

Discovery



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Discovery in U.S. Civil Litigation

“[T]he Rules ... permit ‘fishing’ for evidence as they should.”

-*Olson Transportation Co. v. Socony-Vacuum Co.*
(E.D. Wis. 1944)



The 1938 Federal Rules:



“mark ... the elimination of secrecy in the preparation for trial. Each party may in effect be called upon by his adversary or by the judge to lay all his cards upon the table, **the important consideration being who has the stronger hand, not who can play the cleverer game.**”

-Edson R. Sunderland



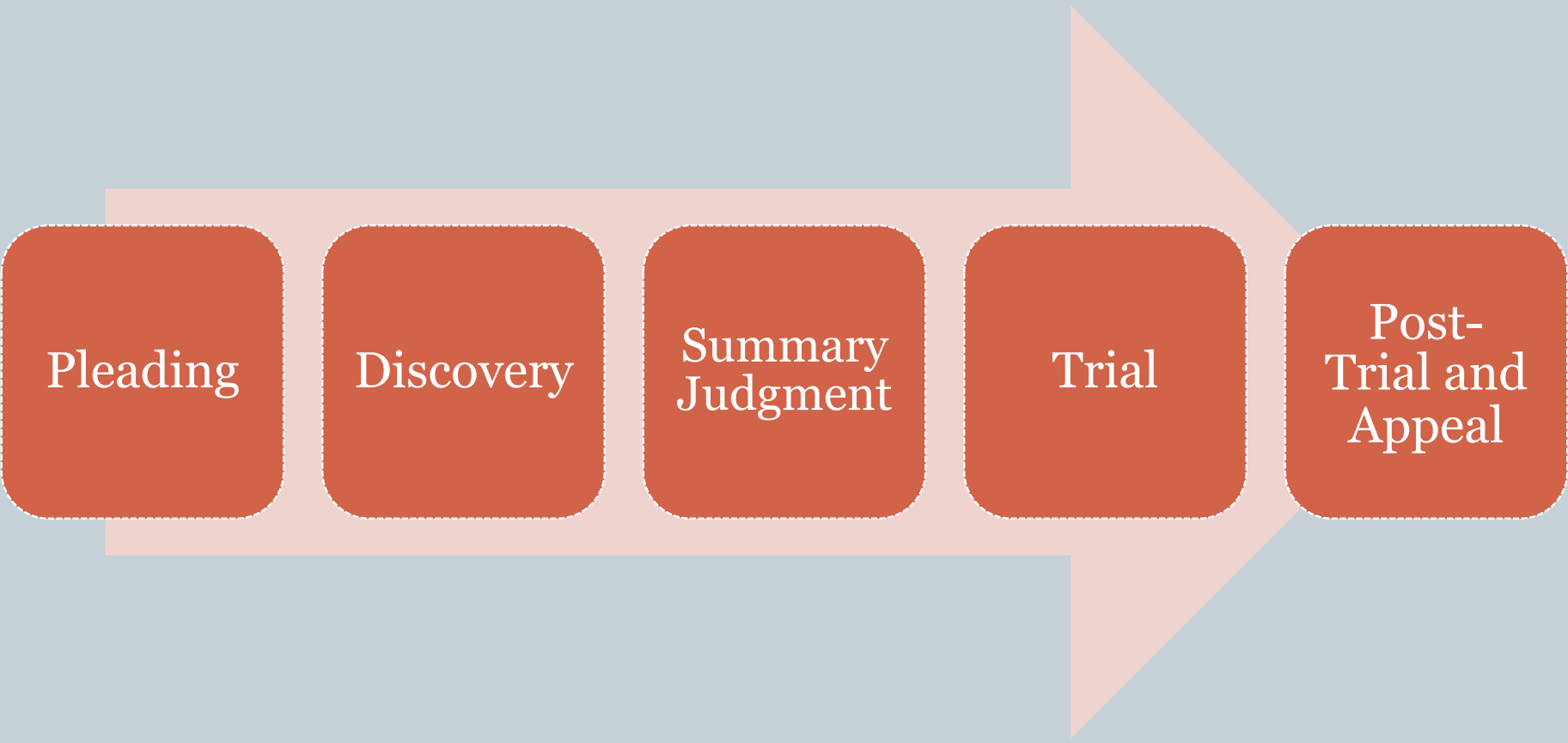
Discovery in Federal Civil Cases



“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”

-Hickman v. Taylor (U.S. Supreme Court, 1947)

Stages of U.S. Civil Litigation



Pleading

Discovery

Summary
Judgment

Trial

Post-
Trial and
Appeal

1938 Revolution Founded on Three Pillars



Discovery in Federal Civil Cases



Discovery in U.S. civil cases allows litigants to gain access to all relevant evidence before trial. This...

1. Avoids trial by ambush
2. Permits access to facts of case
3. Promotes merits resolutions over technical dismissals



Discovery in Federal Civil Cases



Federal Rule of Civil Procedure

Rules 26-37

are the primary rules governing discovery



Presentation Outline



Scope of Permissible Discovery

Discovery in Federal Civil Cases



The starting point is **Rule 26(b)(1)**

It broadly defines the scope of permissible discovery



Rule 26(b)(1) - Scope of Permissible Discovery (the prior rule)



“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”

Rule 26(b)(1) - Scope of Permissible Discovery (the prior rule)

“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense”

26(b)(2)(C).”

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Rule 26(b)(1) - Scope of Permissible Discovery

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Rule 26(b)(1) - Scope of Permissible Discovery (the rule as of Dec 2015-)



“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.”

Rule 26(b)(1) - Scope of Permissible Discovery

“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case”

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Information
evidence to be
discoverable.”

Rule 26(b)(1) - Scope of Discoverable Discovery

“Information within this scope of discovery need not be admissible in evidence to be discoverable.”

“Unnecessary” information within the scope of discovery need not be admissible in evidence to be discoverable. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Scope of Permissible Discovery



“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any **nonprivileged** matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.”

