational companies. One respondent explained how complicity can rest with all of the legal professionals involved:

> The plaintiff[s'] lawyers take the tactic of suing as many defendants as possible under as many legal theories as possible to 'see what sticks' . . . The defense attorneys, billing at an hourly rate, benefit [from the resulting] broad discovery and the amount of time and effort it requires . . . The judges . . . often do not grant motions . . . that could serve to whittle the complaint down to the true cause of actions [or] act to sufficiently limit discovery. By freely granting motions to continue, they allow the cases to drag on for years . . . .

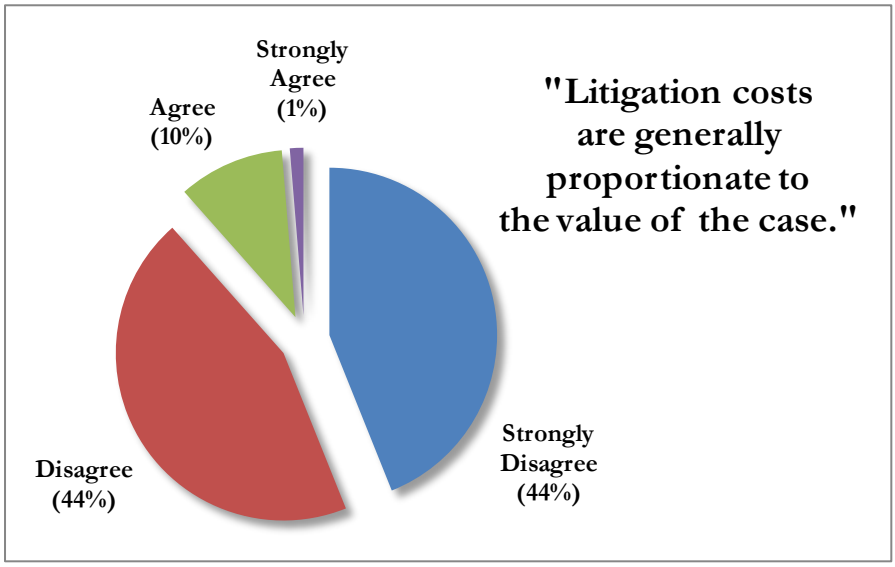
1. THE ISSUE OF COST

The survey probed cost issues and how they affect litigation. One respondent commented:

> Since the onset of formal discovery rules, commercial litigation has increasingly become a contest of budgets. This in combination with in house counsels' unfamiliarity with and fear of litigation and its consequences and [the] related need to hire the "best" (read largest) firms has increased litigation to an economically expensive game.

Respondents find that litigation costs are commonly out of line with the stakes. Nearly nine out of ten respondents disagreed with the statement that "litigation costs are generally proportionate to the value of the case." See Figure 13 for the distribution of answers.

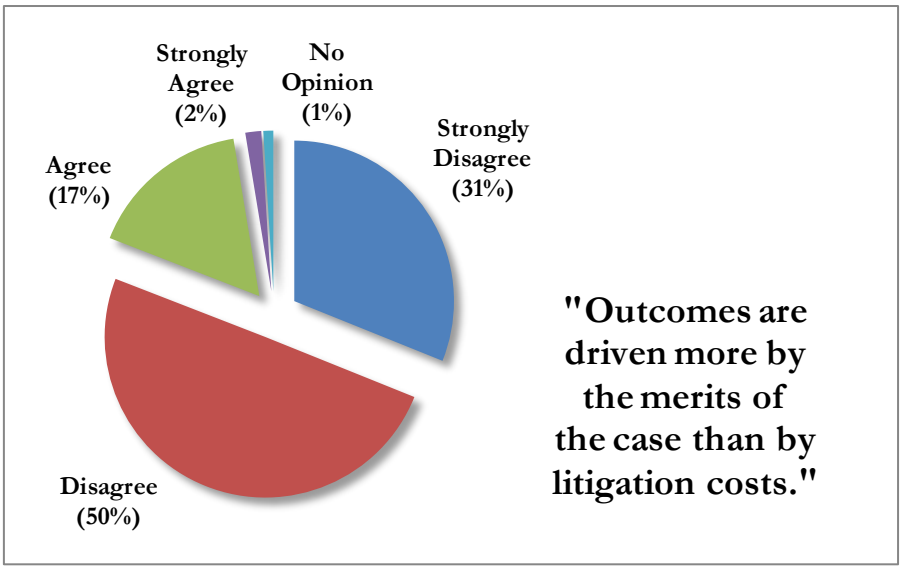
Figure 13 (Survey Question 28a)
n = 315



One respondent explained that the cost of preparing for summary judgment and proceeding through discovery can approach $100,000, even in minor actions.

Not surprisingly, therefore, respondents find that the merits of a case generally do not prevail over cost considerations in determining the result. Over 80% disagreed with the statement that "outcomes are driven more by the merits of the case than by litigation costs." See Figure 14.

Figure 14 (Survey Question 28b)
n = 315

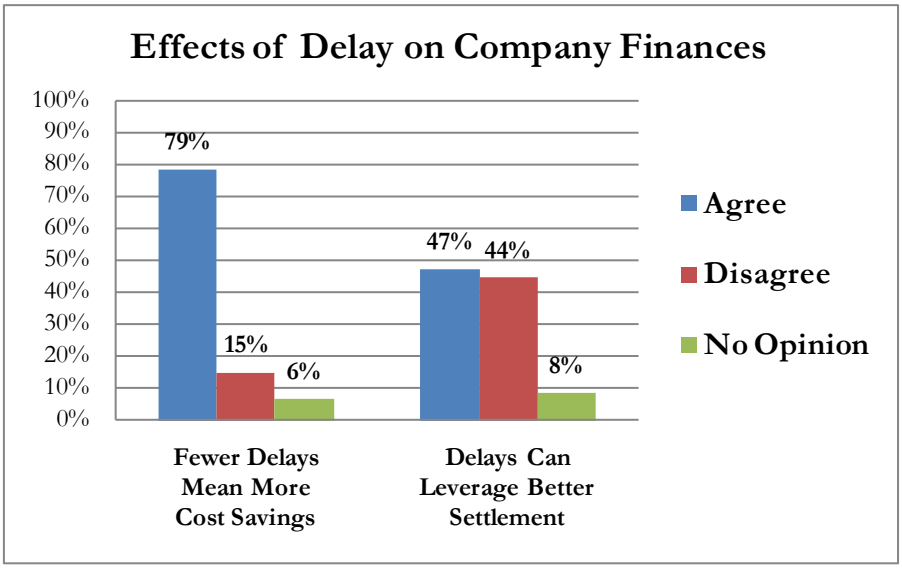


To further refine the issue, one respondent commented that "[d]iscovery cost is a higher factor in the higher value cases."

2. THE ISSUE OF DELAY

The survey probed the effects of delay on company finances, both in terms of pretrial litigation costs and settlement values. Nearly 80% of respondents agreed that "the fewer the delays in the litigation process, the more my company saves in litigation." However, there was no real consensus on the statement that delays "can sometimes save my company money by leveraging a more advantageous settlement." See Figure 15.

Figure 15 (Survey Questions 28c, 28d)
n = 314; 315

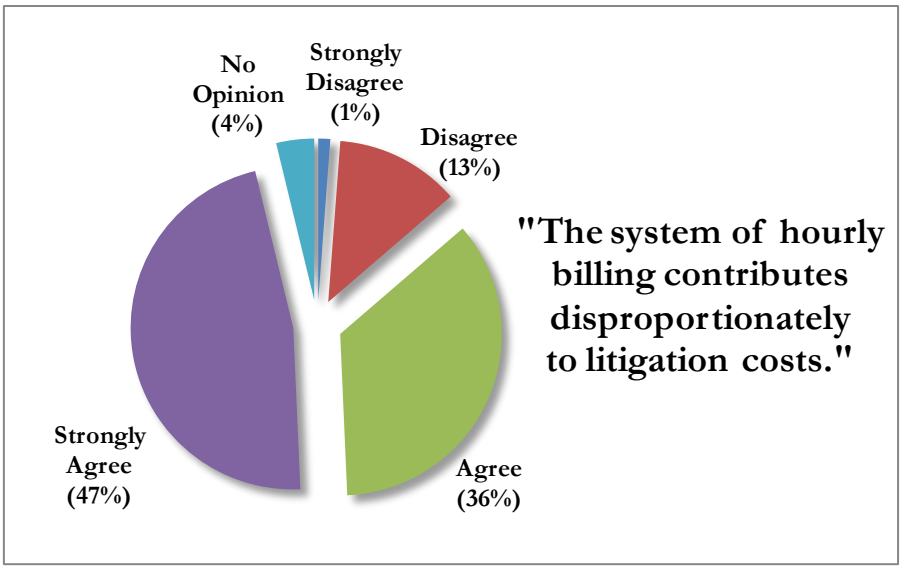


The higher the gross yearly revenues of the respondent company, the greater the tendency to believe in the cost savings of delay reduction. The agreement level rose steadily from 73% for companies with incomes less than $100 million, to 78% for companies with incomes from $100 to 999 million, to 84% for companies with incomes of $1 billion or more. However, a similar trend was not observed with respect to the ability to leverage a better settlement due to delay.

3. ATTORNEY PRACTICES

Respondents indicated that attorney practices contribute to problems in the civil justice system. As shown in Figure 16, almost 85% agreed with the statement that "the system of hourly billing contributes disproportionately to litigation costs."

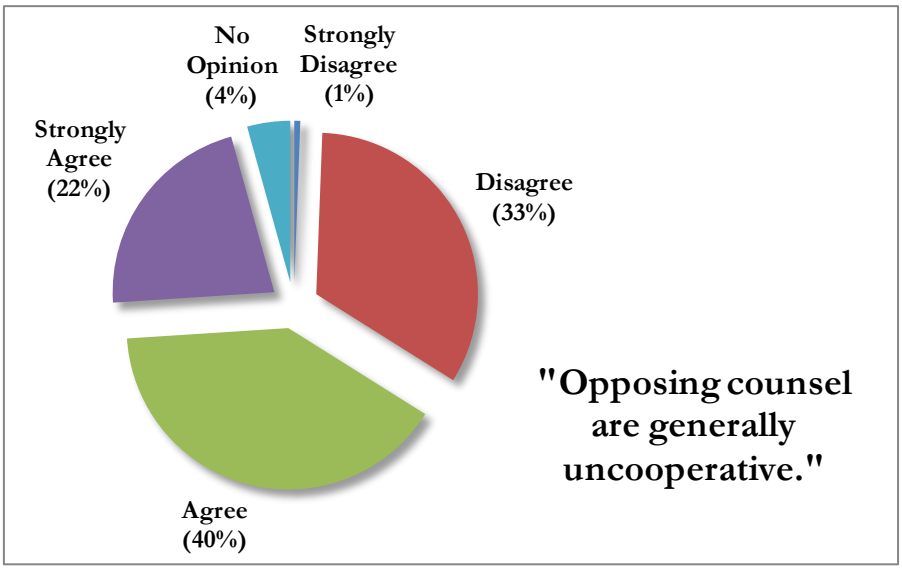
Figure 16 (Survey Question 16f)
n = 345



One respondent described the hourly billing system as "broken" and questioned how to rationalize paying new attorneys up to $400 and senior partners over $1,000, even at "tier 1" firms. Another wrote: "[L]egal fees and discovery costs have ruined civil trials as a truth seeking method. Lawyers have no incentive to get things over with. This makes me sad because I think the trial system could be a good way to get to the truth of some things."

