National Survey of Counsel Concerning 2015 Discovery Amendments to the Federal Rules of Civil Procedure

In January 2019, the Duke Law Bolch Judicial Institute in conjunction with the American Bar Association Section of Litigation, Association for American Justice, Lawyers for Civil Justice, American College of Trial Lawyers, National Employment Lawyers Association, Defense Research Institute, and the American Anti-Trust Institute forwarded a survey containing 16 numbered questions, several with subparts, to the bar organization members. The survey is part of a comprehensive study of the effects of the 2015 discovery amendments to the Federal Rules of Civil Procedure. More than 500 submitted responses to the survey.

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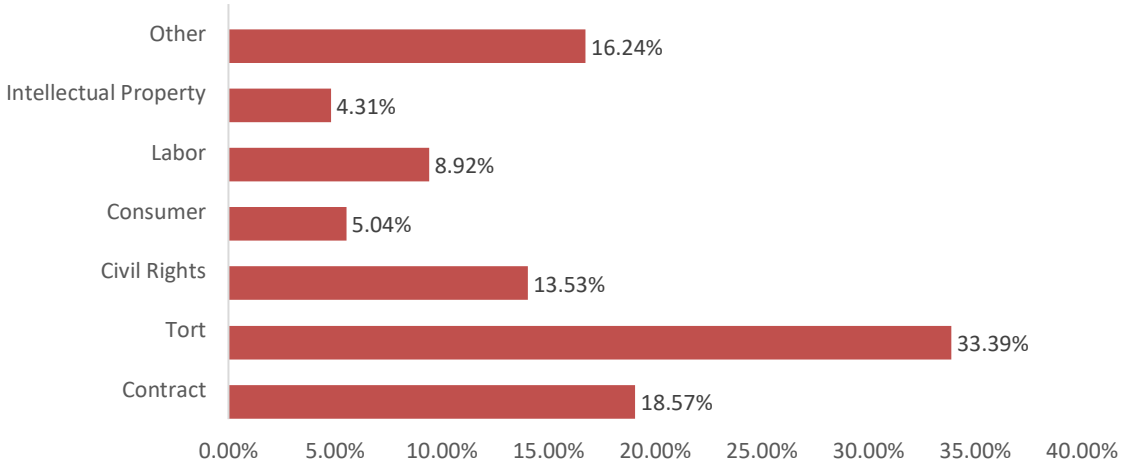
Background Information

#	Organization	%	Count
1	American Bar Association Section of Litigation	19.88%	100
2	Association for American Justice	16.30%	82
3	Lawyers for Civil Justice	4.57%	23
4	American College of Trial Lawyers	26.44%	133
5	National Employment Lawyers Association	15.11%	76
6	Defense Research Institute	17.30%	87
7	The American Anti-Trust Institute	.40%	2
	Total	100%	503

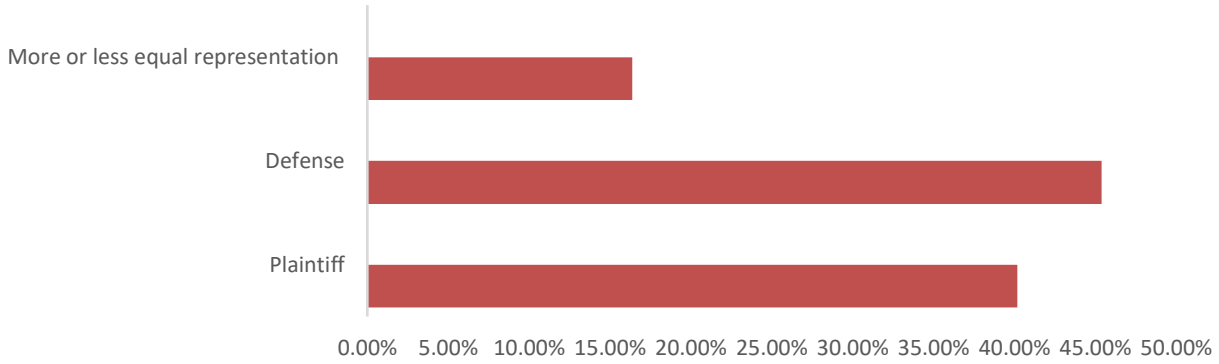
Organizations Responding:

Tell us about your main area(s) of past and current practice (check all that apply):



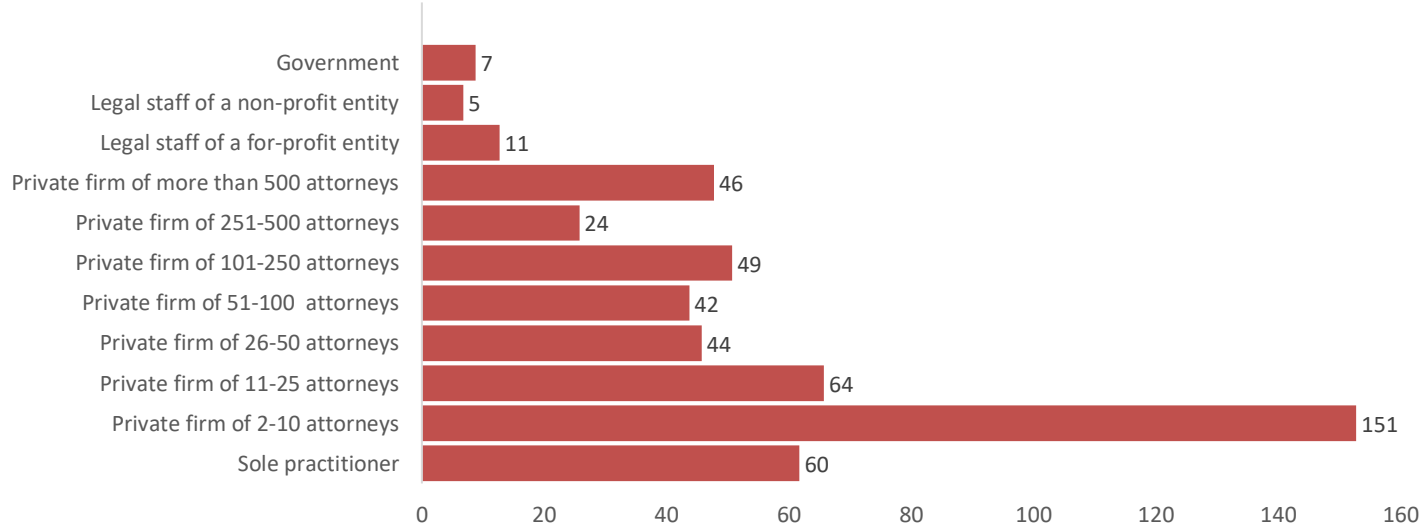
#	Answer	%	Count
1	Contract	18.57%	221
2	Tort	33.39%	355
3	Civil Rights	13.53%	166
4	Consumer	5.04%	53
5	Labor	8.92%	103
6	Intellectual Property	4.31%	49
7	Other	16.24%	176
	Total	100%	1074

You usually represent:



#	Answer	%	Count
1	Plaintiff	39.53%	180
2	Defendant	44.76%	241
3	More or less equal representation of plaintiff or defendant	15.71%	82
	Total	100%	503

Which of the following best describes your law practice setting?



#	Answer	%	Count
1	Sole practitioner	11.93%	60
2	Private firm of 2-10 attorneys	30.02%	151
3	Private firm of 11-25 attorneys	12.72%	64
4	Private firm of 26-50 attorneys	8.75%	44
5	Private firm of 51-100 attorneys	8.35%	42
6	Private firm of 101-250 attorneys	9.74%	49
7	Private firm of 251-500 attorneys	4.78%	24
8	Private firm of more than 500 attorneys	9.15%	46
9	Legal staff of a for-profit entity	2.19%	11
10	Legal staff of a non-profit entity	0.99%	5
11	Government	1.39%	7
	Total	100.00%	503

For the following survey questions **P**= Respondent usually represents Plaintiffs **D**= Respondent usually represents Defendants **B**= More or less equal representation of plaintiff or defendant

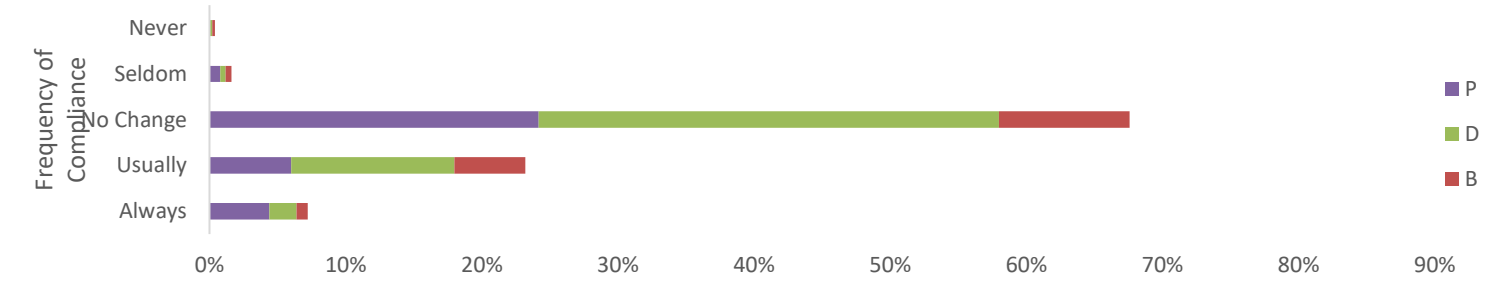
1 - Amended Rule 1 encourages parties and lawyers to cooperate in discovery. What has been your experience with the amendment's effect on the frequency that parties and lawyers cooperate and the effect on cost and fairness?

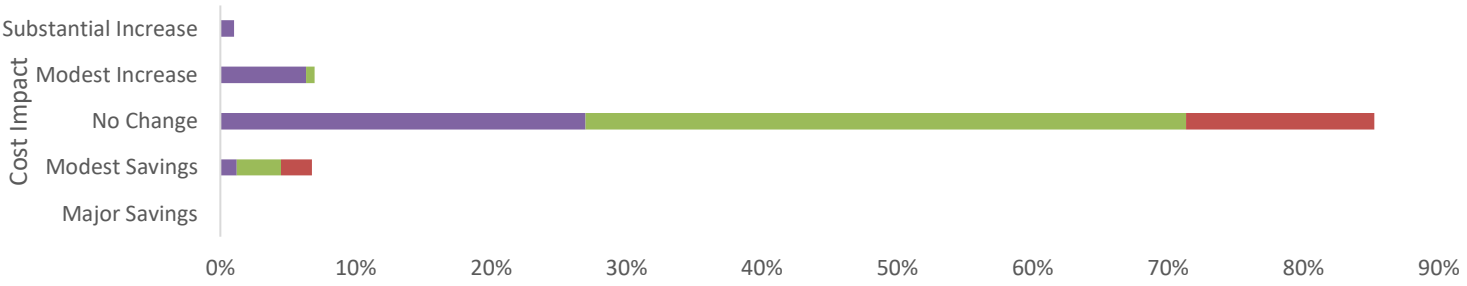
Extent of Parties' Cooperation	Greatly Enhanced			Modestly Enhanced			No Change			Modestly Worsened			Greatly Worsened			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	2	5	2	30	71	32	123	162	42	17	2	2	5	2	2	
	1.80%		9	26.65%		133	65.53%		327	4.21%		21	1.80%		9	499

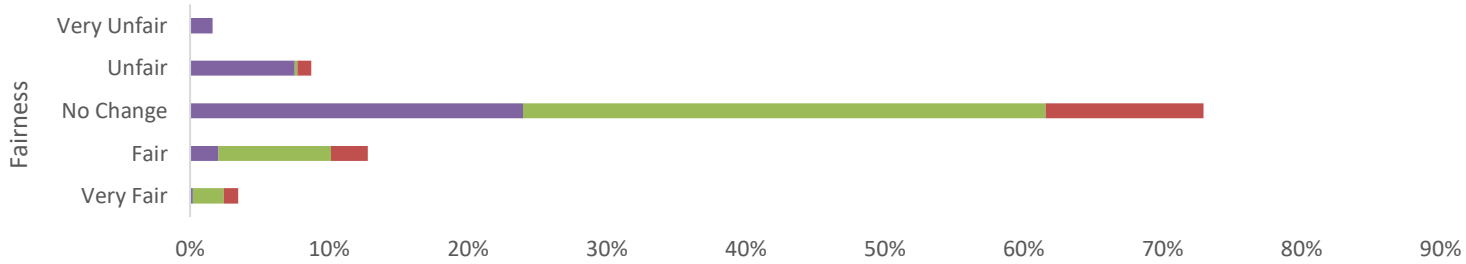
Cost Impact	Major Savings			Modest Savings			No Change			Modest Increase			Substantial Increase			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	4	1	1	15	42	25	118	166	46	24	23	3	12	3	4	
	1.23%		6	16.84%		82	67.76%		330	10.27%		50	3.90%		19	487

Fairness	Very Fair			Fair			No Change			Unfair			Very Unfair			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	3	7	5	15	56	23	100	168	47	40	4	3	10	1	0	
	3.11%		15	19.50%		94	65.35%		315	9.75%		47	2.28%		11	482

2 - Under amended Rule 4(m), complaints are served within 90 days instead of 120 days. What has been your experience with the amendment's effect on the frequency that parties comply with the requirement and the effect on cost and fairness?

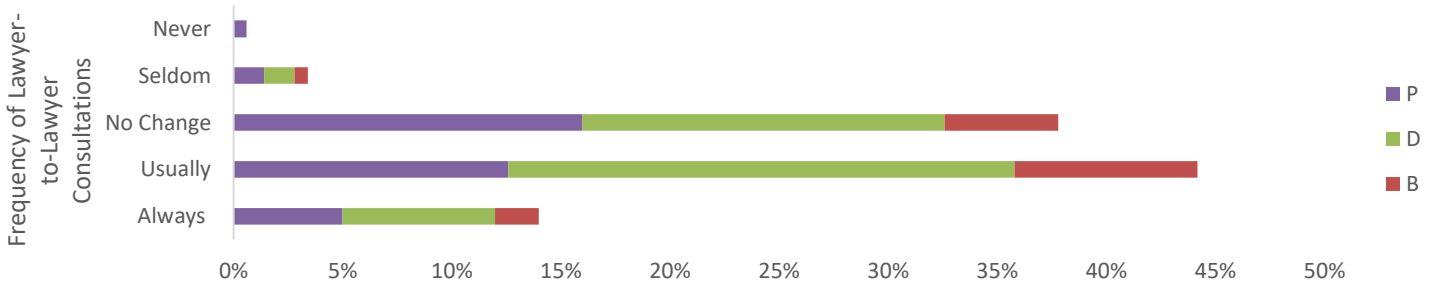


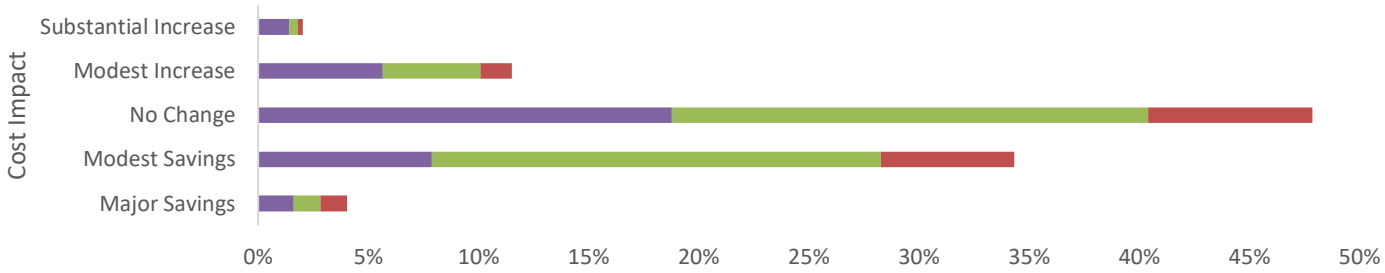


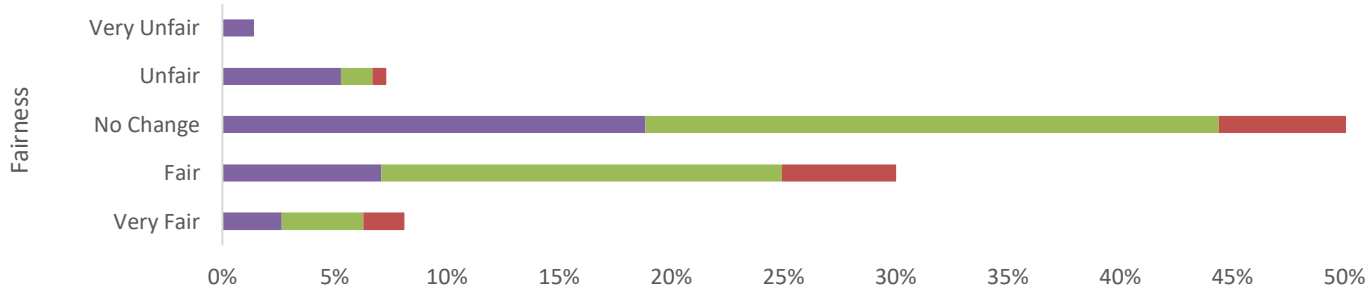


Frequency of Compliance	**Always**			**Usually**			**No Change**			**Seldom**			**Never**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	22	10	4	30	60	26	121	169	48	4	2	2	0	1	1	
	7.20%		36	23.20%		116	67.60%		338	1.60%		8	0.40%		2	500
Cost Impact	**Major Savings**			**Modest Savings**			**No Change**			**Modest Increase**			**Substantial Increase**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	0	0	0	6	16	11	132	217	68	31	3	0	5	0	0	
	0.00%		0	6.75%		33	85.28%		417	6.95%		34	1.02%		5	489
Fairness	**Very Fair**			**Fair**			**No Change**			**Unfair**			**Very Unfair**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	1	11	5	10	40	13	118	185	56	37	1	5	8	0	0	
	3.46%		17	13.21%		65	72.97%		359	8.74%		43	1.63%		8	492

3a - What has been your experience with the amendment's effect on the frequency that parties consult with each other to facilitate discovery and avoid the need to file a discovery motion and the effect on cost and fairness?