Scope of Permissible Discovery



Privileges protect
confidential
communications



Scope of Permissible Discovery



The American Rule:

Generally, the producing party bears the cost of production



Presentation Outline



Mandatory Disclosures

Mandatory Disclosures



Since 1993, FRCP require that certain disclosures be made by parties at three stages in the case:



Mandatory Initial Disclosures at outset of Discovery-Rule 26(a)(1)(A)

1. **Name, address and phone** of anyone with information to support a claim or defense
2. **Documents/tangible things** supporting a claim or defense
3. A Computation of **damages**
4. Any **insurance** agreement



Mandatory Disclosures for Expert Witnesses – Rule 26(a)(2)

1. Identify all testifying experts

2. Provide a written report for all testifying experts



**Expert Witness Robert Proctor
Testifies in *Hess v. RJ Reynolds***

Summary

The majority of professional astronomy now takes place outside of the United Kingdom. This is due to the poor and unpredictable weather conditions of the British Isles, their hemispherical position and to the continuing encroachment of light pollution on British skies. However, astronomy remains a growth subject of academic study, as demonstrated by the increase in the number of students at GCSE, undergraduate and postgraduate level.

This Report emphasises the importance of the amateur astronomy community in the UK. Whilst many observe the stars for purely aesthetic pleasure, there is a thriving community of amateurs who provide important observational data to grateful professional astronomers. Amateur astronomical societies, along with professional astronomers based in the UK, are also instrumental in introducing young and future scientists to astronomy and physics through open days at observatories and by bringing mobile planetaria to schools and groups.

Most importantly of all, amateur societies have been attempting, for over ten years to educate local authorities, government, lighting retailers and the general public about the problems caused by light pollution. Light pollution has grown to such an extent that it threatens the remaining dark skies in the rural areas of the UK. Astronomers have been joined by the Campaign to Protect Rural England in an attempt to persuade government that education and education alone are not enough to stem the swathe of light ruining the night sky for everyone. We agree.

This Report provides recommendations on how light pollution can be controlled without reducing the levels of light needed for safe illumination of urban and rural environments.

Mandatory Disclosures Before Start of Trial – Rule 26(a)(3)



All evidence and
witnesses a party
anticipates
presenting at
trial



Presentation Outline



Part III: Discovery Tools

Presuit Discovery (Rule 27)



May only be used in federal court to preserve testimony from

One about to die



Flee the jurisdiction



In a few states, a broader privilege exists to have discovery
for investigative purposes

Interrogatories (Rule 33)



What are they?	Written questions
To whom may they be sent?	Parties only
How many may be sent?	25 individual questions
Main benefit?	Party must file answers under oath so you can obtain sworn evidence on specific factual points
Main disadvantage	Common practice is for lawyer to prepare answers (even if client signs under oath)

_____ [name] _____,)
))
Petitioner,)
))
) **NO.** _____
_____ [name] _____,)
))
Respondent.)

“PERSON” includes a natural person, firm, association, organization, partnership, business, trust, limited liability company, corporation, and public entity

Discovery Tools – Sample Interrogatory



1. If you have ever been a plaintiff or defendant in any lawsuit other than this action, please state the title, docket number, and jurisdiction in which each lawsuit was filed, as well as the date each lawsuit was filed.
2. Identify each person, excluding your attorneys, to whom you have made any statement or with whom you have had any discussion regarding any aspect of this action, state the date and describe the substance of the statement or discussion
3. Provide the names of any parties who you contend are necessary parties to this action, but who have not been named.

Requests for Production (Rule 34)



What are they?	Method for requesting documents/tangible items
To whom may they be sent?	Parties and nonparties (though subpoena also may be required for NP)
How many may be sent?	Unlimited in number
Main benefit?	May obtain otherwise inaccessible documentary/tangible item proof
Main disadvantage	Depends on what is sought

Discovery Tools – Sample RFP



1. All photographs, videotapes or audio tapes, x-rays, diagrams, medical records, surveys or other graphic representations of information concerning the subject matter of this action, the Plaintiff, or property damage.
2. All written, recorded or signed statements of any party, including the Plaintiff, Defendant, witnesses, investigators, or agent, representative or employee of the parties concerning the subject matter of this action
3. All maintenance records concerning the vehicle being driven by the Defendant on the date of the accident for the two (2) years prior to the accident.
4. All documents identified in your answers to interrogatories.

Requests for Admission (Rule 36)



What are they?	Written requests to admit specific issues of fact or law
To whom may they be sent?	Parties only
How many may be sent?	Unlimited in number
Main benefit?	Principally used to narrow scope of dispute
Main disadvantage	None from requester's perspective

Discovery Tools – Sample RFA



1. Admit that you were driving a 2000 Toyota with Maryland motor vehicle tags on the date of the car crash.
2. The Plaintiff did sustain injuries as a result of the accident which took place on March 17, 2002
3. The attached medical records Bates stamped 01 - 105 are authentic

Depositions (Rule 30, 33)



What are they?	Method for recording oral testimony prior to trial
Who may be deposed?	Parties and nonparties (though subpoena also may be required for NP)
How many may be sent?	No more than ten depositions per side and no more than seven hours/witness, unless agree otherwise
Main benefit?	Allows for gathering of factual information/witness testimony that might otherwise be inaccessible
Main disadvantage	Cost

Presentation Outline



Attorney Client Privilege and *Upjohn v. United States*

Typical Elements of Attorney-Client Privilege



- (1) a confidential communication;
- (2) made between a client (or a prospective client) and a lawyer (or the lawyer's representative);
- (3) for the purpose of obtaining legal advice

Presentation Outline



Work Product Protection

FRCP 26(b)(3)

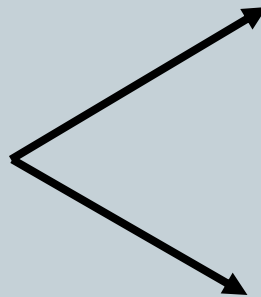
and

Hickman v. Taylor

FRCP 26(b)(3)



Protections of
rule apply to
documents and
tangible things



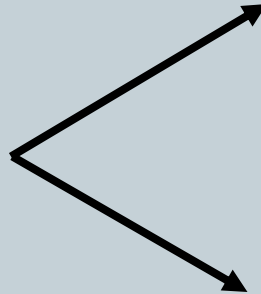
But many courts read the
rule more broadly

And even those that don't
read *Hickman* to provide
common law protection to
other work product

For FRCP 26(b)(3) and *Hickman*:



