



SUPREME COURT CIVIL RULES SURVEY

In July 2010, a new set of Supreme Court Civil Rules came into effect, governing civil proceedings (other than family law cases) in the British Columbia Supreme Court. In September and October of 2011, the CBA BC Branch conducted a survey of its members with respect to the new Supreme Court Civil Rules as a means of measuring how lawyers have found the new rules to work over the first year.

Members were invited to respond to a number of questions highlighting some of the main areas of change to Supreme Court civil practice. The eight areas were:

- Objects Of The Rules – Proportionality;
- Pleadings - Change Of Forms – Notice Of Civil Claim / Response To Civil Claim;
- Case Planning Conferences / Trial Management Conferences;
- Document Discovery;
- Examinations For Discovery;
- Chambers Applications;
- Expert Reports; and
- Fast Track Litigation Rules.

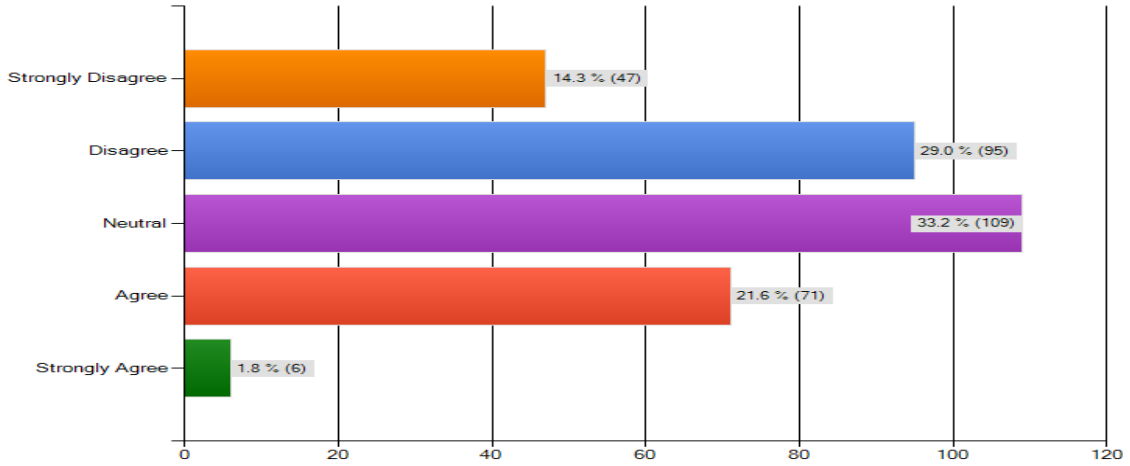
Some 321 members responded to the survey.

In addition to responding to specific questions, members were also invited to provide additional written comments in each of these areas. Many of the survey respondents provided detailed written comments which provide colour to the survey responses and highlighted some specific areas of concern.

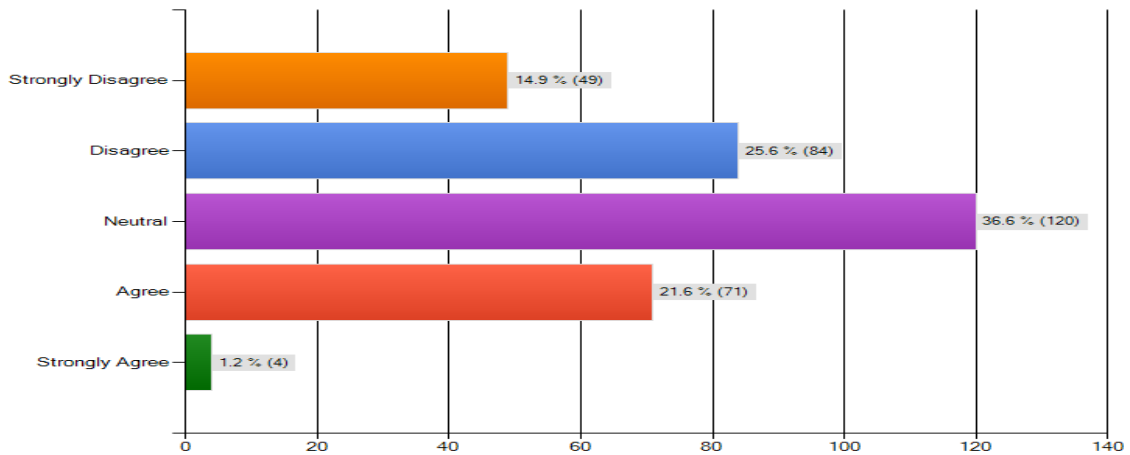
A. OBJECT OF THE RULES – PROPORTIONALITY

Rule 1-3(2) of the Supreme Court Civil Rules includes, as an object, that the court should conduct proceedings in ways that are “proportionate to (a) the amount involved in the proceedings, (b) the importance of the issues in dispute, and (c) the complexity of the proceedings.”. Members were asked to respond to three specific questions about this new object:

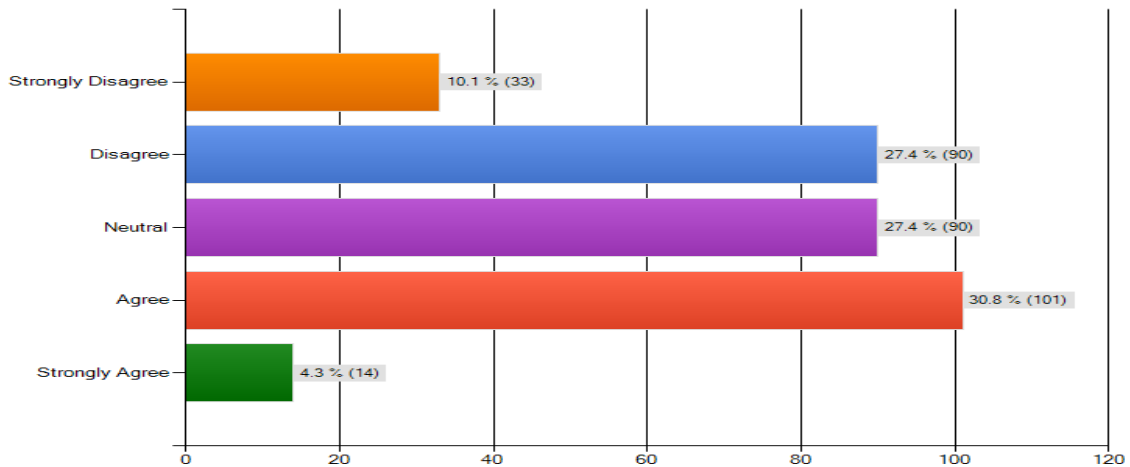
The concept of “proportionality” has impacted the manner in which I deal with my civil litigation matters.



The concept of “proportionality” has impacted the interpretation of the Rules in cases I have been involved in.



I have sought to use the concept of “proportionality” to limit either documentary or oral discovery in a case.



Some 141 – nearly half – of the survey respondents commented on the object of proportionality, and the comments made varied widely. Trends that can be drawn from the answers include:

- The largest number of comments (40) indicated support of the object of proportionality, at least in principle. Some of those comments, however, came with caveats; for example:

This is an example of a concept that is great on paper but the devil is in the details.

- A number of comments (27) expressed the view that the inclusion of proportionality as an object of the rules has not made much of a difference to practice – the following two comments are examples:

I haven't seen any real change in how commercial matters are litigated with the revised role of "proportionality" imported as a concept to the Rules. The rule changes may be appropriate for some personal injury or possibly family matters, but they do nothing to assist with complex commercial litigation. It's been business as usual and I've had both judges at case management conferences and opposing counsel generally reference the new rules with disdain as impractical with the result we carry on as before.