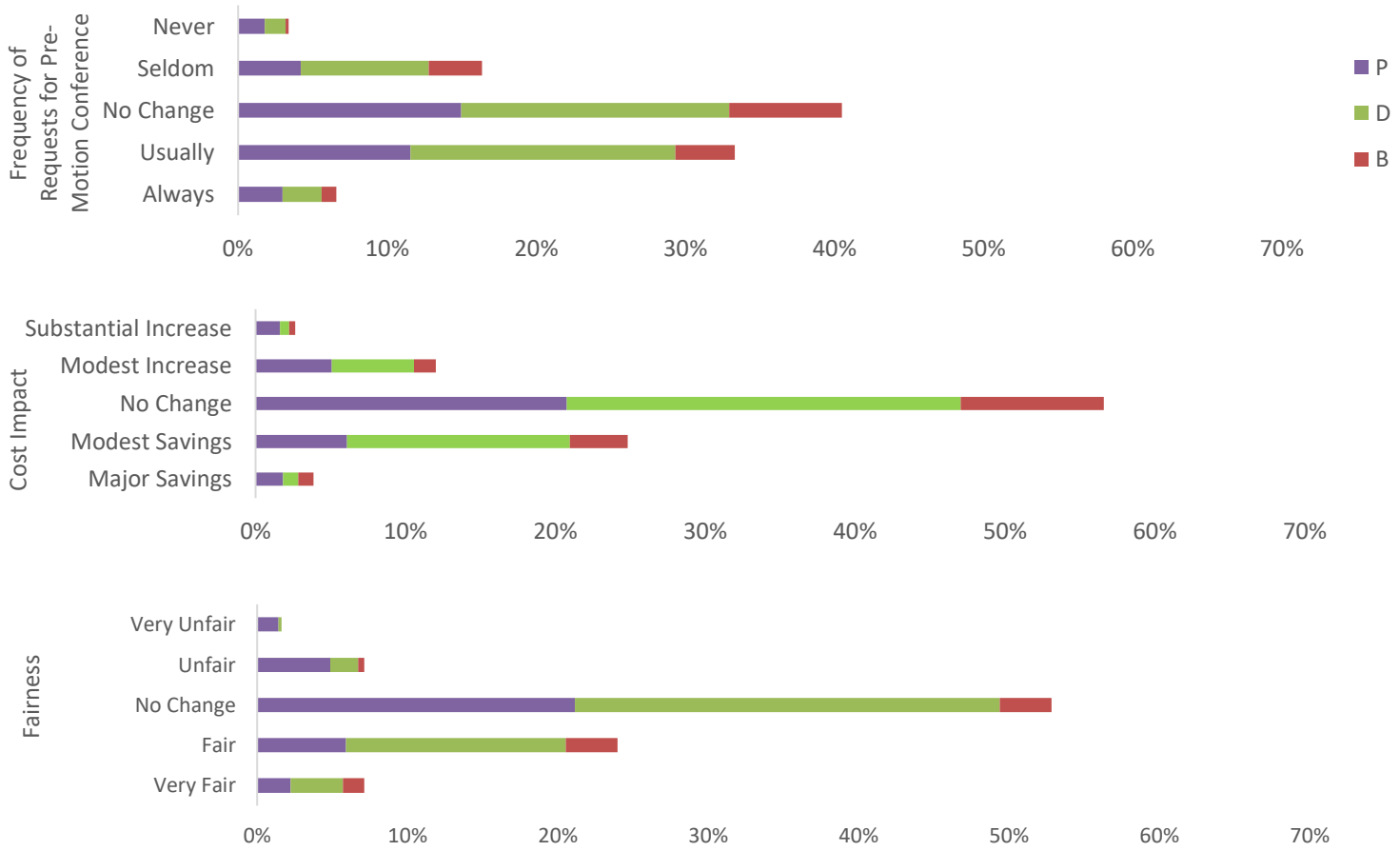




Frequency of Lawyer-to-Lawyer Consultations	**Always**			**Usually**			**No Change**			**Seldom**			**Never**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	25	35	10	63	116	42	80	83	26	7	7	3	3	0	0	
	14.00%		70	44.20%		221	37.80%		189	3.40%		17	0.60%		3	500
Cost Impact	**Major Savings**			**Modest Savings**			**No Change**			**Modest Increase**			**Substantial Increase**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	8	6	6	39	101	30	93	107	37	28	22	7	7	2	1	
	4.04%		20	34.55%		171	47.88%		237	11.52%		57	2.02%		10	495
Fairness	**Very Fair**			**Fair**			**No Change**			**Unfair**			**Very Unfair**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	13	18	9	35	88	25	93	126	43	26	7	3	7	0	0	
	8.11%		40	30.02%		148	53.14%		262	7.30%		36	1.42%		7	493

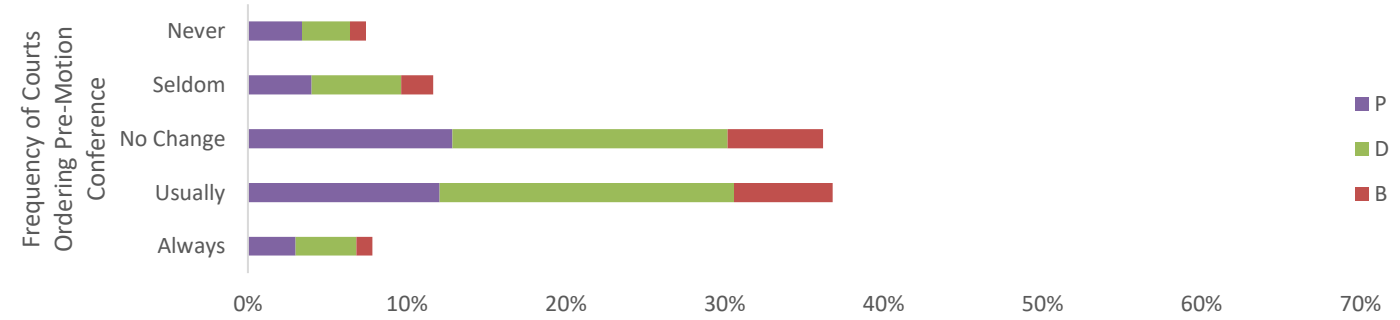
3b - What has been your experience with the amendment's effect on the frequency that parties request a conference with the court before filing a discovery motion and the effect on cost and fairness?

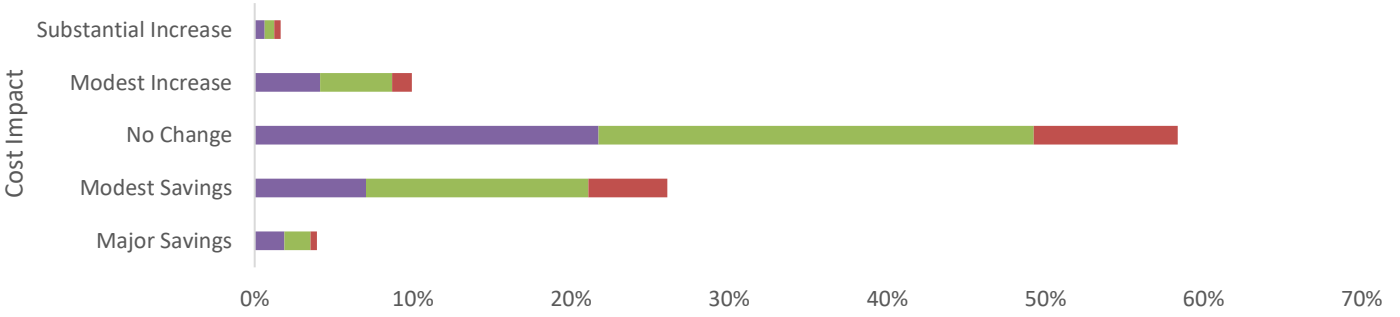
Graph 3b.1

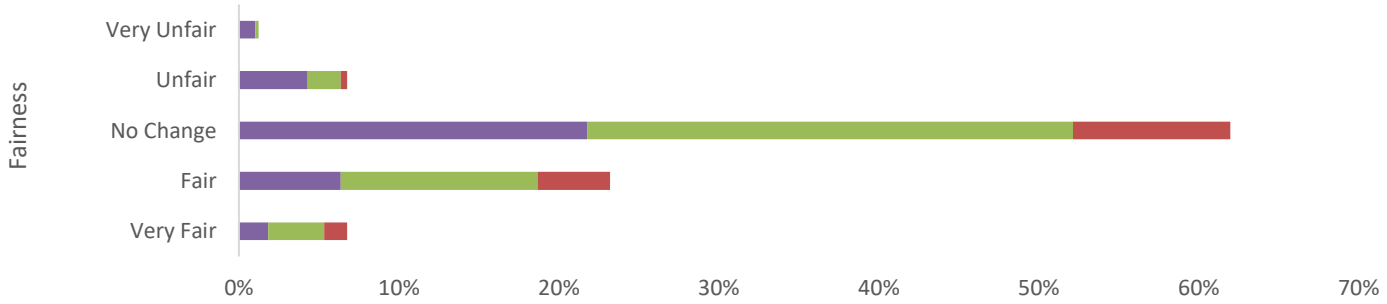


Frequency of Requests for Pre-Motion Conference	**Always**			**Usually**			**No Change**			**Seldom**			**Never**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	501
	15	13	5	58	89	20	75	90	38	21	43	18	9	7	1	
	6.59%		33	33.33%		167	40.52%		203	16.17%		81	3.39%		17	
Cost Impact	**Major Savings**			**Modest Savings**			**No Change**			**Modest Increase**			**Substantial Increase**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	491
	9	5	5	30	73	19	102	129	47	25	27	7	8	3	2	
	3.87%		19	24.85%		122	56.62%		278	12.02%		59	2.65%		13	
Fairness	**Very Fair**			**Fair**			**No Change**			**Unfair**			**Very Unfair**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	492
	11	17	7	29	72	17	104	139	17	24	9	2	7	1	0	
	7.11%		35	24.19%		119	59.96%		295	7.11%		35	1.63%		8	

3c - What has been your experience with the amendment's effect on the frequency that a court on its own orders parties before filing a discovery motion to request a conference with the court and the effect on cost and fairness?





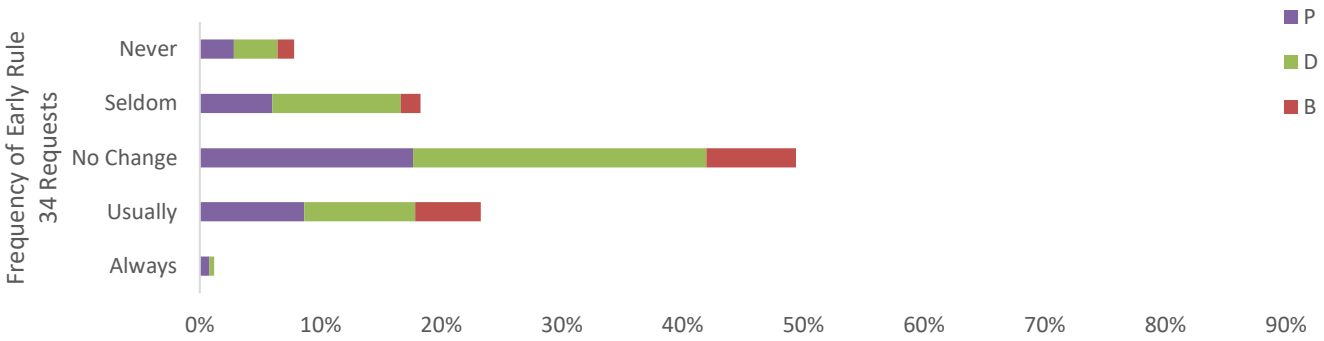


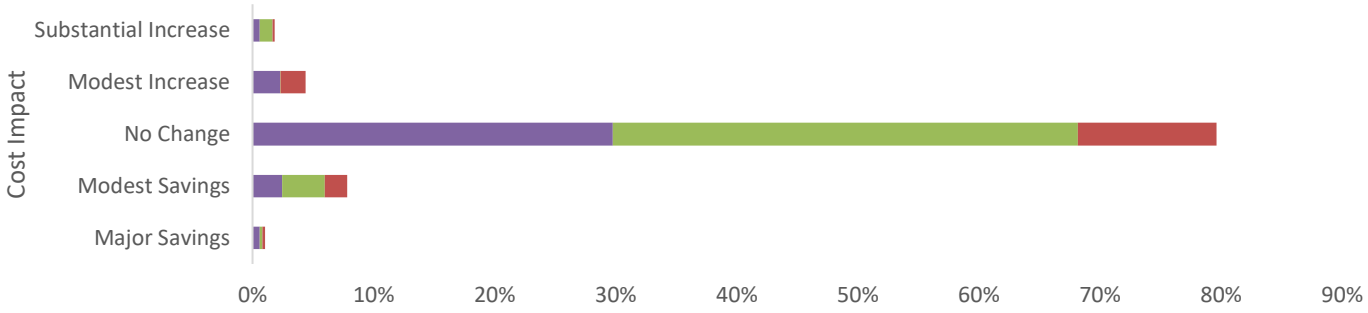
Frequency of Courts Ordering Pre-Motion Conference	Always			Usually			No Change			Seldom			Never			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	15	19	5	60	92	31	64	86	30	20	28	10	17	15	5	
	7.85%		39	36.82%		183	36.22%		180	11.67%		58	7.44%		37	497

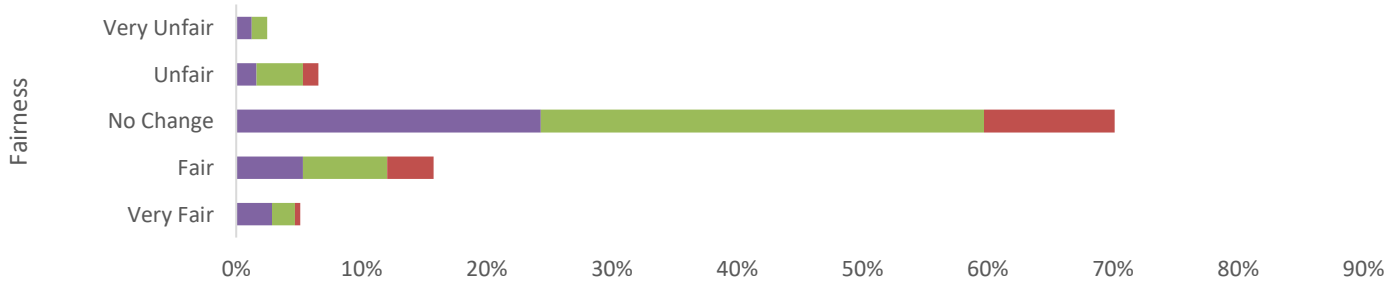
Cost Impact	Major Savings			Modest Savings			No Change			Modest Increase			Substantial Increase			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	9	8	2	34	68	24	105	133	44	20	22	6	3	3	2	
	3.93%		19	26.09%		126	58.39%		282	9.94%		48	1.66%		8	483

Fairness	Very Fair			Fair			No Change			Unfair			Very Unfair			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	9	17	7	31	60	22	106	148	48	21	10	2	5	1	0	
	6.78%		33	23.20%		113	62.01%		302	6.78%		33	1.23%		6	487

4 - Amended Rule 26(d)(2) permits requests for Rule 34 document production before the Rule 26(f) conference. What has been your experience with the amendment's effect on the frequency that parties request early Rule 34 document production and the effect on cost and fairness?





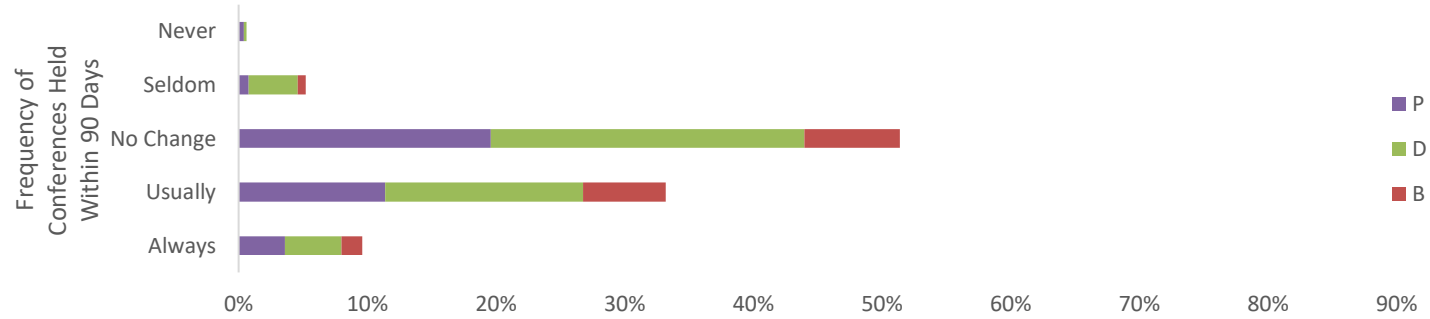


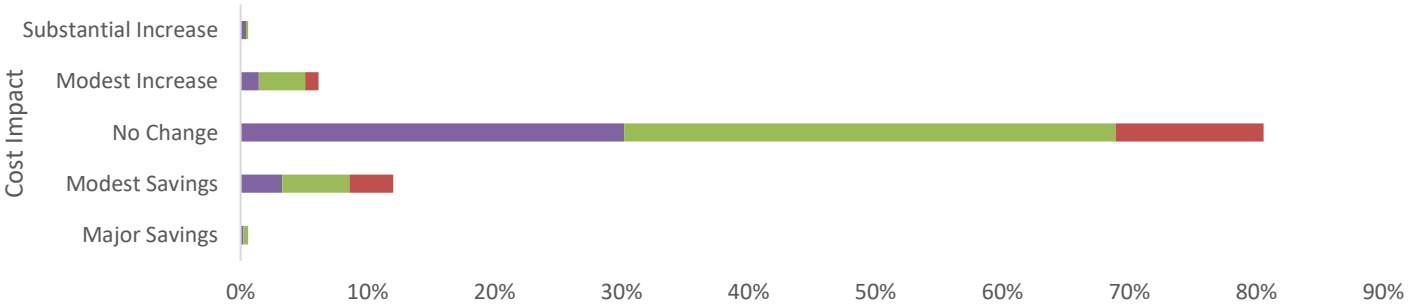
Frequency of Early Rule 34 Requests	**Always**			**Usually**			**No Change**			**Seldom**			**Never**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	4	2	0	43	46	27	88	121	37	30	53	8	14	18	7	
	1.20%		6	23.29%		116	49.40%		246	18.27%		91	7.83%		39	498
Cost Impact	**Major Savings**			**Modest Savings**			**No Change**			**Modest Increase**			**Substantial Increase**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	3	1	1	12	17	9	145	187	56	11	26	10	3	5	1	
	1.03%		5	7.80%		38	79.67%		388	9.65%		47	1.85%		9	487
Fairness	**Very Fair**			**Fair**			**No Change**			**Unfair**			**Very Unfair**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	14	9	2	26	33	18	119	173	51	8	18	6	6	6	0	
	5.11%		25	15.75%		77	70.14%		343	6.54%		32	2.45%		12	489

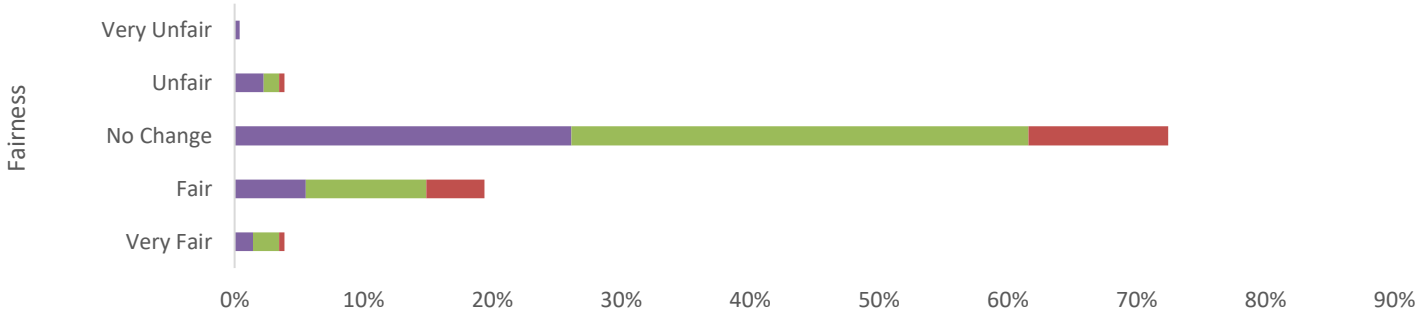
5 - Amended Rule 16(b)(1)(B) encourages judges to hold a live Rule 16(b) conference either in-person or by conference call, video conference, or other means of having a real-time conversation. What has been your experience with the amendment's effect on the frequency that judges hold such conferences, i.e., in-person, conference call, video conference, or other means, and the effect on cost and fairness?

