The Sedona Conference Journal

Volume 11 2010

Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure

Emery G. Lee III & Kenneth J. Withers

Recommended Citation: Emery G. Lee III & Kenneth J. Withers, *Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure*, 11 SEDONA CONF. J. 201 (2010).

SURVEY OF UNITED STATES MAGISTRATE JUDGES ON THE EFFECTIVENESS OF THE 2006 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

By Emery G. Lee III & Kenneth J. Withers[1]
Federal Judicial Center The Sedona Conference®
Washington, DC Phoenix, AZ

Introduction

In the past two years, several surveys have been administered by several different groups attempting to quantify experiences with – and attitudes towards – the American civil litigation system, particularly in federal courts. Starting with the survey of members of the American College of Trial Lawyers (ACTL) administered by the Institute for the Advancement of the American Legal System (IAALS);[2] continuing with surveys of members of the American Bar Association Section of Litigation (ABA),[3] the National Employment Lawyers Association (NELA),[4] and the Association of Corporate Counsel (ACC);[5] and including a survey of 400 senior corporate counsel commissioned by the law firm of Fulbright & Jaworsky,[6] these surveys paint a picture of a legal profession, both defendant and plaintiff, largely dissatisfied with a civil litigation system viewed as costly and time-consuming, burdened by overbroad discovery and governed by ineffective rules.[7] In contrast to these surveys of professional attitudes towards civil litigation in general, the Federal Judicial Center (FJC) conducted a much broader and more scientific survey of both plaintiff and defendant counsel in 3,000 recently concluded federal cases, asking questions about their experience in those particular cases.[8] While the FJC survey yielded strikingly

1 Emery G. Lee III is a Senior Research Associate at the Federal Judicial Center in Washington, D.C. Kenneth J. Withers is Director of Judicial Education and Content at The Sedona Conference® in Phoenix, AZ. The views expressed in this article are those of the authors, and do not necessarily reflect the views of the Federal Judicial Center or The Sedona Conference®.

2 IAALS, "Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System" (2009), *available at* http://www.du.edu/legalinstitute/form-ACTL-Final-Report.html.

3 ABA, "ABA Section of Litigation Member Survey on Civil Practice: Detailed Report" (Dec. 11, 2009), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EE0CFE1E19ED62808525768D00502C34/$File/ABA%20Section%20of%20Litigation%2C%20Survey%20on%20Civil%20Practice.pdf?OpenElement.

4 NELA, "Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009" (2009), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/FE4312C5C76A7B6D852576F70051149D/$File/NELA%2C%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf?OpenElement.

5 IAALS, "Civil Litigation Survey of Chief Legal Officers and General Counsel Belonging to the Association of Corporate Counsel" (2010), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/AEA457B143CF3A9E852577050046F931/$File/IAALS%2C%20General%20Counsel%20Survey.pdf?OpenElement.

6 Fulbright & Jaworsky, LLP, "Fulbright's 6th Annual Litigation trends Report," (2009), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/26EBEE9A1CED6C14852576740055DE8F/$File/Fulbright's%206th%20Annual%20Litigation%20Trends%20Survey%20Report.pdf?OpenElement.

7 For a comparison of the ACTL, ABA, and NELA surveys, *see* Emery G. Lee III and Thomas E. Willging, "Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules," Federal Judicial Center (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf.

8 Federal Judicial Center, "National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules" (Oct. 2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

different results in terms of lawyer satisfaction, with most lawyers reporting that they achieved just results at costs proportionate to the stakes of their case,[9] the FJC survey also found that costs increased dramatically in particular categories of cases.[10]

In preparation for the 12th Annual Sedona Conference on Complex Litigation, held April 8 and 9, 2010, in Phoenix, a group of panelists noted that one important constituency hadn't been surveyed – judges. And while judges were not in a position to report on discovery costs or provide useful opinions on whether outcomes were "fair," they could provide insight on whether the current rules of civil procedure, and particularly the 2006 amendments addressing discovery of electronically stored information, have been "effective" in a number of specific ways.

In March of 2010, The Sedona Conference® approached the Federal Magistrate Judges Association (FMJA) and obtained permission to circulate a 62-question online survey to its entire email list of 594 members, which is slightly broader than the currently authorized 523 full-time and 41 part-time United States Magistrate Judge positions in the federal court system.[11] The questions were originally drafted by Complex Litigation XII faculty members Robert D. Owen, Dawson Horn, III, and William P. Butterfield, with input from Ariana J. Tadler, Paul C. Saunders, and Judge Shira A. Scheindlin. The survey questions were extensively revised by Kenneth J. Withers, after input from members of the FMJA and others, including a test survey.[12] We received 87 responses to the survey between March 4 and March 19, 2010.

The responses indicate that, by and large, the rules are working to achieve the "just, speedy, and inexpensive determination of every action" as dictated by Rule 1 of the Federal Rules of Civil Procedure, to the extent that litigants are using the rules to full advantage. It is safe to say that the amendments to Rules 26(f) and 16(b), which prompt the parties and the court to pay "early attention" to potential e-discovery issues, are rated as the most effective amendments by the judges answering the survey. This is consistent with the dialogue that took place at the April 2010 Complex Litigation Conference in Phoenix. More surprisingly, more than 6 in 10 of the judges who responded to the survey reported that the proportionality provisions in Rules 26(b)(2)(C) and 26(c) were being invoked and that, when invoked, were effective in limiting the cost and burden of e-discovery. Similarly, a majority of responding judges reported that the much-maligned scope of discovery, found in Rule 26(b)(1), is effective at least some of the time in assisting the parties and the court to define the appropriate scope of e-discovery. Almost two-thirds of respondents reported that the parties invoked the scope rule at least some of the time to argue for or against the scope of an e-discovery request, in their experience.