Respondents also find cooperation between opposing counsel to be an issue. Over 60% agreed with the statement that "opposing counsel are generally uncooperative." However, about one-third disagreed. See Figure 17 for the distribution of answers.

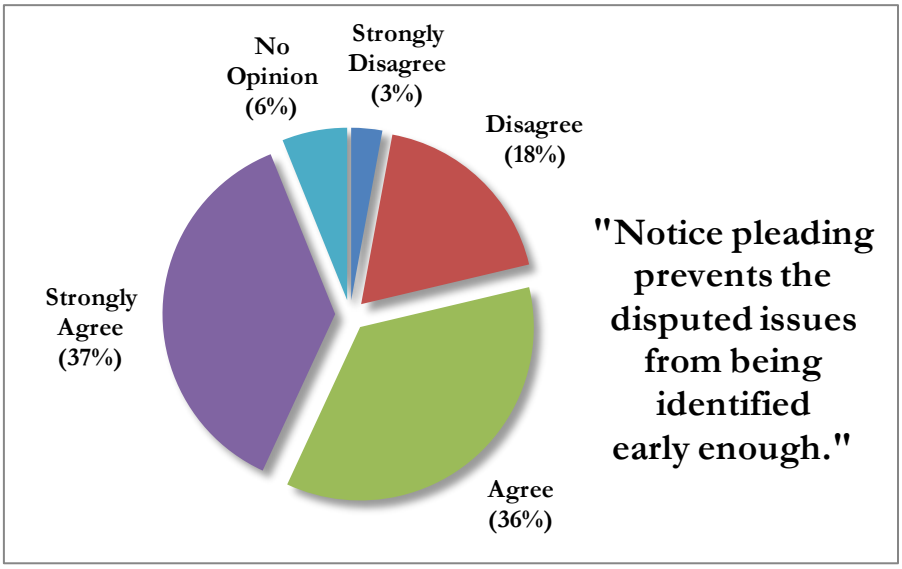
Figure 17 (Survey Questions 16d)
n = 345



4. PLEADING STANDARDS

Respondents believe that notice pleading is an obstacle to the early identification of issues. Nearly 75% agreed with the statement that "notice pleading prevents the disputed issues from being identified early enough," with over one-third expressing strong agreement. Nevertheless, about 20% disagreed. See Figure 18.

Figure 18 (Survey Question 16e)
n = 343

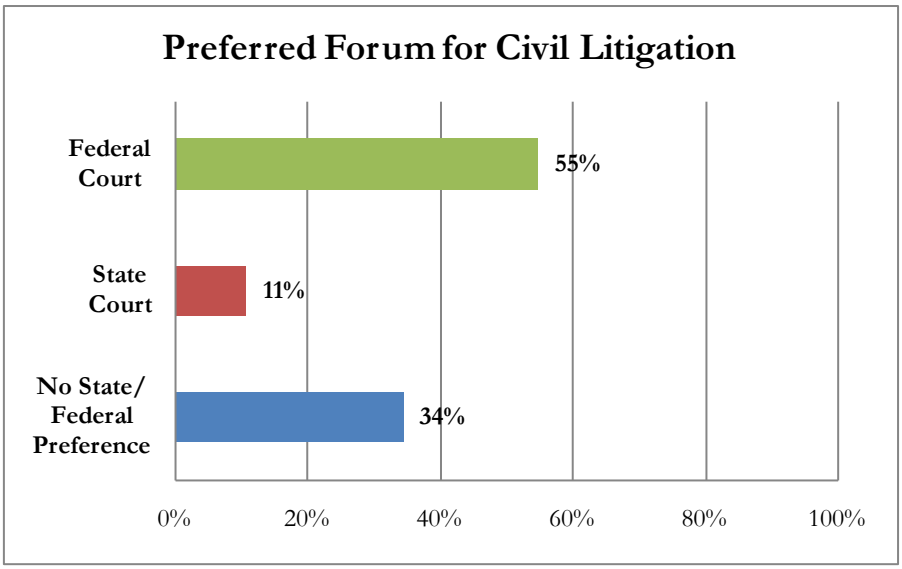


Of those who expressed an opinion, respondent companies with 500 or more employees agreed that notice pleading prevents early identification of issues at a higher rate (82%) than companies with fewer than 500 employees (68%).

5. PREFERRED COURTS

The survey asked for the company's preferred court, when litigation is necessary. A majority of respondents expressed a clear preference for federal court. Only about one in ten respondents expressed a preference for state court. The remaining one-third did not express a clear preference between state and federal court. See Figure 19.

Figure 19 (Survey Question 17)
n = 250



Respondents who prefer federal court for their company most commonly cited the quality of the judiciary as the basis for this preference. They described the federal bench as fair, balanced, and independent, while describing elected state court judges as biased, political, and "beholden to their constituency." This group also perceives federal judges to be more learned, experienced, knowledgeable, and sophisticated. They stated that the federal courts adhere to the rules and the law to a greater extent, and are not afraid to enforce standards or make difficult decisions. The result is more consistency and predictability, in both the pretrial process and the outcome. Several of these respondents remarked that litigation in federal court proceeds at a faster pace. The court that received the most specific mention was the Eastern District of Virginia, due to its "rocket docket" and strict rules on scheduling and discovery. Jurisdictions also mentioned by more than one respondent: California's federal courts; the Southern District of New York; and the Southern District of Texas-Houston Division.[12]

Respondents who prefer state court for their company commented that state court provides greater accessibility and flexibility, with faster resolutions at a lower cost. The most preferred state court is the Delaware Chancery Court, due to that court's knowledge of business disputes and "no-nonsense" judges. A number of respondents mentioned New York's state courts, particularly the Commercial Division.[13]

Respondents who did not express a clear state/federal preference gave various reasons. Some commented that it depends upon the case, the circumstances, and the judge. One respondent stated: "Folks prefer certainty, or a certain level of timing, costs and objective fairness; courts that

[12] The jurisdictions named by only one respondent were: the Second Circuit; the Fourth Circuit; Delaware's federal courts; the Middle District of Florida; the Northern District of Georgia; the Southern District of Iowa; the District of Kansas; Massachusetts's federal courts; the District of Minnesota; New Jersey's federal courts; the Northern District of Ohio; the Southern District of Ohio; the Eastern District of Pennsylvania; and the Northern District of Texas.

[13] Other state jurisdictions named: Denver and Jefferson Counties in Colorado; Fulton, Gwinnett, and Hall Counties in Georgia; Michigan state courts; Douglas County in Nebraska; Travis County in Texas; and Washington state courts.

offer the above, to the extent they can, are obviously preferred." Another respondent noted: "Once we're in court, we've already lost."

Regardless of the preference or court indicated, proximity to corporate headquarters is a predominant factor for many respondents, due to more convenient access, greater familiarity with the court, and reduced litigation costs (*e.g.*, no need to hire local counsel or pay travel expenses).

There is also a desire for specialized courts:

> I find that judges (at least state court judges) handle too few business cases to really be familiar with contract and commercial law. They are too busy with their criminal dockets to really pay attention to the evidence (which is often complicated) put before them on a contract or commercial matter. Contract and commercial cases should be handled by courts dedicated to business disputes before judges who are familiar [with] and competent in [such] matters and have the time to review those matters carefully.

C. THE DISCOVERY PROCESS

This survey probed how discovery is conducted, in the experience of respondent companies. It should be noted that the small number of respondents (2) who indicated that discovery was not conducted in any of their company's cases in the last five years were not asked the subsequent questions concerning discovery.

1. DISCOVERY GENERALLY

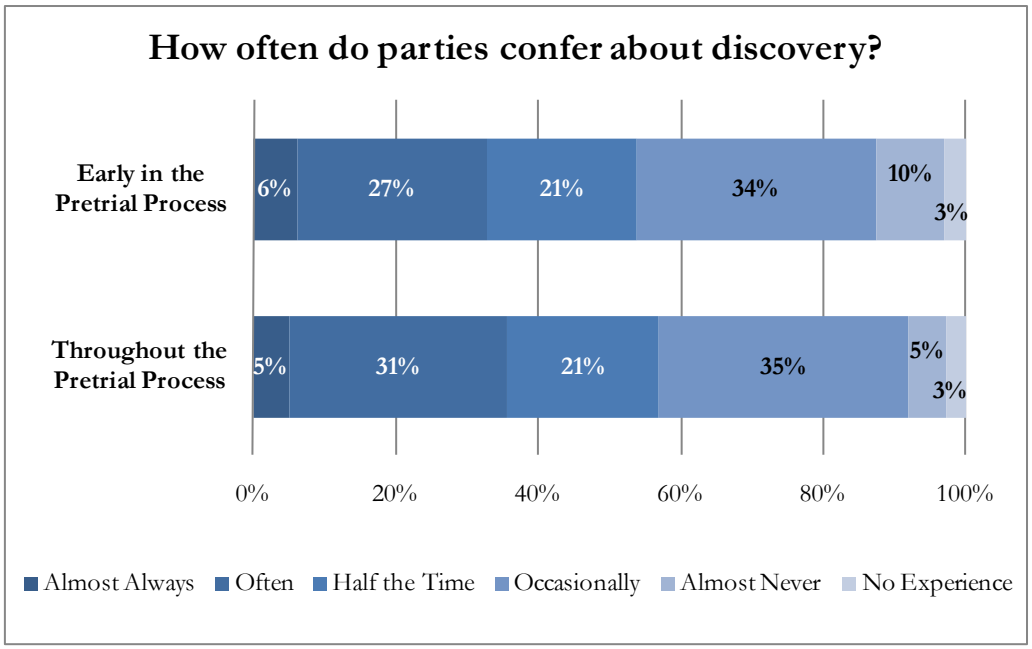
The survey asked the frequency of certain events related to discovery, for respondent company cases in which some discovery was conducted.

a. Conference and Agreement

Notwithstanding rules mandating parties to confer about discovery,[14] responses varied on the extent to which such a conference actually occurs. With respect to conferring early in the pretrial process, only one-third (33%) indicated that it happens "often" or "almost always," while about 20% indicated that it happens "about half the time," and a plurality (44%) indicated that it happens only "occasionally" or "almost never." With respect to conferring throughout the pretrial process, the numbers are fairly similar. See Figure 20.

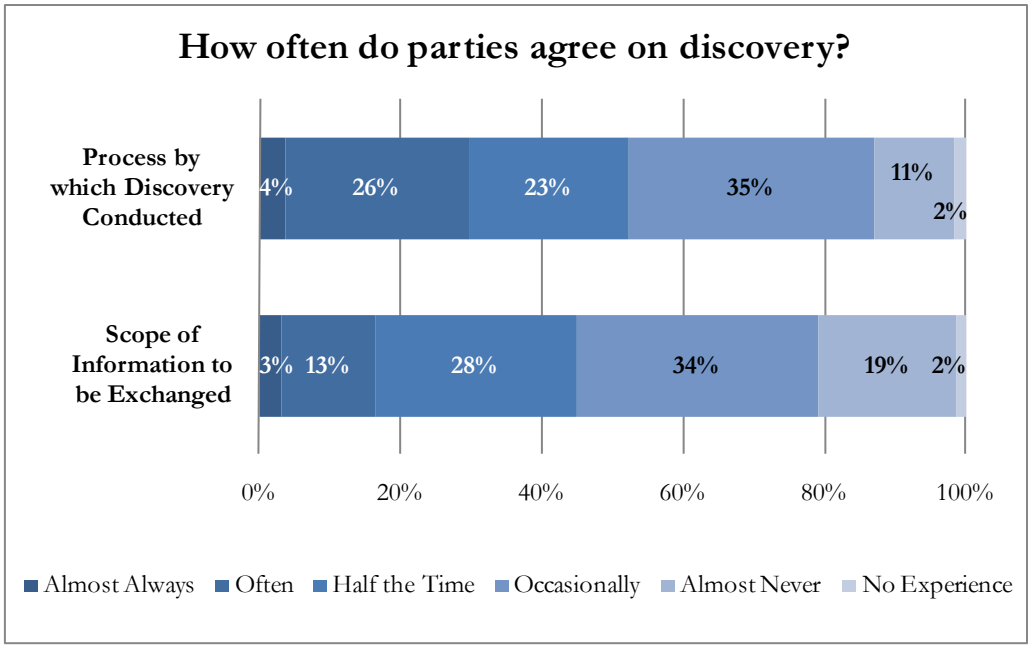
[14] *See e.g.*, FED. R. CIV. P. 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).").