Frequency of Real-Time Rule 16 Conferences	**Always**			**Usually**			**No Change**			**Seldom**			**Never**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	25	21	9	43	83	33	83	105	30	14	27	7	13	4	1	
	11.04%		55	31.93%		159	43.78%		218	9.64%		48	3.61%		18	498
Cost Impact	**Major Savings**			**Modest Savings**			**No Change**			**Modest Increase**			**Substantial Increase**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	4	8	3	17	48	23	125	148	40	23	30	13	2	3	0	
	3.08%		15	18.07%		88	64.27%		313	13.55%		66	1.03%		5	487
Fairness	**Very Fair**			**Fair**			**No Change**			**Unfair**			**Very Unfair**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	11	18	7	30	68	24	125	149	47	5	2	1	2	0	0	
	7.36%		36	24.95%		122	65.64%		321	1.64%		8	0.41%		2	489

6 - Amended Rule 16(b)(2) shortens the time from 120 days to 90 days to hold the Rule 16 scheduling conference. What has been your experience with the amendment's effect on the frequency that scheduling conferences are held within 90 days and the effect on cost and fairness?





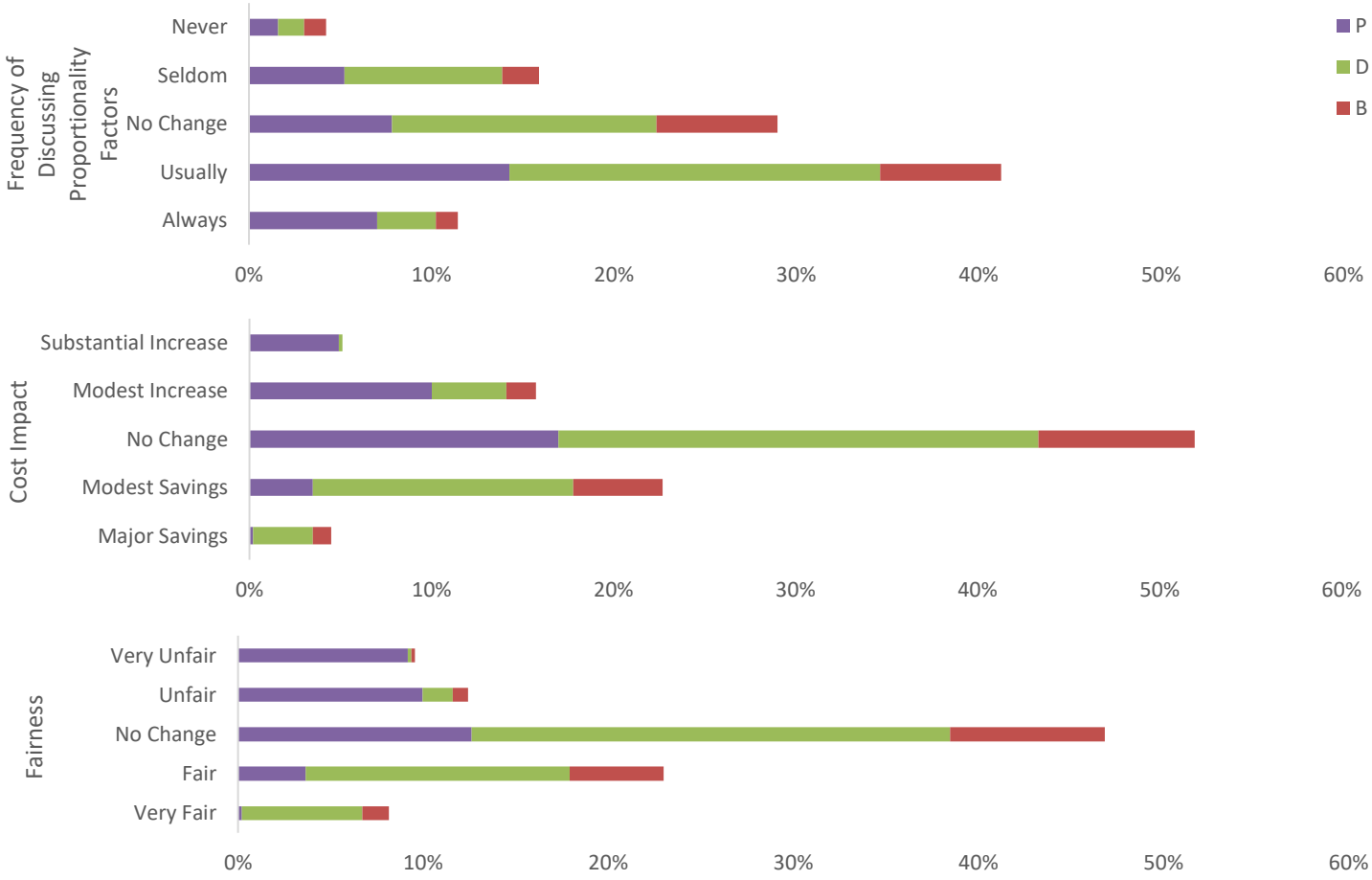


Frequency of Conferences Held Within 90 Days	Always			Usually			No Change			Seldom			Never			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	18	22	8	57	77	32	98	122	37	4	19	3	2	1	0	
	9.60%		48	33.20%		166	51.40%		257	5.20%		26	0.60%		3	500

Cost Impact	Major Savings			Modest Savings			No Change			Modest Increase			Substantial Increase			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	1	2	0	16	26	17	148	190	57	7	18	5	2	1	0	
	0.61%		3	12.04%		59	80.61%		395	6.12%		30	0.61%		3	490

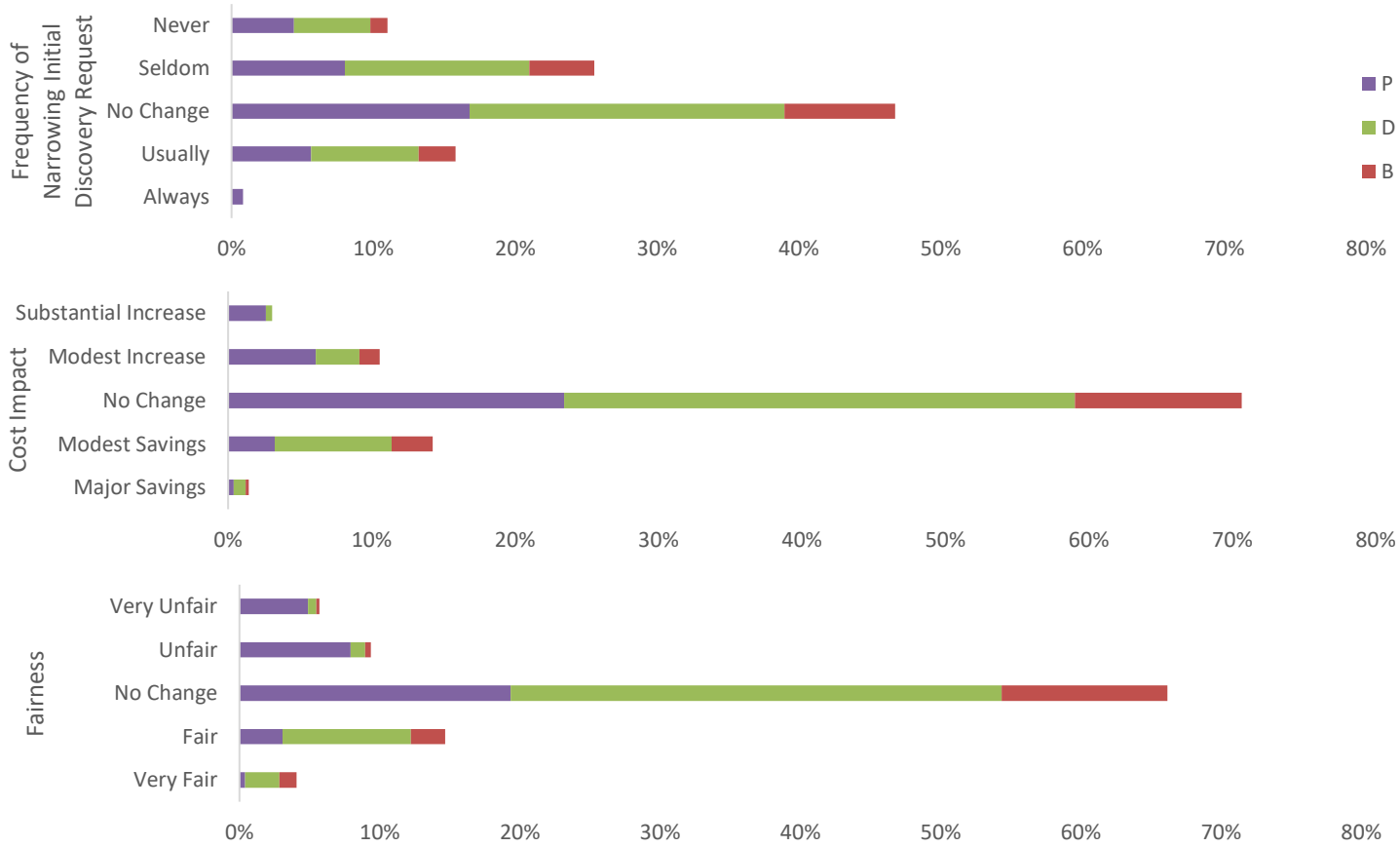
Fairness	Very Fair			Fair			No Change			Unfair			Very Unfair			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	7	10	2	27	46	22	128	174	53	11	6	2	2	0	0	
	3.88%		19	19.39%		95	72.45%		355	3.88%		19	0.41%		2	490

7 - Amended Rule 26(b)(1) was intended to require parties when making their initial discovery requests for information to take into account proportionality factors. What has been your experience with the amendment's effect on the frequency that you, your opponent, or the court have mentioned or discussed proportionality factors when making or responding to initial discovery requests and the effect on cost and fairness?



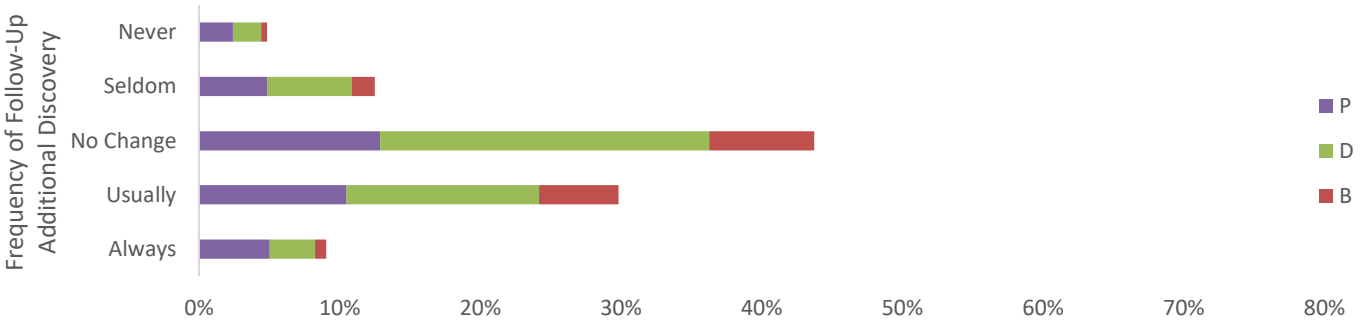
Frequency of Discussing Proportionality Factors	**Always**			**Usually**			**No Change**			**Seldom**			**Never**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	35	16	6	71	101	33	39	72	24	26	43	10	8	7	6	
	11.47%		57	41.25%		205	27.16%		135	15.90%		79	4.23%		21	497
Cost Impact	**Major Savings**			**Modest Savings**			**No Change**			**Modest Increase**			**Substantial Increase**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	1	16	5	17	70	24	83	129	42	49	20	8	24	1	0	
	4.50%		22	22.70%		111	51.94%		254	15.75%		77	5.11%		25	489
Fairness	**Very Fair**			**Fair**			**No Change**			**Unfair**			**Very Unfair**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	1	32	7	18	70	25	62	127	41	49	8	4	45	1	1	
	8.15%		40	23.01%		113	46.84%		230	12.42%		61	9.57%		47	491

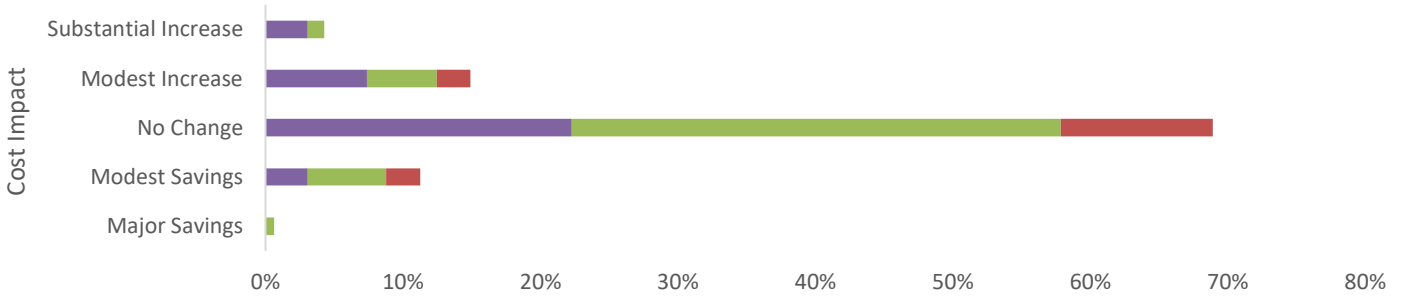
8a - What has been your experience with the amendment's effect on the frequency that parties first request information that is most likely to be important to resolving central issues and only later request broader discovery, if necessary, and the effect on cost and fairness?

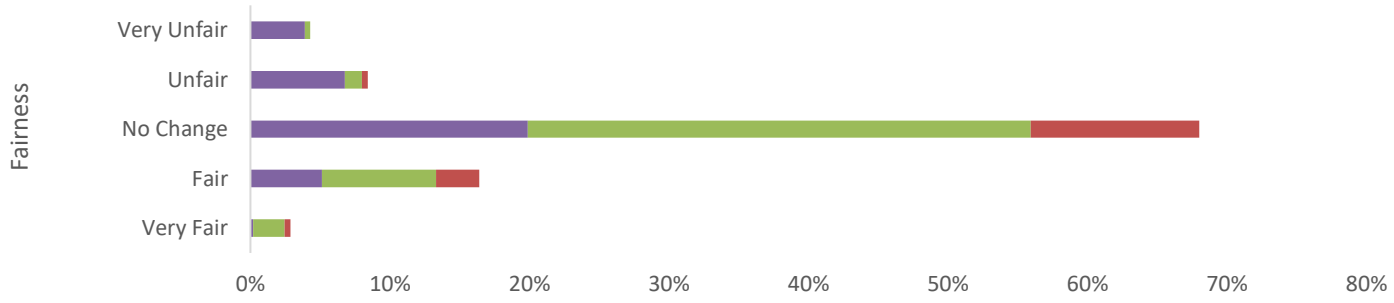


Frequency of Narrowing Initial Discovery Request	**Always**			**Usually**			**No Change**			**Seldom**			**Never**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	4	0	0	28	38	13	84	111	39	40	65	23	22	27	6	
	0.80%		4	15.80%		79	46.80%		234	25.60%		128	11.00%		55	500
Cost Impact	**Major Savings**			**Modest Savings**			**No Change**			**Modest Increase**			**Substantial Increase**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	2	4	1	16	40	14	115	175	57	30	15	7	13	2	0	
	1.43%		7	14.26%		70	70.67%		347	10.59%		52	3.05%		15	491
Fairness	**Very Fair**			**Fair**			**No Change**			**Unfair**			**Very Unfair**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	2	12	6	15	45	12	95	172	58	39	5	2	24	3	1	
	4.07%		20	14.66%		72	66.19%		325	9.37%		46	5.70%		28	491

8b - What has been your experience with the amendment's effect on the frequency that parties follow up with additional discovery requests after the parties had first completed discovery on information that was most likely to be important to resolving central issues and the effect on cost and fairness?