One interesting pattern that emerges from the survey is that some of the rules addressed in the survey are not being invoked on a consistent basis. This is especially true of Rule 26(g), which will receive additional discussion in a later section. But it is also true of the use of Rules 26(f) and 16(b) to address preservation issues or the use of Rule 16(b) scheduling orders to set explicit timeframes for the completion of specific e-discovery tasks. Similarly, many respondents expressed no opinion as to whether Rule 34 was effective in avoiding or resolving disputes over the form of production.

---

9 *Id.* at 27-28, 30.
10 *Id.* at 35-44.
11 For a thorough description of the role of United States Magistrate Judges in the federal judicial system, see Federal Magistrate Judges Association, *available at* http://www.fedjudge.org/.
12 It should be noted that while The Sedona Conference® is grateful for the cooperation of individual members of the FMJA in drafting and administering the survey, the FMJA as an organization at no time has endorsed or sponsored the survey or its results.

Use and Effectiveness of 2006 Rules Amendments

Figure 1 summarizes the respondents' answers to a series of questions regarding how often various 2006 Rules amendments are invoked in the e-discovery proceedings over which they had presided. Rule 26(b)(1) ("Scope in General") was reported being invoked "frequently" by 23.4% of respondents, "sometimes" 42.9%, "rarely" 24.7%, and "never" 9.1%. In other words, the scope rule was reported as being invoked sometimes or frequently by almost two-thirds of respondents, 66.2%. About one-third of respondents reported that the scope rule was invoked rarely or never.

Only 13% of responding judges indicated that Rule 26(b)(2)(B) is being invoked "frequently," with 41.6% of respondents indicating "sometimes," 32.5% "rarely," and 11.7% "never." In other words, over half of respondents, 54.6%, responded that Rule 26(b)(2)(B) is invoked at least sometimes, and 44.2% responded that it is invoked rarely or never.

Rules 26(b)(2)(C) and 26(c) were reported being invoked "frequently" by 20.8% of respondents, "sometimes" 42.9%, "rarely" 22.1%, and "never" 13.0%. In other words, more than 6 in 10 respondents, 63.7%, reported that the proportionality rules were invoked, at least sometimes; 35.1% reported that they were invoked rarely or never.

Respondents reported receiving reports of Rule 26(f) discovery planning conferences prior to Rule 16(b) scheduling conferences "always" 28.6%, "frequently" 14.3%, "sometimes" 16.9%, "rarely" 22.1%, and "never" 18.2%. In other words, about 4 in 10 respondents indicated that they always or frequently received reports of the 26(f) conference prior to the 16(b) conference, and about 4 in 10 indicated that they rarely or never received such reports prior to the 16(b) conference. About 2 in 10 indicated that they sometimes received such reports prior to the 16(b) conference.

Interestingly, 40.3% of respondents indicated that they "never" explicitly set out timeframes for completion of e-discovery tasks in Rule 16(b) scheduling orders, with 35.1% indicating doing this "rarely," 16.9% "sometimes," 5.2% "frequently," and 2.6% "always." In other words, more than three-quarters of responding judges reported that they rarely or never set out explicit timeframes for completion of e-discovery tasks in their Rule 16(b) scheduling orders.

On preservation issues, only 2.6% of respondents indicated that they "always" receive reports from Rule 26(f) conferences explicitly addressing ESI preservation, with 16.9% "frequently" receiving such reports, 37.7% "sometimes," 29.9% "rarely," and 11.7% "never." In other words, fewer than 1 in 5 respondents, or 19.5%, frequently or always receive 26(f) reports addressing preservation issues, and more than 4 in 10, or 41.6%, rarely or never do.

Accordingly, Rule 16(b) orders include explicit provisions regarding preservation of ESI "always" in 5.2% of respondents' Rule 16(b) scheduling orders, "frequently" in 11.7%, "sometimes" in 22.1%, "rarely" in 39.0%, and "never" in 20.8%. In other words, almost 6 in 10 respondents rarely or never address ESI preservation issues in Rule 16(b) scheduling orders in proceedings involving e-discovery issues.

Disputes over the form of production of ESI that required judicial intervention to resolve, governed by Rule 34, were reported as occurring "frequently" by 13% of respondents, "sometimes" 45.5%, "rarely" 32.5%, and "never" 9.1%. In other words, almost 6 in 10 respondents, 58.5%, reported that disputes over the form of production of ESI

requiring judicial intervention occurred sometimes or frequently, and slightly more than 4 in 10 reported that such disputes occurred rarely or never.

Finally, respondents were divided evenly with respect to how often assertions of privilege have been raised after production of ESI under Rule 26(b)(5). Only 9.1% of respondents indicated that such assertions were made "frequently," 40.3% "sometimes," 28.6% "rarely," and 20.8% "never." In other words, about half of respondents, 49.4%, reported that such assertions were made sometimes or frequently in ESI cases, and 49.4% reported that such assertions were made rarely or never.

Figure 1: Frequency of use of 2006 rules amendments, based on magistrate judges' experiences: "how often [invoked or used]?" (Questions 4, 7, 9, 15, 16, 24, 25, 37, 47)