Figure 20 (Survey Questions 18b, 18c)
n = 335; 337



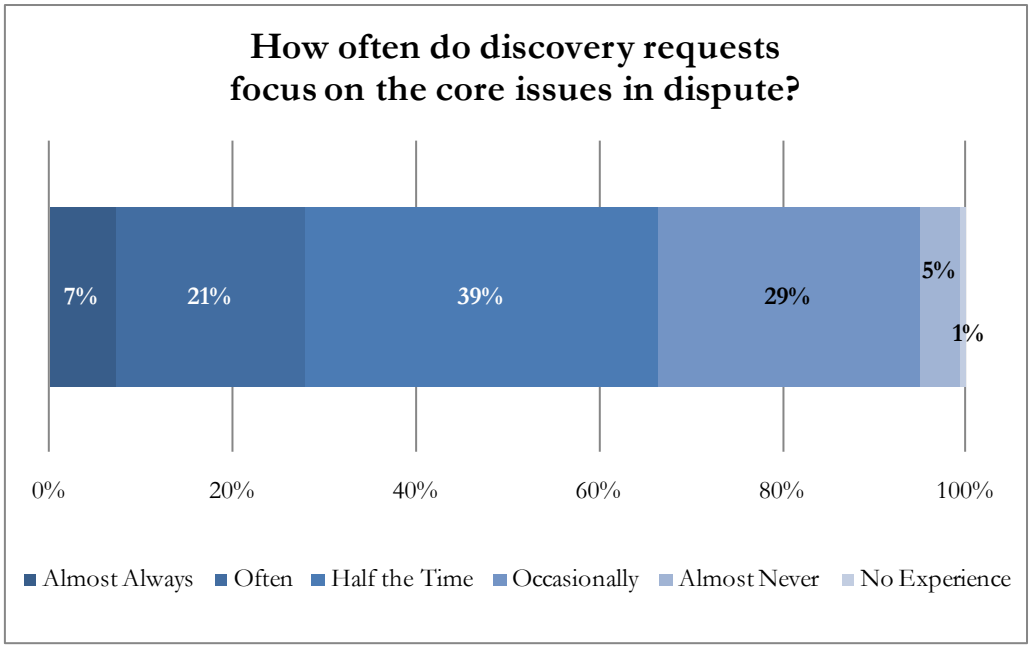
According to respondents, parties are able to agree on the process for conducting discovery more frequently than they are able to agree on the scope of information to be exchanged. Exactly 30% of respondents reported that agreements on the process occur "often" or "almost always," while half as many reported that level of agreement on the scope. For both issues, approximately 70% to 80% of respondents indicated that agreement occurs no more than half the time. See Figure 21.

Figure 21 (Survey Questions 18d, 18e)
n = 337; 335



There is no consensus with respect to how often discovery requests focus on the core issues in dispute. Roughly speaking, about one-third of respondents indicated that requests frequently focus on the core issues, about one-third indicated that requests focus on the core issues "about half the time," and about one-third indicated that requests infrequently focus on the core issues. See Figure 22.

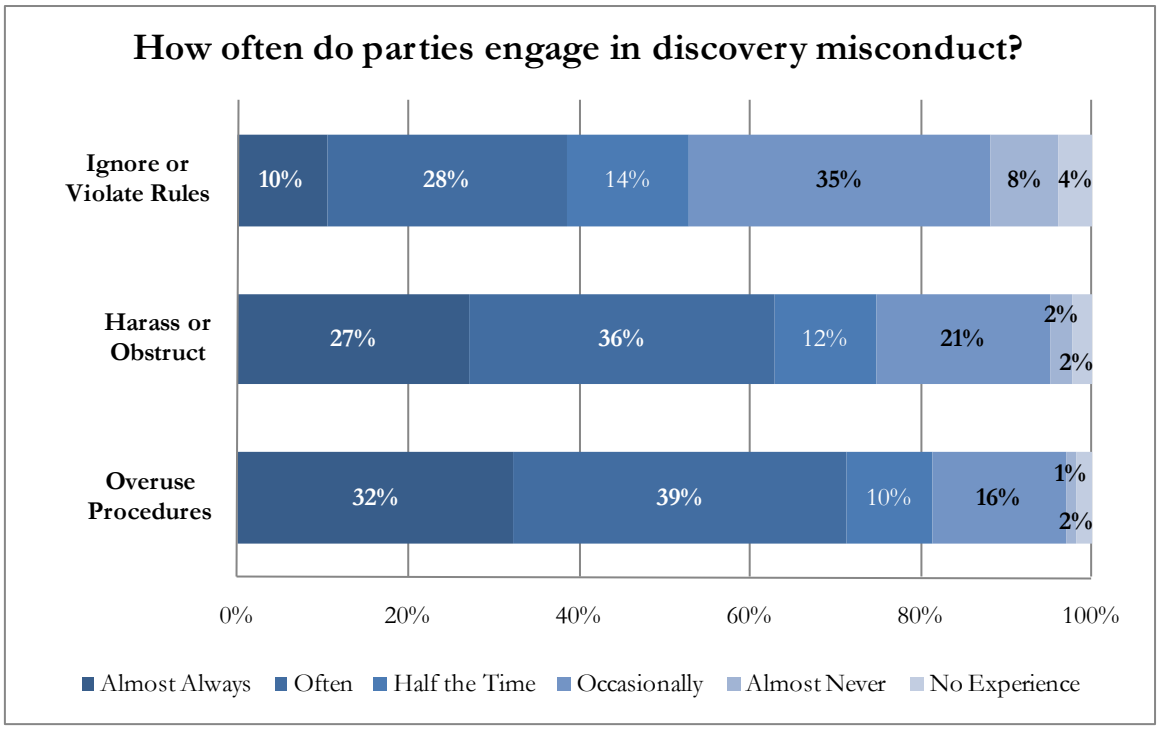
Figure 22 (Survey Question 18(a))
n = 337



b. Misconduct

Respondents reported high levels of discovery misconduct. Nearly 40% indicated that parties frequently – often or almost always – "ignore or violate discovery rules." Over 60% indicated that parties frequently "harass or obstruct the opposition (for example, by giving obviously inadequate answers or requesting information clearly not discoverable)." And over 70% indicated that parties "overuse permitted discovery procedures (beyond what is necessary/appropriate for the particular case)." See Figure 23.

Figure 23 (Survey Questions 18f, 18g, 18h)
n = 335; 336; 337



Not surprisingly, one respondent qualified his or her response: "To the extent I have answered the questions in this survey to indicate that I believe civil discovery is abused by litigants, that is not a reflection on my opinion of my own counsel."

c. Allocation of Costs

The survey asked respondents to explain the circumstances under which discovery cost-shifting is appropriate, if any.

The most common answer – given over three times more than any other answer – was that cost-shifting should occur upon "abuse" of the discovery process. Abusive misconduct was described variously as: failing to comply with requirements; engaging in "fishing expeditions"; issuing overly broad, frivolous, or duplicative requests; and acting in bad faith to delay the action, hinder discovery, or gain leverage. One respondent commented: "Too often second and third breaches of rules/discovery orders are excused by an exasperated judge trying to move the proceedings on."

A portion of respondents indicated that cost-shifting is warranted when the burden of the requested discovery is disproportionate, either in relation to the importance of the information or the amount in controversy. A portion also indicated that cost-shifting is appropriate when the request involves electronically stored information not used in the ordinary course of business, such as inactive, archival, or legacy system data.

A number of respondents indicated that the losing party should pay discovery costs, particularly when the claims are deemed "frivolous." A number also indicated that either partial or

full cost-shifting is appropriate in all cases, and especially when electronic discovery is involved. "ALL fees and costs must be on the line – businesses only understand and care about one thing – money. Put a company's money on the line [and] it will act differently."

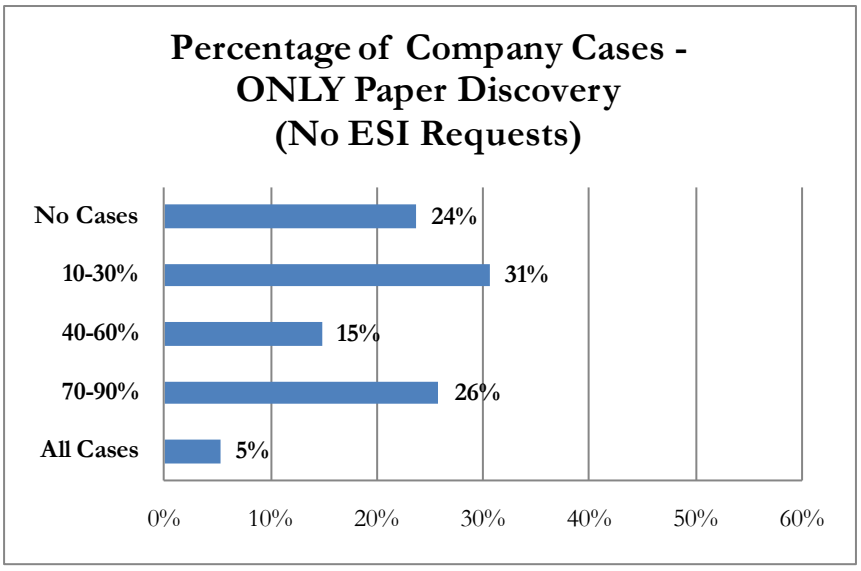
Other situations cited by more than one respondent as appropriate for cost-shifting: when there is a contractual cost-shifting agreement; when there is asymmetry between the parties; when discovery costs reach a certain threshold; when the discovery is disputed and ultimately reveals no relevant information; when discovery is sought from a non-party; and in class actions.

However, several respondents wrote that cost-shifting is simply not appropriate. Another stated that, with respect to litigation between companies or organizations, cost-shifting should occur only in "extreme situations."

2. ELECTRONIC DISCOVERY

On the extent of electronic discovery ("e-discovery") in respondent company cases in the last five years, nearly one-quarter reported requests for electronically stored information ("ESI") in every case. By contrast, only 5% reported solely traditional paper discovery in all cases. See Figure 24 for the distribution of responses.

Figure 24 (Survey Question 19)
n = 330



a. E-Discovery at the Company

The survey explored the workings of e-discovery at respondent companies. It should be noted that those respondents (17) who reported no e-discovery at their company in the last five years were not asked any of the subsequent questions on the topic.