Work product
covers things



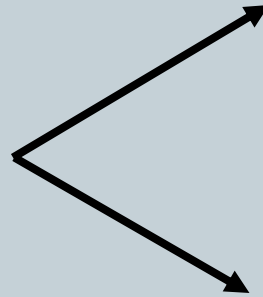
prepared in anticipation
of litigation or for trial

by or for a party or its
representative

For FRCP 26(b)(3) and *Hickman*:



Exceptions to
work product
protection



substantial need for the
materials; and

Cannot, without undue
hardship, obtain their
substantial equivalent by
other means

For FRCP 26(b)(3) and *Hickman*:



However, there
is no exception
for core work
product under
Rule
26(b)(3)(C)

Work Product: Putting it all together



Step 1: Is work product protection being sought for documents/tangible things or something else? (Note: that it is common to ask this question, but the analysis in Steps 2-4 is basically the same under Rule 26(b)(3) or *Hickman*)

Step 2: Was the discovery being sought prepared in anticipation of litigation or for trial and was it prepared by or for a party or its representative?

Step 3: Does the discovery being sought concern ordinary or core work product (i.e., the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation)?

Step 4: Assuming we're dealing with ordinary work product, is there substantial need for the materials; and is the party seeking the discovery not able, without hardship, to obtain their substantial equivalent by other means?

Presentation Outline



Electronically Stored Information (ESI)

ESI – Defining the Problem



The volume and complexity of
ESI is enormous



Because of its volume and complexity, ESI
raises many hard discovery problems

ESI: Preservation Obligations

When a party reasonably anticipates litigation, routine document retention/destruction policies must be suspended



ESI: Preservation Obligations



The two key questions are:

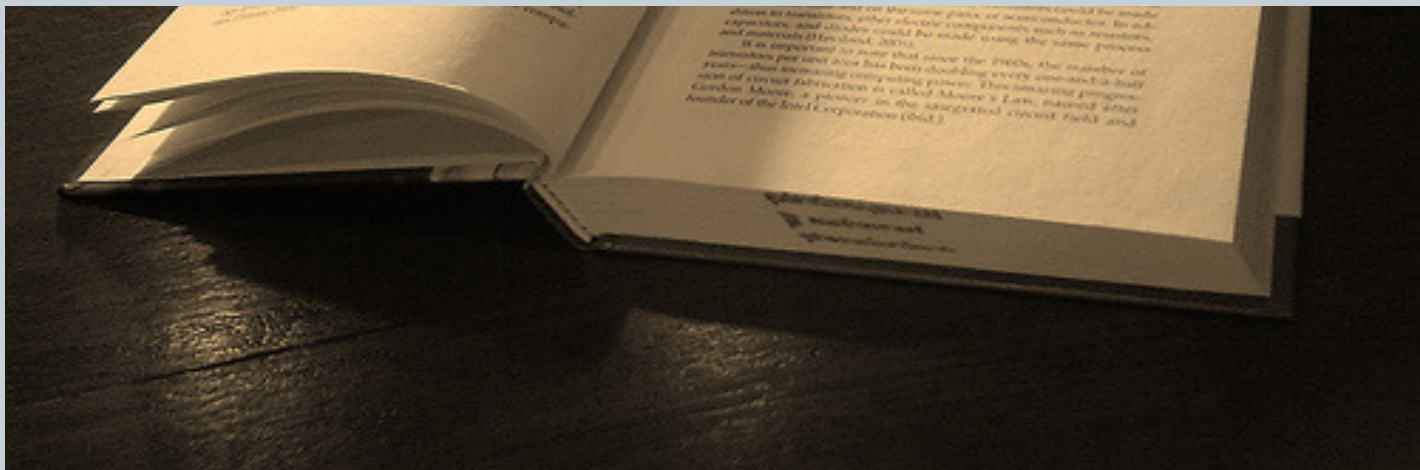
1. When is litigation “reasonably anticipated”?
2. What evidence must be preserved?



ESI: Disclosure and Production Issues



Rule 26(a)(2) and Rule 26(b)(2)(B):
One has a duty to disclose records in its
“possession, custody or control” that are
“reasonably accessible”



“Possession, Custody or Control”

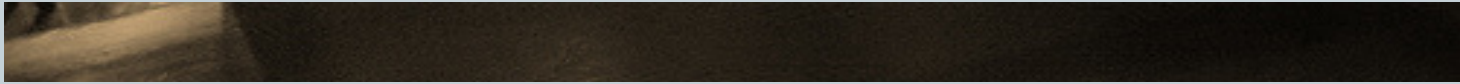


Ownership or physical possession not required



Instead, the question is whether one has the right or practical ability to obtain the records

“Reasonably Accessible”

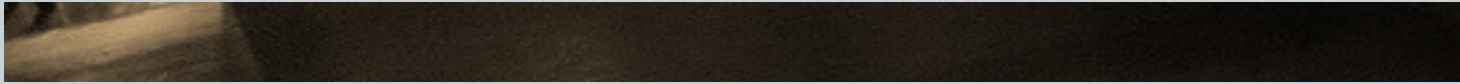


Rule 26(b)(2)(B)

“A party need not provide discovery of electronically stored information from sources that the party identifies as **not reasonably accessible** because of undue burden or cost”



“Reasonably Accessible”



Rule 26(b)(2)(B)

However, even as to inaccessible records:
“the court may nonetheless order discovery
from such sources **if the requesting party
shows good cause**”



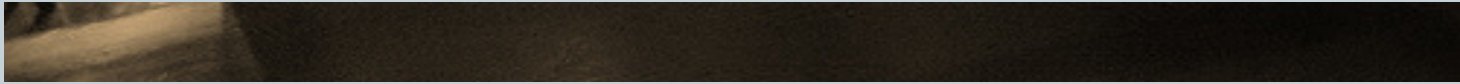
Rule 37(e) (the rule as of Dec 2015-)



“(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment. .”

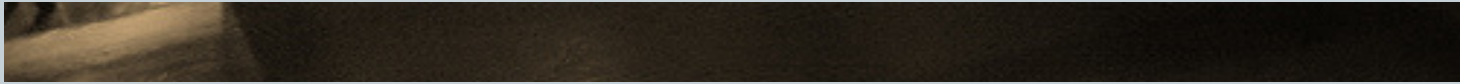
New Rule 37(e)



“If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party **failed to take reasonable steps** to preserve it...”