This is a concept that I always used in my practice even before the new Rules. As an object, it is laudable. Practically, however, the bench and the bar have yet really to seize upon the concept and apply it in a daily manner.

- Another common sentiment expressed in many comments (25) was that the courts have not yet really gotten behind the object of proportionality and applied it in their judgments. The following comments are examples of this sentiment:

The concept of proportionality, while reflected in the text of the Rules, does not appear to have translated into any change whatsoever in the way Courts are interpreting the Rules, in my experience.

The concept is great. However, the courts are not fully bought into it, which undermines access to justice by failing to manage costs for all litigants.

This concept ought to be applied more forcefully by our judges and masters, particularly in litigation where there is inequality of financial resources between plaintiff and defendant. Plaintiffs are still using pre-trial procedures to pressure defendants economically often using specious applications to force defendants to take further steps that are truly unnecessary in proportion to the relief sought in the litigation.

It is too weak; Judges are disinclined to place "limits" on cases; they seem to have a great deal of inertia having been so inured to the old Rules.

- A number of comments (14) expressed concern that proportionality has been used inappropriately. Interestingly, some counsel who regularly act for defendants view it as a concept that favours plaintiffs, while some who regularly act for plaintiffs view it as a concept that favours defendants. For example:

It is an ideologically conservative and defence-biased concept that interferes with judicial discretion in a manner analogous to mandatory minimum sentencing.

Proportionality really means limiting disclosure to the benefit of claimants and disadvantage of defendants.

The concept is used strategically rather than philosophically. Most lawyers have missed the point

The difficulty with proportionality as a concept is that it undermines the key and crucial concept of full disclosure. Just because a case involves a lower amount of funds, does not mean that a litigant should be forced to lose their case because another party hides behind proportionality in failing to disclose important documentation that leads to a crucial line of inquiry. Many of my cases over the years have been won or lost based on getting all the other parties documents. In my view, relevance, and not proportionality, should govern disclosure.

From my point of view, it appears that some counsel are using the concept of proportionality to excuse dragging their feet on document disclosure.

- A number of comments (13) expressed concern that the concept of proportionality is too vague or subjective to be useful, and that there has been a resultant lack of consistency in its application. For example:

Generally, the concept is challenging in that it requires a court to make assessments regarding the utility of procedures, evidence etc without necessarily having fully heard the case. It might have its fullest application in the field of cost consequences, where it can be demonstrated that steps were pursued that were disproportionate to the risk and interest.

- A number of comments (13) expressed concern that the object of proportionality creates uncertainty and, as a result, increases the cost of litigation. For example:

It has become another weapon in the arsenal of adversaries. Those that do not want discovery or more process because they think it tactically disadvantageous use it as an argument to prevent more information coming out and undermining their case. Those who want more discovery and process, whether to get at the truth or to use the cost of the process as a tool, argue that justice requires the additional steps. With no fixed standards for what amounts to a "large case" in which full discovery is warranted and what amounts to a "small case" where it is not, parties, counsel and judges are left to throw arguments and concepts at each other without the predictability and certainty that is supposed to go with the rule of law.

It is wrong to attempt to justify the rules on the basis of proportionality. Counsel who are experienced and who do not play games with document production would not have to address proportionality. . . .The rules are also a source of confusion and added cost to the clients.

- Several comments (10) express the view that the object of proportionality was misguided and not helpful. For example:

The concept of proportionality seems to be a way to prevent individuals with smaller claims from pursuing them or making it impossible to make out their claims. Proportionality may limit discovery, but it does not limit the evidence required to prove a matter.

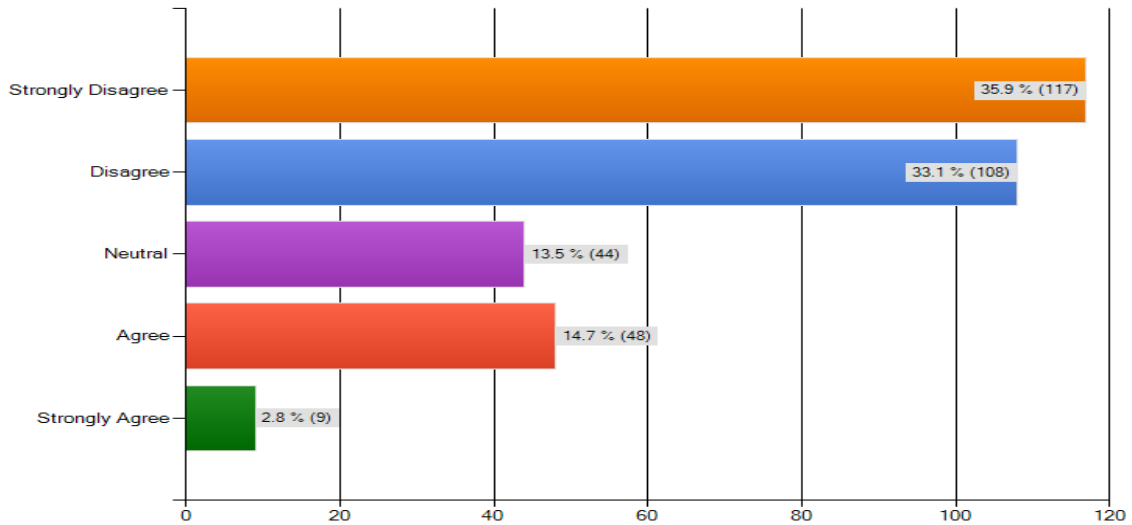
- Two other concepts that were reflected in multiple comments (5 each) include:
 - A sense that the concept of proportionality was already implicit in the Rules of Court, and that making it express added nothing; and
 - A concern that, while the object of proportionality is good, some of the other new rules undercut that object and led to increased litigation costs for even smaller matters.

B. CHANGES TO THE PLEADINGS RULES

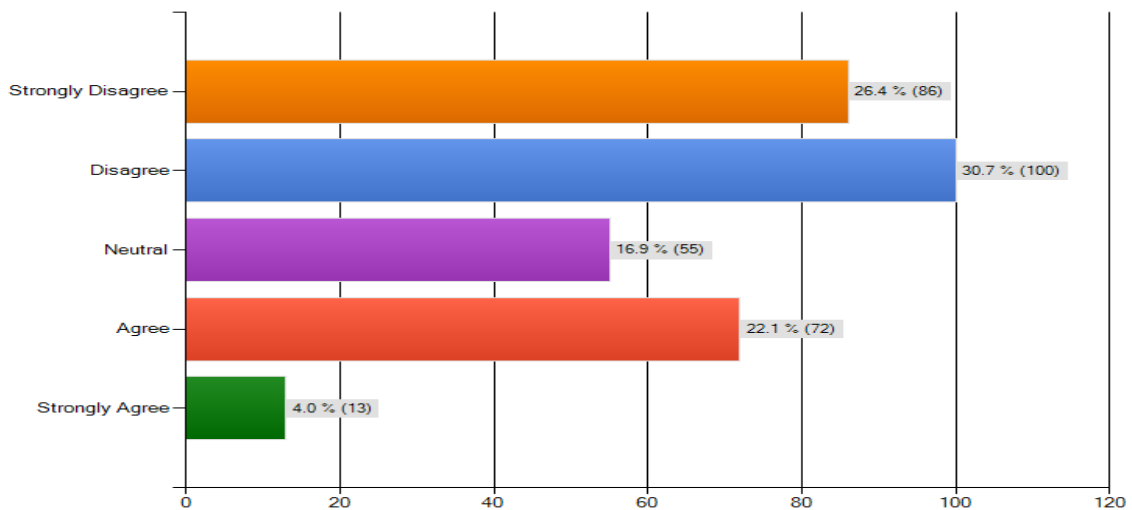
The Supreme Court Civil Rules created new names for the main documents used to commence and defend actions, and also made changes to the form of these documents. As well, significant changes were made to the manner and time limits within which a defendant to an action could make claims against third parties. Survey questions regarding pleadings focused on these changes.