Respondents were requested to indicate the mechanisms their company "regularly utilizes" for dealing with e-discovery, and were permitted to select all that apply. See Figure 25 for the division of responses. Only the top three mechanisms are present in at least half of respondent companies. Important policies – litigation hold and records retention/destruction – have been

established in the majority of respondent companies. However, fewer companies have implemented structures to proactively understand and manage electronic data. For example: only one in four indicated having an in-house coordinator for planning and policy; only one in five indicated having a data map; and less than 15% indicated having a records manager for planning and policy.

Figure 25 (Survey Question 20)
n = 313

Mechanisms for Dealing with ESI	
Litigation hold policy	84%
Records retention/destruction policy	73%
Culture of communication between IT, the legal department, and outside counsel	50%
Employee education on retention policy	48%
In-house attorney team for implementing holds and/or conducting e-discovery	40%
Employee education on e-discovery holds	40%
Attorney education on holds or conducting e-discovery	39%
In-house coordinator for implementing holds and/or conducting e-discovery	30%
E-discovery vendor	28%
In-house coordinator for planning and policy	25%
In-house interdisciplinary team for implementing holds/conducting e-discovery	24%
Specialized outside counsel	22%
Data map	21%
Specialized software for processing e-discovery requests	18%
Records manager for planning and policy	13%
"Cloud computing" service (off-site data storage and remote access)	6%
Comprehensive on-site e-discovery "lab"	3%
Other	2%

For three important mechanisms, Figure 26 shows differences by the top three respondent industries. Manufacturing is the strongest regarding litigation hold policies and data maps, while professional services is the weakest regarding records retention/destruction policies.

Figure 26 (Survey Questions 1, 20)
n = 56; 37; 37

E-Discovery Mechanisms by Industry			
	Manufacturing	Finance and Insurance	Professional Services
Litigation hold policy	89%	78%	78%
Records retention/destruction policy	71%	70%	62%
Data map	29%	16%	16%

Not surprisingly, the likelihood of having a litigation hold policy, a records retention/destruction policy, and a data map appears to increase as yearly revenues increase. See Figure 27.

Figure 27 (Survey Questions 4, 20)
n = 56; 111; 125

E-Discovery Mechanisms by Gross Yearly Revenues			
	Revenues less than $100 million	Revenues of $100-999 million	Revenues of $1 billion or more
Litigation hold policy	71%	86%	90%
Records retention/destruction policy	61%	70%	85%
Data map	11%	15%	33%

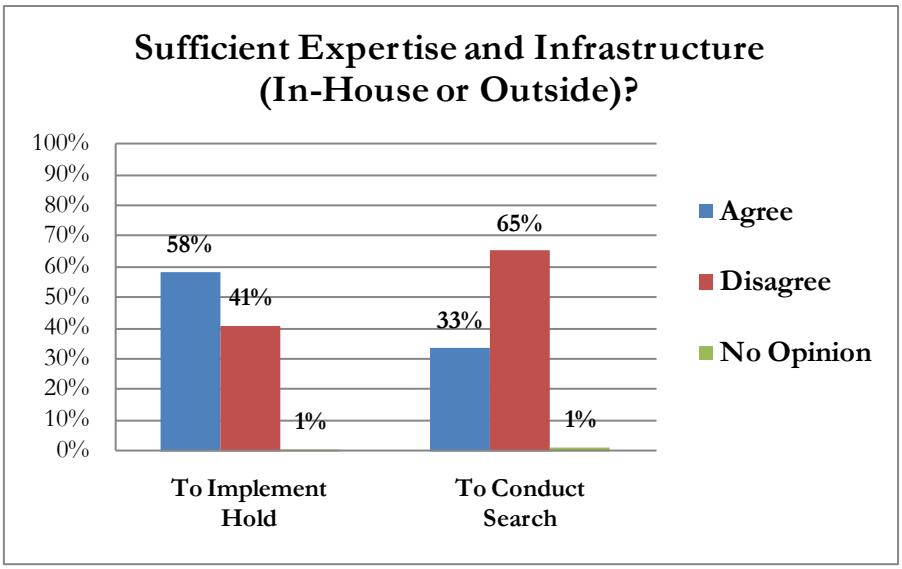
In addition, respondent companies with 10,000 or more employees have established litigation hold policies, records retention/destruction policies, and data maps at higher rates than companies with fewer employees. See Figure 28.

Figure 28 (Survey Questions 5, 20)
n = 235; 74

E-Discovery Mechanisms by Number of Employees		
	1 to 9,999 Employees	10,000 or More Employees
Litigation hold policy	80%	95%
Records retention/destruction policy	68%	89%
Data map	15%	41%

Many respondents acknowledge significant resource gaps with respect to e-discovery. While a majority of respondents believe that their company has sufficient in-house or outside expertise and infrastructure to implement "an adequate but targeted hold without undue cost or delay," over 40% do not believe their company has the ability to do so. Even more troublesome, exactly 65% indicated that their company does not have sufficient in-house or outside expertise and infrastructure to conduct an e-discovery search "without undue cost and delay." See Figure 29. One respondent provided one word for how his or her company deals with e-discovery: luck.

Figure 29 (Survey Questions 21d, 21f)
n = 308; 308



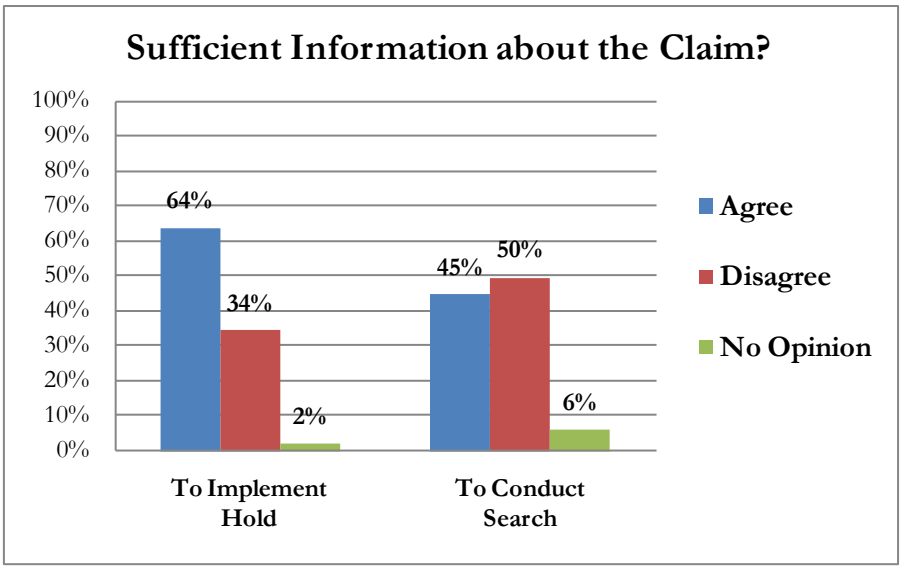
Of those who expressed an opinion, respondent companies in NAICS's "finance and insurance" category were more likely to report sufficient resources to implement a hold (67%) and conduct a search (42%) than companies in professional services (50% implement hold; 27% conduct search) and manufacturing (48% implement hold; 20% conduct search).

Of those who expressed an opinion, respondent companies with annual revenues of $1 billion or higher were more likely to report sufficient resources to implement a hold (70%) than companies with lower earnings (52%). However, earnings levels do not appear to correspond with a company's perceived ability to conduct a search.

Of those who expressed an opinion, a majority of companies with fewer than 100 employees reported insufficient resources to implement a hold (38% sufficient; 62% insufficient), while a majority of companies with 100 or more employees reported sufficient resources (61% sufficient; 39% insufficient). Again, however, the number of employees does not appear to correspond with a company's perceived ability to conduct a search.

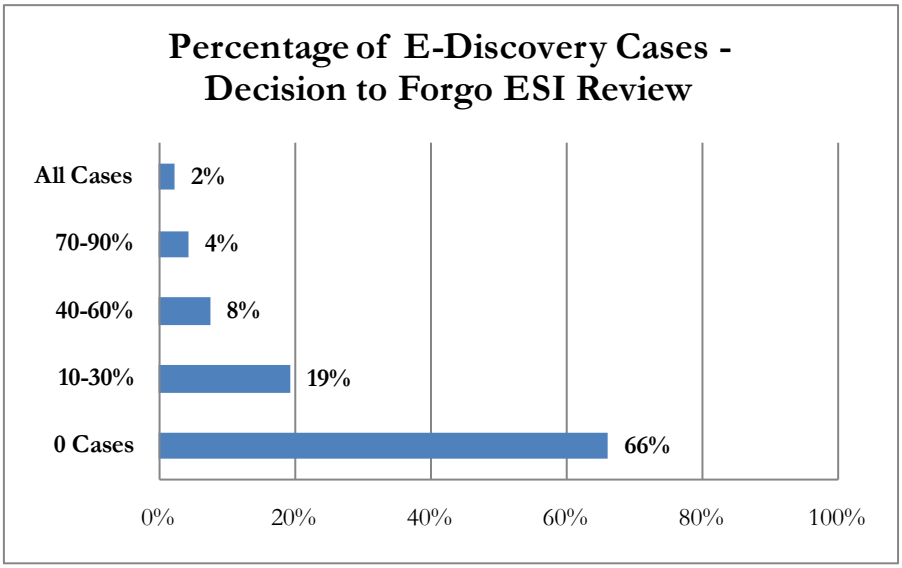
The survey asked for an assessment of the level of information provided by the opposing party. Nearly 65% indicated that their company usually has sufficient information about the claim(s) to implement an "adequate but targeted" litigation hold. However, respondents are split on whether their company usually has sufficient information from an e-discovery request to conduct a "reasonable" search. See Figure 30.

Figure 30 (Survey Questions 21c, 21e)
n = 309; 305



The survey asked respondents to estimate the portion of their company's e-discovery cases in the last five years, in which the legal department decided to "forgo relevance and privilege review of some of the ESI the company produced, in order to reduce the burden of discovery." As shown in Figure 31, two-thirds of respondent companies have not employed such a strategy. However, one-third has done so in at least 10% of cases.

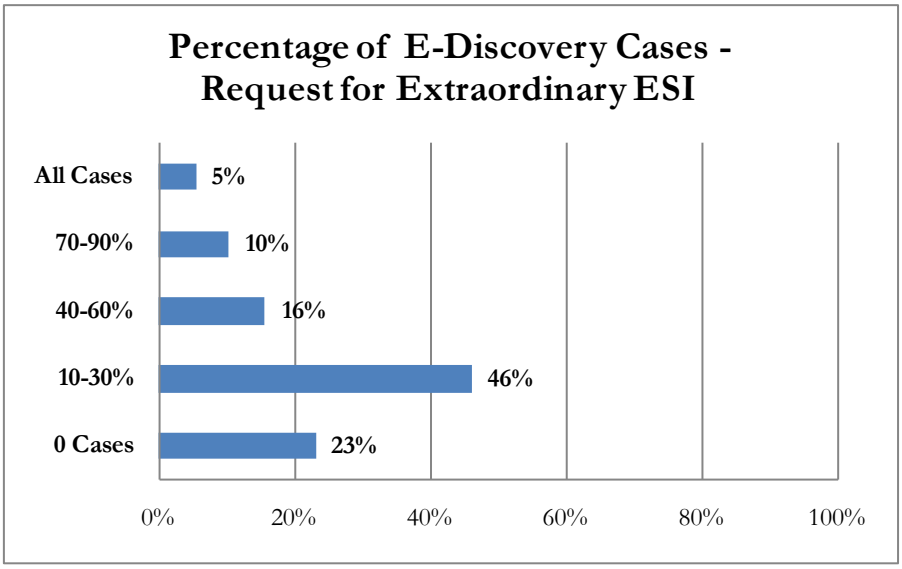
Figure 31 (Survey Questions 23)
n = 290



The survey asked respondents to estimate the portion of their company's e-discovery cases in the last five years, in which the legal department received requests for ESI "not used in the ordinary course of business (such as metadata, archival data, or legacy system data)." Nearly one-quarter of respondent companies have not received any requests for extraordinary ESI, while 5%

have received at least one extraordinary ESI request in all of their cases. See Figure 32 for the distribution of responses.