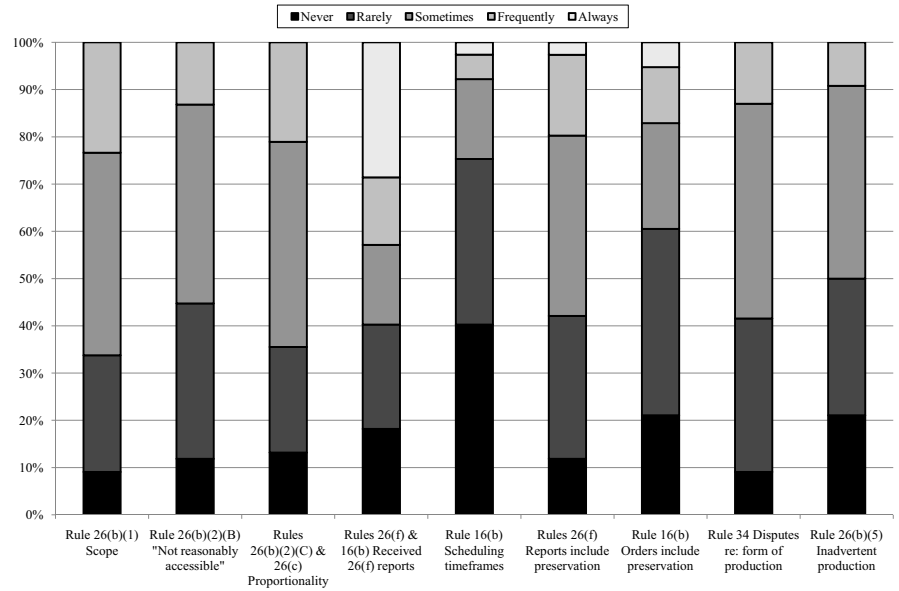


Figure 2 summarizes respondents' answers to a series of questions asking how often 2006 rules amendments had been effective in achieving their goals. With respect to the scope of discovery, Rule 26(b)(1), 18.2% of respondents reported that it had been "frequently" effective, 40.3% "sometimes," 29.9% "rarely," 3.9% "never," with 7.8% not having experience with the rule in e-discovery cases. In other words, 58.5% answered that the rule was effective sometimes or frequently in assisting the parties and the court define the appropriate scope of e-discovery, with 33.8% indicated that it rarely or never did so.

When asked how often Rule 26(b)(2)(B) had been effective in limiting the cost and burden of discovery, 22.1% of respondents answered "frequently," 33.8% "sometimes," 20.8% "rarely," and 5.2% "never," with 16.9% not having experience with the rule. In other words, more than half of respondents, 55.9%, found Rule 26(b)(2)(B) effective in limiting the cost and burden of e-discovery, at least sometimes, more than a quarter of respondents, 26%, answered that it rarely or never did so, and about 1 in 6 respondents did not express an opinion.

With respect to Rules 26(b)(2)(C) and 26(c), 19.5% of respondents answered that they had "frequently" been effective in limiting the cost and burden of e-discovery, 44.2% "sometimes," 15.6% "rarely," 2.6% "never," and 18.2% indicated no opinion. In other words, 63.7% of respondents reported that Rules 26(b)(2)(C) and 26(c) had been effective in limiting the cost and burden of e-discovery, at least sometimes, about 1 in 5, 18.2%, reported that they were rarely or never effective in doing so, and another 1 in 5 had little or no experience with these rules in e-discovery cases.

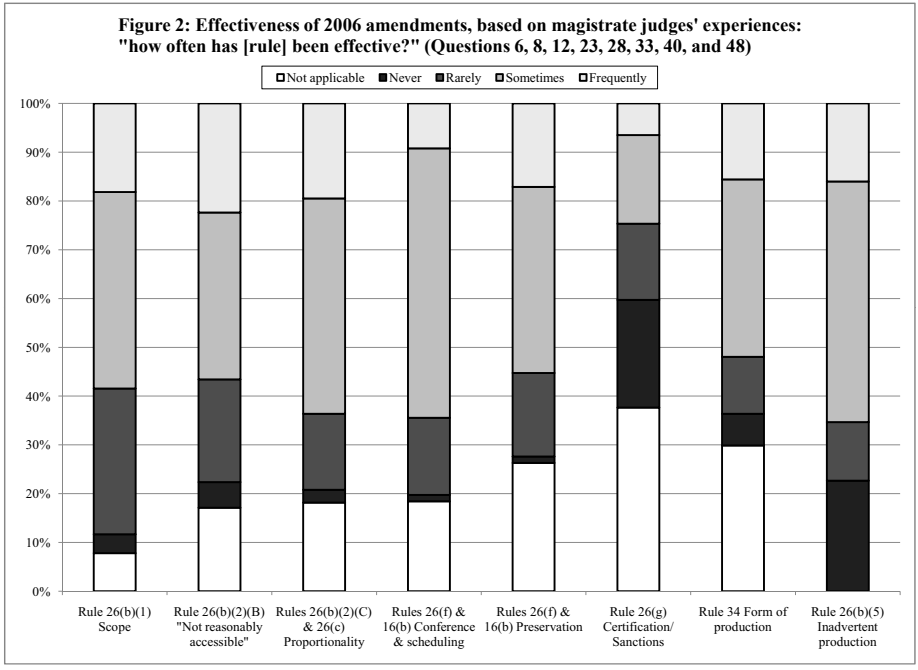
Turning to the "early attention" Rules 26(f) and 16(b), 9.1% of respondents answered that these amendments had been effective in limiting the cost and burden of discovery "frequently," 54.5% "sometimes," 15.6% "rarely," 1.3% "never," and 18.2% expressed no opinion. Fully 63.6% of respondents found these rules effective, at least sometimes, with just 16.9% finding them effective rarely or never. Still, about 1 in 5 respondents were unable to answer because of limited experience with the rules.

With respect to Rules 26(f) and 16(b) and preservation issues, 16.9% of respondents reported that the "early attention" rules had been effective in addressing preservation issues "frequently," 37.7% "sometimes," 16.9% "rarely," 1.3% "never," with 26% not expressing an opinion. In other words, slightly more than half of respondents, 54.6%, reported that the "early attention" rules had been effective in addressing preservation issues sometimes or frequently, and less than 1 in 5, 18.2%, reported that they had been effective rarely or never. But again, a relatively large percentage of respondents, more than 1 in 4, had little or no experience with cases in which preservation issues were addressed early in e-discovery cases.

As can be seen clearly in Figure 2, Rule 26(g) certification has not been very effective as a deterrent against improper or disproportionately burdensome discovery requests, incomplete discovery responses, and/or improper objections. Only 6.5% of respondents reported that it had been effective in doing so "frequently," 18.2% "sometimes," 15.6% "rarely," and 22.1% "never." Almost 4 in 10 respondents were unable to answer because of a lack of experience with Rule 26(g)—a topic addressed below, in connection with Figure 5.