With respect to the new names and forms for making and defending claims, the two issues raised were as follows:

The new forms for a Notice of Civil Claim and Response to Civil Claim are simpler and easier to use than the old forms of Writ of Summons, Statement of Claim, Appearance and Defence.



I find it useful to separate the material facts, relief requested and legal basis in these forms.



With respect to the abandonment of the Writ of Summons, there were 4 comments specifically supporting this change and 8 comments expressing concern. An example of the latter is:

I do regret the loss of the writ; there are times when it is necessary to file to preserve deadlines, although it is unlikely the matter will proceed (i.e. when there is a concurrent human rights claim). It is a waste of client resources and lawyer time to have to go to the extent of a Notice of Civil Claim.

Some 14 comments specifically expressed concern about the abandonment of the Appearance. Examples of these comments include:

I find the abolishment of the Appearance particularly problematic in my foreclosure practice as there is no simple way to go on record as acting for a party who has not yet decided on its position (which often isn't known until well after the response to petition is due).

In cases where a party has to be neutral but must also participate (i.e. an executor in a Wills Variation Action) it is no longer an option to simply file an appearance and no defence. This leads to needless cost and delay.

I think it was preferable to have Defendants / Third Parties file an Appearance as an initial form of acknowledgment they are taking an active role in the litigation and to provide an address for service.

Time limits for filing Response is a problem. Defendants are delaying filing & using the fact that they are not yet on record to their advantage.

Only two comments specifically expressed concern about the changes to the names of the forms.

With respect to the new forms, some 11 comments expressed support for the new forms, although some of those comments came with caveats; for example:

The new forms which split facts, relief and legal basis require more thought up front and take more time to prepare. Ultimately a useful and necessary exercise, but I think it is confusing to lay litigants in particular who have difficulty setting out a legal basis.

While I disagree that the new forms are simpler and easier to use than the old forms, I prefer them as it requires lawyers to understand their case "up front" and requires them to collect all the relevant facts and documents earlier rather than later in the process.

The largest group of comments (34) expressed dislike for the new forms of Notice of Civil Claim and Response to Civil Claim. Examples of these comments include:

The Notice of Claim form and Response to Civil Claim form are in fact harder, particularly for non-legally trained persons to use and to complete. Following the form often makes no sense and requires duplication of statements, particularly in the cases of mixed law and fact questions, i.e., negligence and contract cases.

The new form has levels of complication that make many cases hard to plead. The pleadings that have been filed are often difficult to follow. They are generally not briefer than the old pleadings. A well drafted pleading under the old rules is vastly superior to the pleadings seen so far under the new rules.

Another large group of comments (27) expressed concern that there is confusion and inconsistency as to the division of both the Notice to Civil Claim and the Response to Civil Claim into parts. For example:

I find the new Notice of Civil Claim results in less useful pleadings from counsel. Some are simply ignoring the change and shoehorning the old style of pleading into the new form. Other counsel are skeletal in the legal basis and it's unclear what causes of action they rely on from the material facts pleaded. With self-represented litigants, I usually see them just set out the same thing three different ways in each of the Parts so it then becomes an exercise in parsing out whether anything might turn on the slight discrepancies in wording as between what they say are material facts versus the relief versus the legal basis on which they base their claim. It's pretty frustrating and increases costs.

My least favourite feature of the new rules is the form of the N of CC and the Response. I find the divisions artificial. Rather than lending conceptual clarity (which one would assume was the original purpose), they break the flow of the statement of claim, and can make it very awkward to plead matters of mixed fact and law.

The separation of "facts" from "legal basis" creates unnecessary repetition. It is confusing and time consuming.

The use of legal basis appears to be interpreted very differently. Some people simply list the statutes they are relying on and others have a detailed narrative.

The new forms for basic pleadings appear to have been designed to meet gross deficiencies in pleadings, where the pleader does not have a basic understanding of what must be pleaded to set out a cause of action or defence. The trade-off for this are forms that are awkward to use and, among other things, promote replication of allegations where it is unclear whether the pleading is one of "fact" or "law".

The lack of guidance of what constitutes material facts under the new rules and the new forms is problematic. In the Response to Civil Claim, the difference between "Defendant's Version of the Facts" and "Additional Facts" is unclear. It is unclear where to put pleadings that are mixed issues of fact and law - under facts or legal basis?

My biggest problem with pleadings is the separation of the material facts and legal basis as our authoritative precedent *McLachlin & Taylor* seem to suggest little is required for a legal basis but I think more should be there, in other words, whenever there is a legal conclusion to be drawn from the facts. I think the separation is confusing and time consuming for counsel to try to distinguish when, for counsel, there wasn't a major problem with the previous format of a statement of claim. I have seen the notice of claim of unrepresented parties and the separation of the facts and legal basis isn't helping me to understand the claim either and they too seem not to understand the difference between fact and legal basis.

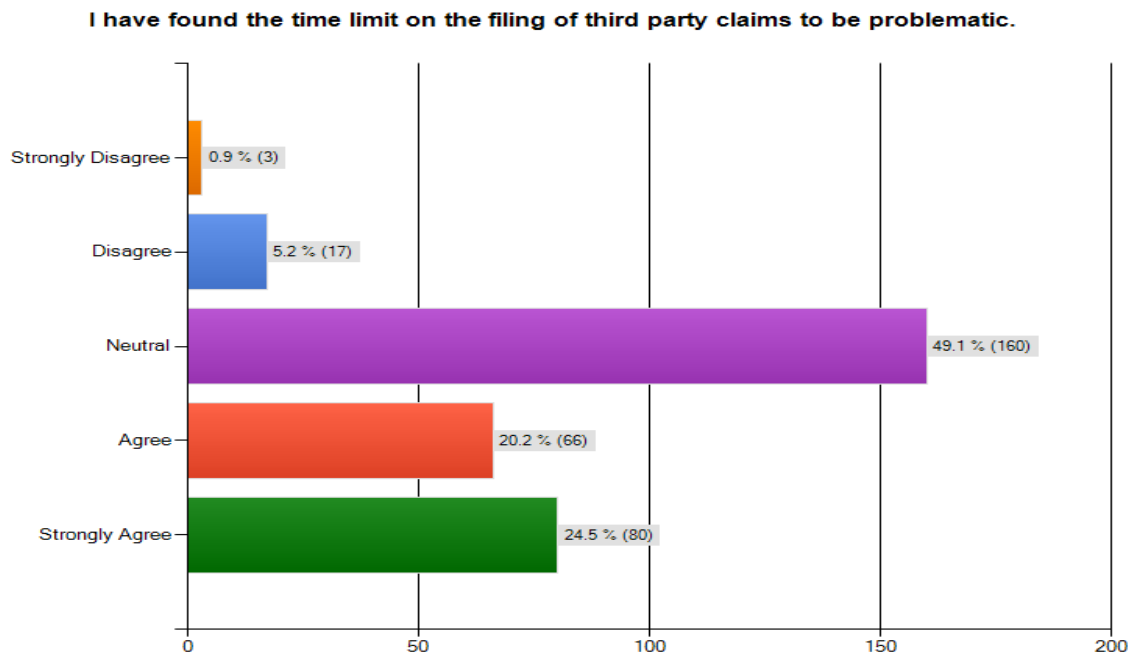
In some pleadings I find it difficult to separate the law from the facts. Sometimes it is easier to put the law in with the facts when it logically flows. I find that I end up repeating myself in the legal basis section.