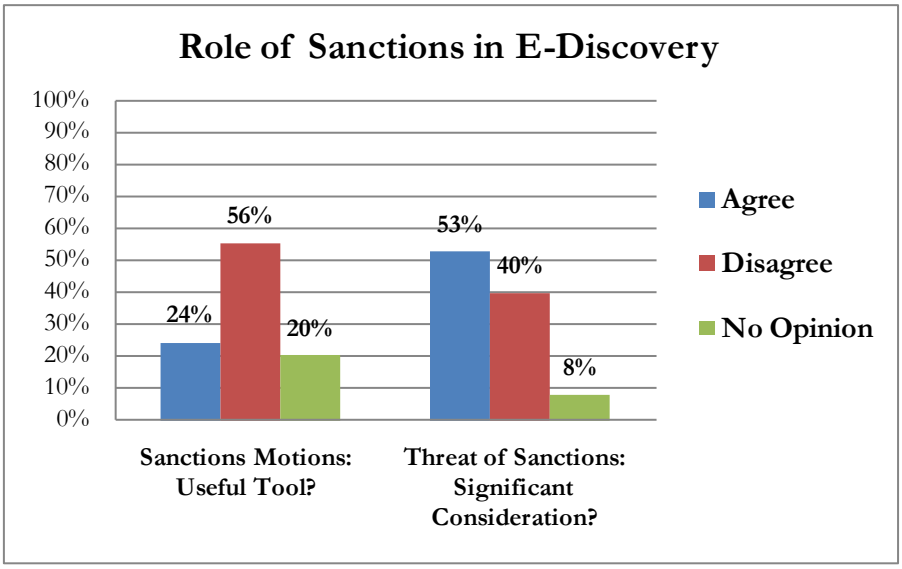
Figure 32 (Survey Questions 22)
n = 296



Only 11% of respondent companies require someone with technical expertise to attend discovery hearings (either in-person or by phone) as a matter of policy. The remaining 89% do not have such a policy. Respondent companies with gross revenues of less than $100 million were more likely to require the presence of a technical expert (20%) than companies with greater earnings (9%).

With respect to sanctions, a majority of respondents disagreed that "motions for sanctions are a useful tool in responding to e-discovery abuse." Nevertheless, a majority did agree that "the threat of sanctions is a significant consideration in my company's e-discovery decisions." See Figure 33.

Figure 33 (Survey Questions 21h, 21i)
n = 308; 310



Of those who expressed an opinion, respondent companies earning less than $100 million were more likely to find sanctions motions to be a useful tool (49%) than companies with higher earnings (26%). However, this distinction did not hold with respect to whether the threat of sanctions is a significant consideration in the company's e-discovery decisions.

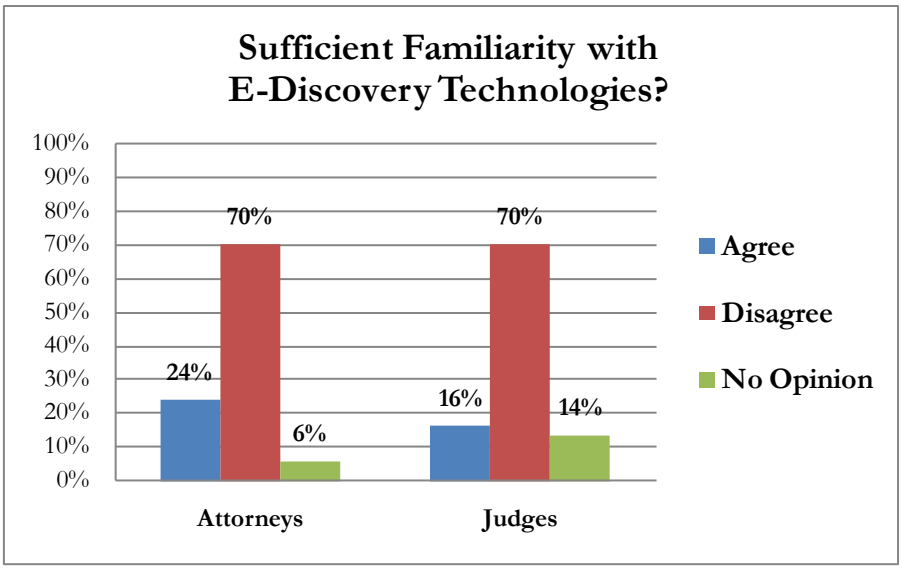
Likewise, of those who expressed an opinion, respondent companies with fewer than 100 employees were more likely to find sanctions motions to be a useful tool (52%) than companies with more employees (28%). However, this distinction did not hold with respect to whether the threat of sanctions is a significant consideration in the company's e-discovery decisions.

b. E-Discovery Generally

This portion of the survey sought to capture perceptions of e-discovery as a general matter. Again, these questions were not asked of respondents whose companies have had no e-discovery in the last five years.

There is a consensus that both attorneys and judges have inadequate knowledge of e-discovery technologies. Exactly 70% disagreed that attorneys have sufficient familiarity "to know how to obtain necessary information without undue cost and delay." The same proportion disagreed that judges have sufficient familiarity "to rule appropriately in discovery disputes." See Figure 34.

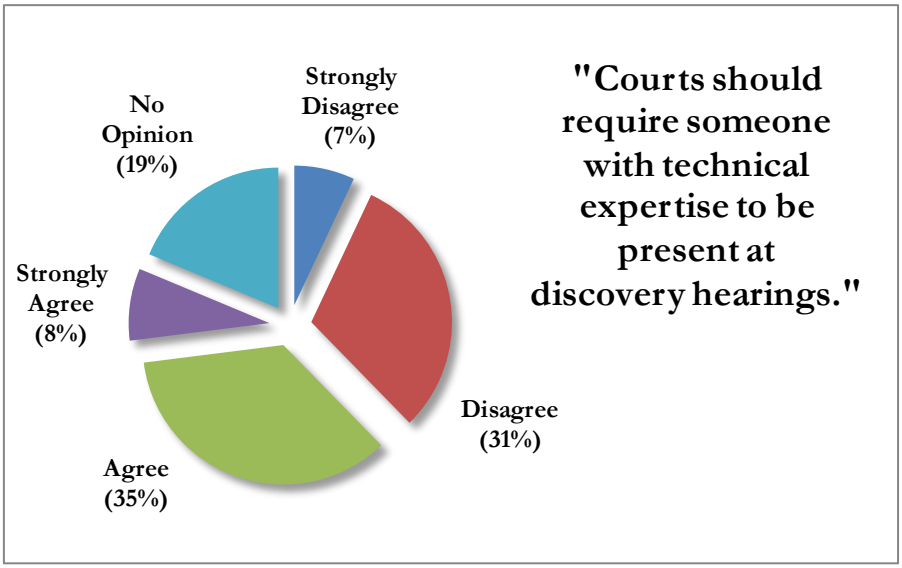
Figure 34 (Survey Questions 21a, 21b)
n = 309; 310



Of those who expressed an opinion, respondent companies with gross yearly revenues of less than $100 million were more likely to indicate that judges have sufficient technical knowledge (31%) than companies earning $100 million or more (17%).

Despite the perceived lack of knowledge on the part of attorneys and judges, respondents did not come to a consensus on whether the presence of someone with technical expertise should be required at discovery hearings. See Figure 35 for the distribution of responses.

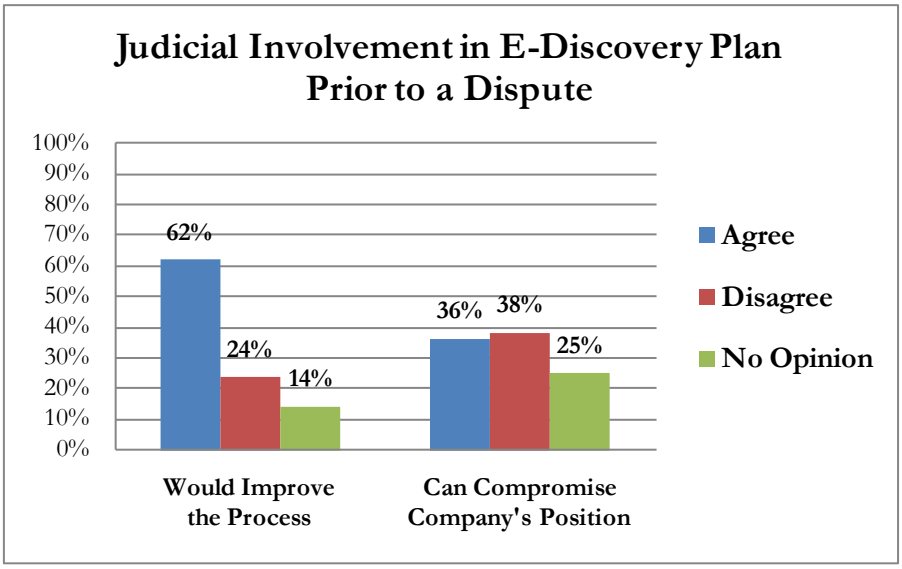
Figure 35 (Survey Questions 25a)
n = 300



A majority of respondents believe that greater court involvement in "crafting an e-discovery plan prior to a dispute would improve the process." There was no consensus, however, on whether

such involvement "can compromise my company's position by requiring too much disclosure about our ESI." See Figure 36.

Figure 36 (Survey Questions 25b, 25c)
n = 300; 299

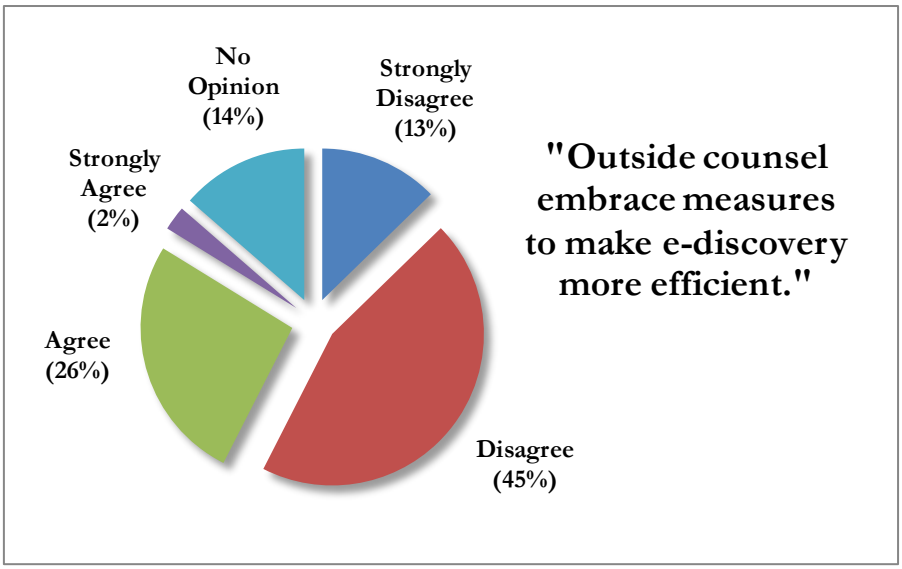


Of those who expressed an opinion, respondent companies in the finance and insurance category were less likely to believe that increased judicial involvement would improve the process, and more likely to believe that it could compromise the company's position, than respondent companies in manufacturing or professional services.