Rule 34 was reported as effective in avoiding or resolving disputes over appropriate forms in which ESI should be produced "frequently," by 15.6% of respondents, "sometimes" 36.4%, "rarely" 11.7%, "never" 6.5%, with 29.9% of respondents not expressing an opinion. Similar to responses to other "effectiveness" questions, about half of respondents, 52% in this case, reported the rule effective sometimes or frequently, less than 1 in 5 found the rule effective rarely or never, and a relatively large percentage of respondents not able to express an opinion—about 3 in 10 respondents.

Finally, 15.6% of respondents reported that Rule 26(b)(5) had been effective in avoiding or resolving disputes over inadvertent production of privileged documents in e-discovery "frequently," 48.1% "sometimes, 11.7% "rarely," 22.1% "never."[13] In other words, fully 63.7% reported that Rule 26(b)(5) had been effective, at least sometimes, with 33.8% reporting that the rule was rarely or never effective in preventing or resolving privilege disputes.

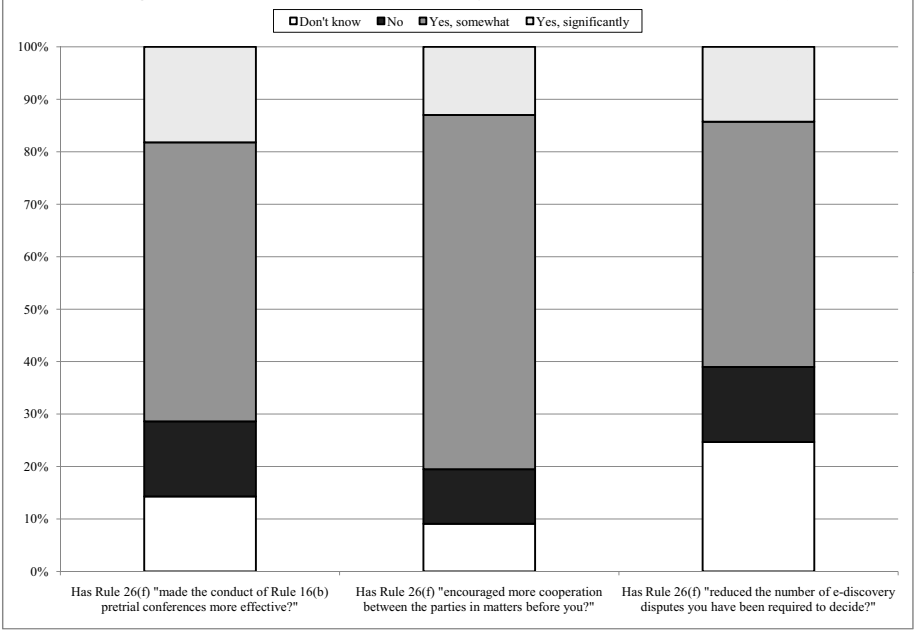


13 Two respondents did not answer the question.

Rule 26(f) Discovery Conferences

Figure 3 summarizes respondents' answers to a further series of questions on Rule 26(f) discovery conferences. When asked whether Rule 26(f) had "made the conduct of Rule 16(b) pretrial conferences more effective," 18.2% of respondents answered, "yes, significantly," 53.2% "yes, somewhat," 14.3% "no," and 14.3% "don't know." When asked whether Rule 26(f) had "encouraged more cooperation between the parties in matters before you," 13% answered "yes, significantly," 67.5% "yes, somewhat," 10.4% "no," and 9.1% "don't know." And when asked whether Rule 26(f) had "reduced the number of e-discovery disputes you have been required to decide," 14.3% answered "yes, significantly," 46.8% "yes, somewhat," 14.3% "no," and 24.7% "don't know." In short, 71.4% of judges responding to the survey had found Rule 26(f) had been at least somewhat effective in improving the conduct of Rule 16(b) pretrial conferences, 70.5% had found Rule 26(f) at least somewhat effective in encouraging the parties to cooperate, and 61.1% had found that Rule 26(f) had reduced the number of e-discovery disputes that they had been called upon to resolve. About 1 in 4 judges expressed no opinion as to whether Rule 26(f) had reduced e-discovery disputes.

Figure 3: Effectiveness of Rule 26(f) discovery conferences (Questions 17, 18, and 19)

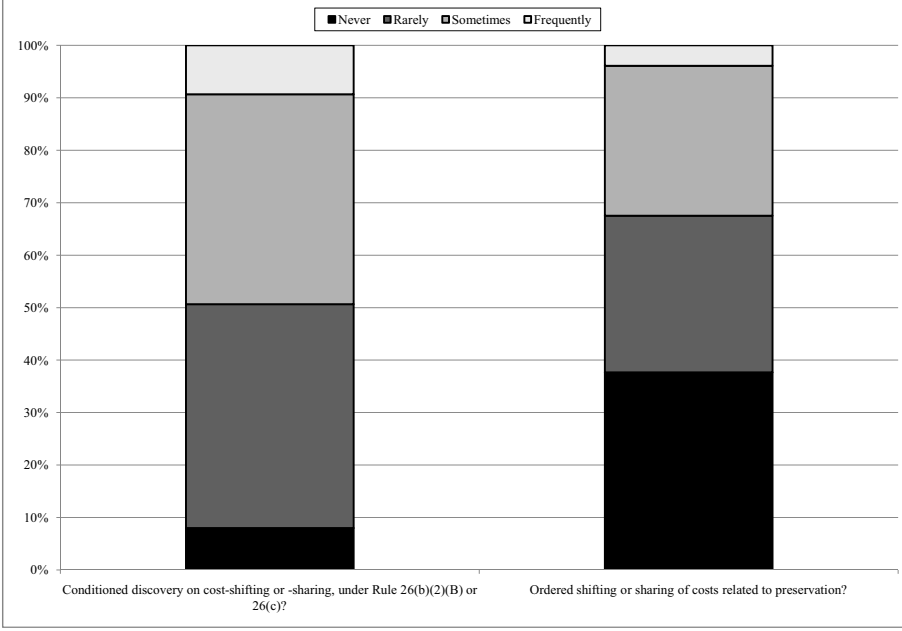


Cost-Shifting

Two questions on the survey asked the judge respondents about the frequency of cost-shifting or cost-sharing in e-discovery cases. Figure 4 summarizes their responses to these questions. There is a relatively stark split in practices related to cost-shifting, in general. Only 9.1% of respondents indicated that they "frequently" condition discovery on cost-shifting, under Rule 26(b)(2)(B) or Rule 26(c); 39% indicated that they "sometimes" do so, 41.6% "rarely," and 7.8% "never." In other words, about half the respondents (48.1%) frequently or sometimes condition discovery on cost-shifting, and about half (49.4%) rarely or never do.