Three of the comments specifically expressed dislike of having each part of a Notice of Civil Claim or Response to Civil Claim start at paragraph number 1. It would make more sense to have the numbers run consecutively through a pleading.

Two other comments expressed concern at the requirement that a Response to Civil Claim respond specifically to each paragraph in a Notice of Civil Claim:

They haven't changed much except for making Responses nearly incomprehensible, due to having to cross reference the NOCC for every paragraph. Also, it's very common (I practice for the Defendants) to see paragraphs in the NOCC that I can admit most, but not all of, so I end up denying. Then if you want to explain specifically, paragraph by paragraph, what you're admitting/denying, it turns into a giant mess.

With respect to third party notices, the survey sought a response to the following:



The new time limit for third party notices was universally panned in the 28 comments that specifically referred to this issue. Representative comments include:

The time limit for the filing of third party claims is a huge step backwards with respect to cost, efficiency and "proportionality". I work on insurance defence files which involve multi-parties. In most instances, the insurer has not finished assessing coverage or assigning counsel within 42 days of service of the NOCC. In

other instances where no insurers are involved, and I am appointed as defence counsel prior to the 42 days, there may then be a rush to name as many potential third parties as possible to avoid the cost of having to apply for leave. This is often done without having any documents to assess which parties should be properly named as third parties. This brings us back to the "scattergun" approach. 42 days is simply not enough time to assess whether a third party claim exists and it puts defendants to unnecessary cost to have to apply for leave to issue these notices - particularly in circumstances where the trial is a year or two away. I have been required to make several applications for leave to issue a TPN, even on files where the trial is not yet set.

The time limit for the filing of Third Party Notices is entirely unworkable and also adds to the cost of litigation by requiring applications to be made for filings after the time limit. Often you don't have adequate information to bring third party claims until after examinations for discovery etc. have been completed. The rules promote bringing parties into the action without a proper factual or legal basis simply to beat the deadline. This rule should be changed to relate back to the trial date. It only makes sense.

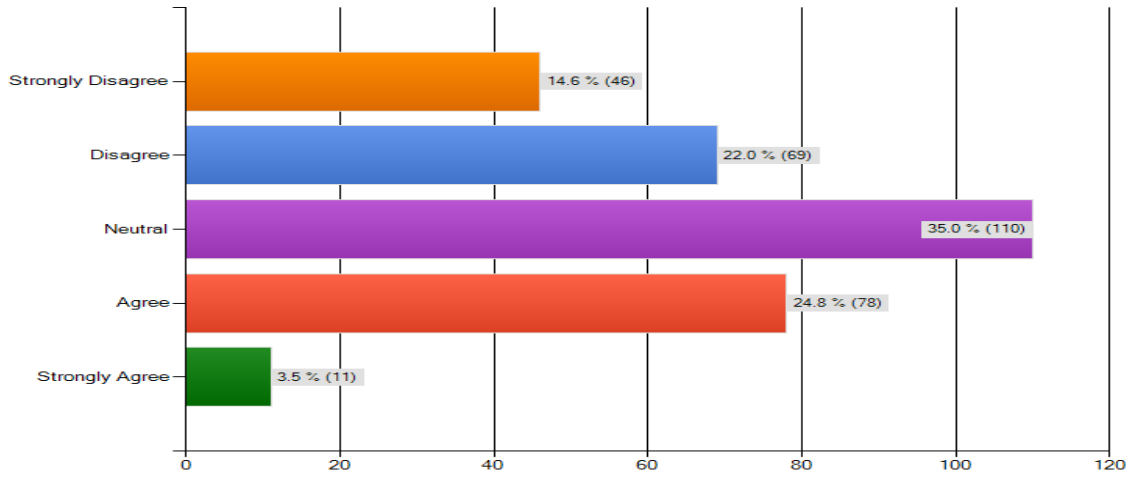
The time period for issuing third party notices has led to 'shotgun' third party notices. Parties are being brought in out of fear of missing a limitation period rather than because of a thorough fact investigation that has given the issuing party a basis to conclude the third party has legitimate exposure.

C. CASE PLANNING AND TRIAL MANAGEMENT CONFERENCES

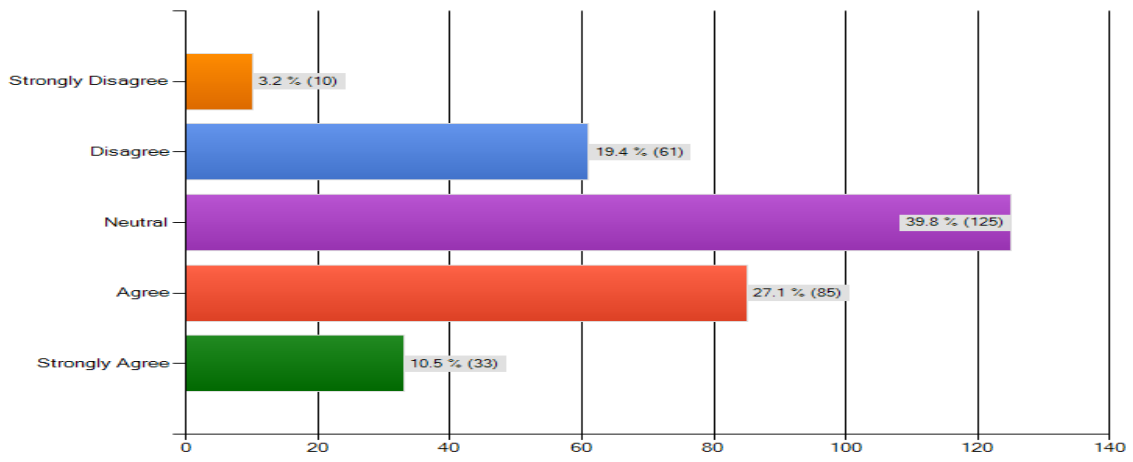
The Supreme Court Civil Rules made numerous changes to the procedures for pre-trial conferences in actions in the Supreme Court. The survey included several questions dealing with both Case Planning Conferences, which are intended to occur early in the process, and with Trial Management Conferences, which are intended to occur shortly before an action goes to trial.

With respect to Case Planning Conferences, the issues raised were as follows:

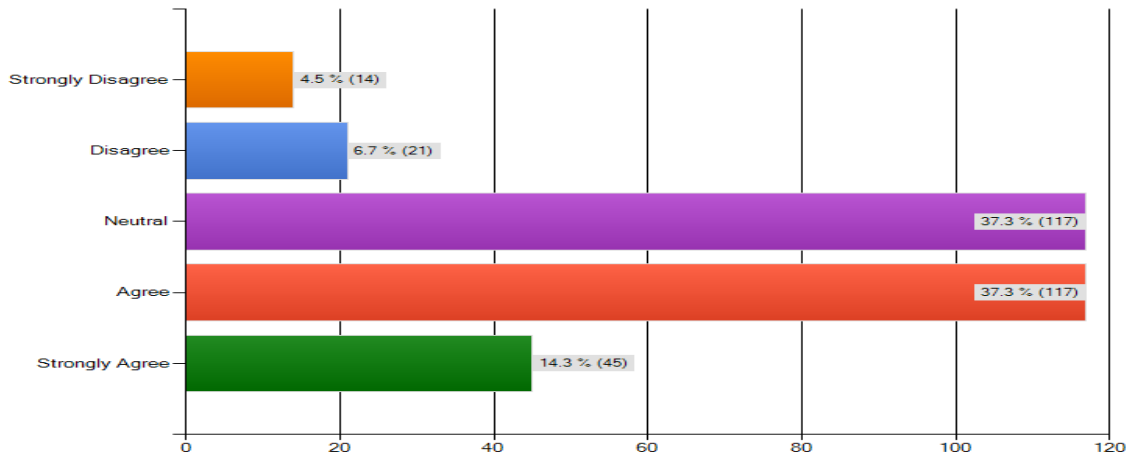
I have found the Case Planning Conferences to be a useful part of the civil litigation process.