Of those who expressed an opinion, a majority of respondent companies with between 100 and 4,999 employees disagreed that increased judicial involvement could compromise the company's position, while a majority of companies with fewer than 100 or more than 4,999 employees agreed.

A majority of respondents disagreed with the statement that "outside counsel embrace measures to make e-discovery more efficient." However, nearly 30% find that outside counsel do accept and incorporate efficiency measures. See Figure 37 for the distribution of answers.

Figure 37 (Survey Question 21g)
n = 308



Some respondents specifically commented on the burden of e-discovery:

- "E-discovery is a huge cost burden, that (in our experience) rapidly exceeds the value of any given case."

- "The cost of discovery in light of e-discovery rules has rendered our system so expensive that I believe the FRCP are literally in violation of the 14th Amendment – small and medium sized businesses cannot afford to get due process in civil litigation."

- "The discovery of electronic data is clearly the most important new litigation concern to arise in the past few decades. The costs of compliance (preservation, review, production) are enormous; the amount of data is massive; the ignorance of effective retrieval systems is rampant; the knowledge of the courts is limited; and, the rules of procedure are still antiquated."

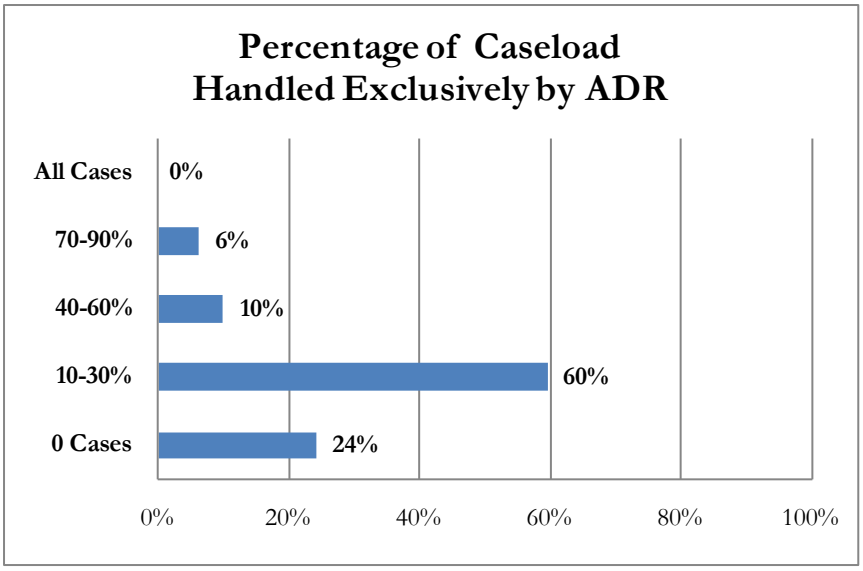
One respondent expressed a "sincere hope that the direction taken as a result of this survey is to bring e-discovery back to some realm of reasonableness and common sense, and not a mini-industry for e-attorneys and e-consultants."

D. THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION: MOVING CASES OUT OF LITIGATION

The survey sought to determine the role and effects of alternative dispute resolution ("ADR") in civil litigation for respondent companies.

Initially, the survey asked for the portion of the company's civil caseload in the last five years that has been handled *exclusively* through an ADR process rather than the courts. Respondents were instructed to exclude ADR undertaken outside of the litigation context. As shown in Figure 38, nearly one-quarter of respondent companies have had no civil cases handled solely by ADR, and nearly 85% have had less than one-third of cases handled solely by ADR. No respondent companies indicated an entire caseload funneled to ADR.

Figure 38 (Survey Question 31)
n = 314

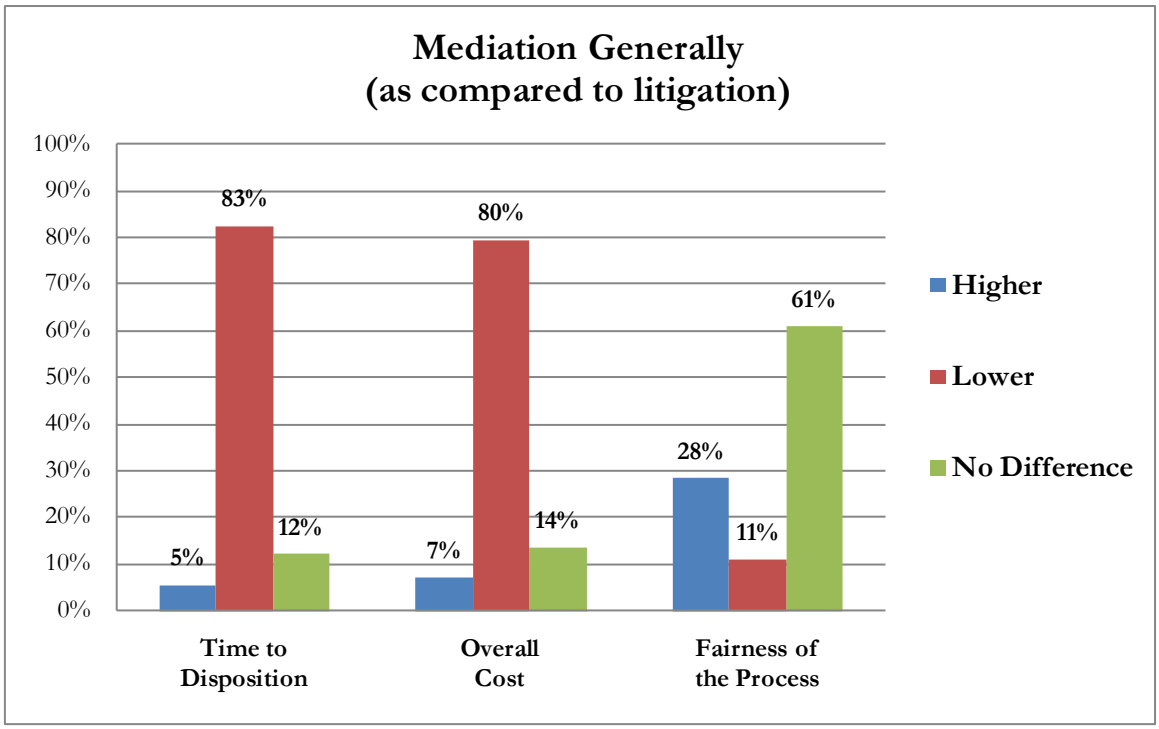


For the above cases, ADR was contractual or by agreement of the parties in an average of 71% of cases, and court-ordered in an average of 29% of cases. In addition, the ADR consisted of mediation in an average of 59% of cases, arbitration in an average of 39% of cases, and some other form of dispute resolution in an average of 2% of cases.

1. MEDIATION

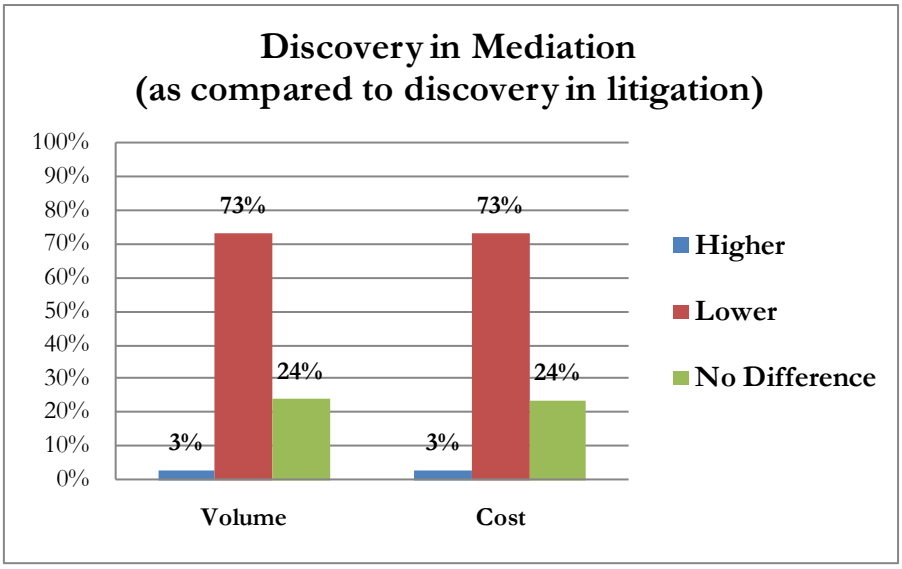
Of respondents who reported that a percentage of their company's caseload was handled in mediation, the survey asked how mediation compares to litigation in terms of time, cost, and procedural fairness. As shown in Figure 39, a strong majority of respondents believe that mediation involves shorter disposition times and lower overall costs. Moreover, a majority believe that there is no difference in the fairness of the process.

Figure 39 (Survey Questions 36a, 36b, 36c)
n = 184; 185; 184



The survey asked the same group of respondents how discovery in mediation compares to discovery in litigation. With respect to both the volume of discovery and its cost, approximately three out of four believe that mediation involves a decreased burden. Approximately one-quarter believe there is no difference in the burden of discovery. See Figure 40.

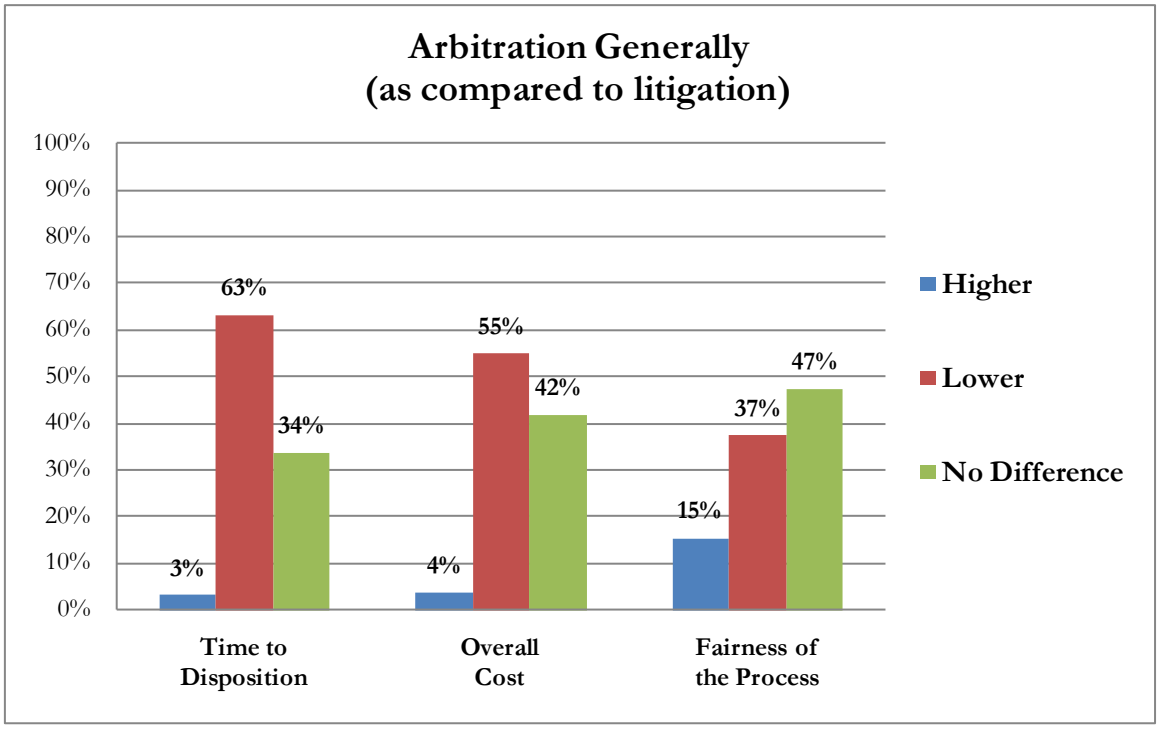
Figure 40 (Survey Questions 37a, 37b)
n = 180; 177