Fewer respondents yet answered that they frequently or sometimes order cost-shifting related to preservation. Only 3.9% of respondents indicated that they "frequently" order cost-shifting related to preservation, and 28.6% indicated that they "sometimes" do so. In contrast, 29.9% of respondents indicated that they "rarely" order cost-shifting related to preservation, and 37.7% indicated that they "never" do so. In other words, more than 2 in 3 respondents indicated that they rarely or never order shifting or sharing of costs related to preservation.

Figure 4: Frequency of cost-shifting or sharing (Questions 11 and 26)



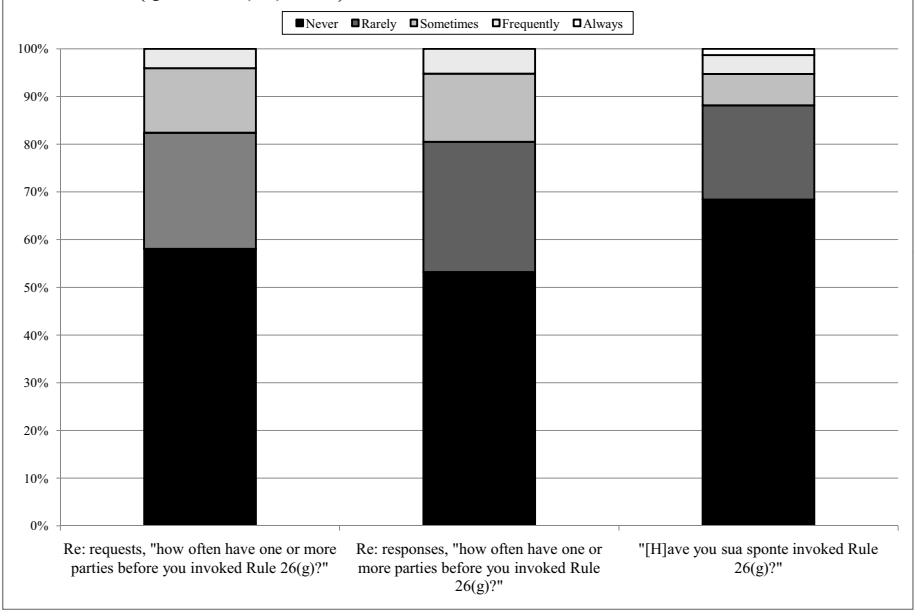
Rule 26(g) Sanctions

As mentioned above, there can be little doubt that Rule 26(g) is an underutilized provision in the Rules. Figure 5 summarizes the responding judges' answers to a series of questions on this rule. With respect to the propriety of requests for production of ESI, only 3.9% of respondents indicated that parties invoke Rule 26(g) "frequently," and just 13% indicated that parties "sometimes" do so. Almost 1 in 4 respondents indicated that parties "rarely" invoke Rule 26(g) with respect to requests for production of ESI, and more than half, 55.8%, indicated that parties "never" do so. With respect to responses to requests for production of ESI, only 5.2% of respondents indicated that parties invoke Rule 26(g) "frequently," and only 14.3% indicated that they "sometimes" do so. More than 1 in 4, on the other hand, indicated that the parties "rarely" do so, and, again, more than half, 53.2%, indicated that parties "never" invoke Rule 26(g) with respect to responses to requests for production.

Moreover, judges generally do not invoke Rule 26(g) *sua sponte*. Almost 1 in 5 respondents, 19.5%, indicated that they "rarely" invoke Rule 26(g) *sua sponte*, and more than 2 in 3, 67.5%, indicated that they never invoke the rule *sua sponte*. Only 1.3% of judges responding to the survey indicated that they "always" do so, with 3.9% indicated that they "frequently" do so, and 6.5% "sometimes.

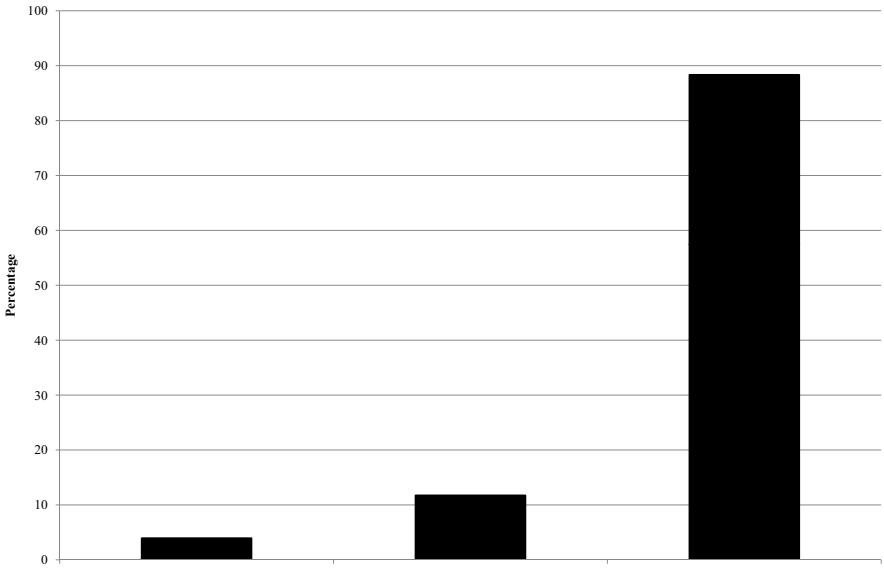
Moreover, sanctions are not commonly imposed for violations of Rule 26(g), as can be seen in Figure 6. Only 3.9% of responding judges indicated that they had sanctioned a requesting party for a violation of Rule 26(g), and only 11.7% indicated that they had sanctioned a responding party. Almost 9 in 10 of the judges responding to the survey, 88.3%, had never sanctioned a party for a violation of Rule 26(g).[14]