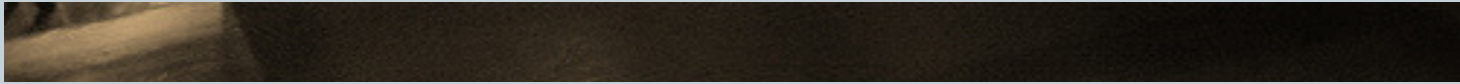
New Rule 37(e)



“...and it cannot be restored or replaced through additional discovery...”



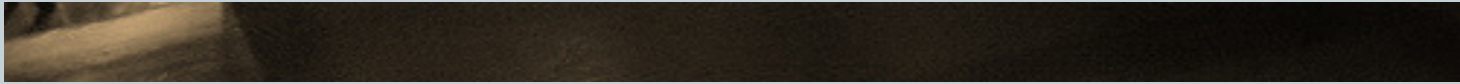
New Rule 37(e)



“(1) upon finding **prejudice** to another party from loss of the information, may order measures **no greater than necessary to cure the prejudice...**”



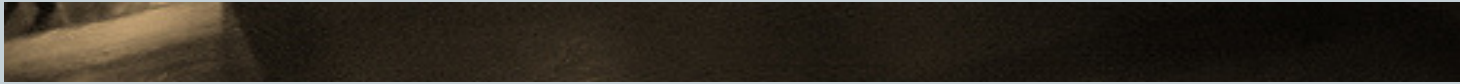
New Rule 37(e)



“(2) only upon finding that the party acted **with the intent to deprive another party of the information’s use** in the litigation may...”



New Rule 37(e)



- (A) **presume** that the lost information was **unfavorable** to the party;
- (B) **instruct the jury** that it may or must presume the information was unfavorable to the party; or
- (C) **dismiss** the action or enter a **default judgment**.”

”



Presentation Outline



Assessing Critiques of American Discovery

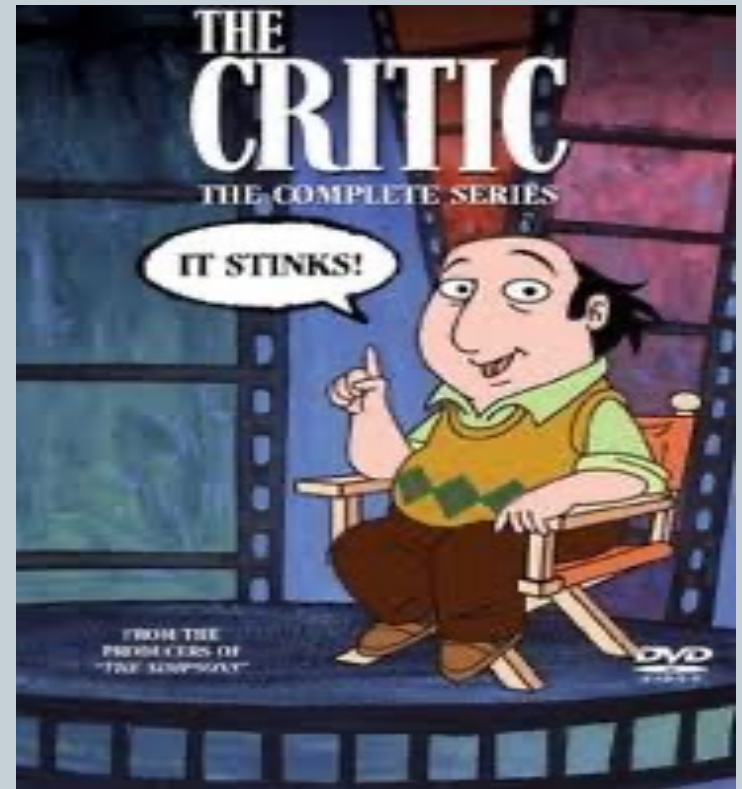
Critics of U.S. Discovery say:

Costs are enormous

Out of proportion to value
of case

Forces settlement without
regard to merits

Invades personal information



Empirical Evidence Does Not Support Critics



Recent research by Federal Judicial Center (FJC)
casts serious doubt on criticisms



FJC 2009 Survey



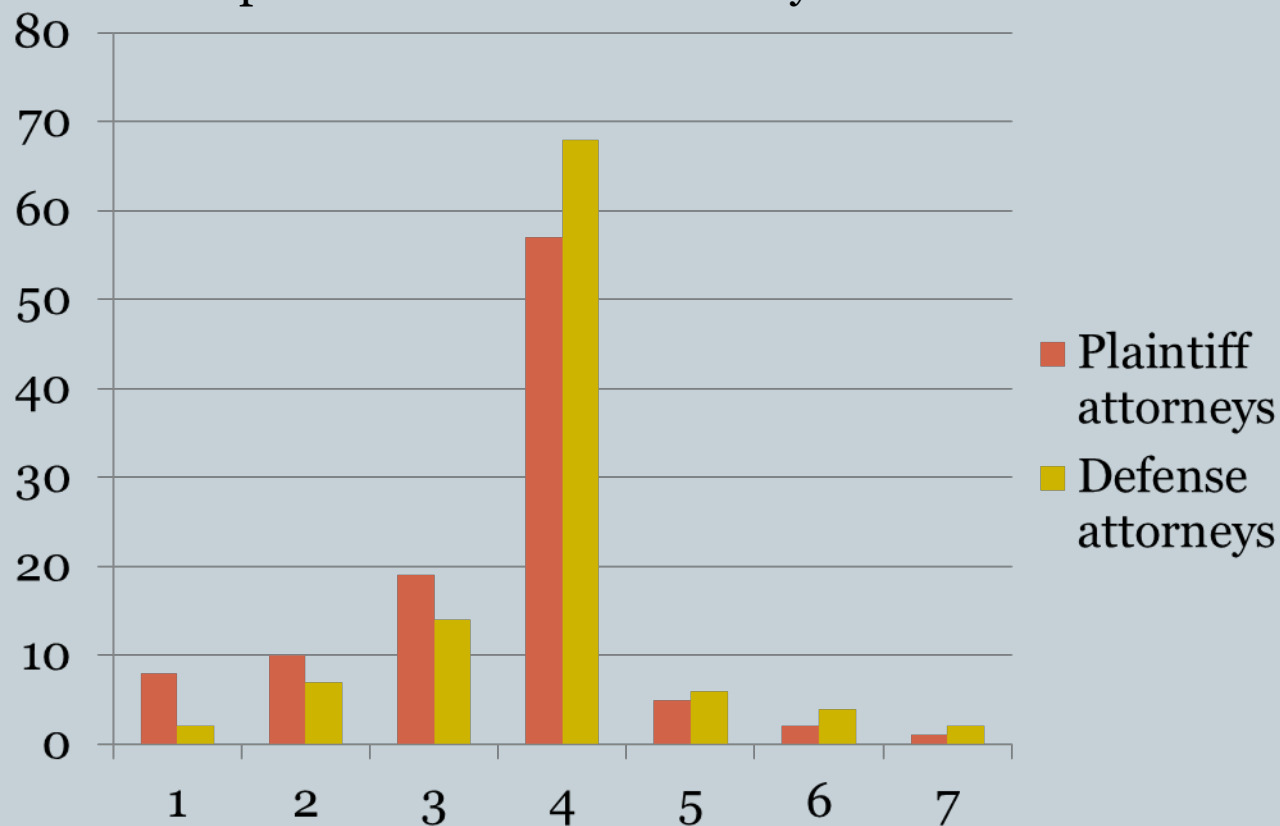
Cost of federal cases, including attorney's fees, reported to be:

Plaintiff's attorney's estimates	Defense attorney's estimates
Median \$15,000	Median \$20,000
10 th percentile \$1,600	10 th percentile \$5,000
95 th percentile \$280,000	95 th percentile \$300,000

FJC 2009 Survey



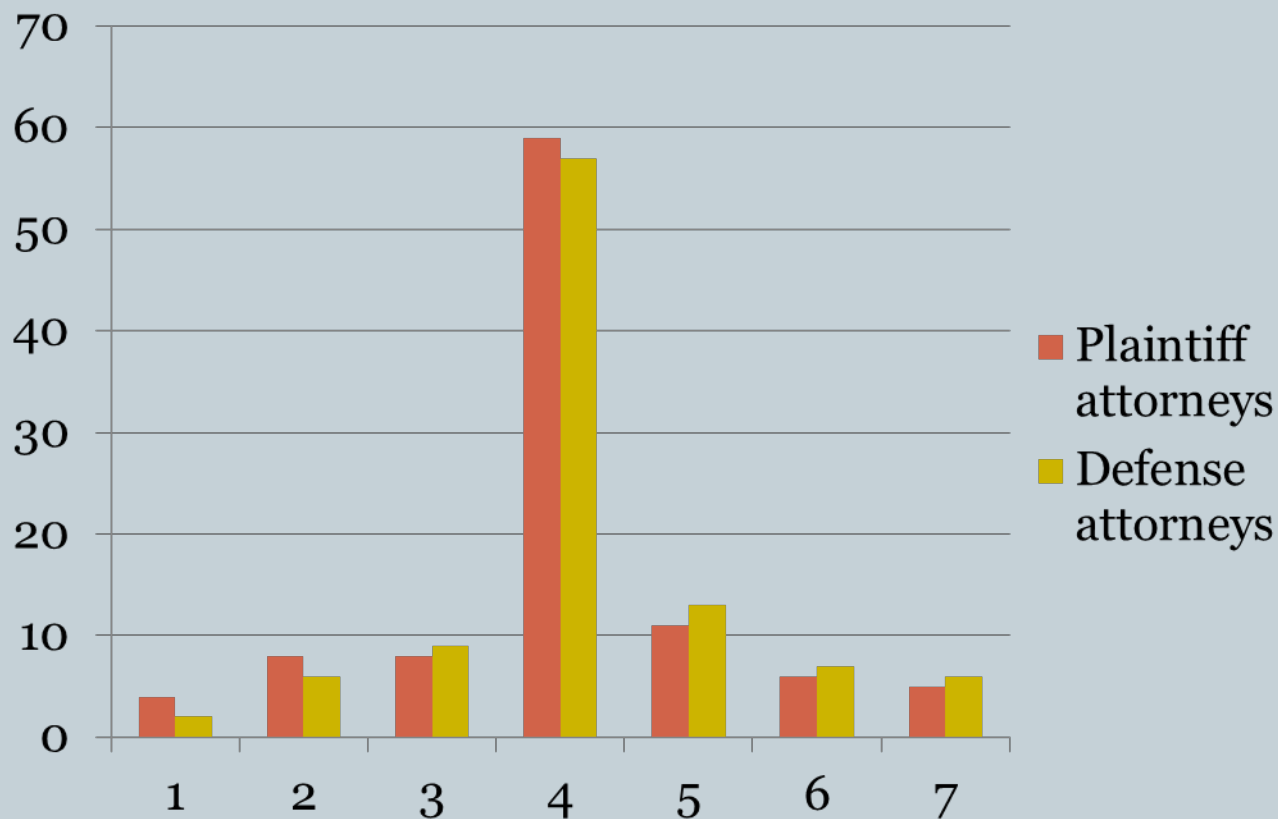
“On a scale of 1 to 7, with 1 being too little, 4 being the right amount, and 7 being too much, how much information did the disclosure and discovery generated by the parties in the named case yield?”