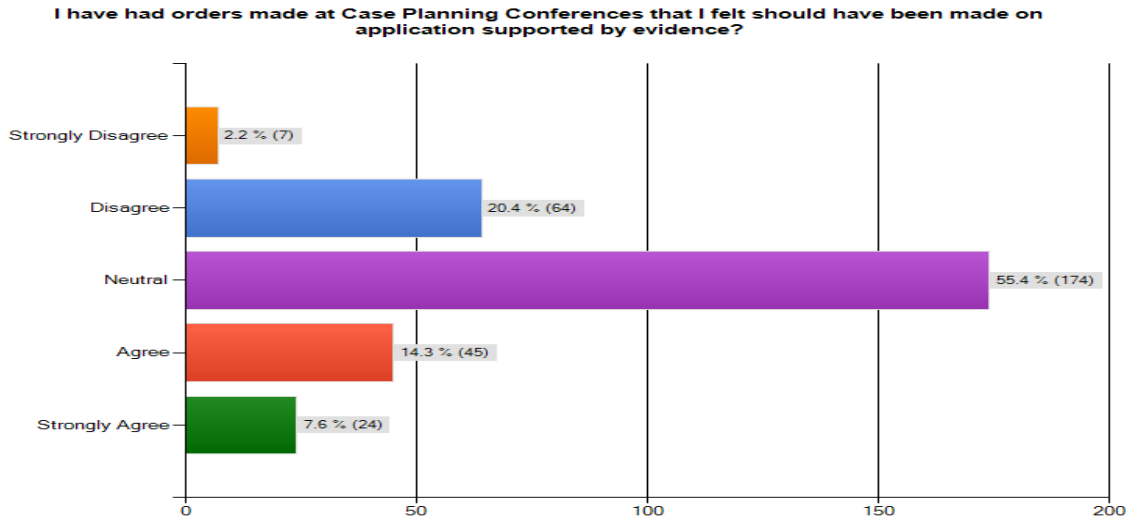


I have had parties request or the court direct Case Planning Conferences to be held when unnecessary.



I have found the rule that a Case Planning Conference may not hear contested applications to be unnecessarily restrictive.





A total of 74 survey respondents made comments on case planning conferences. Of these, 7 were supportive of the process, while 11 expressed concern that such conferences produced no real benefit. Examples of the negative comments include:

The only case planning conferences I have had that have successfully moved a case forward were cases involving unrepresented litigants. In all other cases, since the scope of CPCs appears to be mostly about setting timelines, it is much more efficient for counsel to simply establish a schedule on consent. If courts could hear contested applications at CPCs, it would broaden their usefulness.

Largely a waste of time. Made it harder to obtain case management when it is actually needed.

Case Planning Conferences serve less purpose than a room where the parties would be compelled to attend with their counsel and have coffee for 60 minutes. The judges are not prepared to make orders of significance. Moral suasion is the most effective thing that I have seen wielded by a judge, and mostly it is counsel listening to one another.

Several survey respondents expressed specific concern about the cost of participating in a case management conference – some (7) expressing concern generally, while others (4) specifically referring to the requirement for a case management conference in a fast track action.

Examples of these comments include:

They can range from a total waste of time to useful, as one might expect. The paperwork required makes them expensive, whether useful or not.

The requirement of having a CPC before any other court applications are possible in Fast Track matters runs counter to the concept of proportionality: Why waste everybody's time with a CPC where the court is not prepared to make any order on contested matters? Why not proceed directly to an application?

Three respondents expressed concern that some parties request case planning conferences as a matter of policy, whether necessary or not, and that this exacerbates their cost impact.

Several respondents (6) indicated concern that judges and masters presiding over case management conferences were too unwilling to deal with issues or grapple with difficult decisions, while other respondents (4) expressed concern that judges and masters were too willing to get involved in making decisions on matters that should have been dealt with in chambers. Other respondents (3) were of the view that the usefulness of the case management conference varies greatly depending on who is hearing it. Examples of these comments include:

I had a Master preside who rolled his eyes and said "whose idea were these anyway"?. He then set the trial for a length that was the longest estimate, of only one of 5 parties, and way out proportion to the amount in issue. I was very glad my clients were NOT there. CPCs could and should be useful if the presiders are prepared to roll up their sleeves.

Some of the judges / masters are willing to make orders at the CPC without evidence and others refuse to hear anything without evidence. It is all over the place.