Figure 5: Reported use of Rule 26(g) in e-discovery cases: "how often invoked?" (Questions 29, 30, and 31)



14 Figures do not add to 100% because respondents could report imposing sanctions on both kinds of parties.

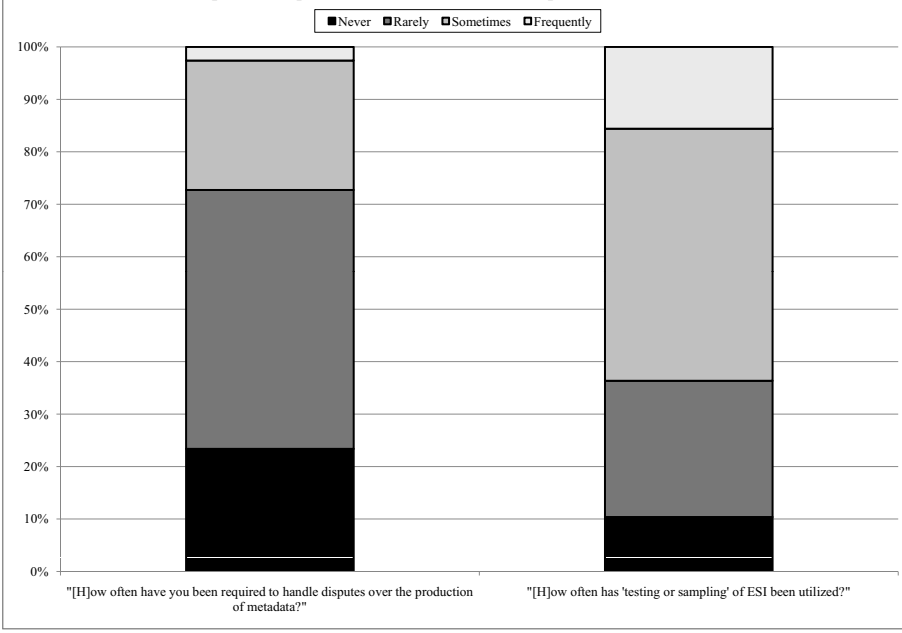
Figure 6: Distribution of responses to question 32: "In e-discovery proceedings over which you have presided, have you ever sanctioned a party for violating Rule 26(g)?"



Rule 34

Two questions asked respondents about issues with respect to Rule 34 and forms of production in e-discovery cases—metadata and testing or sampling of ESI. The responses to these questions are summarized in Figure 7. Only 2.6% of responding judges indicated that they are "frequently" required to handle disputes over the production of metadata, with 24.7% indicated "sometimes," 49.4% "rarely," and 23.4% "never." In other words, almost 3 in 4 respondents, 74.1%, are rarely or never called upon to resolve disputes over metadata. The picture that emerges with respect to the use of sampling or testing of ESI is different, with 15.6% of respondents indicated that testing or sampling is "frequently" used, and 48.1% that it is "sometimes" used. Still, slightly more than 1 in 3 respondents reported that testing or sampling is "rarely," 26%, or "never," 10.4%, used in their e-discovery cases. The takeaway would seem to be that testing or sampling is being used, although perhaps not as often as it might be.

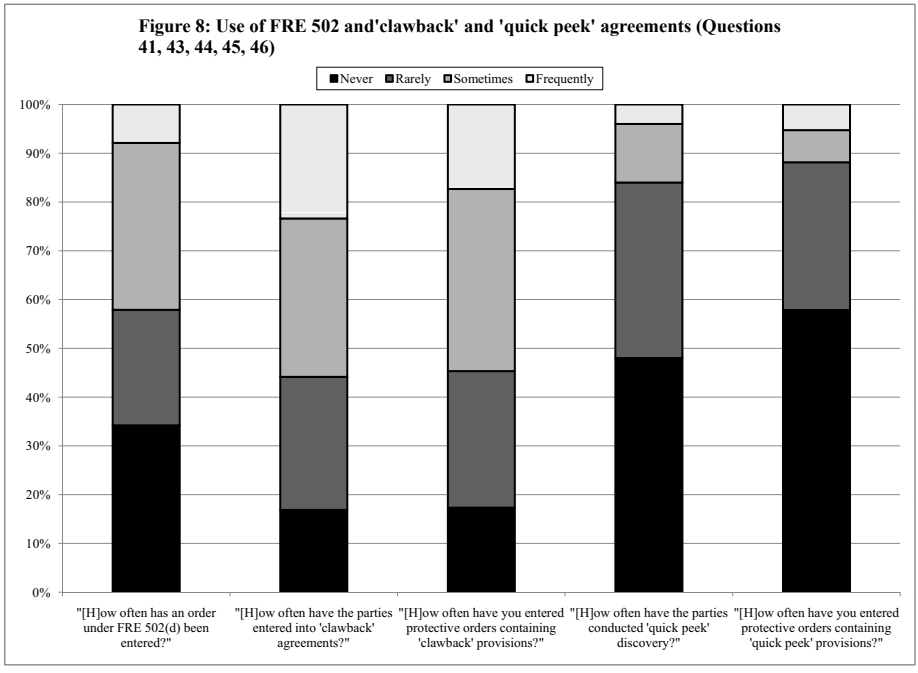
Figure 7: Frequency of special issues in Rule 34 form of production (Questions 38 and 39)



Privilege and Work-Product Issues

The survey asked the judges a series of questions related to recently enacted Federal Rule of Evidence 502 and the use of "clawback" and "quick peek" agreements between the parties in their e-discovery cases. Figure 8 summarizes the responses to these questions.