FJC 2009 Survey



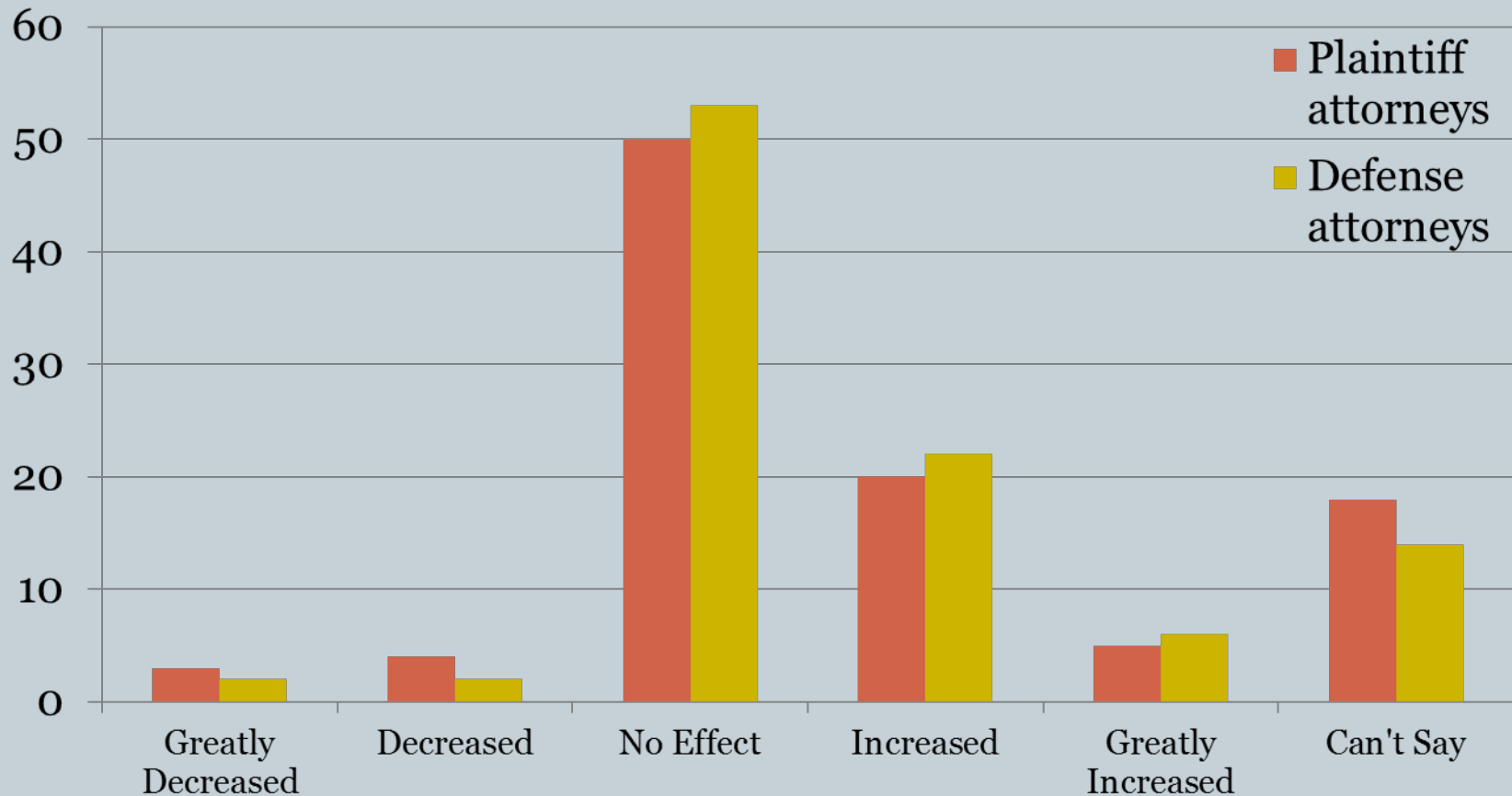
“On a scale of 1 to 7, with 1 being too little, 4 being the right amount, and 7 being too much, how did the costs of discovery to your side in the named case compare to your client’s stakes?”



FJC 2009 Survey



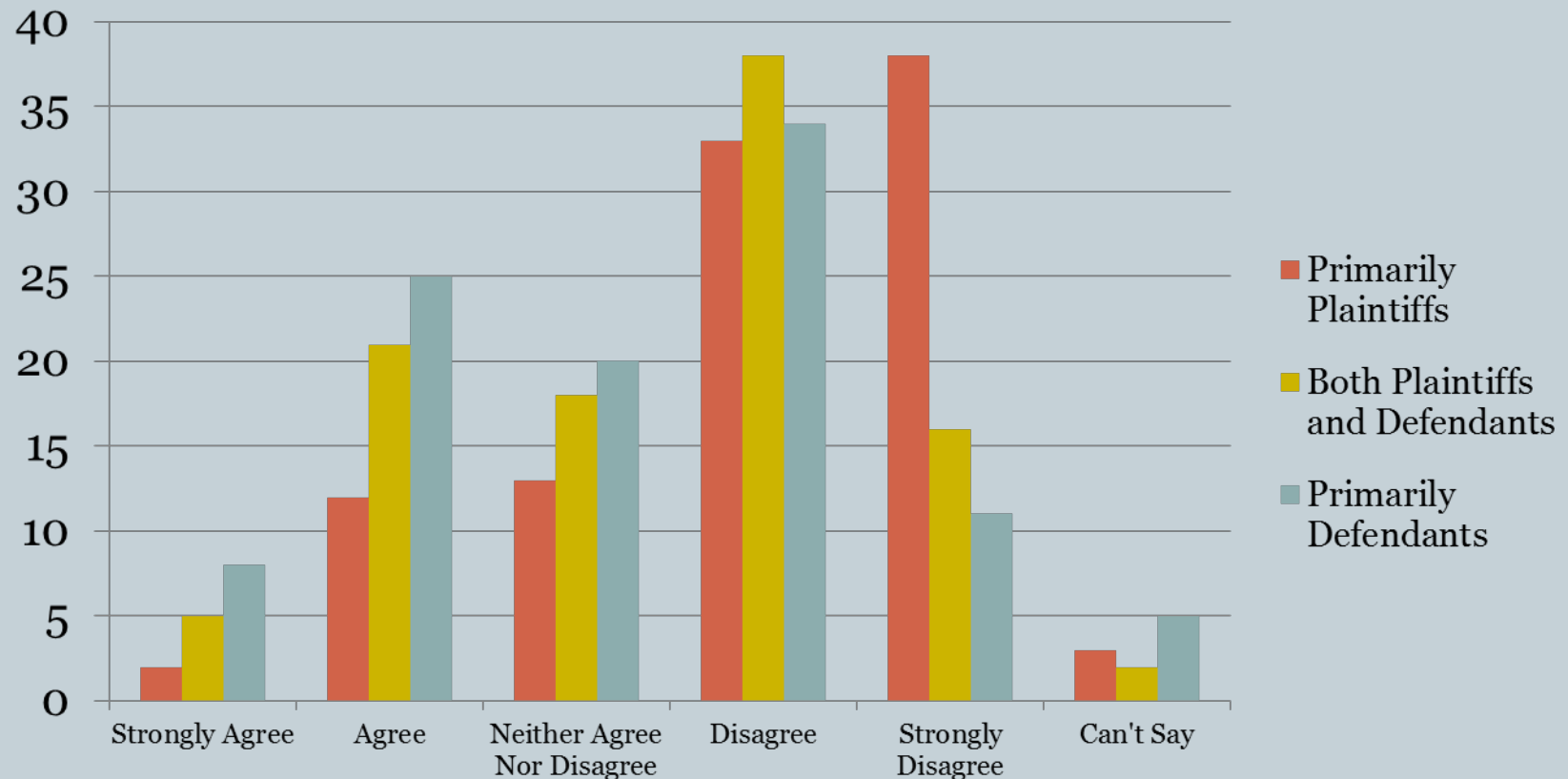
“What effect on settlement did the costs of discovery...have in the named case?”