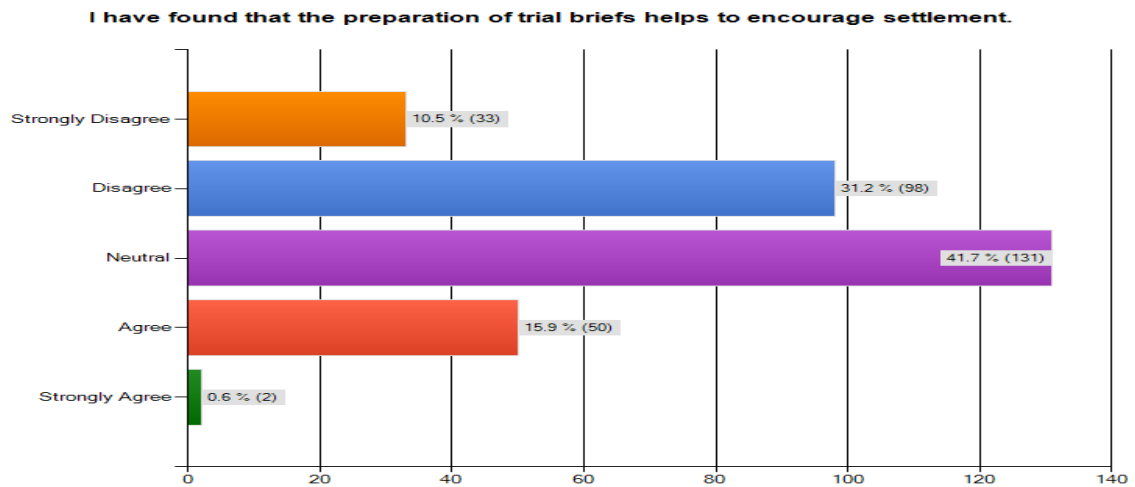
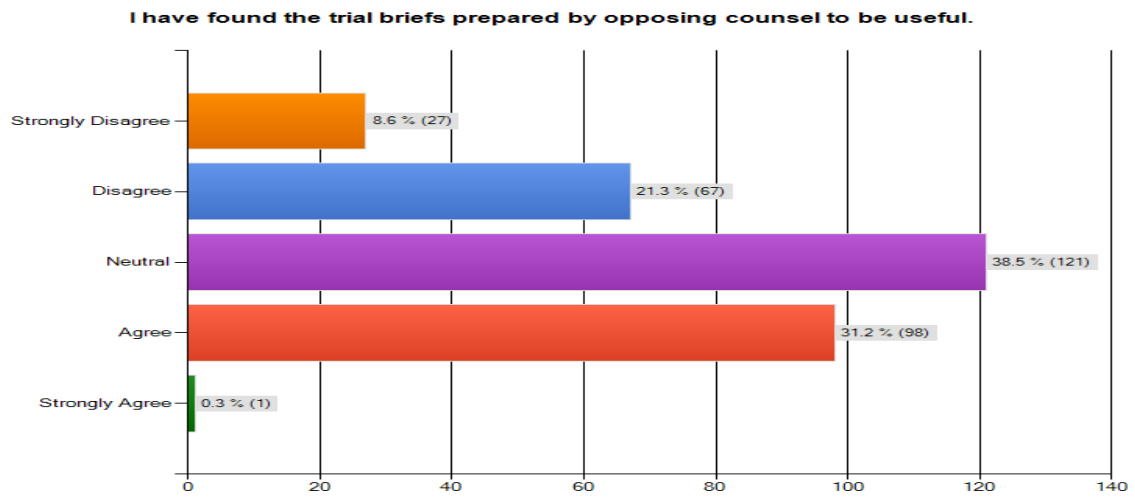
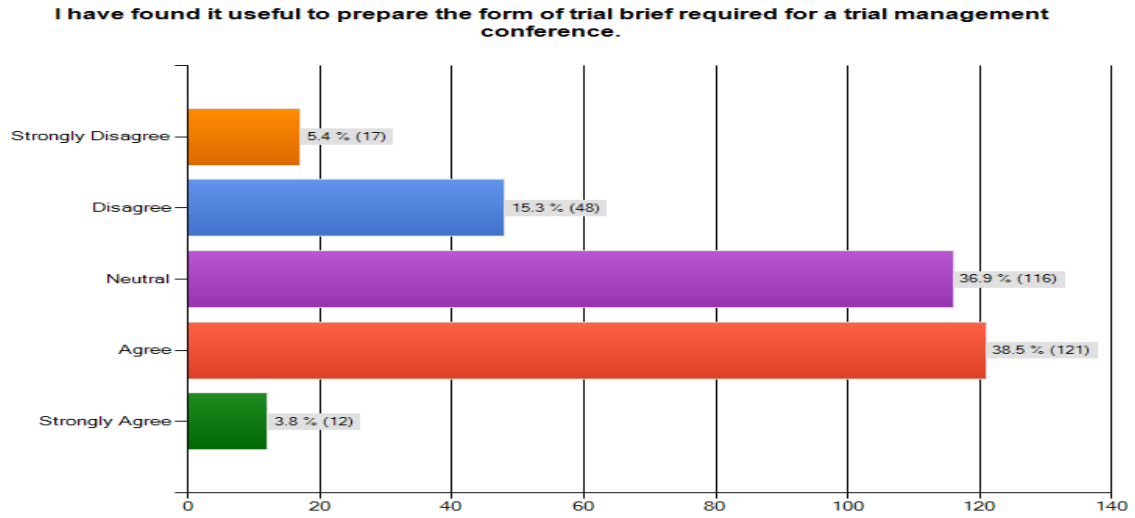
Sometimes CPCs are useful, much more often they are not. It strongly depends on the judge.

A number of respondents expressed the view that case planning conferences would only be useful if the trial judge was to be involved and managing the case throughout:

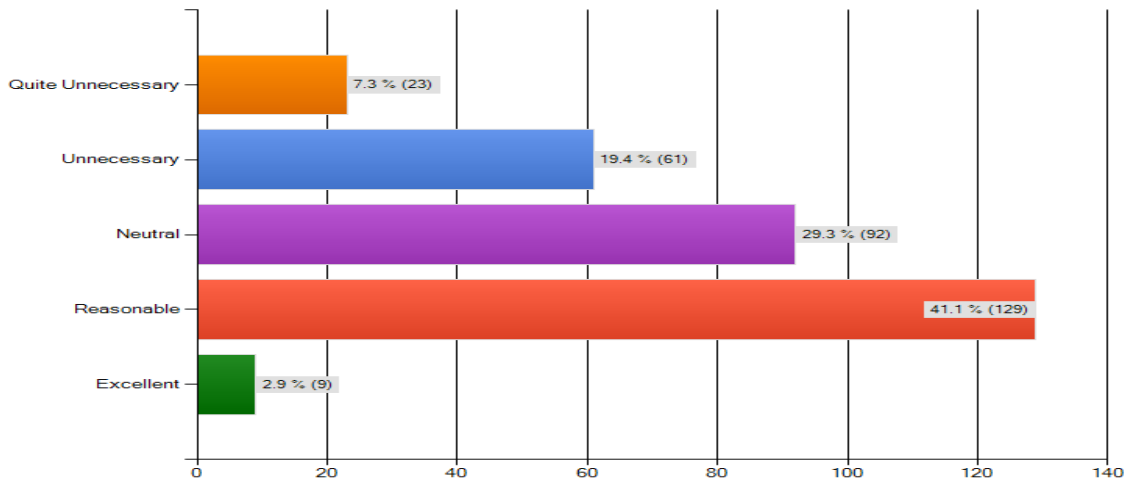
Having a Master or a series of different judges CAN make them a waste of time. In serious cases, one judge who knows the facts (as was previously the case) is much more helpful than what I have found on recent CPCs.

Other respondents expressed concern about the difficulty scheduling a case planning conference in a reasonable time, and about the impact of all of the judicial time devoted to case planning conferences on the availability of judges to hear matters.

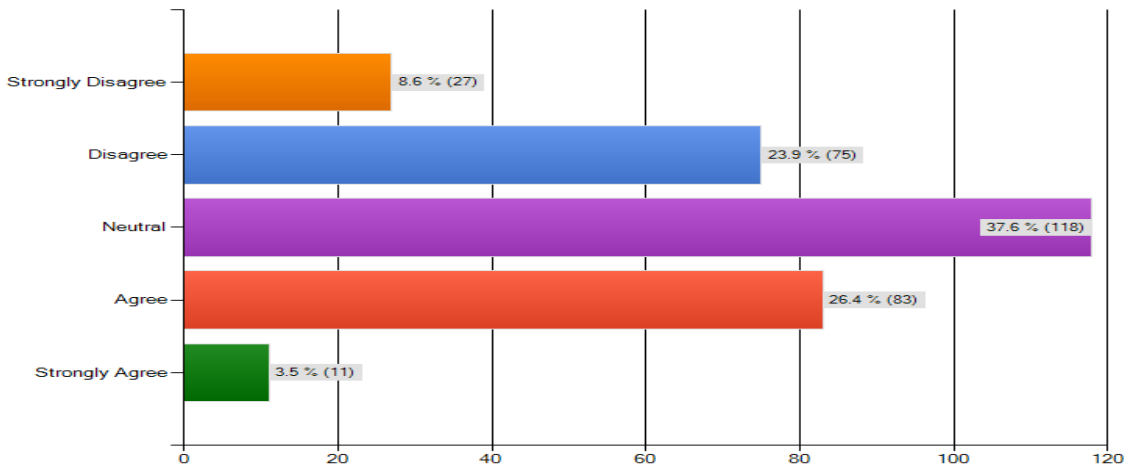
With respect to Trial Management Conferences, the issues raised were as follows:



I find that the use of Trial Management Conferences for all trials is:



The hearing of a Trial Management Conference by someone other than the trial judge does not impact substantially on its usefulness.



There were 74 comments submitted with respect to Trial Management Conferences. Several (8) commented that trial management conferences were a useful process. A number (11), however, questioned whether trial management conferences were worth the cost – and particularly whether they should be mandatory in all cases. Examples of these comments include:

Competent counsel have always prepared briefs and have sought PTC's when appropriate. The new mandatory TMC's in all cases usually result in lip service briefs from opposing counsel, and a waste of time attending court. The worst of all is the random judge assigned to the TMC -- may make an order which is countermanded by the trial judge.