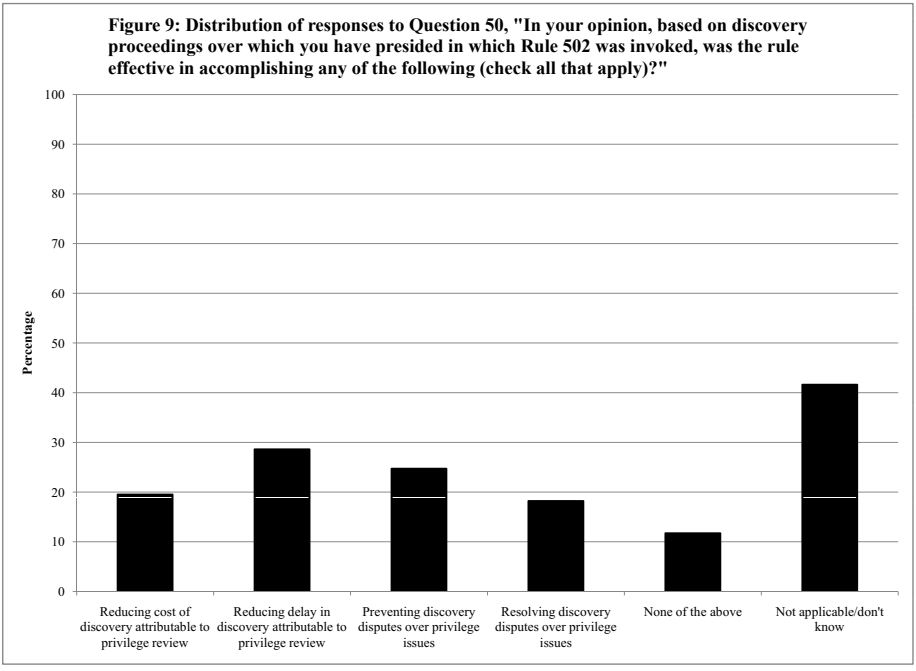
Consistent with anecdotal impressions, FRE 502(d) appears to be an underutilized rule, at least at this early stage in its life. Only 7.8% of responding judges indicated that they have "frequently" entered orders under FRE 502(d), with 33.8% indicating "sometimes," 23.4% "rarely," and 33.8% "never." Almost 6 in 10 respondents, 57.2%, indicated that the parties rarely or never employ FRE 502(d). It may actually be an encouraging sign that about 1 in 3 judges responding to the survey reported that FRE 502(d) orders are entered "sometimes," but it is probably too early to tell. The responses to a follow-up question on the effectiveness of FRE 502 shows that the most common response was "not applicable/don't know." These responses are summarized in Figure 9.



Even prior to enactment of FRE 502, parties in e-discovery cases had other means to attempt to reduce the expense of privilege and work-product review. Fully 23.4% of the judges responding to the survey indicated that the parties before them had "frequently" entered into clawback agreements, with 32.5% indicated that they had "sometimes" done so, 27.3% "rarely," and 16.9% "never." In other words, more than half of respondents, 55.9%, reported that parties are entering into clawback agreements frequently or sometimes. Moreover, judges appear to be issuing protective orders containing clawback provisions, when the parties enter into such agreements. Fully 16.9% of respondents indicated that they "frequently" enter protective orders containing clawback provisions, with 36.4% indicating that they "sometimes" have done so, 27.3% "rarely," and 16.9% "never." Again, about half of respondents, 53.3%, are entering protective orders with clawback provisions frequently or some of the time.

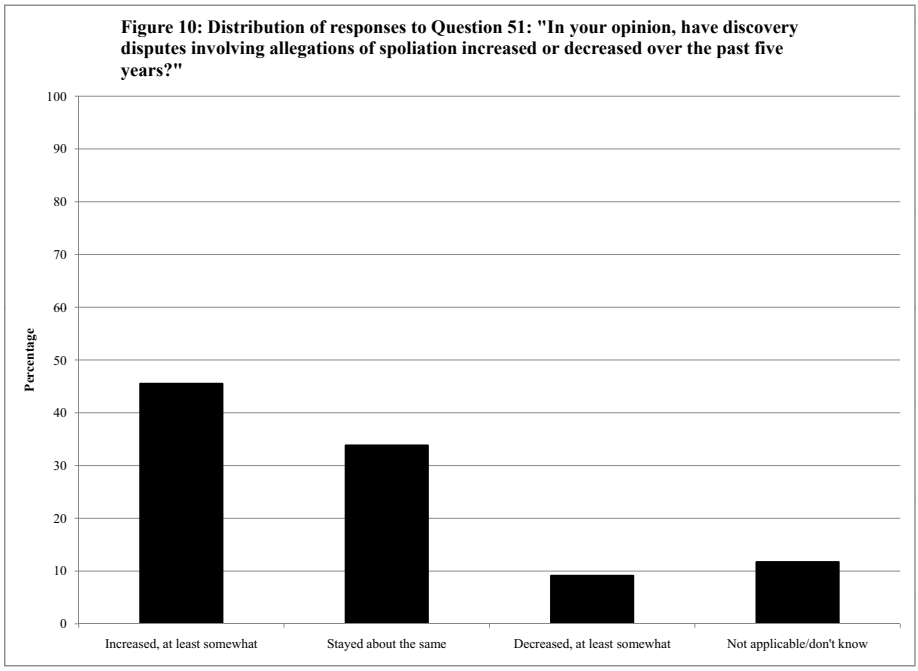
"Quick peek" discovery procedures, in which open-file disclosure is conducted prior to any privilege review under a reservation of rights, appears to be less common than clawback agreements. Only 3.9% of judges responding to the survey indicated that the parties before them are conducting quick peek discovery "frequently," with 11.7% indicating that the parties have done so "sometimes," 35.1% "rarely," and 46.8% "never." In other words, more than 4 in 5 respondents reported that quick peek discovery is rarely or never used. And it follows that judges are not entering protective orders containing quick peek provisions. Only 5.2% of respondents indicated that they "frequently" enter protective orders containing quick peek provisions and only 6.5% indicated that they "sometimes" do so. Fully 29.9% of respondents indicated that they "rarely" enter protective orders containing quick peek provisions, and 57.1% indicated that they "never" do so. In short, 87% of responding judges rarely or never issue protective orders containing quick peek provisions.