2. ARBITRATION

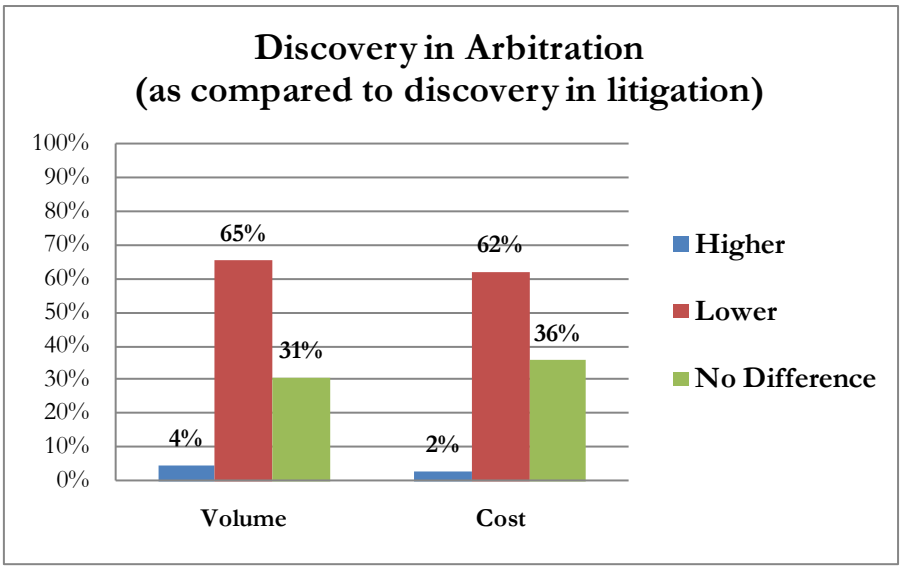
Of respondents who reported that a percentage of their company's caseload was handled in arbitration, the survey asked how arbitration compares to litigation in terms of time, cost, and procedural fairness. As shown in Figure 41, a majority of respondents believe that arbitration involves shorter disposition times and lower overall costs. A plurality believe that there is no difference in the fairness of the two processes, but a significant portion (37%) find arbitration to be less procedurally fair.

Figure 41 (Survey Questions 34a, 34b, 34c)
n = 169; 168; 169



The survey asked the same group of respondents how discovery in arbitration compares to discovery in litigation. With respect to both the volume of discovery and its cost, approximately two out of three believe that arbitration involves a decreased burden. Approximately one-third believe there is no difference in the burden of discovery. See Figure 42.

Figure 42 (Survey Questions 35a, 35b)
n = 167; 168



3. RESPONDENT COMMENTS ON ADR

Many respondents specifically commented on alternative dispute resolution. Some noted marginally less discovery, process, cost, and time to disposition. However, it was also noted that the benefits of ADR are decreasing as it has "taken on many of the attributes of full-blown litigation." Another stated that ADR is not of "much value if it does not save discovery costs."

Respondents pointed to additional benefits that render ADR worthwhile, such as the non-public process and more limited exposure. However, the quality of the decision-maker, the procedures employed, and the extent to which the law is followed vary considerably. Commenting respondents did not come to a consensus on whether ADR generally provides equitable results.

With respect to mediation, a number of respondents commented that it is more cost-effective if done prior to extensive discovery, but less likely to be successful because the parties do not have information that will move them from their original positions. With respect to arbitration, one respondent wrote: "[A]rbitrators typically 'split the baby' [which] is no better than a forced settlement."

One respondent suggested that it would be better for judicial officers to conduct early neutral evaluations or settlement conferences. Another stated that "[m]ediation and arbitration need to be managed, just like litigation," if costs are to be kept reasonable. A third respondent urged ADR agencies to develop e-discovery expertise that would ensure competency to handle such issues.

All told, the comments varied. One respondent suggested that ADR proceedings be mandated, while another described the American Arbitration Association as "today's Highway Robber." A third stated: "We have arbitration clauses, but I'm not convinced that makes sense."

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

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.

One respondent commented: "Changes are essential." Respondents most commonly suggested requiring the unsuccessful party to pay at least a portion of the prevailing party's costs and/or attorney fees. One respondent wrote: "There is no impediment to litigants using litigation cost as a lever to force numerous defendants to individually settle matters for modest sums in lieu of litigation . . . or a well financed defendant from 'spending' a financially challenged plaintiff out of the suit."

Respondents also frequently advocated for curtailing open-ended discovery and focusing the scope of permitted discovery. One respondent described it as moving away from the "more discovery is better mindset." Suggestions for doing so included:

- Have only one neutral expert per case to advise the fact-finder, which would eliminate "the battle of the 'hired guns'" and contribute to better decisions;
- Limit the number of depositions and have more witnesses simply testify at trial;
- Eliminate written interrogatories or allow only a "scripted" set of standard interrogatory questions;
- Scale the amount of discovery allowed based on the size of the case; and
- Implement a system of discovery in stages, with progression to the next level only as necessary within the context of the case.

A number of respondents urged the adoption of a European model – with each party initially required to produce only the evidence that it intends to present, and the judge thereafter determining the parameters of further discovery. In fact, several respondents coupled the call for a reduction in the scope of routine discovery with a call for judges to actively manage the "design of discovery."

Many respondents focused on e-discovery, commenting that they would like to see clear, streamlined, and binding rules, with "reasonableness" as important as "technical feasibility." They advocated for the elimination of "scorched earth" e-discovery of drafts, hidden information, and "other electronic data bearing no relationship to the final form of the communication as transmitted." One respondent commented: "As a general matter, for commercial contract disputes, the costs and abuses generated by unlimited e-discovery eclipse any true value in the discovery obtained."

Some respondents emphasized that the court should assume a stronger role in the pretrial process. They would like to see judges define and adhere to precise schedules, enforce the requirements and limits contained in the rules, take control of difficult issues, and provide timely rulings. Respondents would also like to see more frequent sanctions imposed upon attorneys who

abuse the process, expressing frustration with the number of delays and excuses allowed. Related comments include:

- "Make judges [become] actively involved in resolving discovery disputes rather than the usual 'plague on both your houses' hands off approach which generally favors obstructionist behavior."

- "Judges . . . appear to want to let parties fight it out for a while and spend money and hopefully reach a nuisance value settlement so the judge doesn't have to make any decisions."

- "Generally, once a judge has established a track record in handling discovery issues, most attorneys will adjust their practices accordingly."

Several respondents commented that requiring pleadings to include the facts known at the time of filing to support each legal theory would narrow the issues and allow for early discussions about the merits and the possibility of settlement. In addition, discovery could be limited to the factual issues pled in good faith.

Other respondents advocated for a neutral expert case assessment, or court-supervised mandatory mediation, prior to discovery. A handful of respondents suggested earlier and more serious consideration of dispositive motions. Two respondents would like to see punitive damages paid into a state victims' fund or a general fund for the courts. Other suggestions included: set a firm trial date one year from the filing date; limit the amount of legal fees that can be incurred by type of suit; and reimburse costs incurred by non-parties.

A couple of respondents tempered their suggestions with a reminder of the fundamental benefits of the American civil justice system:

- "Having litigated overseas without discovery, we have discovered, to paraphrase Churchill on democracy, that extensive pretrial discovery is the worst litigation method, except for all the others."

- "While the responses provided to this survey may seem to indicate that I would advocate for significant policy changes, that is not my intent. Instead, I believe that the current structure of the courts of the United States is fair and just (however, they are overburdened) . . . ."

V. CONCLUSION

IAALS sincerely thanks all of the individuals and organizations who dedicated precious time, effort, and energy to make the General Counsel 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

Please note: Your organization will be referred to as your "company," notwithstanding its type.

This survey concerns CIVIL LITIGATION in U.S. state and federal courts. Your answers should reflect your company's experience with COURT PROCEEDINGS. You should not consider internal investigations or the broader universe of administrative or regulatory proceedings that might precede or replace the filing of a complaint.

I. COMPANY BACKGROUND

1. Your company's primary industry:

_____

2. Scope of your company:

- □ Local
- □ Regional
- □ National
- □ Multinational

3. Location of your company's headquarters:

Country or Region

- □ United States
- □ Canada
- □ Caribbean
- □ Central America
- □ South America
- □ Western Europe
- □ Central Europe
- □ Eastern Europe
- □ Middle East
- □ North Africa
- □ Sub-Saharan Africa
- □ South and Central Asia
- □ East Asia
- □ Australia and the Pacific

State or Province (U.S. and Canada only)

_____

4. Your company's gross revenues in the last fiscal year (U.S. dollars):

- □ Less than $100 million
- □ $100 million to $999 million
- □ $1 billion or more
- □ Prefer not to disclose this information

5. Current number of company employees:

- □ 1 to 99
- □ 100 to 499
- □ 500 to 999
- □ 1,000 to 2,499
- □ 2,500 to 4,999
- □ 5,000 to 9,999
- □ 10,000 or more

6. Current number of full- and part-time attorneys employed by your company's in-house legal department, in all locations:

- □ 1 to 5
- □ 6 to 20
- □ 21 to 50
- □ More than 50

7. **In the last 5 years, approximately how many U.S. STATE OR FEDERAL CIVIL COURT CASES has your legal department been involved in litigating, either as a party or a non-party respondent to a subpoena?**
   - ☐ Less than 5
   - ☐ 5 to 10
   - ☐ 11 to 25
   - ☐ 26 to 50
   - ☐ 51 to 100
   - ☐ 101 to 250
   - ☐ More than 250

If you answered "Less than 5" in Question 7, please stop here and return the survey as completed to this point. 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.

If you selected any of the other options, please continue to Question 8.

II. COMPANY LITIGATION IN THE LAST FIVE YEARS

For Questions 8 through 13, consider the U.S. state or federal civil court cases that your legal department has been involved in litigating IN THE LAST 5 YEARS, either as a party or a non-party respondent to a subpoena.

8. **Most common case types:**
   Select up to three types.
   - ☐ Administrative
   - ☐ Antitrust
   - ☐ Bankruptcy
   - ☐ Breach of fiduciary duty
   - ☐ Civil rights
   - ☐ Complex commercial
   - ☐ Construction
   - ☐ Consumer fraud
   - ☐ Contract disputes
   - ☐ Employment discrimination
   - ☐ Environmental
   - ☐ ERISA
   - ☐ Insurance disputes
   - ☐ Intellectual property
   - ☐ Labor
   - ☐ Patent
   - ☐ Personal injury
   - ☐ Product liability
   - ☐ Property damage
   - ☐ Real property
   - ☐ Securities
   - ☐ Tax
   - ☐ Torts (generally)
   - ☐ Torts (mass)
   - ☐ Other _____
   - ☐ Other _____
   - ☐ Other _____

9. **Your company's role:**
   Your total should equal 100%.
   a. PLAINTIFF in an estimated _____ % of cases
   b. DEFENDANT in an estimated _____ % of cases
   c. NON-PARTY RESPONDENT in an estimated _____ % of cases

10. **Character of the dispute:**
    Your total should equal 100%.
    a. Company opposing COMPANY in an estimated _____ % of cases
    b. Company opposing INDIVIDUAL(S) in an estimated _____ % of cases
    c. Company opposing a CLASS in an estimated _____ % of cases

11. **Type of forum:**
    Your total should equal 100%.
    a. STATE COURT in an estimated _____ % of cases
    b. FEDERAL COURT in an estimated _____ % of cases

12. **Estimated percentage of cases in which discovery was conducted:**
Please round to the nearest answer option.