FJC 2009 Survey



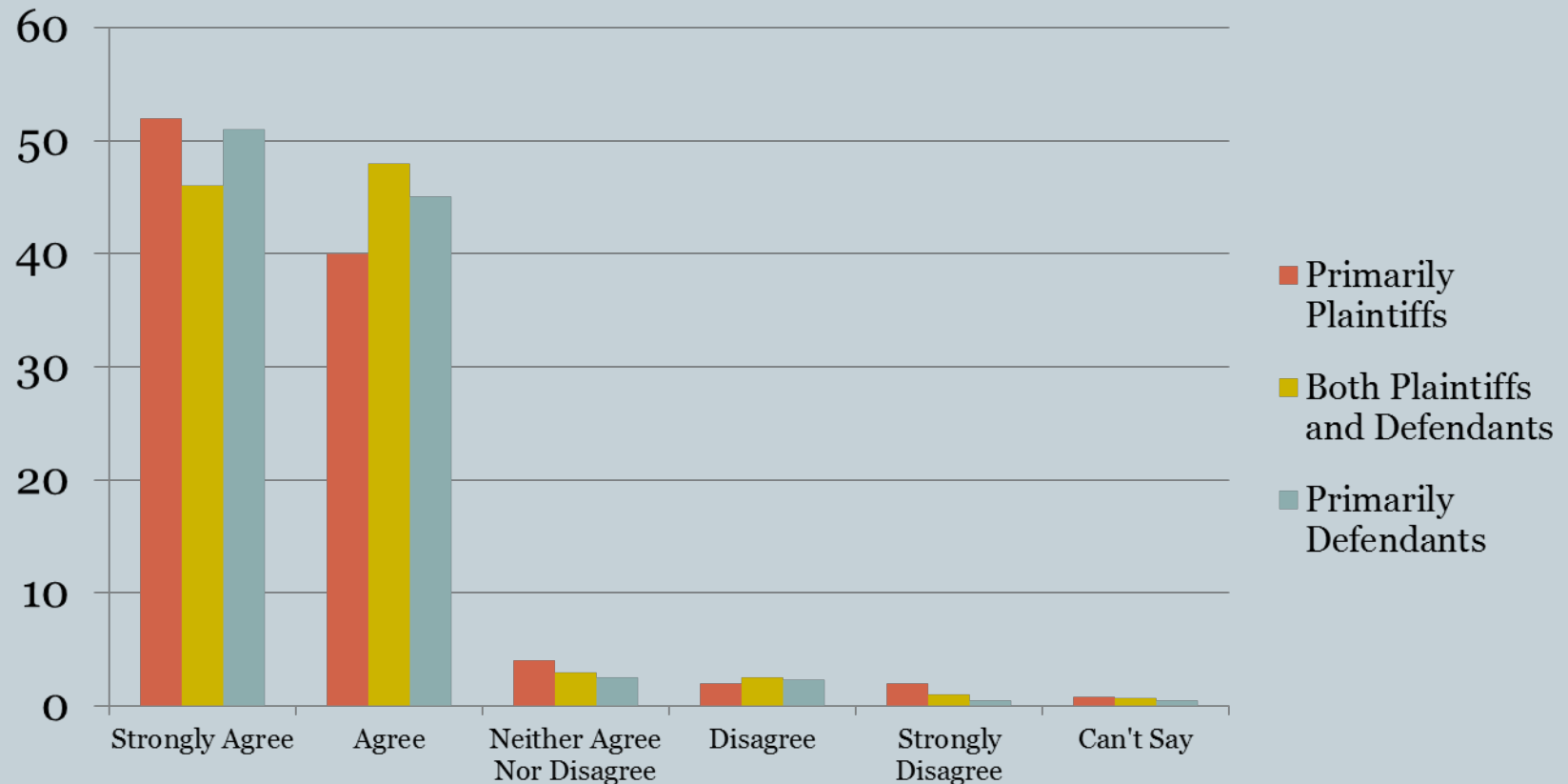
“The Rules should be revised to limit discovery in general”