Figure 9: Distribution of responses to Question 50, "In your opinion, based on discovery proceedings over which you have presided in which Rule 502 was invoked, was the rule effective in accomplishing any of the following (check all that apply)?"



Spoliation and Preservation

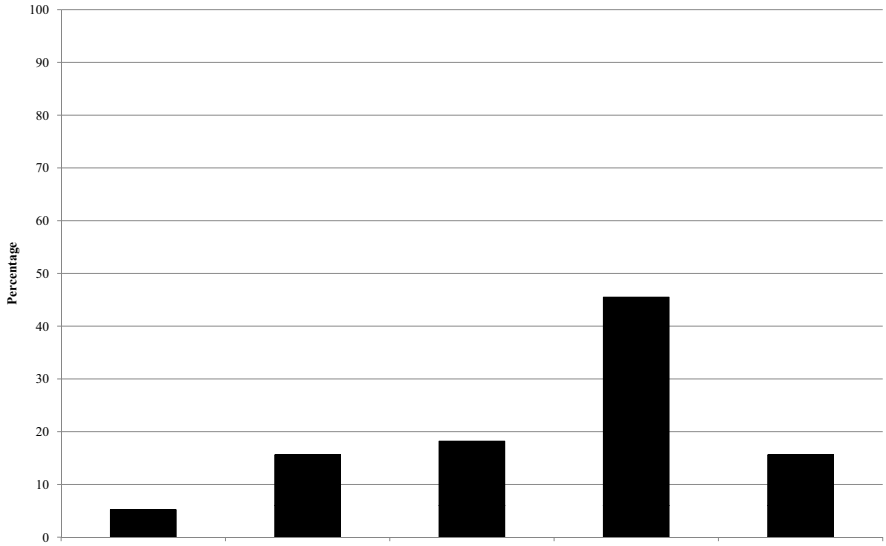
This survey may provide some support for the anecdotal impression that spoliation claims have increased in recent years. About 4 in 5 responding judges indicated that, in their opinion, discovery disputes involving allegations of spoliation had either increased at least somewhat over the past five years (45.5%) or stayed about the same (33.8%). Only 9.1% of respondents expressed the view that such disputes had decreased, at least somewhat, in the past five years, and 11.7% were unwilling or unable to express an opinion. These responses are summarized in Figure 10.



However, the largest group of judges in the survey responded that they had "never" granted or recommended sanctions (beyond compelling discovery and awarding costs) in e-discovery proceedings involving allegations of spoliation. As can be seen in Figure 11, fully 45.5% of responding judges answered "never" to that question. About 1 in 5 respondents, 18.2%, indicated that they had imposed sanctions for spoliation (beyond compelling discovery and costs) only once, and 15.6% indicated that they had done so two or three times. Only 5.2% of respondents indicated that they had imposed sanctions for spoliation (beyond compelling discovery and costs) more than three times.[15]

Another way to get at the rarity of sanctions: of judges who have imposed or recommended sanctions in e-discovery cases involving allegations of sanctions, only 13.3% had imposed such sanctions more than three times.

Figure 11: Distribution of responses to Question 52: "In e-discovery proceedings involving allegations of spoliation, how often have you granted or recommended sanctions beyond compelling further discovery and awarding costs?"



15 Another 15.6% responded "not applicable."

Overall Efficacy of Civil Litigation

Figure 12 summaries the judges' reactions to six statements that parallel the statements found in the surveys of practitioners. Six in 10, 60.9%, agreed with the first statement that cases "are generally being resolved or settled on the merits," with only 2.3% disagreed, 19.5% neither agreeing nor disagreeing, and 17.2% "don't know." On the other hand, an almost equal percentage, 59.8%, agreed with the statement that costs "are affecting the parties' assessment … [of] whether to file or settle a case." 8% disagreed, 13.8% neither agreed nor disagreed, and 18.4% "don't know."

Slightly less than half of the responding judges, 47.1%, agreed with the statement that cases "are generally being resolved in a timely manner," with 19.5% disagreeing, 20.7% neither agreeing or disagreeing, and 12.6% "don't know."

Rather dramatically, a mere 21.8% of the responding judges agreed with the statement that cases "are generally being resolved at a cost to the parties … proportional to the stake[s]." Slightly more, about 29.8%, disagreed with that statement, with 21.8% neither agreeing nor disagreeing and 26.4% "don't know."

In a question unique to this survey, only 43.6% of the responding judgers agreed with the statement that cases "are generally being resolved with an expenditure of judicial resources … proportional to" the stakes. 20.6% disagreed, 21.8% neither agreed nor disagreed, and 13.8% "don't know."

Finally, judges were asked about the attorneys who appear before them in cases involving e-discovery. Less than half of the responding judges, 42.5%, agreed with the statement that attorneys "appear to be knowledgeable and conscientious about the rules, case law, and practice of e-discovery." A substantial 33.3% of the judges disagreed with that statement. 21.8% neither agreed nor disagreed, and only 2.3% indicated that they didn't know, indicating that 1/3 of judges believe that attorneys are unprepared, to one degree or another, for e-discovery.

Figure 12: Magistrate judges' reactions to statements regarding e-discovery cases and costs (Questions 55–60)