□ 0%
□ 10%
□ 20%
□ 30%
□ 40%
□ 50%
□ 60%
□ 70%
□ 80%
□ 90%
□ 100%

13. **Estimated percentage of cases that went to trial:**
_____ %

III. CIVIL LITIGATION GENERALLY

14. **Estimated change in the number of active U.S. state or federal civil court CASES involving your company over the last 5 years:**

□ Active cases have decreased.
□ Active cases have increased.
□ I have not perceived a trend.

15. **Estimated change in the number of U.S. state or federal civil court TRIALS involving your company over the last 5 years:**

□ Trials have decreased.
□ Trials have increased.
□ I have not perceived a trend.

16. **Below is a list of common complaints about the American civil justice system. As a general matter, please indicate your level of agreement with each statement as a whole.**

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. The civil justice system is too complex.	□	□	□	□	□
b. The civil justice system takes too long.	□	□	□	□	□
c. The civil justice system is too expensive.	□	□	□	□	□
d. Opposing counsel are generally uncooperative.	□	□	□	□	□
e. Notice pleading prevents the disputed issues from being identified early enough.	□	□	□	□	□
f. The system of hourly billing for attorneys contributes disproportionately to litigation costs.	□	□	□	□	□

17. **When litigation is necessary, is there a particular court in which your company prefers to litigate? Please specify the court – if any – and the reason for your answer.**

_____
_____
_____

IV. DISCOVERY

If you indicated in Question 12 that discovery was conducted in 0% of your company's cases in the last five years, please skip to Question 26.

If you indicated in Question 12 that discovery was conducted in 10% or more of cases, please continue to Question 18.

18. Consider your company's U.S. state and federal civil court cases in the last 5 years in which some discovery was conducted. Please indicate your opinion as to the frequency of the following. If your legal department has no experience with the topic, please select "No Experience."

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Experience
a. Discovery requests focus on the core issues in dispute.	□	□	□	□	□	□
b. Parties confer about discovery early in the pretrial process.	□	□	□	□	□	□
c. Parties confer about discovery throughout the pretrial process.	□	□	□	□	□	□
d. Parties agree on the process by which discovery is conducted.	□	□	□	□	□	□
e. Parties agree on the scope of information to be exchanged.	□	□	□	□	□	□
f. Parties overuse permitted discovery procedures (beyond what is necessary/appropriate for the particular case).	□	□	□	□	□	□
g. Parties harass or obstruct the opposition (for example, by giving obviously inadequate answers or requesting information clearly not discoverable).	□	□	□	□	□	□
h. Parties ignore or violate discovery rules.	□	□	□	□	□	□

19. Consider your company's cases in the last 5 years in which some discovery was conducted. Estimated percentage of those cases that involved ONLY TRADITIONAL PAPER DISCOVERY (no requests for electronically stored information ("ESI")):

□ 0%
□ 10%
□ 20%
□ 30%
□ 40%
□ 50%
□ 60%
□ 70%
□ 80%
□ 90%
□ 100%

If you answered "100%" in Question 19, please skip to Question 26.

If you selected any of the other options, please continue to Question 20.

20. Mechanisms your company regularly utilizes for dealing with electronic discovery ("e-discovery") – if any:

Please check all that apply.

□ Data map
□ Records retention/destruction policy
□ Litigation hold policy
□ Specialized outside counsel
□ E-discovery vendor
□ Records manager for planning and policy
□ In-house coordinator for planning and policy
□ In-house coordinator for implementing holds and/or conducting e-discovery
□ In-house attorney team for implementing holds and/or conducting e-discovery
□ In-house interdisciplinary team for implementing holds and/or conducting e-discovery
□ Specialized software for processing e-discovery requests
□ Comprehensive on-site e-discovery "lab"
□ "Cloud computing" service (off-site data storage and remote access)
□ Attorney education on holds or conducting e-discovery
□ Employee education on retention policy
□ Employee education on e-discovery holds
□ Culture of communication between IT staff, the legal department, and outside counsel
□ Other: _____
□ Other: _____
□ Other: _____

21. As a general matter, please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. Attorneys have sufficient familiarity with e-discovery technologies to know how to obtain necessary information without undue cost and delay.	□	□	□	□	□
b. Judges have sufficient familiarity with e-discovery technologies to rule appropriately in discovery disputes.	□	□	□	□	□
c. When a litigation hold is required, my company usually has sufficient information about the claim to implement an adequate but targeted hold.	□	□	□	□	□
d. My company currently has the expertise and infrastructure (either in-house or outside) to implement an adequate but targeted hold without undue cost or delay.	□	□	□	□	□
e. When an e-discovery request is received, my company usually has sufficient information from the requesting party to conduct a reasonable search.	□	□	□	□	□
f. My company currently has the expertise and infrastructure (either in-house or outside) to conduct an e-discovery search without undue cost or delay.	□	□	□	□	□
g. Outside counsel embrace measures to make e-discovery more efficient.	□	□	□	□	□

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
h. Motions for sanctions are a useful tool in responding to e-discovery abuse.	□	□	□	□	□
i. The threat of sanctions is a significant consideration in my company's e-discovery decisions.	□	□	□	□	□

22. Consider your company's cases in the last 5 years in which e-discovery was conducted. Estimated percentage of those cases in which your company received requests for ESI not used in the ordinary course of business (such as metadata, archival data, or legacy system data):

□ 0%
□ 10%
□ 20%
□ 30%
□ 40%
□ 50%
□ 60%
□ 70%
□ 80%
□ 90%
□ 100%

23. Consider your company's cases in the last 5 years in which e-discovery was conducted. Estimated percentage of those cases in which your legal department chose to forgo relevance and privilege review of some of the ESI your company produced, in order to reduce the burden of discovery:

□ 0%
□ 10%
□ 20%
□ 30%
□ 40%
□ 50%
□ 60%
□ 70%
□ 80%
□ 90%
□ 100%

24. As a matter of policy, does your company require the attendance of someone with technical expertise at discovery hearings (either in-person or by phone)?

□ Yes
□ No

25. As a general matter, please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. Courts should require someone with technical expertise to be present at discovery hearings.	□	□	□	□	□
b. Judicial involvement in crafting an e-discovery plan prior to a dispute would improve the process.	□	□	□	□	□
c. Judicial involvement before a dispute arises can compromise my company's position by requiring too much early disclosure about our ESI.	□	□	□	□	□

V. COSTS

26. Change in the TOTAL yearly cost of pretrial litigation at your company over the past 5 years:

□ Costs have decreased.
Reason: _____

□ Costs have increased.
Reason: _____

□ I have not perceived a trend.

27. Change in the cost of pretrial litigation for the TYPCIAL CASE at your company over the past 5 years:

□ Costs have decreased.
Reason: _____

□ Costs have increased.
Reason: _____

□ I have not perceived a trend.

28. As a general matter, please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. Litigation costs are generally proportionate to the value of a case.	□	□	□	□	□
b. Outcomes are driven more by the merits of the case than by litigation costs.	□	□	□	□	□
c. The fewer the delays in the litigation process, the more my company saves in litigation costs.	□	□	□	□	□
d. Delays in the litigation process can sometimes save my company money by leveraging a more advantageous settlement.	□	□	□	□	□

If you indicated in Question 12 that discovery was conducted in 0% of your company's cases in the last five years, please skip to Question 30.

If you indicated in Question 12 that discovery was conducted in 10% or more of cases, please continue to Question 29.

29. Please indicate the circumstances under which discovery cost-shifting is appropriate – if any.

_____
_____
_____

30. If you could change any one rule or procedure to decrease litigation costs while maintaining a fair system, what would it be and why?

_____
_____
_____

VI. ALTERNATIVE DISPUTE RESOLUTION

31. In the last 5 years, estimated percentage of your company's civil caseload that has been handled exclusively through an alternative dispute resolution ("ADR") process rather than the courts (please do not consider ADR undertaken outside of the litigation context):

□ 0%	□ 60%
□ 10%	□ 70%
□ 20%	□ 80%
□ 30%	□ 90%
□ 40%	□ 100%
□ 50%	

If you answered "0%" in Question 31, please skip to Question 38.

If you selected any of the other options, please continue to Question 32.

32. For the cases handled exclusively through ADR in the last 5 years:

Your total should equal 100%.

a. ADR was COURT-ORDERED in an estimated _____ % of cases
b. ADR was contractual or BY AGREEMENT of the parties in an estimated _____ % of cases

33. For the cases handled exclusively through ADR in the last 5 years:

Your total should equal 100%

a. ARBITRATION in an estimated _____ % of cases
b. MEDIATION in an estimated _____ % of cases
c. OTHER form of ADR in an estimated _____ % of cases

If you answered "0%" for the percentage of cases arbitrated in Question 33(a), please skip to Question 36.

If you indicated in Question 33(a) that arbitration was conducted in a percentage of cases, continue to Question 34.

34. In your company's experience, how does ARBITRATION compare to litigation in the majority of cases?

a. Time	**b. Overall cost**	**c. Fairness of the Process**
□ Shortens time to disposition	□ Decreases cost	□ Less fair
□ No difference in time	□ No difference in cost	□ No difference in fairness
□ Lengthens time to disposition	□ Increases cost	□ More fair

If you indicated in Question 12 that discovery was conducted in 0% of your company's cases in the last five years, please skip to Question 36 (read the instructions preceding Question 36).

If you indicated in Question 12 that discovery was conducted in 10% or more of cases, please continue to Question 35.

35. In your company's experience, how does discovery in ARBITRATION compare to discovery in litigation in the majority of cases?

a. Volume of discovery	**b. Cost of discovery**
□ Decreases the volume of discovery	□ Decreases discovery costs
□ No difference in volume	□ No difference in cost
□ Increases the volume of discovery	□ Increases discovery costs

If you answered "0%" for the percentage of cases mediated in Question 33(b), please skip to Question 38.

If you indicated in Question 33(b) that mediation was conducted in a percentage of cases, continue to Question 36.

36. In your company's experience, how does MEDIATION compare to litigation in the majority of cases?

a. Time	b. Overall cost	c. Fairness of the Process
□ Shortens time to disposition	□ Decreases cost	□ Less fair
□ No difference in time	□ No difference in cost	□ No difference in fairness
□ Lengthens time to disposition	□ Increases cost	□ More fair

If you indicated in Question 12 that discovery was conducted in 0% of your company's cases in the last five years, please skip to Question 38.

If you indicated in Question 12 that discovery was conducted in 10% or more of cases, please continue to Question 37.

37. In your company's experience, how does discovery in MEDIATION compare to discovery in litigation in the majority of cases?

a. Volume of discovery	b. Cost of discovery
□ Decreases the volume of discovery	□ Decreases discovery costs
□ No difference in volume	□ No difference in cost
□ Increases the volume of discovery	□ Increases discovery costs

VII. CONCLUSION

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

_____
_____
_____
_____