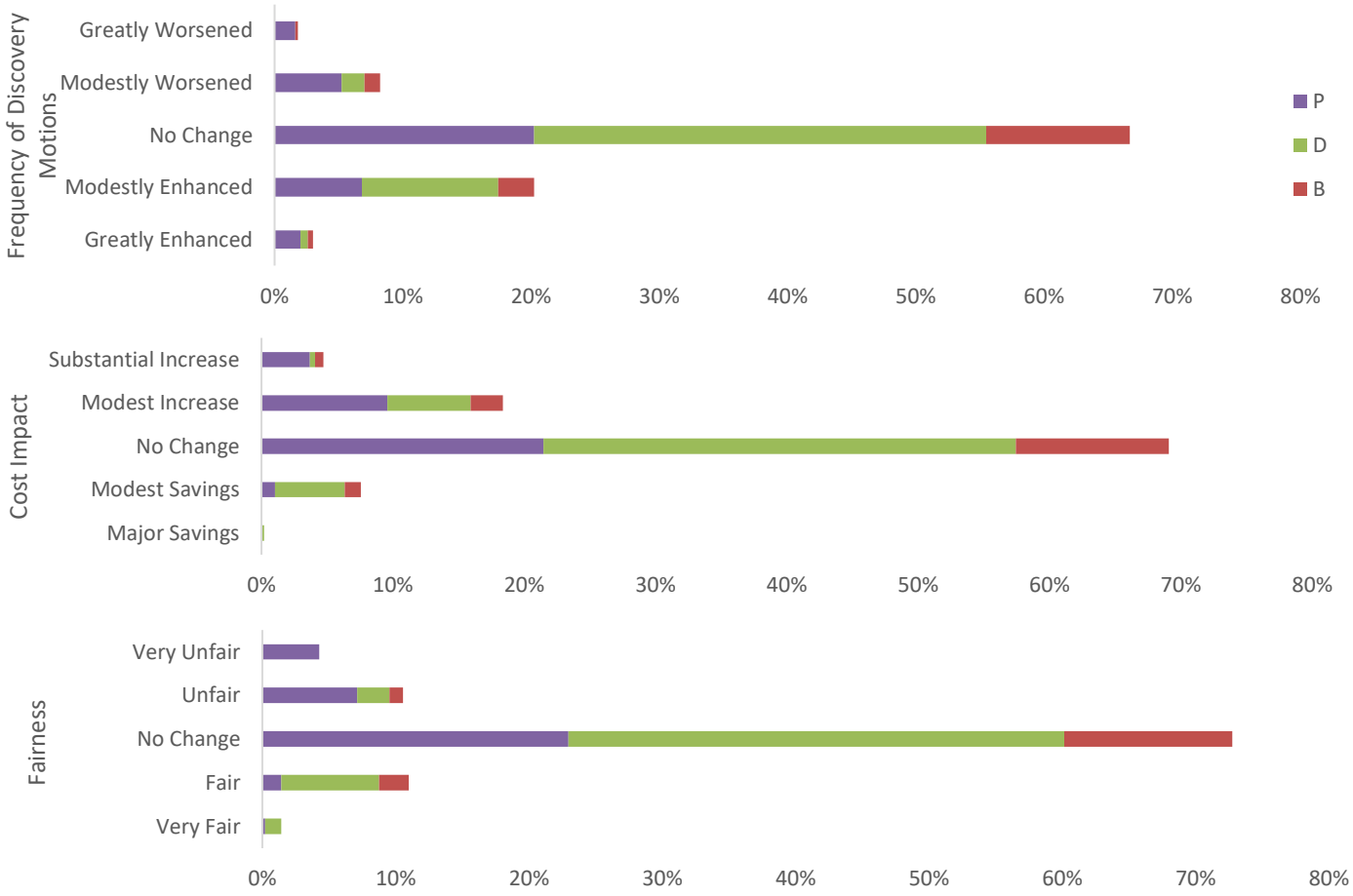


Frequency of Follow-Up Additional Discovery	Always			Usually			No Change			Seldom			Never			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	25	16	4	52	68	28	64	116	37	24	30	8	12	10	2	
	9.07%		45	29.84%		148	43.75%		217	12.50%		62	4.84%		24	496

Cost Impact	Major Savings			Modest Savings			No Change			Modest Increase			Substantial Increase			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	0	3	0	15	28	12	109	174	54	36	25	12	15	6	0	
	0.61%		3	11.25%		55	68.92%		337	14.93%		73	4.29%		21	489

Fairness	Very Fair			Fair			No Change			Unfair			Very Unfair			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	1	11	2	25	40	15	97	176	59	33	6	2	19	2	0	
	2.87%		14	16.39%		80	68.03%		332	8.40%		41	4.30%		21	488

9 - New rule amendments historically result in an uptick in motion practice until the bench and bar become fully familiar with them. What has been your experience with amended Rule 26's effect on the frequency that parties raise or file discovery motions and the effect on cost and fairness?

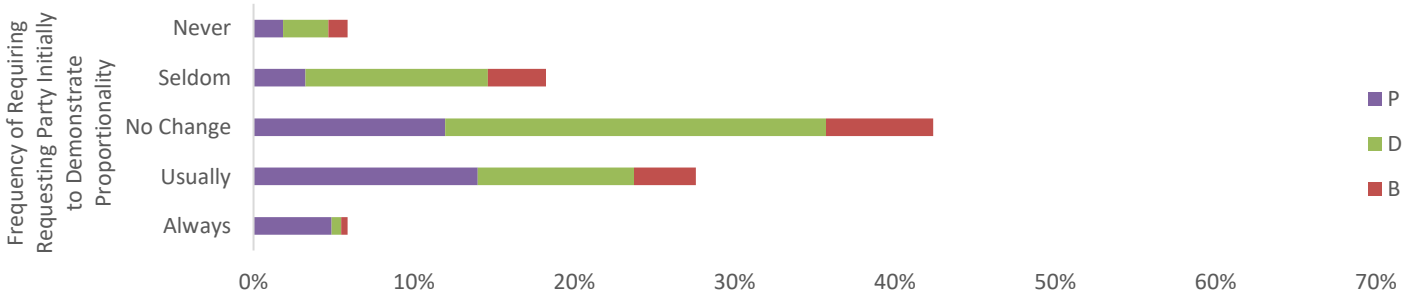


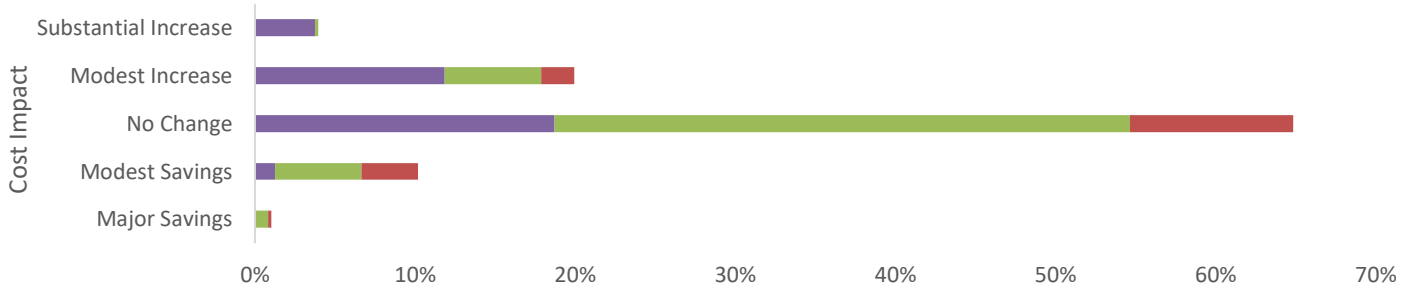
Frequency of Discovery Motions	Greatly Enhanced			Modestly Enhanced			No Change			Modestly Worsened			Greatly Worsened			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	10	3	2	34	53	14	101	176	56	26	9	6	8	0	1	
	3.01%		15	20.24%		101	66.73%		333	8.22%		41	1.80%		9	499

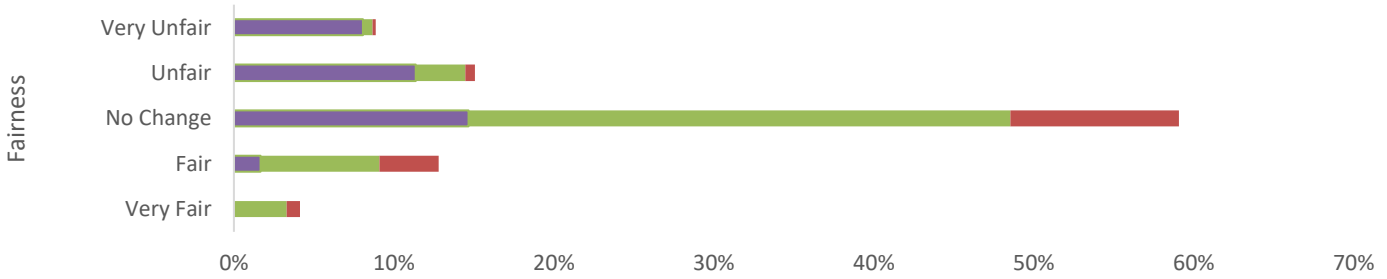
Cost Impact	Major Savings			Modest Savings			No Change			Modest Increase			Substantial Increase			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	0	1	0	5	26	6	105	176	57	47	31	12	18	2	3	
	0.20%		1	7.57%		37	69.12%		338	18.40%		90	4.70%		23	489

Fairness	Very Fair			Fair			No Change			Unfair			Very Unfair			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	1	6	0	7	36	11	113	183	62	35	12	5	21	0	0	
	1.42%		7	10.98%		54	72.76%		358	10.57%		52	4.27%		21	492

10 - The Committee Notes expressly state that amended Rule 26 was not intended to affect who bears the burden to demonstrate proportionality. What has been your experience with courts requiring the requesting party, and not the responding party, to demonstrate initially that its discovery request is proportional to the needs of the case?





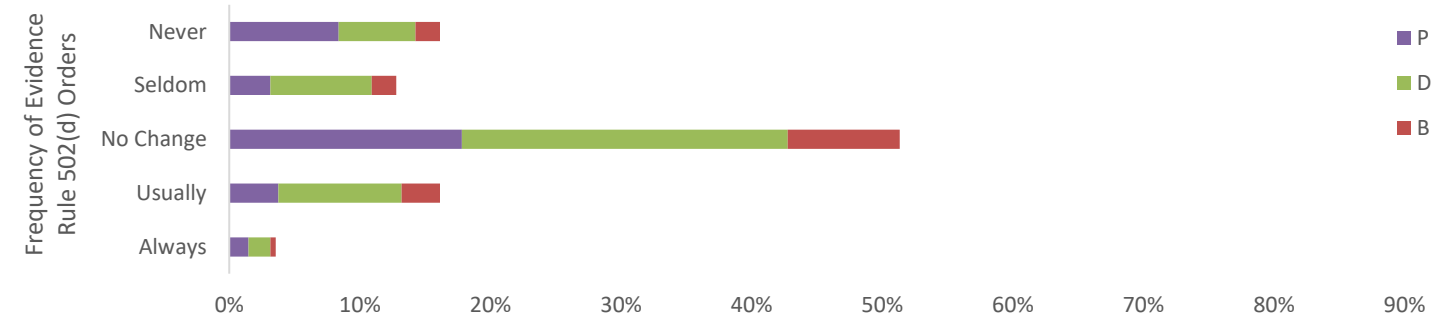


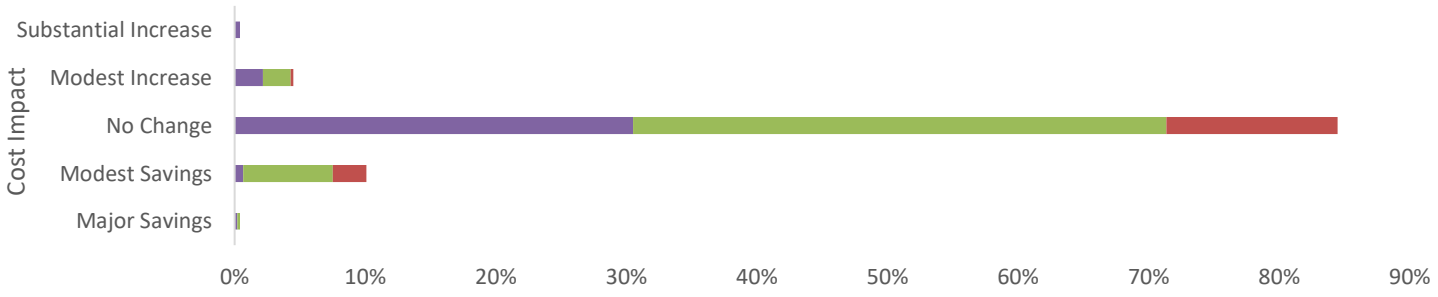
Frequency of Requiring Requesting Party Initially to Demonstrate Proportionality	Always			Usually			No Change			Seldom			Never			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	24	3	2	69	48	19	59	117	33	16	56	18	9	14	6	
	5.88%		29	27.59%		136	42.39%		209	18.26%		90	5.88%		29	493

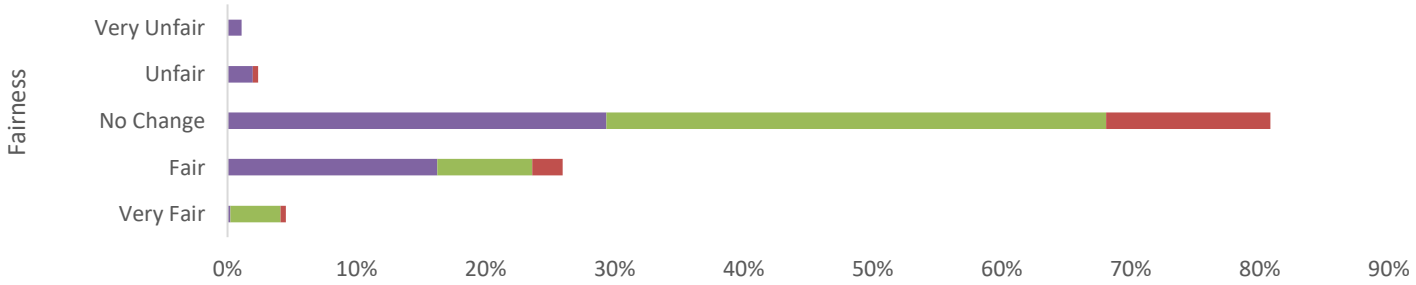
Cost Impact	Major Savings			Modest Savings			No Change			Modest Increase			Substantial Increase			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	0	4	1	6	26	17	90	173	49	57	29	10	18	1	0	
	1.04%		5	10.19%		49	64.86%		312	19.96%		96	3.95%		19	481

Fairness	Very Fair			Fair			No Change			Unfair			Very Unfair			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	0	16	4	8	36	18	71	164	51	55	15	3	39	3	1	
	4.13%		20	12.81%		62	59.09%		286	15.08%		73	8.88%		43	484

11 - Amended Rule 26(f)(3)(D) encourages parties to seek a Federal Rule of Evidence 502(d) order. What has been your experience with the amendment's effect on the frequency that a court issues a Federal Rule of Evidence 502(d) order and the effect on cost and fairness?





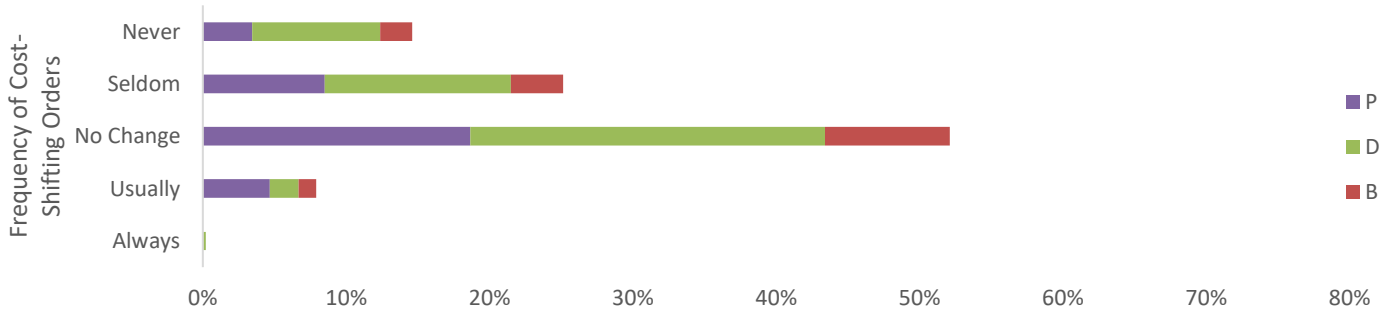


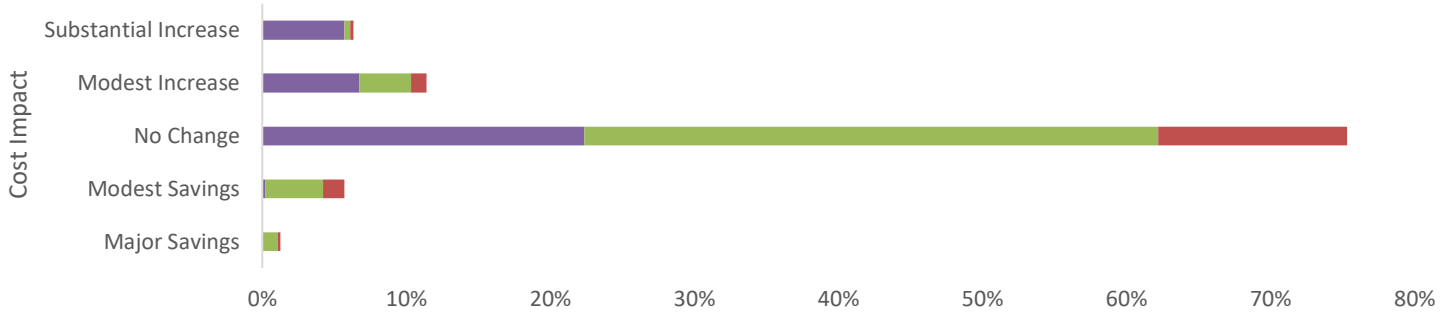
Frequency of Evidence Rule 502(d) Orders	Always			Usually			No Change			Seldom			Never			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	7	8	2	18	45	14	85	119	41	15	37	9	40	28	9	
	3.56%		17	16.14%		77	51.36%		245	12.79%		61	16.14%		77	477

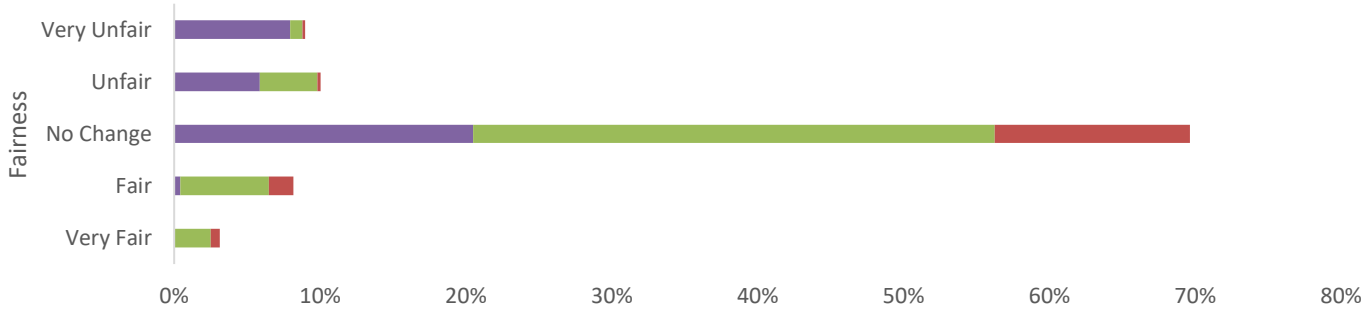
Cost Impact	Major Savings			Modest Savings			No Change			Modest Increase			Substantial Increase			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	1	1	0	3	32	12	142	190	61	10	10	1	2	0	0	
	0.43%		2	10.11%		47	84.52%		393	4.52%		21	0.43%		2	465

Fairness	Very Fair			Fair			No Change			Unfair			Very Unfair			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	1	18	2	7	34	11	136	179	59	9	0	2	5	0	0	
	4.54%		21	11.23%		52	80.78%		374	2.38%		11	1.08%		5	463

12 - Amended Rule 26(c)(1)(B) makes explicit a court's authority to shift some discovery costs to the requesting party under appropriate circumstances. What has been your experience with the amendment's effect on the frequency that courts order that some or all of the discovery costs be shifted to the requesting party and the effect on cost and fairness?