FJC 2009 Survey



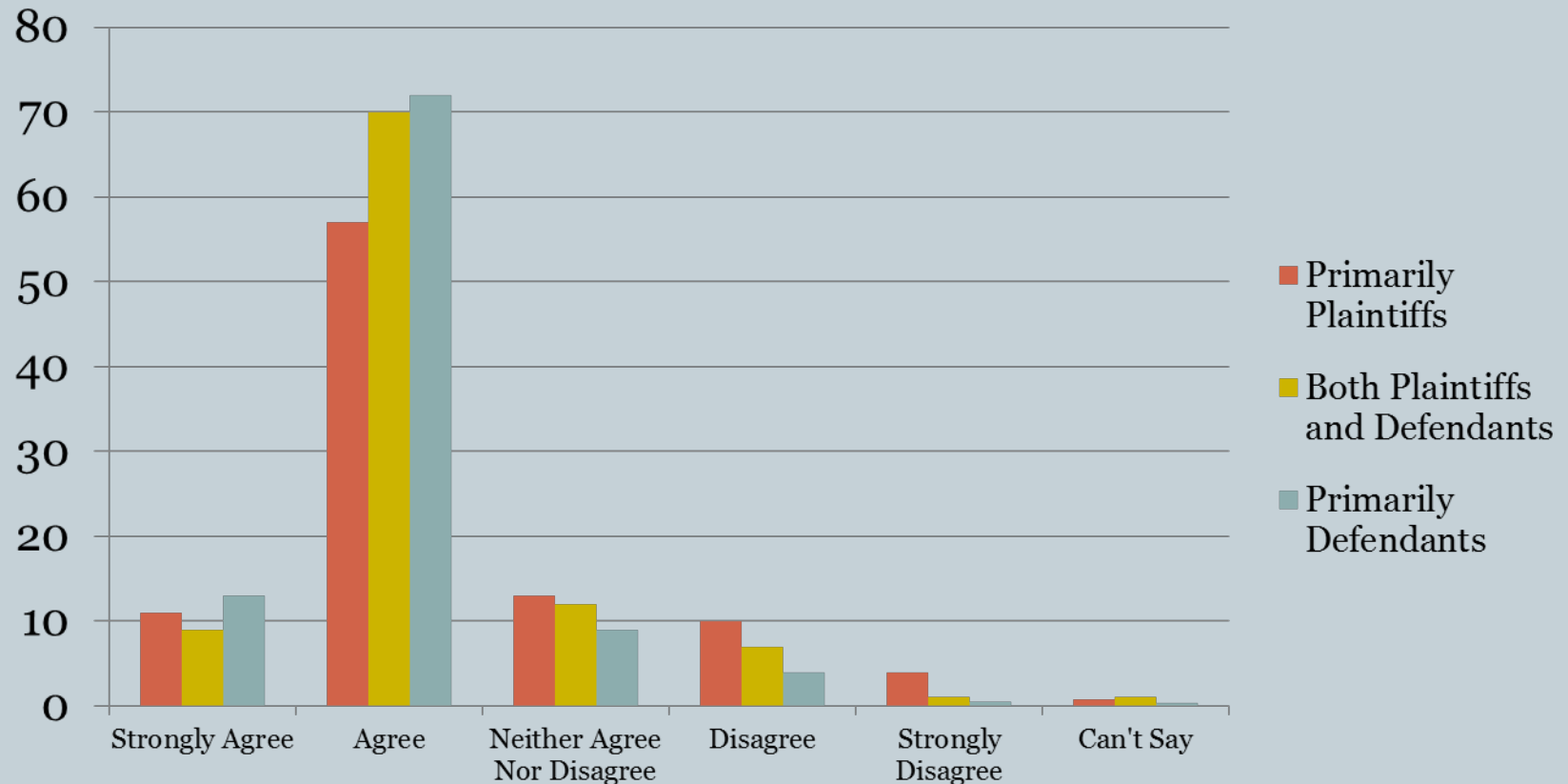
“Attorneys can cooperate in discovery while still being zealous advocates for their clients



FJC 2009 Survey



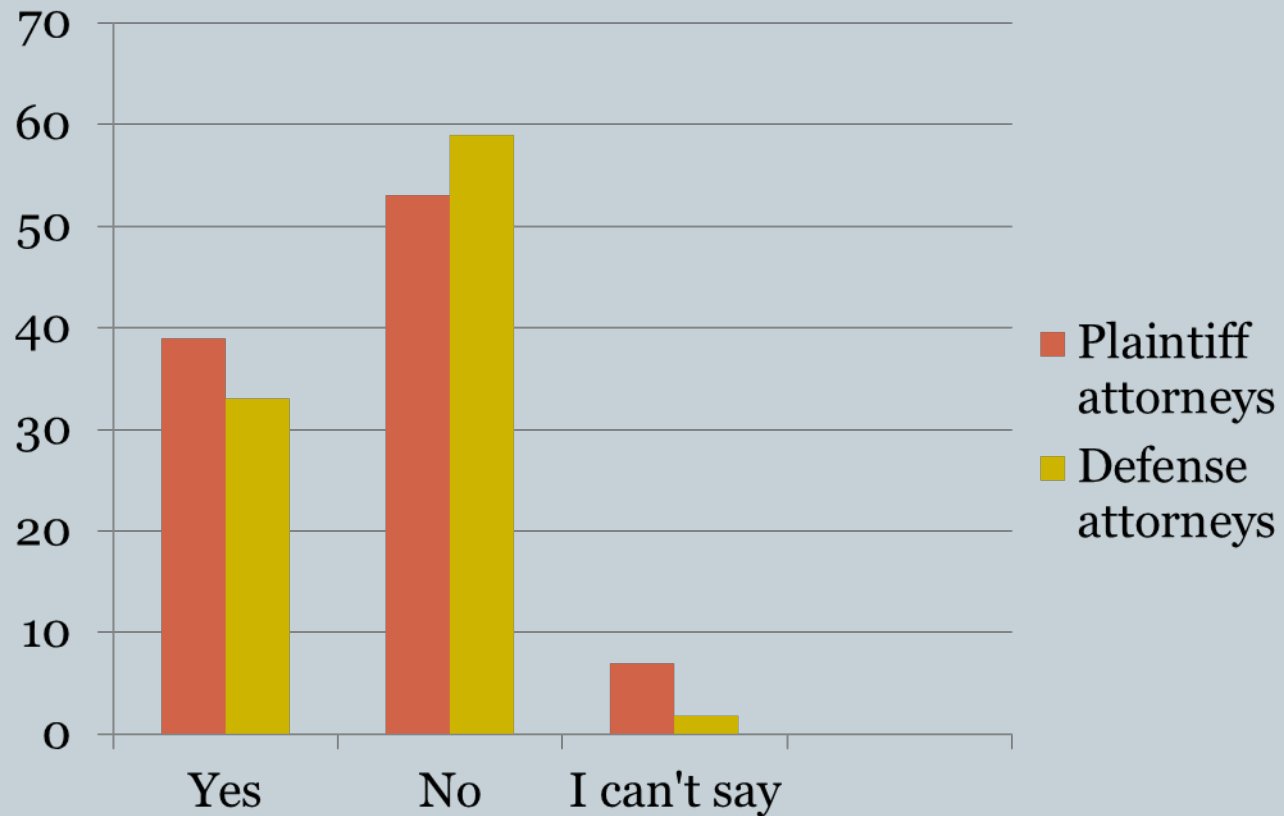
“The procedures employed in the federal courts are generally fair”



FJC 2009 Survey



Did any party in the named case request production of [ESI]?



FJC 2009 Survey



Percentage of ESI cases reporting problems, by number of problems reported per case