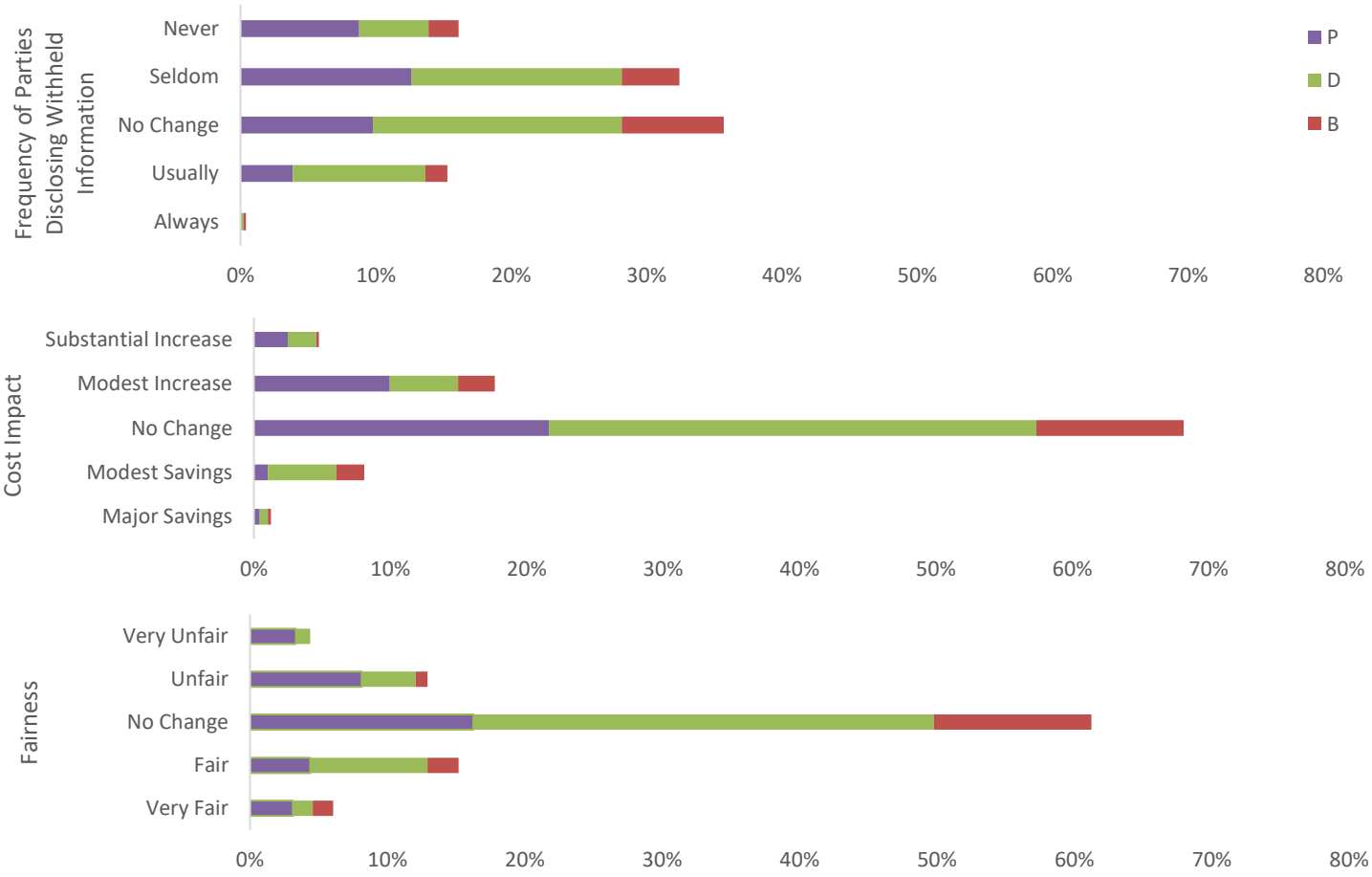


Frequency of Cost-Shifting Orders	**Always**			**Usually**			**No Change**			**Seldom**			**Never**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	0	1	0	23	10	6	92	122	43	42	64	18	17	44	11	
	0.20%		1	7.91%		39	52.13%		257	25.15%		124	14.60%		72	493
Cost Impact	**Major Savings**			**Modest Savings**			**No Change**			**Modest Increase**			**Substantial Increase**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	0	5	1	1	19	7	106	189	62	32	17	5	27	2	1	
	1.27%		6	5.70%		27	75.32%		357	11.39%		54	6.33%		30	474
Fairness	**Very Fair**			**Fair**			**No Change**			**Unfair**			**Very Unfair**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	0	12	3	2	29	8	98	171	64	28	19	1	38	4	1	
	3.14%		15	8.16%		39	69.67%		333	10.04%		48	9.00%		43	478

13 - Amended Rule 34(b)(2)(B) requires a party to identify specific grounds for objecting to a discovery request. What has been your experience with the amendment's effect on the frequency that parties identify specific grounds for objection and the effect on cost and fairness?

Frequency of Parties Specifying Grounds of Objection	**Always**			**Usually**			**No Change**			**Seldom**			**Never**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	1	8	5	29	109	30	68	87	35	63	37	8	14	1	1	
	2.82%		14	33.87%		168	38.31%		190	21.77%		108	3.23%		16	496
Cost Impact	**Major Savings**			**Modest Savings**			**No Change**			**Modest Increase**			**Substantial Increase**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	5	3	3	10	54	17	122	140	50	29	33	7	4	7	8	
	2.27%		11	16.70%		81	64.33%		312	14.23%		69	2.47%		12	485
Fairness	**Very Fair**			**Fair**			**No Change**			**Unfair**			**Very Unfair**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	22	17	8	27	70	24	95	138	44	18	9	2	9	2	0	
	9.69%		47	24.95%		121	57.11%		277	5.98%		29	2.27%		11	485

14 - Amended Rule 34(b)(2)(C) requires a party to identify and disclose all responsive information withheld because it was not proportional to the needs of the case. What has been your experience with the amendment's effect on the frequency that parties identify and disclose withheld information and the effect on cost and fairness?

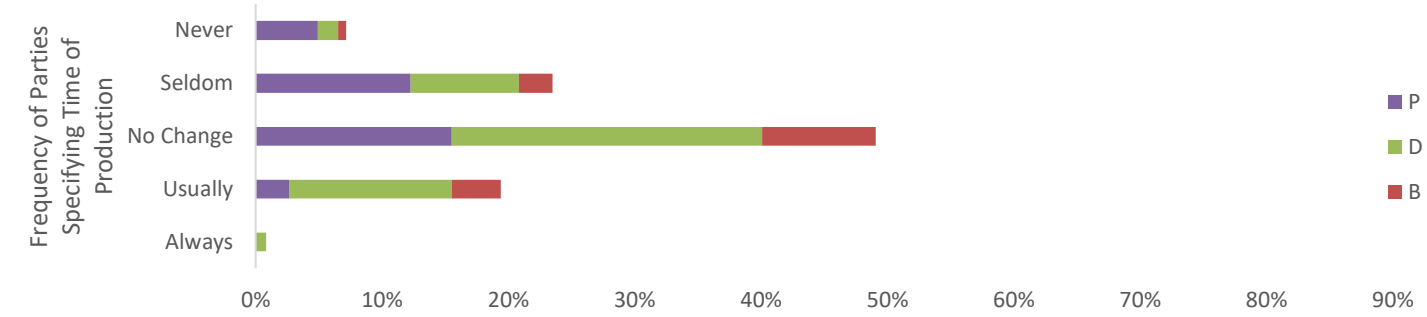


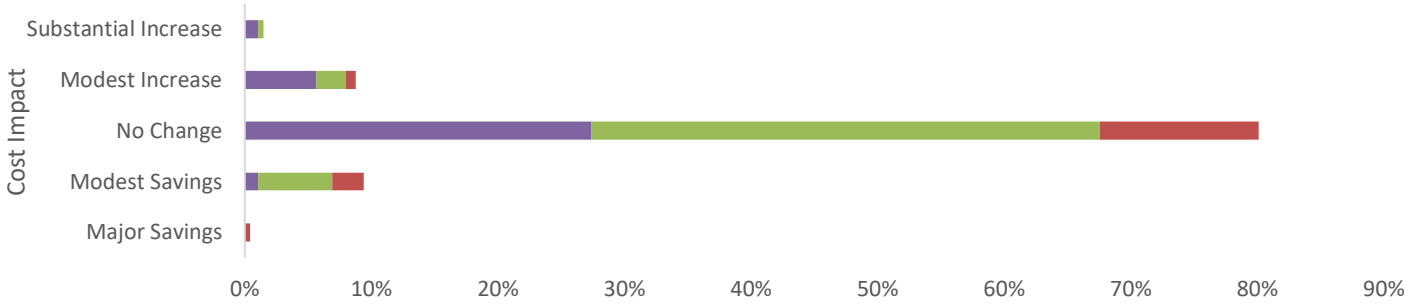
Frequency of Parties Disclosing Withheld Information	Always			Usually			No Change			Seldom			Never			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	0	1	1	19	48	8	48	90	37	62	76	21	43	25	11	
	0.41%		2	15.31%		75	35.71%		175	32.45%		159	16.12%		79	490

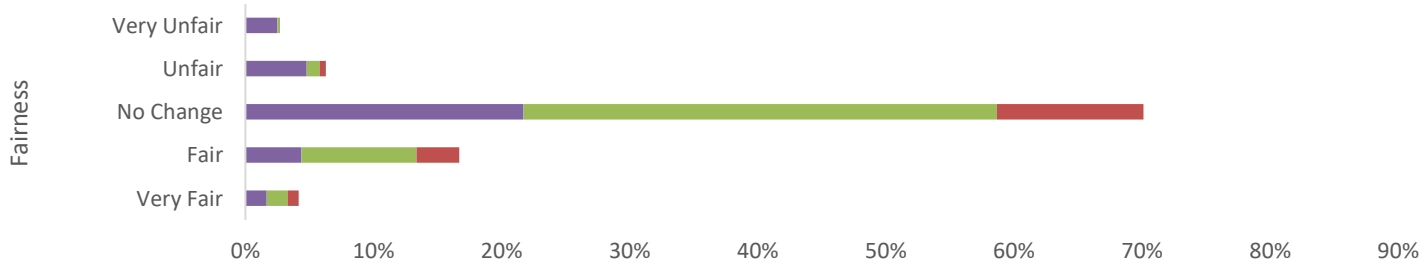
Cost Impact	Major Savings			Modest Savings			No Change			Modest Increase			Substantial Increase			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	2	3	1	5	24	10	104	172	52	48	24	13	12	10	1	
	1.25%		6	8.11%		39	68.19%		328	17.67%		85	4.78%		23	481

Fairness	Very Fair			Fair			No Change			Unfair			Very Unfair			Total
	P	D	B	P	D	B	P	D	B	P	D	B	P	D	B	
	15	7	7	21	41	11	78	161	55	39	19	4	16	5	0	
	6.25%		30	15.21%		73	61.25%		294	12.92%		62	4.38%		21	480

15 - Amended Rule 34(b)(2)(B) requires a party to specify a reasonable time when it will produce responsive information. What has been your experience with the amendment's effect on the frequency that parties specify the time when they will produce responsive information and the effect on cost and fairness?

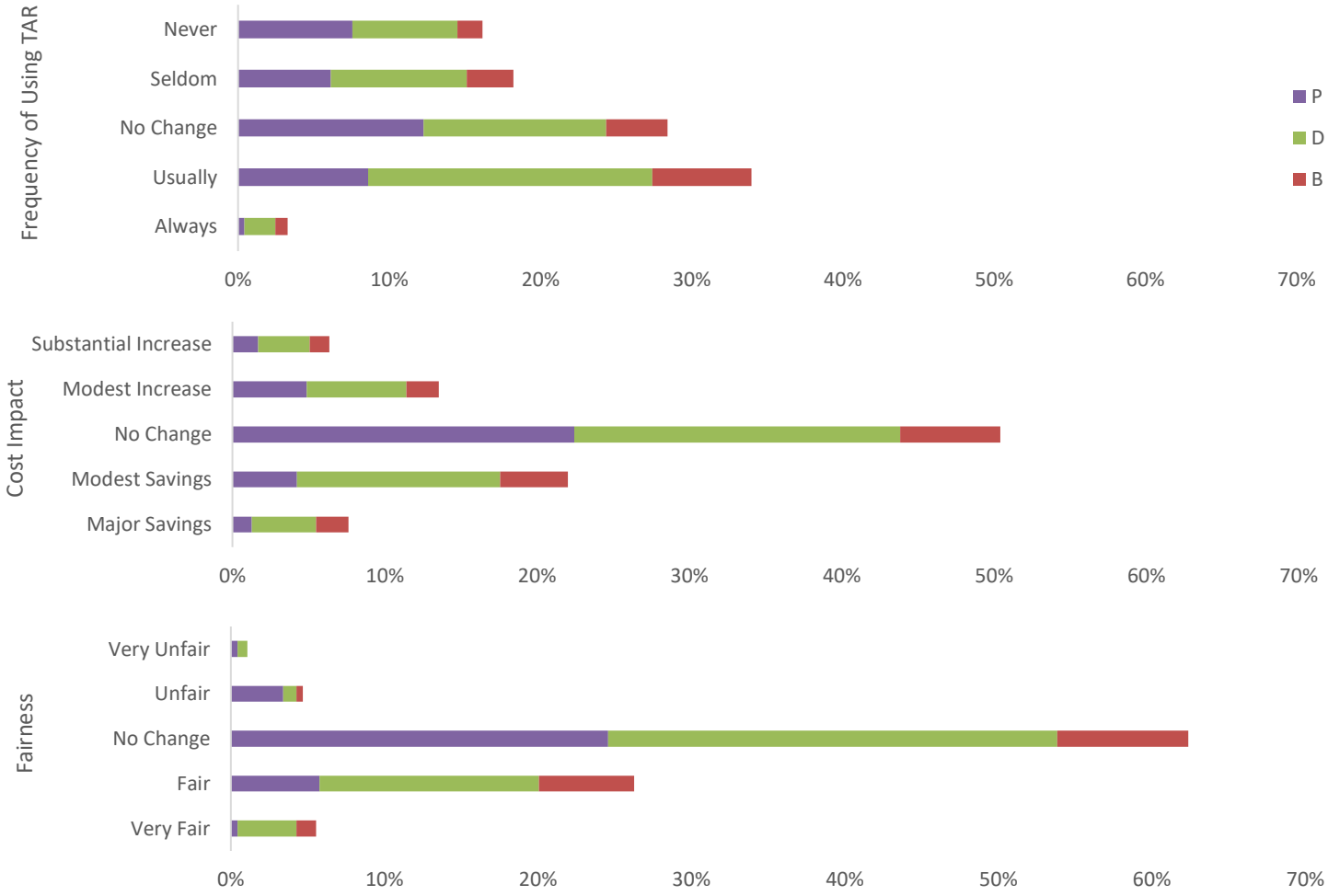






Frequency of Parties Specifying Time of Production	**Always**			**Usually**			**No Change**			**Seldom**			**Never**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	0	4	0	13	63	19	76	120	44	60	42	13	24	8	3	
	0.82%		4	19.43%		95	49.08%		240	23.52%		115	7.16%		35	489
Cost Impact	**Major Savings**			**Modest Savings**			**No Change**			**Modest Increase**			**Substantial Increase**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	0	0	2	5	28	12	131	192	60	27	11	4	5	2	0	
	0.21%		1	9.41%		45	80.13%		383	8.79%		42	1.46%		7	478
Fairness	**Very Fair**			**Fair**			**No Change**			**Unfair**			**Very Unfair**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	8	8	4	21	43	16	104	177	55	23	5	2	12	1	0	
	4.18%		20	16.70%		80	70.15%		336	6.26%		30	2.71%		13	479

16 - The Committee Note to Rule 26 acknowledges the effectiveness of new technology, stating: "Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information." Have you or the opposing party used TAR (technology-assisted review) either to produce responsive information or to prioritize documents for review?



Frequency of Using TAR	**Always**			**Usually**			**No Change**			**Seldom**			**Never**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	2	10	4	42	92	32	60	59	20	30	44	15	37	34	8	
	3.27%		16	33.95%		166	28.43%		139	18.20%		89	16.16%		79	489
Cost Impact	**Major Savings**			**Modest Savings**			**No Change**			**Modest Increase**			**Substantial Increase**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	6	20	10	20	63	21	106	101	31	23	31	10	8	16	6	
	7.63%		36	22.03%		104	50.42%		238	13.56%		64	6.36%		30	472
Fairness	**Very Fair**			**Fair**			**No Change**			**Unfair**			**Very Unfair**			**Total**
	P	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	**P**	**D**	**B**	
	2	18	6	27	67	29	115	137	40	16	4	2	2	3	0	
	5.56%		26	26.28%		123	62.39%		292	4.70%		22	1.07%		**5**	468

COMMENTS BY MEMBERS OF SEVEN BAR ORGANIZATIONS WHO SUBMITTED RESPONSES TO NATIONAL SURVEY

Amendments Are Improvements

- Viewed as a whole, I think the 2015 amendments are a major improvement in saving expense and moving cases along somewhat more efficiently.
- Rules seem to be working well in my district and with regard to my cases.
- I practice in the District of Arizona, which is one of two districts participating in the MIDP Program, which may impact my survey results. Also, our district regularly required court conferences with the judge prior to discovery motions even before the amendments. As a result, this change has not had a large impact on my practice but I agree that it is the most effective way to resolve discovery disputes in a timely and cost-effective manner.
- I'm usually a government plaintiff in antitrust merger litigation which is on such a fast clock that the shortening of deadlines in the FRCP has had no impact, especially when you are going to trial in six months or less from filing the filing of the complaint. In addition, the options for the answers do not clearly match the questions, but overall the rule changes have resulted in modest savings, increased fairness, and a little more attention to discovery by the parties. However, the rule changes requiring specific objections, identification of materials withheld, and statement of when production will occur has resulted in increased costs because many parties still have to be reminded to meet the new requirements because they continue past practice of blanket objections.
- In more complex federal litigation, the competence and professionalism of counsel usually leads to mutual adherence to the new rules, more streamlined and efficient approaches to resolving procedural disputes and less frequent resort to anything resembling the Rambo litigation tactics of a bygone era.
- Too soon to really see any changes, but directionally, we're making progress.
- I think that the 2015 amendments were well stated. Federal district judges need to lead the way in ensuring compliance with the new amendments.
- I think the discussed changes have been very good, but I have limited direct experience with the specifics, and more have been involved in the spirit of the changes, which I think is helpful. In other words, the changes endorse in every case consideration of the costs, need, and trade-offs in discovery.
- It is working. Let it develop.
- The proportionality requirements have had a significant impact on curtailing wide-ranging, largely irrelevant fishing expeditions for documents that have, in the past, been extremely costly with which to comply and forced plaintiffs' counsel to be more specific and focused on document production requests. In my opinion, that single change was long overdue and I hope that our state court will eventually adopt the same scope limitations.
- Overall, discovery requests from the plaintiff's bar have gotten extremely broad and overly burdensome, particularly those requests directed to corporate defendants. There has been no consistent application of limitations on these fishing expeditions.

Amendments Worsen Status Quo

- The proportionality standard is being used to extend discovery, increase costs, limit production and focus litigation over discovery rather than the underlying issue.
- Discovery still is too expensive. If the courts are not careful, arbitration will replace the courts as the favored DR forum.
- Almost uniformly, the new rules have worked to prevent discovery and has injected additional arguments (cost-shifting and proportionality) that serves only to delay resolution of discovery disputes and hold up production.
- The N.D. Cal., where I mainly practice, has really not changed its practices. The judges, particularly the Magistrate Judges, usually require the parties to submit a "joint discovery dispute letter." That in my view is unfair, and actually increases costs and delay.
- Proportionality rule has resulted in more information by the defense being withheld and more cost due to increased motion practice and also delay in moving the case along
- The only major difference I have seen is Defendants assertion of "proportionality" as another grounds to resist production. Our district courts are either to over worked or seem otherwise resistant to make a party produce relevant materials. This naturally biases the Plaintiff who has the burden of proof and who is usually the party in need of information. The Courts' instinct is so often to "split the baby" that every additional objection made available to defendants is just one more reason something may not be produced. My question is constantly whether I ask for what I really need and I really feel is fairly discoverable or ask for twice as much with the hopes I get what I need. The more hoops they make the parties jump through, the more the rules encourage that mindset. If it takes me 6 months to get a discovery issue heard and decided and then I get a small percentage of what I need, that just does not help.
- Go back to the original rules.
- Who is responsible for proposing these amendments? The selection of those folks needs to be balanced: plaintiff's counsel, defense counsel, corporate counsel, union counsel, judges, etc.

- By repeal.
- Eliminate the changes to Rule 26.
- The proportionality inclusion should be rescinded, and the familiar relevancy standard should be reinstated. Proportionality is now used as a routine discovery blocking device, making discovery disputes more likely. This raises the costs of litigation for the parties and exhausts judicial resources to resolve the disputes. The new "proportionality" qualifier has really served to make the exchange of relevant information more cumbersome, time-consuming and costly. Judges already had the authority to circumscribe discovery requests that were unduly broad, expensive or disproportional.
- The proportionality amendment to Rule 26 should be eliminated, along with the language about cost-sharing, which ignores the dramatic difference in resources and possession of information between plaintiffs and defendants across many areas of the law.
- I mainly represent low wage employees. To the extent that the new rules proportionality requirements are becoming a part of litigation, litigation has become more unfair to my clients.. Often the low level employee clients that I represent do not have access to the information that they would need to support their claims. Often my clients have little contact with anyone other than the low level manager to whom they report and therefore do not have any knowledge of the company hierarchy and who the actual decision makers are. Therefore production of discovery by employer defendants is critical to their cases. At the same time because they are low wage earners,, damages worth one year's wages equal only a modest sum of money on an absolute scale. Because proportionality tends to be measured by looking at the dollar value of the damages instead of the percentage of the annual wages of the plaintiff, to the extent discovery has been impacted by the new rules, the impact of the new rules proportionality requirement on my clients has been unfair.
- I find corporate defendants using proportionality as their new boilerplate objection to everything, rendering it meaningless. And some judges seem to think it means that the burden is on the requesting plaintiff to have evidence that the discovery they seek will be valuable enough to justify the cost -- evidence that of course I can't have in the absence of discovery. Better guidance is needed.
- The amendments continue the move away from the full and open exchange of information which began before the 2015 amendments. In particular, the reliance on electronic versions of documents, while reducing the volume of paper exchanged by the parties, does not necessarily produce information that is relevant to a case. Frequently, documents that are produced in pdf format (because they were scanned) do not match the originals, either because the backs of the documents were not copied or because only one version of the document was produced, e.g. the copy that does not contain the hand-written notes of a supervisor, or highlighting. Further, the 502 provisions have become problematic, as they do not contain any time constraints. I have been involved in cases where documents are produced in a case, relied upon during depositions and discovery, only to be "withdrawn" prior to trial as inadvertently produced privileged documents. That provision of the rules has relieved attorneys from any obligation to promptly review what documents they have produced until the documents are used against them. While there is value to having documents produced quickly, the receiving party should have some assurance, after a reasonable period of time that the documents are not subject to any privilege and can be relied upon during the litigation.
- The amendments should be revised to enhance rather than limit discovery. Arguments regarding proportionality have considerably increased the cost of conducting discovery. Parties often use it as a first-pass shield and objection to resist discovery. This requires further efforts by the requesting party to compel discovery, first informally through deficiency letters, telephone conferences, and meetings, then through motions to compel, discovery conferences, and other judicial intervention. Because courts frown on becoming involved in discovery disputes, the burden is often implicitly placed on the party compelling discovery rather than the party resisting production, even though the rule states otherwise. Although the amendments that require objections to be specific and for privilege/proportionality logs to be produced are beneficial, lack of judicial enforcement is an issue. The language should be strengthened to help curb discovery abuses involving delays and withholding of discoverable information through boilerplate objections and unsubstantiated claims of privilege.
- Repeal them
- Repeal them all!

Amendments Made No Difference

- Discovery stonewalling continues. Rule changes have not tempered stonewalling.
- Local rules and law firm procedures frequently trump the impact of F R Civ P changes. We need meaningful F R Civ P changes. These were nice, but too timid to have much impact.
- Many areas didn't change for me because of the rule changes because our district court already had many of those things baked into our standard scheduling orders or local law, such as no privilege waiver for inadvertent production, encouragement of technology, specific objections required.
- Both Massachusetts and New Hampshire state courts have had these "proportionality" rules in place for years, and the federal district courts by local rules already had universal pre-motion meet-and-confer rule for all disputes. The result is that the issuance of these rules had little effect on the nature of practice in the courts where I frequently appear.

- Amendments have made little, if any, difference.
- The Western District of Michigan historically had required many of the changes which were made to Fed. Rule 16.
- The 2015 amendments were positive, but did not impact my practice significantly, primarily because the local practice in my home federal district already generally conducted discovery in the manner the amendments were intended to promote.
- No, except that in the Southern District of Texas the Judges have not changed their practices much under the new rules yet.
- Many of the changes made by the amendments were already in practice in my federal district court.
- Most of the changes were the way the courts in my districts already practice. Our district has always been blessed by trial judges and magistrates who have been involved in discovery disputes and who have not hesitated to enforce appropriate discovery requirements. For this reason, many of my responses are "no change" because the judges I appear in front of were already insisting on fairness in the process. I think the changes would be better appreciated in a district with more passive judges than the district I practice in
- In the District of Connecticut, and employment law cases, all of our judges use the Initial Discovery Protocols for Employment Discrimination Cases. These protocols require both parties to produce certain core documents, and to provide other essential information. In districts that use the protocols, many of the survey questions above are basically irrelevant, and this fact is made the survey questions more difficult to answer. If there had been a Non-Applicable choice available, I would have used that choice quite often.
- There is limited discovery in ERISA cases, and the defendants have "professional witnesses" who respond to any 30(b)(6) depositions with the procedures that should be in place, and the Courts do not allow enough discovery to challenge that testimony. The amendments have not affected that problem.
- The proportionality component has not moved the needle much so far. Judges need more guidance and precedent for limiting discovery in tort cases as well as the fortitude to apply such limits.
- Make real changes.
- If those able to make change actually want to improve discovery, there should be serious considerations to eliminating unnecessary costs.
- State that proportionality means relevant to the facts of THE CASE AT HAND, not prior experience, similar acts, other claims or litigation or punitive damages evidence.
- Make them mandatory as the default
- I think that discovery should be under a Discovery Master knowledgeable about the matter being litigated. An environmental case should have an environmental practitioner and so on.
- More time required with new changes to make positive recommendations. Keep using surveys.
- Most changes calculated to reduce conflict and lessen judicial involvement have the opposite effect.

Amendments Favor Plaintiffs

- The people who write and debate these rules live in their own world, far divorced and unfamiliar with the vast majority of the folks in the trenches. They also have no concept of what it costs to comply with the order that they think are “fair and reasonable.” Litigation is strangling the US not because any defendant gets heard on the merits but because they cannot afford to comply with the rules that the ABA and the honored rule authors write for the judges, who welcome the opportunity to avoid trials. Bravo.
- The 2015 amendments were intended to provide enhanced tools for controlling discovery costs, but in this jurisdiction, they have had the opposite impact. The local judges have not changed any of their procedures or scheduling orders. Instead, the amendments have been interpreted in a draconian fashion to impose greater burdens, costs, and unfairness when judges use any excuse to overrule objections on technical grounds and order massive discovery without regards to the costs. There may be isolated examples in large discovery cases or in some jurisdictions, but for the routine civil discovery case, discovery burdens and costs of compliance have increased greatly in the last few years, particularly as e-discovery continues to work its way into even routine cases. We have no phased discovery or proportionality when we have 3-4 months to conduct all discovery.
- Of 38 years of very active federal court practice, the last 3 have been absolutely miserable---seemingly in association with the ridiculous abuses of discovery, none of which have been curbed by these Amendments. They serve as their own cottage industry which interferes with Rule 1 objectives. A miserable failure.
- The requirement to identify a reason for an objection is a good one, but, at least in consumer cases, I find it increases the burden to the defendant and isn't followed by the consumer. Also, the requirement to provide a basis for the objection and to identify the documents withheld is unreasonably and onerously applied in the E.D.Va., where the local rules require that objections be served within 15 days along with a privilege log and identification of any documents withheld on the basis of the objections. For practical purposes, that gives the responding party 15 days to collect and review their documents. In complex litigation, including class actions, that is impossible to do. The plaintiffs know that, and they use these local rules to their advantage. For example, in consumer class actions, the plaintiffs have little to no documents to produce, but demand the

defendants produce troves of documents covering many years and thousands to millions of consumers. Combine that with the E.D.Va.'s rocket docket, and the district (particularly the Richmond Division) is a plaintiff's dream and a defendant's nightmare

- Most of the opposing counsel I deal with have not changed their behavior. Courts are a mixed bag. Although I must say that anytime I hear a court cite Rule 1, I want to assume the fetal position and grasp my wallet, because that usually means the court is going to impose some unreasonable and impractical requirement which (a) ignores the reality of private practice; (b) makes life more complicated and more expensive; and (c) is going to skewer the defendant.
- The bench bias against defendants and requiring non-proportional discovery responses continues to worsen and be disheartening.
- In my experience, the courts often apply proportionality only to the defendants' production and refuse to consider proportionality to plaintiff's productions.
- Stop skewing the rules to front-load burdens on defendants who likely need substantially more time than the rules provide to get their arms around complex cases so that they can provide reasonably complete discovery. Also, at some point with the proliferation of data, the courts and parties need to accept that no matter how extensive good faith efforts may be to identify, search for and find all relevant electronically stored information, the reality is that there will almost always be gaps, with some relevant documents being missed due to the imprecision of search methodology, the cost of collection and conversion to searchable text, and the inherent nature of certain materials not being subject to text searches at all.

Amendments Favor Defendants

- The issues on fairness and cost impact are often hard for me to assess as my litigation has really decreased in the last few years. However, some general observations: proportionality typically results inflated estimates by defendants, resulting in the need for motions, more spinning the wheels. The mandatory counsel conferences in my cases have not resulted in the production of information that would have been withheld prior to amendments. I hear from colleagues that they still feel many judges are shooting from the hip and making bad (more restrictive access) decisions. For sure this varies from Judge to Judge. The same is true with respect to some counsel.
- The 2015 changes have made it far more difficult to obtain evidence necessary to prove a civil rights or employment law violation, likely by design. The new emphasis on proportionality has given violators a new and .very powerful tool to object to, and obstruct discovery. The changes should be repealed.
- The amendments have generally allowed judges to restrict the scope of discovery when a party complains enough and requests a hearing. The net result is that less information is being exchanged. It seems that judges default to this position: if the requestee is complaining that the requestor is being over broad, I should probably curtail the request in some way. Thus, proportionality has been read to shrink the universe of discoverable information as a general proposition.
- I typically represent individuals or small businesses against defendants with significantly greater resources (government or large corporations). My experience with ALL rules that in good faith intend to encourage the parties to work things out amicably and to be forthcoming in discovery is that they have the opposite effect: the knowledge that many additional steps must be taken before a motion to compel may be granted encourages the deeper-pocket party to raise frivolous objections and avoid providing meaningful and responsive discovery until forced to do so, running up the inquiring party's costs and wasting time, often forcing continuances and delays in reaching the merits.
- The proportionality amendments leave far too much discretion to judges and favor large corporations over the right of individuals. In California, where state laws provide for fairly broad discovery, it means that if someone is harmed by an out of state corporation they will likely obtain less of a recovery for the wrong than someone equally harmed by an in state corporation. It also gives credence to the idea that a company can be too large to effectively look for all responsive documents, so they simply do not have to, without considering how relatively little such searches cost compared to the company's overall wealth. For example, in a lawsuit against an automotive manufacturer in CA state court, the manufacturer made an argument that would be recognized as a proportionality argument in Federal court, for the purpose of attempting to not provide other consumer complaints. Even with declarations that it would costs thousands of dollars to produce the requested documents, the court ordered production because the company had revenues and cash on hand in the billions. In Federal court, a judge might disallow that same discovery because the case (not the defendant) was not proportional to the information sought. In State court, once we received the information, everyone was able to reach a settlement and avoid burdening the court further. In Federal court, it is likely the parties would have ended up in a trial due to lack of sufficient information exchanged. The requirements for more meeting and conferring, and discovery conferences, are very good requirements.
- It is pretty clear the defense sees this as a chance to hide important information by claiming the discovery seeking it is not proportional to what they claim is a trivial case (as in banking litigation seeking information about other affected consumers).
- Proportionality is often a hurdle we have to overcome and is often, if not always argued by the defendants. It seems discovery requests are either too narrow, and objected to on other grounds, or not proportional. It really just creates another objection for companies to hide behind and to justify their failure to produce all of the relevant documents. It's just an arbitrary standard at this point. When the defendant is a large company the fact that there are simply thousands of documents is used as

an argument that the request is not proportional, but really this is more related to the fact that the defendant is an international conglomerate with millions of documents, not that the request is not proportionate

- In my experience, these rules are dutifully imposed on Plaintiffs by magistrates and infrequently applied with the same vigor to Defendants.
- I find that discovery abuse occurs frequently by employer defendants where some counsel adopt a stance that they will produce little or will not produce in the requested format until a court orders them to do so. This makes the discovery process extraordinarily expensive and drawn out by forcing the requesting party to closely monitor and frequently follow up with counsel regarding their existing obligations. The rules regarding proportionality provide additional tools by employer defendants to resist discovery.
- The proportionality requirements are used by the defense in civil rights and employment cases to their advantage because they already possess the relevant information, so it is the plaintiff that ends up having to justify expensive discovery. This would arguably be all right if summary judgments were harder to obtain, but federal courts are instead enamored with summary dispositions. The combination of developments threatens to deny access to justice to all but the wealthy.
- In discrimination cases, Defendants refuse to provide substantive responses to discovery requests. There are always more objections than facts presented. When the employer has all the information and refuses to provide it, the Courts generally do not compel them to produce what they have. It is very unfair for the poor humans who are involved as Plaintiffs.
- Proportionality is primarily used against plaintiffs; defense counsel abuse discovery more than plaintiff counsel
- It seems the only factors judges consider under proportionality are the costs associated with the case which has effectively halted a Plaintiff's ability to enforce his or her civil rights.
- In employment cases, one party--the employer--is in possession of most of the information. The proportionality rule hurts plaintiffs, who are at a disadvantage, and who are called upon to justify their reasonable discovery requests. This requirement is costly and should be unnecessary where there is such an obvious disparity in the parties' access to information.
- The proportionality rule is simply being used by defense counsel to avoid answering any discovery requests without requiring court intervention. Defense counsel believe they are entitled to determine the scope of the plaintiff's action and what is proportional to that scope, which is not properly their role in litigation. The proportionality amendment has no practical impact except to increase the number and severity of disputes in discovery, to the detriment of the plaintiff, who, in employment and civil rights cases, almost always starts (and now often ends) the case with little information or documents compared to the defendant.
- Most of these discovery changes have been used a tools against plaintiffs, improperly. We continue to be expected to know the systems within which we're seeking information from defendants, with no requirement that they bring us onto a level playing field in terms of that knowledge. Requiring early discussions about information storage systems and what is kept would be most helpful.
- Proportionality is used as a preemptive motion *in limine*, particularly in employment discrimination cases. The employer asserts a theory of the case which plaintiff "should be" pursuing, and then limits discovery based on that theory, arguing anything further is not "proportional." Too often courts agree with this analysis, thereby restricting access to relevant documents/information necessary to prove pretext or bias.
- Any time you give a defendant more excuses not to provide documentation in an employment case, you make the plaintiff's cases more burdensome and expensive. These are cases where one side generally has all of the documentary evidence and where the plaintiff must obtain data and information to prove her case from the defendant. They already objected too often, and often on frivolous grounds, making discovery in these cases ridiculously complicated. In fact, Defense attorneys in this area know that cooperation does not pay, and they make quite a bit more money when they fight discovery needlessly, requiring multiple discovery conferences and/or motions. Judges rarely sanction them for this conduct, so it continues.
- These one sided revisions are simply unfair to plaintiffs and create numerous opportunities for corporate defendants represented by teams of lawyers to evade engaging in timely and full discovery, and add to the fees all clients end up having to pay. The idea of relevance has been narrowed and it is harder to get at the truth.
- The amended rules are extremely unfair to plaintiffs and have dramatically increased the cost of litigating in federal court. In other words, they tilt the scales even more in the responding party's favor, typically a defendant. By the nature of Defendants' conduct, Defendants normally hold the very evidence a Plaintiff needs to prove their case. The amendments give Defendants more tools to make justice unattainable, cost prohibitive, or at a minimum, delayed.

In my practice, the Rule 26 amendment routinely results in corporate defendants hiding documents and custodians on the basis of proportionality. Sometimes we are able to parse out that those documents or custodians are missing based on what is produced, but I strongly suspect that much is lost. While I recognize the good intention of the amendment, the Committee must recognize that practitioners defending large corporations take advantage of the amendment at the expense of truth (and ultimately justice). Realize that truth is indeed what we bargain away by prioritizing that corporations save money on discovery. Under the amendment, our justice system's values are unpardonably skewed.

- In my federal tort cases, large corporate defendants usually have most of the information that is subject to discovery. It is critical that the Discovery Rules evolve to create: 1) greater protections for plaintiffs who lack the resources of large defendants, including de-emphasizing proportionality as an strategy for corporate defendants to reduce their discovery efforts and production; 2) strong requirements for corporate defendants to make specific document production corresponding to specific requests for production; 3)strong requirements for defendants to make specific, supported discovery objections; 4) strong requirements for parties to identify all responsive documents withheld from production for any reason, including the basis for the withholding; and 5) requirements that require parties, especially parties relying on technology assisted review, to be transparent about how searches were conducted in order to identify documents responsive to specific requests for production.
- By making them less one-sided in favor of Defendants. All "changes" that are made tend to limit the scope of discovery and take away tools or otherwise make it harder for plaintiffs to obtain information and prosecute their cases. Example, there was literally no sound reason to limit time for service to 90 days, reduced from 120. It only. Makes Plaintiff's Job more onerous and creates a trap. Sometimes you have to get a case filed due to SOL issues. Especially in employment cases where we get 90 day right to sue notices from EEOC. Sometimes you have to get filed and then spend some time perfecting and amending. The rule change took away 30 days for no good reason.
- Codification of proportionality rules and guidelines encouraging the parties to focus discovery on central issues unfairly undermine the ability of plaintiffs to prosecute employment cases, or any other case in which the bulk of discoverable information is possessed by the employer (or other defendant), and can encourage more not fewer expensive and time-consuming motion practice. The proportionality rule should be revised accordingly or removed, and the focus on relevance and likelihood of leading to admissible evidence restored.
- Please stop providing the Defense bar with more and more advantages. The 2015 changes were very defense minded. I fear the next set will even go farther. Plaintiffs should not have to beg for fairness, and an even hand, but here I am asking that the courts are not turned into the play-ground of mega-corporations and the superrich.
- Waive or eliminate the proportionality rule in employment and labor cases, and in particular, discrimination and other civil rights cases.

Bench and Bar Unfamiliar with Amendments

- Sophisticated counsel usually conferred/worked things out, even before the Rule amendments. However, the amendments give a useful tool to those dealing with recalcitrant/unsophisticated/game-playing counsel on the other side. One problem, however, is that not all judges or magistrates have read -- or have any desire to read -- the amendments, either as to proportionality v. reasonably calculated or the need for judicial involvement.
- Most parties are not following the rule changes (i.e. not specifically identifying documents that are withheld, etc.) but the changes significantly increase fairness when followed. So the rule is great, and lawyers need to become more familiar with it and comply with it.
- As a Plaintiff's attorney I like Rule 34 b/c I may not need to produce a privilege log and the hassle that entails. I am very familiar with ESI production and TAR but with the exception of 2 opponents in the last ten years, I can't get a party to agree to ESI production methods and usually have to include it unilaterally in case management report and depending on the District, move to get the other side to come up with an ESI plan. Furthermore, more Districts do not even require the parties to address ESI in the case management report which is huge disservice.
- From a plaintiff attorney's perspective, I really appreciate the new discovery requirements such as Rule 34(b)(2)(B) and (C). Sadly, it seems most defense attorneys I work with are either unaware of these changes, or more likely, refuse to acknowledge them. Judges (state ones, as I work primarily in state court but within a state that has incorporated these changes) are about 50/50 in putting "teeth" into enforcement. I do believe the 120-to-90 day rule change for service was unnecessary and hamstrings plaintiff's lawyers more.

Judges Should Practice Active Discovery Management

- Courts rarely engage in substantive and continuing discovery analysis as the rules anticipated.
- The only way any of these amendments will achieve the desired result is with active judicial involvement at all stages of the litigation. Judges must hold hearings and issue orders. My experience is that many judges fail to follow the oath they took. I, for one, am tired of hearing from the court "I'm too busy to hear your case."
- The rules do not cause changes; only the conduct of the court does so. Our dockets are so crowded that most of the judges simply send out their own orders covering most of these subjects AND it is almost impossible to get a conference with the COURT although we often get to know the magistrate judges in this context.
- Actual judicial engagement early in the discovery process to discuss how proportionality and cost will be addressed, enforcement of staged discovery and proportionality, and real consideration of cost-shifting. The rules don't help much if the courts do not change their practice.

- Courts need to be much more proactive in addressing proportionality. Discovery in a complex case should not cost millions of dollars. So little of a big production ever gets used. The system in Canadian federal courts seems much more cost-efficient.
- The best way to deal with discovery would be to convene a conference as soon as one party alerts the court to a problem. Bringing in the lawyers right away and asking the objecting party to explain its objection would quickly result in agreement to provide more information or expose the request as improper. Requiring all these meetings and voluntary productions just favors the side that wants to be obstreperous.
- Early and extensive "settlement" conferences involving magistrates and the litigants (attorneys and clients) can often result in identifying "issues" (on the "merits" and involving discovery). Costs, and possible case or issue resolutions can also be identified. Continued and periodic consultations involving parties and clients can and usually do result in economic solutions and case settlements. Therefore I would encourage more mandatory settlement and status conferences with all parties and attorneys.
- I wish there were some way to set a deadline for judicial responses! Some judges are timelier than others in issuing orders and earlier rulings by the court could decrease costs to the parties.
- Increase limits on number and duration of depositions without court approval; more direct involvement of courts or magistrates in proportionality issues

Active Judicial Discovery Management is Bad

- The new rules have increased the cost to practice in federal court, there is absolutely no doubt about it. The judges are constantly involved in every aspect increasing the cost. Lawyers are not allowed to just prepare their case. Every time you have to go in front of a judge you have to prepare more paper, more time. Federal court is too into micro-managing the lawyers.
- Discovery worked better in the old days before the courts started all this micro-managing, which usually serves to accomplish nothing more than make work benefitting the larger party. Just let us do our jobs, to ask for what we need, then go see the judge if we are not getting the cooperation we think we deserve.
- Back the court out of the case. Let lawyers be lawyers. Lawyers know when they need the court. Have lawyers come to court and orally argue. Your above questions don't really get to the meat of the issue in federal court today. It's too much micro management, and realistically how many trials do federal judges really have anymore. The rules are too draconian and require everything NOW. It's the whole hurry up to wait. Too many sanctions, fear of sanctions etc.
- Reduce the judges' role in discovery disputes by giving both parties skin in the game, i.e., end the practice that discovery is free to the requesting party and introduce some market forces, e.g., a modest co-pay to be borne by requesting parties to deter asking for the moon.
- Judges (understandably) generally don't know enough about the specific facts of a case to police discovery at the micro level that a "proportionality" analysis demands. It's tempting for them to superimpose an oversimplified view of the case that doesn't account for the proof strategy of the party with less access to relevant information, and deny discovery if its connection to the case isn't exceedingly simple and obvious. That's why proportionality is such a dangerous and easily-misused concept to highlight in the Rules.

Meet and Confer Meetings

- In my experience the meet and confer processes imposed by the courts, whether through the rules or as part of local procedure do little to actually reduce the need to bring motions nor speed the process of resolving disputes. Instead, all too often I have found that it is simply one more step that must be gone through. The burden on parties is not insignificant in time and effort spent in fruitless negotiations that do not have the force of a court order behind them. The role of the courts is to make decisions in an ordered forum. To the extent that meet and confer is used to remove dispute resolution from an ordered forum to a bargaining situation where parties often have widely disparate knowledge of the information, the courts have abdicated their responsibilities. If judges are unwilling to make decisions, even on discovery matters, they shouldn't be judges.
- The meet and confer requirements are used as a weapon in complex cases. Parties are incentivized to respond to legitimate discovery requests with bogus objections, which force the requesting party to engage in time consuming exchanges of deficiency letters and attempts to confer. The delinquent party achieves its goal of DELAY by violating the spirit of the Rules. This is especially so in dockets like the 4th Circuit Rocket Docket, although, for the most part, our excellent District judges follow a substance over form approach, and do not reward such behavior. It is a significant problem in other Districts.
- I just wanted to voice my EXTREME frustration with the meet and confer requirements under the FRCP. Specifically I am finding: 1. Defendant standard is to use boilerplate and known improper objections 2. When called, they delay to "attempt" to correct. 3. You are then required to confer again (further delay) 4. DF again stonewalls, etc… 5. Fight eventually becomes about whether Plaintiff agreed, or properly addressed, to a "fix" before filing a motion to compel, and a further need to try to answer (further delay) NOT the discovery issues. DF shows how they have repeatedly tried to satisfy the PF's unreasonable demands. By the time the court sees the problem they blame the Plaintiff for being unreasonable and the DF has cleaned up its act to some degree. HUGE amount of additional work and the court frequently STILL gives the defense one free bite at the apple. The

defendants are INCENTIVIZED by the FRCP to improperly respond to discovery and object because if a plaintiff doesn't call them out on it, or waits to long, they win by default. There is NO incentive to do it right the first time. No penalty for initial boilerplate objections which mandates long and time consuming letters tailored to the discovery asking for DF to do it right.

- In my recent experience, generally the more required conferences, call-and-confers, mandated specifics, and permitted or required 'factors' to be considered, then the more arguments can be conjured up. In most cases, these things simply provide more opportunities for multiple lawyer involvement, more 'events' to be dealt with, and more billable time and cost (e.g. 'vendors' for EFI scrubbing and production) all resulting in a much more expensive lawsuit, with no discernible change in outcome. It is unfair to financially modest litigants who find themselves opposite the government or a wealthy business enterprise, and cannot afford the increased legal costs of a drawn out process with a plethora of fighting opportunities along the way--not to mention the monetary and non-monetary costs of a bogged timetable in an overloaded judicial system.
- The meet and confer requirements have allowed defendants to delay providing meaningful responses. What we have been finding is that the exchange goes like this 1. Defendant uses boilerplate and known improper objections 2. When called, they delay to "attempt" to correct. 3. You are then required to confer again (further delay) 4. DF again stonewalls again. 5. Fight eventually becomes about whether we agreed or properly addressed the matter before filing, not the discovery issues. Defendant then gets to argue they have repeatedly tried to satisfy the plaintiff's "unreasonable" demands. There is no incentive to do it right the first time and no penalty for initial boilerplate objections.
- The problem with the rule amendments is that they presume that parties and attorneys are answering discovery in good faith and a spirit of cooperativeness. I represent plaintiffs in tort and employment cases and it has been my experience that Defendants do not answer discovery in good faith. To the contrary, the meet and confer rules allow them to blatantly violate both the letter and spirit of the rules. Thus, there has been no decline in the use of blanket preliminary objections, frivolous "form" objections, and no compliance with Rule 34's requirement that a party be informed about the extent to which a request is not being answered or materials are being withheld.
- Discovery conferences should be optional, as it is often easier for Plaintiffs to get what they need in employment cases simply by filing a motion. Discovery conferences rarely save time or effort. Magistrate judges get it right less often when ruling during these conferences, than they did when we filed discovery motions. Defense attorneys use conferences to harass plaintiffs. Placing a burden on plaintiffs in employment cases to establish proportionality just piles additional burdens on plaintiffs and their attorneys. In this context, it is abused by defense attorneys who make more money on conflict than on cooperation.

Pre-Motion Conference

- I did not like the survey choices. I cannot say "usually" or "always" with respect to any of these changes. Sometimes would have been an answer that I might have selected for many of them. I think it takes judges and practitioners a while to settle into the framework of the new rules. The general concept of trying to reduce the cost of discovery is sinking in, and Judges are more receptive, in my view, to arguments that advance that objective. The new rules give some teeth to that concept. In NJ, where I practice, the local rules have required a conference before a discovery motion is filed, and I have found that to be very effective both in encouraging the parties to try to resolve the matter (because we know the Judge will ask what we have done in that regard) and in getting, in most cases, a quick decision without a lot of involved expense and motion practice.
- While I like the idea of a conference call with the court prior to filing discovery motions in theory, in practice, it can mean the court makes a decision without the benefit of briefing, and it is hard to get the judge to change his or her mind thereafter, even though a decision made after briefing might have been different in the first instance. The other thing I see is waiting on a motion until a call can take place with the court, and the court then says that briefing is needed, so there's been a lot of delay added with no movement on discovery.
- I have found it very effective and efficient when judges offer (require) informal hearings or phone calls with the Court prior to discovery motion practice. I wish that more defense attorneys faced consequences for improperly resisting discovery or lodging boilerplate objections with no specific information or supporting arguments. I think more judges should use the discovery protocols for employment cases created by Judge Lee Rosenthal (and other judges and attorneys)
- (1) Consistent enforcement by the courts of the Rule 34 obligations; (2) Abrogation of 2015 changes on proportionality, which primarily have served to provide yet another excuse for defense counsel to lodge frivolous boilerplate objections and stonewall legitimate discovery. (3) Make mandatory the kind of discovery dispute resolution procedures adopted in the scheduling orders of many judges in the E.D. Ky. and W.D. Ky., which require the parties to contact the court if they can't resolve a discovery dispute, submit two-page letter briefs to the court, and have the dispute resolved via a speedy telephonic conference with the court; and (4) Require all federal district courts to adopt the practice of maintaining a discovery-disputes hotline for the speedy and inexpensive resolution of discovery disputes and squelching of deposition misconduct.

In-Person Rule 16 Conferences

- #5 - My experience since the 2015 amendments is that most judges still conduct the Rule 16 conference by telephone without the parties' participation (i.e. only counsel). The Judges who conduct the conference in person are the ones who were doing that before the 2015 amendments went into effect. I've yet to participate in a Rule 16 conference where an attorney or party participated by video conference.
- I believe that in person Rule 16 conferences are far more productive in achieving the goals of case management that prompted the 2015 amendments than telephone and conferences. Many judges continue to view the Rule 16 conference as a perfunctory scheduling exercise not the "serious exchange requiring careful planning by the lawyers and often attended by the parties" envisioned by the Advisory Committee. Amend Rule 16(b)(1)(B) to require personal attendance by all counsel unless excused by the Court for good cause shown.

Judges Fail to Sanction Violators

- Discovery rule changes will accomplish little until the judiciary shows a consistent willingness to hold the parties accountable for discovery abuses. Most defense lawyers I deal with in employment and civil rights cases make generalized, boilerplate objections, fail to produce most responsive information, do not specify which documents are being withheld, and fail to produce a privilege log. The delays and costs associated with challenging this obstructionist practices are substantial.
- Positive changes have more to do with the professionalism of opposing counsel rather than specific rule changes. Jerks remain jerks and the reluctance of courts to impose sanctions, maintains the status quo.
- The amendments allow large or rich defendants to delay waste time and cost nor money. The court doesn't enforce the rules.
- In the general, the federal judiciary has become increasingly hostile to resolving any sort of discovery disputes. In cases where parties have unequal resources (like employment and civil rights) it is the defense strategy to withhold information until forced to disclose. And, even then, defense counsel knows they won't face any consequences where a motion to compel is required. So my hope is for an increased appetite to enforce the rules that require free and open discovery.
- It costs 400% more to defend a case in federal court than state court in my jurisdiction, at least, and much of that is discovery compliance costs. The revisions were implemented by judges to increase discovery burdens because the judges figured out that painful discovery costs encourages settlement. Putting discovery in the hands of judges doesn't help when judges hate discovery and prefer to grant discovery requests with the expectation that this will encourage settlement. There has to be real reform that simplifies the rules, makes overly broad and burdensome discovery the exception and not the rule. Right now, it is the rule. Further, judges have taken an almost comically strict view of discovery, which further increases the costs and burdens.
- Compliance and enforcement would be nice.
- Put more teeth behind the proportionality of discovery. In large cases, plaintiffs are still seeking that needle in the haystack document that might not even exist, but costs a fortune to search.
- Enforce the proportionality requirements. Give real teeth to them. Limit plaintiffs' rights to discovery. Require all judges to hold Rule 16 conferences and discovery conferences before motions to compel are filed. Don't permit discovery (except as necessary for jurisdictional issues) while a 12(b) motion is pending.
- -More consistent judicial enforcement. -Revise amendments to provide guidelines on burden/expense for large entities. -Revise amendments to allow for recovery of attorney's fees from the party not complying with the amendments.
- Too many courts are reluctant to apply the Rules as intended. There generally remains too much reluctance to focus or limit discovery on the claims and defenses of the parties rather than general subject matters.
- Greater enforcement of the rules--appears that defendants are typically following what is required with regard to the amendments, but plaintiffs often are not.
- Courts need to enforce the rules. They need to be more proactive case managers.
- If judges will actually enforce the rules, that would help immensely.
- 1) Roll back the proportionality requirement. Judges will still be empowered to control discovery, as they always were. 2) Greatly increase the penalties for obstructing justice through discovery tactics (such as refusing to produce; unreasonably delaying production; coaching witnesses; hiding witnesses; and overusing objections).
- Defendants still need to produce documents and these amendments allow judges to go easy on them.
- Courts need to require parties to stop using boiler plate objections and just answer the questions. Courts need to insure that withheld documents are identified in a list. Courts need to resist confidentiality orders as they are a major cost and delay problem.
- Lower the bar for sanctions and incorporate them into the meet and confer process.
- Having judges be more firm in enforcing the new rules.

- Courts need to sanction parties, with real sanctions, for failing to adhere to disclosure and discovery requirements. There is no disincentive, whatsoever, to hide the ball because there are no real consequences and an award of a few thousand dollars in attorneys' fees is just a cost of doing business.
- Makes judges enforce them
- The courts should be required to make proportionality rulings in connection with discovery fights. In my experience, they will not entertain proportionality arguments and the plaintiffs have to carry no part of excessive discovery costs.
- Have to give that some thought. Not in a position to respond now
- Reference the Sedona Principles on cooperation in discovery in the notes or add a similar discussion, to suggest to judges they can push this very hard would be helpful. In addition, most judges hate discovery and make it very perilous to bring discovery issues to their attention, but this actually causes more abuse because the opposing party has to often have the Rule 7 conference in order to file a motion before the other side drops its unreasonable and often indefensible position. In other words, you often have to demonstrate your willingness to take it to the judge (which often requires more than a threat to do so) to get the other side to take a reasonable position. So changes or discussion that would note that judges efforts to avoid discovery actually increase costs because there is a lot more tussling over discovery going on than would otherwise occur.
- The amendments are good, but the judge must be willing to hear discovery disputes and actively enforce the intent of the rule changes.
- Parties don't cooperate in discovery because the rules tell them to do so. If there is cooperation, it is because cooperation is in the best interest of both parties. The courts are manifestly irritated by discovery disputes, which are often fact-specific and mind-numbingly dull to anyone other than the litigants, and take a "pox on both your houses" approach. Every litigator knows that, of course. Thus, so long as the courts' attitude remains the same, and the courts maintain the fiction that parties will resolve these issues themselves, the party who decides cooperation is not in its best interest -- that it is better, for instance, to withhold and stall and force the other party to bring the matter to the judge (who almost always does not want to hear it), or that it is better to demand outrageous amounts of information and force the other side to essentially reframe the requests and respond accordingly, just to appear reasonable -- will have the better of it. This is precisely the opposite result of what the rules intend. To improve discovery, there should be presumptive limits (similar to the number of depositions per side or the length of depositions) on written discovery: X number of document requests (maybe standard document requests, supplemented by the parties own RFPs), a presumptive limit on third party subpoenas, presumptive limits on ESI (e.g., a limit on the number of custodians and search terms, perhaps standard interrogatories (narrowly supplemented by the parties' own interrogatories)). Discovery should be automatically stayed during a motion to dismiss -- no one gains from spending money searching for documents in a case that might be narrowed or dismissed altogether. There should be deadlines for deciding motions to dismiss. Sanctions for missing deadlines need to be self-executing, with a robust requirement for excuse. (By way of comparison between theory and practice, while in theory the failure to adhere to initial disclosure obligations results in automatic exclusion. In practice, this is hardly ever enforced.) And judges should either decide discovery disputes promptly, or delegate to a magistrate who will -- set hearing dates every two weeks, require limited filings prior to hearing, and decide the issue quickly. I doubt any judge aspires to the bench to control discovery. But discovery -- the cost, extent, and information obtained through discovery -- is one of the primary drivers in civil litigation, and too often that, rather than the merits, is what ends up being outcome-determinative. We have detailed, usually well-thought-out rules governing what evidence can be admitted at trial, even though close to zero percent of civil cases ever go to trial. We need at least as comprehensive a regime to govern the pretrial discovery process, where many more cases languish and are won or lost.
- By having courts apply them to Rule 30(b)(6)
- By the courts actually requiring the parties to abide by them, and by the courts abiding by them themselves.
- Courts need to enforce the prohibition on General Objections.
- The rule amendments will not adequately address the problems they are intended to address as long as district judges/magistrate judges do not insist on civility of counsel and proportionate discovery.
- The rules are not the problem, the availability of competent judges is an issue.
- Increase the frequency of judicial intervention and monitoring of cases through live status conferences.
- It is not about improving the rules. Frankly, the judges have little interest in delving into the tough issue of proportionality, regardless of the rules. The prevailing mindset is inherited from years of bad legal culture, in which judges simply decline to put boundaries on discovery demands, and use the extraordinary expense that ESI retrieval and review impose on litigants to leverage settlements. Big Law is a huge violator, as its incentives to overstaff and overwork cases, having associates grind on trivia, are obvious. Thus, civil jury trial is dying. Lawyers have become great at bickering over ESI and terrible at trials. Judges do not restrain it, and clients settle cases because the whole exercise is brutally expensive.
- Until the courts fully embrace the letter and spirit of the changes and rule accordingly, significant change will occur only at the rate the judges are replaced with new people who embrace the changes. Change in Federal Courts moves at a glacial pace.
- The real-world problem with the rules is that they seem to take an approach of relying on parties cooperating and wanting to complete discovery. This has not been my experience in the real world. In the real world, attorneys are way too happy to hide

behind the meet and confer requirements and the informal approaches to resolving disputes. Frankly, it was frustrating during the rollout of the rules to go to seminars and presentations and hear academics and judges discuss the rules as though attorneys would approach discovery with the goal of working cooperatively and making discovery easy. That has not been my experience. The counterparts in my cases are almost always represented by AMLAW 200 firms or regional civil defense firms. They almost always include "preliminary objections" that purport to be applicable to all discovery and have the effect of making it impossible to rely on any answer or understand what objections are being made. I recently had to file a motion to compel in a case where the counterparts was represented by a top-10 AMLAW firm. They refused to provide the addresses for witnesses, even though there is a mandatory disclosure under Rule 26. Of course, my motion was granted, but there were no sanctions for the defendant. Thus, they effectively forced me to waste time with good-faith efforts and filing a motion and suffered no consequences at all. In fact, they gained the strategic advantage of forcing me to waste so much time and of withholding evidence for several months. The amendments, and the rules in general, would be improved by encouraging greater court involvement, greater use of sanctions, and the imposition of sanctions that have teeth and would affect behavior. Unfortunately, in the real world, we need active referees. It simply is not working to delegate the responsibility for calling fouls to the players. In addition to providing for sanctions for blatantly frivolous and obstructionist discovery conduct, I would like to see some exception to the meet and confer process. Don't get me wrong - in some instances, the meet and confer process is great and helpful. But that is only where there is a good faith dispute or where the parties can informally exchange information to tailor discovery. There should be some exception to the meet and confer process, for example, when a party has blatantly violated the rules. Currently, for example, when a party fails to provide a specific objection, makes a patently absurd "form" objection, or fails to indicate what, if anything, is being withheld, the counterparts is forced to engage in the good faith process. It's sort of a game of "mother may I." You have to write a letter or arrange a phone call with the other side to say, "Mother may I have responses that comply with the rules." The obstructionist party usually agrees to make some changes, and "stands" on others, forcing a motion. It is a time consuming and expensive process. And at the end of it, the usual outcome is simply that a party is ordered to comply with the rules, but no sanction is issued. The incentive is thus to continue to refuse to participate in discovery.

Proportionality Not Well-Defined

- The questions are incomplete. The biggest problem is the battles over proportionality. It is usually one party in personal injury or product liability cases that has the documents. they do all they can to limit not only the ability to obtain the documents in the case at hand, but to prevent those documents from being shared for other cases. This results in an incredible waste of time, energy and resources. The courts have always had the ability to limit discovery based on the particular facts. The proportionality requirement ensures that those battles will happen in every case. Often the party with the documents is not forthright about the ease of obtaining and searching its documents. Proportionality test should be abolished.
- The best recent amendment was that boiler-plate objections are improper. The worst is the crutch of "proportionality", which frequently means evidence is not produced, despite the value of the information and later the lack of disclosure is forgotten by the Judge. For example, I received a "sampling" of hours and wage records in a FLSA case, then when we settled the judge demanded to know the "total value" of the case, despite the fact that I did not have that information produced to me. The same is argued often in Class Motions, that "Plaintiff has only X number of violations". I also note that placing the burden on the asking party puts plaintiffs at a huge disadvantage, as Defendants have the knowledgeable of what is held, but plaintiffs don't have that information, yet plaintiffs somehow have to know the unknown, thus we are forced to guess or speculate. I also note that many of my answers were tempered by a strong set of local rules, such as a requirement to meet and confer before filing a motion has been a local rule for as long as I have been in practice.
- Proportionality has done nothing to improve the efficiency of the discovery process. In all cases, what is "proportional" is purely subjective to each party and the court. The rule of proportionality simply gives the party opposing discovery yet another bases to withhold discovery and delay the proceedings. Mandating (or suggesting) court involvement when court dockets are already overloaded does nothing but encourage delay tactics. The shorter deadlines and specificity requirements are fine. Proportionality is best replaced with rules permitting parties to file discovery motions in short order, limited in size and decided on the papers. Speeding up the discovery process will have a much greater cost saving for all parties involved. Discretionary rules like proportionality will never help opposing parties "meet and confer."
- Define proportionality. I'm not sure how that would be accomplished, but with TAR and mostly electronic records proportionality should be less of a concern these days.
- State that proportionality means relevant to the facts of THE CASE AT HAND, not prior experience, similar acts, other claims or litigation or punitive damages evidence.
- Put more of an emphasis on the importance of issues in the case, such as civil rights. Allow civil rights plaintiff broader access to electronic discovery.

- No court understands what proportionality means. The rules need to be clearer about what proportionality actually entails. I like the old standard "not calculated to lead to the discovery of admissible evidence" and Oppenheimer better. For small cases, it is easier and cheaper.
- Further emphasis is needed to make it beyond dispute that "the amount in controversy" is not the best lens in which to view proportionality in civil rights, labor, and employment cases. The "needs of the case" in those sorts of cases very much depend on broad discovery, because of the imbalance of information and access to witnesses, although the damages amounts in controversy often are relatively small relative to other federal civil litigation. Congress has made clear, however, the broader importance of enforcing these federal laws even beyond the monetary recovery at issue. Unfortunately, defense counsel and the judiciary too often view the "amount in controversy" as the be-all-and-end-all of civil rights and employment litigation. This creates a vicious cycle that stifles civil rights enforcement: when courts view these cases as "small dollar," they are more likely to restrict discovery; without discovery, plaintiffs' claims are more likely to fail; and civil rights enforcement suffers as a result.
- I have seen some tendency among judges to interpret the "proportionality" factor as applying to a party's ability to pay rather than to the needs of the case. I don't think it's fair to impose a greater burden on a party that has resources to provide far-ranging discovery just because they can better afford that than can a party with less resources. An amendment to make clear that proportionality doesn't mean ability to pay would be helpful to address this issue.

Proportionality Burden of Proof

- The proportionality requirement has served as another roadblock to the evidence gathering process. Plaintiffs have the burden of proof, and by making it harder for them to get relevant information due to purported "proportionality" concerns impedes the administration of justice. It tilts the playing field unfairly in favor of the big guys, and makes it harder for the little guy to get a fair shake.
- Provide more explicit guidance on the burden of proof in Rule 26 proportionality disputes. Right now we have insufficient historical precedent on the multi-factored approach, and it would be very helpful to have a more precise delineation of when and to what extent the requesting or responding party must carry the burden of establishing reasonableness.
- Clarify which party has the burden to establish proportionality. Courts have given multiple and contradictory orders on this question.

Boilerplate Objections

- Marginal advances have been made on the goal of eliminating form boilerplate objections. That said, there should be further guidance that a conclusory objection is no objection at all.
- The amendment to Rule 34(b)(2)(B), in explicitly requiring parties to specify the grounds for objections and the information withheld, if any, is a positive change, in my view, and the judges and magistrate judges in my local federal district court enforce it fairly consistently. However, the rule change has not changed the initial behavior of defendants-companies, which still almost uniformly issue vague, boilerplate objections. Only after a motion practice and a court order do they comply.
- The rule assumes the legitimacy of the question and assumes objections are improper until proven otherwise. Actual experience is the reverse. Questions are largely illegitimate to start with and the questioner knows it because she doesn't want to potentially overlook something that might later prove to be important so makes them as broad and far reaching as possible. I should have to tell them what I looked for and what I am producing, not that I looked for all the bull crap they asked for, found it or not, and if found, refused to produce it. Any attorney who actually instructs their client to comply with this rule as written is an idiot and will never get repeat business. Its literal meaning is honored only in its breach.
- The use of boilerplate objections is still as prevalent as ever.
- "Not proportional"", as had been predicted, has become the new all-purpose boilerplate objection by the defense. Judges are allowing the withholding of a wide range of documents based on it, crippling the prosecution of discrimination cases viewed through too narrow a lens. Examples: complaints of discrimination by co-workers in the same protected class are not "proportional"; internal studies of the racial climate (in a race discrimination case) are not "proportional".
- The effect of the amendments was that parties modified their language in boiler-plate objections to include proportionality, but the parties' still clung to bad habits fostered by the pre-amendment rules: general objections, not specifying what was withheld, not producing non-objectionable material, and being generally stubborn in discovery.
- My experience is the Defendants continue with overall objections, object to everything .I have not had enough experience with arguments of proportionality. Several of my cases have been subject to a piolet program of mandatory discovery from the court. This I think works as it prevents hiding the ball, making Defendants tell the defenses before discovery and at the beginning of the case.
- Defendants usually make the same multi-part objections to all questions and then add "Notwithstanding these objections, Defendants answer ...." (in context of question 13)
- Courts do not seem to be aware that the large law firms simply ignore the requirements of these rules. For too often, we get discovery responses that contain the same boiler plate objections to each response. This happens in every case. The

respondent rarely states whether documents have been withheld until after at least 1 or 2 calls and conferences on discovery issues. This increases the costs because we are having to fight this fight in virtually every case.

Specificity of Objections

- The Rule 34(b)(2)(B) and (C) requirements of stating objections with specificity and identifying what will not be produced based on proportionality seem fertile grounds for increasing the number of discovery motions based on arguments that the objection or identification was not sufficiently descriptive or specific. The dispute then turns not on a substantive dispute over what was actually produced or withheld but on a procedural dispute about the adequacy of the form of the response. That would defeat the purpose of the amendments.
- District by district instructions/guidelines/calls to action urging the use of specific objections.
- The Amendments to Rule 26 which limits Objections to proportionality are not functionally sound in the world of real litigation.

Documents Withheld

- The obligation imposed by Rule 34(b)(2)(C) first sentence is unworkable and counterproductive. Every single document request that I have received includes multiple requests that amount to fishing expeditions, in whole or in part. In order to state something "responsive" is being withheld you have to speak with the client and the client has to spend time to determine whether those documents exist. Why should they have to spend the time searching for something their attorney tells them they don't have to produce it? For example, a request asks for 25 years' worth of certain records. I advise the client a reasonable production requires them to look for only 5 years' worth of those records and I will only produce 5 years' worth without a court order. The rule says that nevertheless the client must search for the full 25 years just so I can say whether such older "responsive" records exist, which never will be produced. Every single document request in some case poses a problem of this sort in a myriad of different permutations.

Specifying Date When Documents to be Produced

- In the District in which I practice (D. Colo.), nearly all civil cases are referred to magistrate judges who conduct scheduling conferences and handle discovery issues. Prior to the 2015 amendments, the magistrate judges each had their own particular practice standards for handling discovery disputes, almost all of which required some sort of hearing or conference with the court prior to filing a discovery motion. Accordingly, we have seen no change in how scheduling conferences or discovery issues are handled that can be attributed to the 2015 amendments. The big change that has resulted from the 2015 amendments is the significant increase in frequency of defendants responding to Rule 34 requests by stating that "documents will be produced," and not stating a date by which documents will be produced. While the 2015 amendments were supposed to reduce or eliminate the use of boilerplate objections to discovery requests, I have seen change in the assertion of those objections.

One Party Fails to Comply to their Advantage

- In paragraphs 13-15, I usually comply with the new rule and the other side doesn't. It costs me more to do it than the other side in consumer class action cases. That's why my answer is what it is. The other side seldom follows the rule but I always do.
- In short, opposing counsel uses the Rules to discern strategy and thereby gain an upper hand in witness prep and otherwise. Additionally, some are always using the forced emphasis on meet and confer to delay. They give crumbs and don't yield until you threaten court intervention. Then you get a crumb, rinse, repeat. Only when something is before the Court do you get fairness and compliance.
- With electronic discovery, the length of time necessary to obtain documents is expanding rapidly. Proportionality is a constant battleground. The length of the privilege logs are increasing and the amount of time necessary to get relevant documents is enlarging. It is a nightmare for a plaintiff. The worst situation is when a defendant "drops" a huge volume of documents on a plaintiff at the last minute before a deposition. This should be addressed in the rules.
- We did not need them to begin with. Discovery depends upon all the counsel playing fair.
- It is not so much the rules as those who must use those rules and unless your opposing counsel has a mindset to actually work to try and avoid discovery motions, you will end up with a fight.
- Many law firms and lawyers abuse the discovery processes for purely economic gain. Until we can take greed out of the equation, discovery abuse will continue to be a problem.

Zealous Representation

- There seems to be conflict between how lawyers perceive their role as advocates as someone who must turn over every stone in order to meet their ethical obligations to their client and the rule changes whose intent it is to judge the true relevance to the central issues of overly broad discovery.

Time Periods

- The 120-day time frame also allows parties time to negotiate and resolve claims. There is no reason to shorten the time frame. I would actually advocate to increase it to 6 month (180 days).
- The shortening the time to serve was a silly amendment as it simply lessens the ability to request waiver of service. Requiring specificity as to objections and delineating what documents are being withheld or will be produced were good amendments. Judges need to start actually enforcing those rules.
- You forgot to mention that the time for a Defendant to respond to the Complaint after service of process was increased from 20 days to 21 days under Federal Rule of Civil Procedure 12(a)(1)(A)(i). Local rules are also being used to give higher page limits to movants than respondents during motion practice. This practice tilts the playing field in favor of the movants during summary judgment proceedings.
- The 120 time frame also allows parties time to negotiate and resolve claims. There is no reason to shorten the time frame. I would actually advocate to increase it to 6 months (180 days).
- Shorten time to initial Rule 16 conference.

TAR

- TAR is brilliant but Courts rarely allow it by itself. They usually make the parties first participate in term identification which is silly and difficult to get agreement on.
- More latitude in providing computer searches and the information obtained is necessary.

Interrogatories

- Sorry, I do little work in federal court (because it is remarkably expensive and therefore generally not a good forum for individual plaintiffs), and accordingly I do not feel that I am sufficiently well-informed to respond to the survey. In my view, the rules need a radical overhaul, including such reforms as elimination of interrogatories and limitations on expert discovery, so that federal courts can again be a reasonable forum for litigation involving an individual litigant.
- Interrogatories should be served in 2 sets. Each of the first set of 10 must be a question ending with a question mark and the first word must be one of the following: who, what, when, where, how or why; and the interrogatory cannot be longer than 150 characters (not words) in length, including punctuation and spaces. Any defined terms used in these first set of 10 interrogatories must abide by the 150 character limit for the definition and such definition may not include other defined terms. Each of the first 10 interrogatories that fails to abide by this formatting rule does not have to be answered at all. B. Rule 34(b)(2)(C) should state: An objection to part of a request must specify the part and permit inspection or produce copies of documents responsive to the rest. Such partial response must specify the scope of the search conducted or to be conducted despite objection and specify whether any otherwise responsive materials located during such search are being withheld.
- Eliminate interrogatories. Don't limit them, don't make them proportional, make them illegal.

Cost-Shifting

- Cost shifting needs to be made a more explicit part of the rules - not discretionary.
- Add additional cost shifting into the rules to push the party seeking additional discovery to bear the burden of the request.
- Reframe the proportionality requirement to only prohibit discovery if the cost of retrieval of the information very greatly outweighs the benefit.
- Mandatory cost-shifting for willful or negligent non-compliance.
- Make some cost shifting to the party requesting discovery mandatory.

MDL and Complex Litigation Discovery

- In MDL litigation (which is most of my practice) judges do not believe they are subject to the discovery rules but rather make up their own in the form of a case management order. The system is very unfair to a defendant and none of the amendments have addressed the fact that MDL judges do not seem to believe that the discovery rules apply to them.

Preservation

- Make clear that preservation requirements start upon the commencement of litigation (or when litigation is imminent).
- To make it clear that once a party fails to preserve evidence, because of its own mere negligence, the court has discretion to take any action to make the adverse party whole. As it stands now, district courts have little discretion address negligent failure to preserve.

Privilege Log

- There should be a clear idea of what constitutes a proper privilege log.