They are, in general, a complete waste of time and money, and add unnecessary expense. To require exchange of trial briefs and to leave it open to one party to require a trial management conference, by telephone should any party seek to

appear by telephone, would be sufficient. I say this because of the complete inability of the court to do what is required to make the trial management conference effective. What would be required, but is not attainable, is to have a muscular trial management conference process with the trial judge presiding and with a culture of judicial pro-activeness in presenting and in carrying through with expectations for a focused economical trial process. We don't have that. We won't get that. What we have is a process that is the worst of all possible worlds: ineffective and expensive.

My impression is that this rule, like others, is more for the benefit of the court than for the parties or counsel.

Several respondents (8) expressed concern that many trial management briefs were so general as to be meaningless.

The trial brief and trial management conference are useful tools for the parties to understand the other's case. However, in some cases I have received trial briefs that are so generalized that they are meaningless, e.g. seeking "appropriate non-pecuniary damages" as opposed to specifying the range of damages sought.

While some counsel do not take the trial briefs seriously re: providing case law, they are generally a good idea. Hopefully there will be some censure from the court for deficient trial briefs sometime down the road.

Another concern expressed in several comments (11) was a need to have the trial judge involved in case management conferences or not do them at all:

Having the trial judge or a CMC judge hear TMC's in serious cases pre-amendments was much more useful. They usually knew the case (having often heard previous motions) and were in a better position to encourage settlement discussions. Some recent TMC judges have not even raised settlement and I have found it may be simply a scheduling exercise that could have been handled by a clerk.

My experience is that almost all trial management conferences are not conducted before the trial judge and therefore the judges presiding are reluctant to make orders available to them in order to increase the efficiency of the trial. I have heard the comment that the TMC judge does not want to tie the hands of the trial judge. This makes the TMC much less useful.

Finally, two comments deal with specific issues that have arisen:

Need to add a mechanism where parties exchange witness lists before trial briefs. As it is, it is difficult to complete the cross examination portion of the trial brief when we don't know the other party's witnesses.

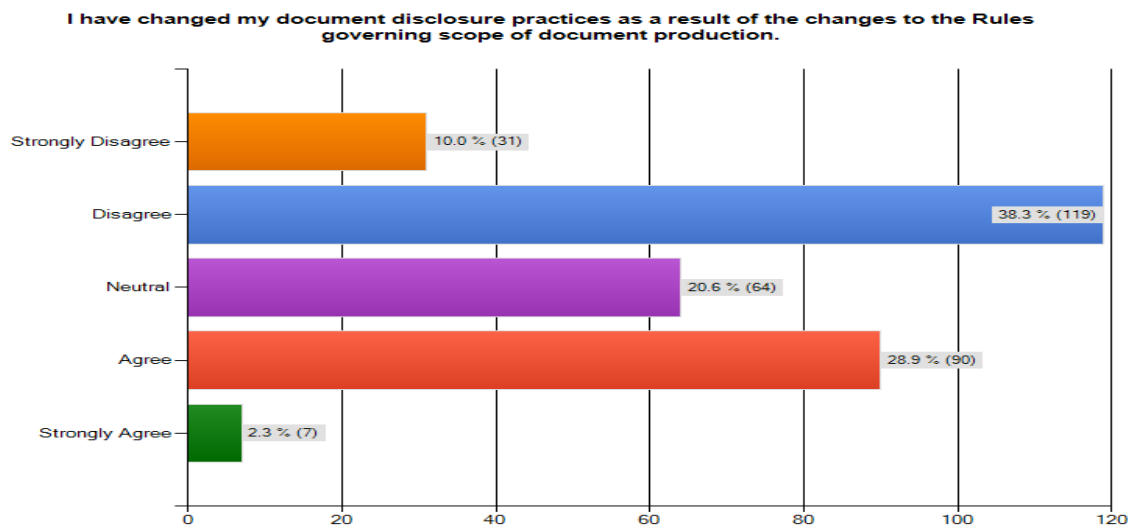
The time to complete such briefs, including providing case authorities if done fully and completely adds increased expense to the parties. It would be preferable to simply include a provision for orders on the timing of case authority exchanges

rather than make a requirement no later than 28 days before trial. The old format of witness list was much easier to use and allowed for the calculating the time necessary for trial for parties to be done on one document, now two are required.

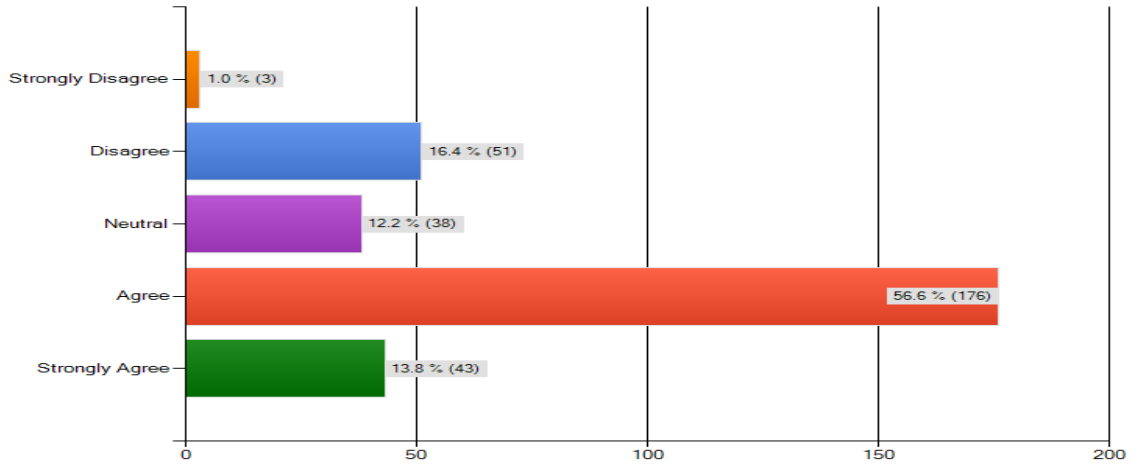
D. DOCUMENT DISCOVERY

The Supreme Court Civil Rules changed the standard of relevance for disclosure of documents in Supreme Court actions. Under the old rule, a party had to list and disclose any document that related to a matter in question in the action. Under the new rule 7-1, the test is whether a document could, if available, be used to prove or disprove a material fact – subject to the ability of opposing parties to demand disclosure of additional categories or classes of documents that relate to matters in question in the action.

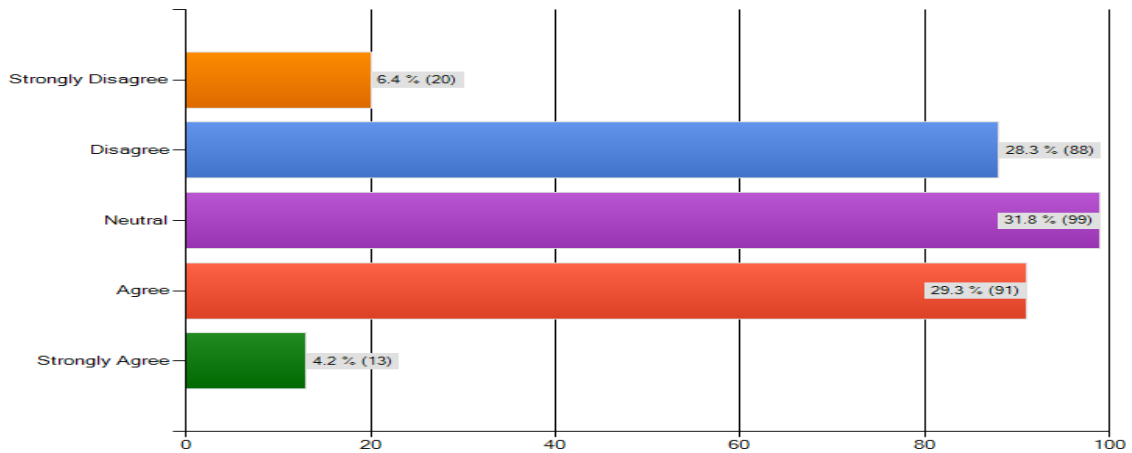
The following issues were raised with respect to the new document disclosure rule:



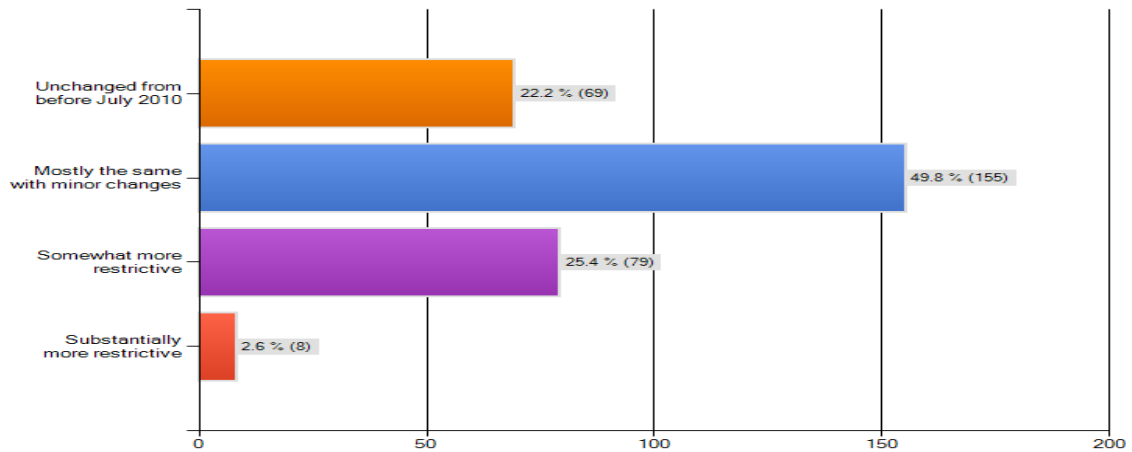
I generally disclose the same volume of documents under the new Rules as I did under the old Rules.



I am more likely under the new Rules to send letters requesting specific categories of documents.



In my experience, the approach of the Court to document production applications and the scope of documentary discovery under the new rule has been:



Some 57 respondents added comments with respect to the changes to document discovery. Of those comments:

- Four confirmed that the respondents believed the move from the traditional discovery test was a good idea.
- Eight indicated that respondents had seen no change to the actual practice; for example:

In the 100 or more cases that I have handled in the last year in the Supreme Court, I see no changes to document discovery. I don't see that as a negative. The document discovery under the old Rules was not a problem in the cases that I was dealing with. As predicted by many, lawyers, and to some extent judges, are voting with their feet, and ignoring the new rules wherever possible. This has made the system continue to function. If the new rules were to be followed by the spirit and letter, the system would have ground to an even greater halt than what we have experienced in, for example, Chambers.

I wish the masters and judges would actually apply the new rules so we can see if they work. There has been little change in practice.

- A further eight comments expressed concern that the new rule would be used by parties to avoid disclosing documents that should be disclosed; for example:

One's position on document discovery depends on whether one views getting at the truth as a priority in litigation. Limiting discovery is an invitation to game playing by litigants. The advantage of the previous rule was that it was clear. The disadvantage of the current rule is that it is less so and invites testing by litigants who perceive potential advantage in not having to disclose information that may prejudice their case.

Far more leeway to avoid producing categories of documents unknown to other party that would prejudice position.

- Six respondents expressed concern that the work to filter their own documents and consider and pose requests to opposing counsel for production of classes of documents actually created more work than simply following the traditional approach

It is a massive job to filter documents under the new rules in large document cases. It is far less expensive to just list everything as was the previous practice. It also requires ongoing additional work as the scope of document production evolves as cases evolve. For rules that were intended to speed things up and reduce costs, this has had the opposite effect.

The new scope of disclosure significantly increases the costs of reviewing client documents prior to listing - not in keeping with the just, speedy and inexpensive determination of matters.

All the new Rules on document production have achieved is to create more work for me in trying to get relevant documents disclosed from opposing counsel. It has created more work and more cost to my client, with no simplification whatsoever. I have attended in court more often since the new Rules, seeking document disclosure, than I did in the five years before the Rules were changed - and I am succeeding when I attend, which tells me that opposing counsel is simply trying to use the new Rules to claim no obligation to disclose when there clearly still is such an obligation.

- Five respondents expressed concern that the requirement to divide up disclosable documents between different categories created an unnecessary extra burden and expense on parties, to no obvious benefit:

The requirement to categorize documents into those that you expect to rely on at trial and so on is cumbersome, time consuming at that juncture of the case, and unnecessary. It should be deleted from the Rules.

The new List of Document forms are very troublesome and unnecessarily create work for legal offices. The forms are too complex and splitting into multiple parts of producible documents is unnecessary.

- Several of the comments (including many of those referred to above) expressed concern about the cost of dealing with document issues; an example of these is:

The changes, by arming parties with arguments about whether a document or class of documents falls within the Rule, have added to rather than decreased costs to litigants. A "no discretion/Peruvian Guano" world is preferable to a "war of letters / chambers application" world.

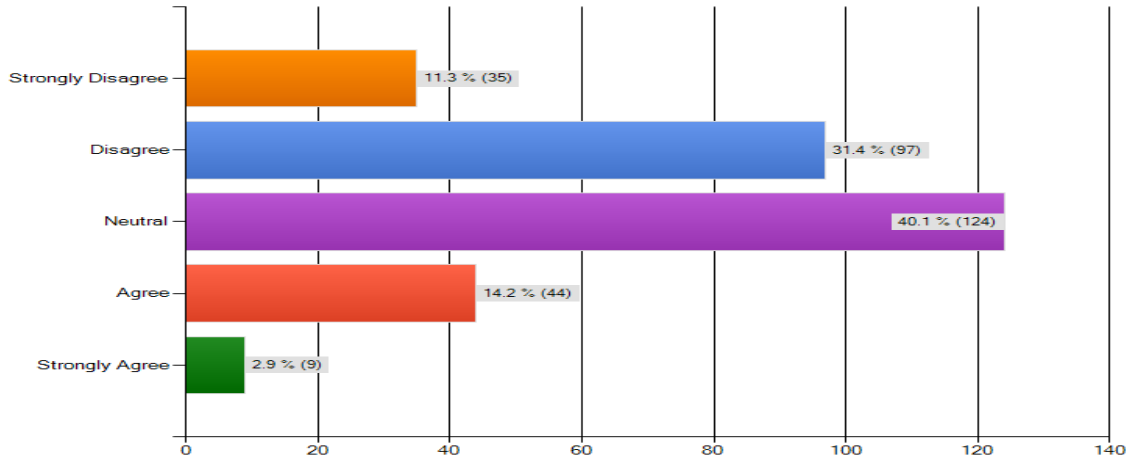
My experience has been that document production applications seem to be needed more often than was the case under the old rules.

The rule change was vast overkill to a simple problem - in the rare case where massive document disclosure was perceived to be a problem - a party could seek a case management order from the court. Now document disclosure is a piecemeal multi date disclosure process - for the vast majority of cases previously counsel knew what needed to be produced - now more cost is spent upfront - decreasing access to justice.

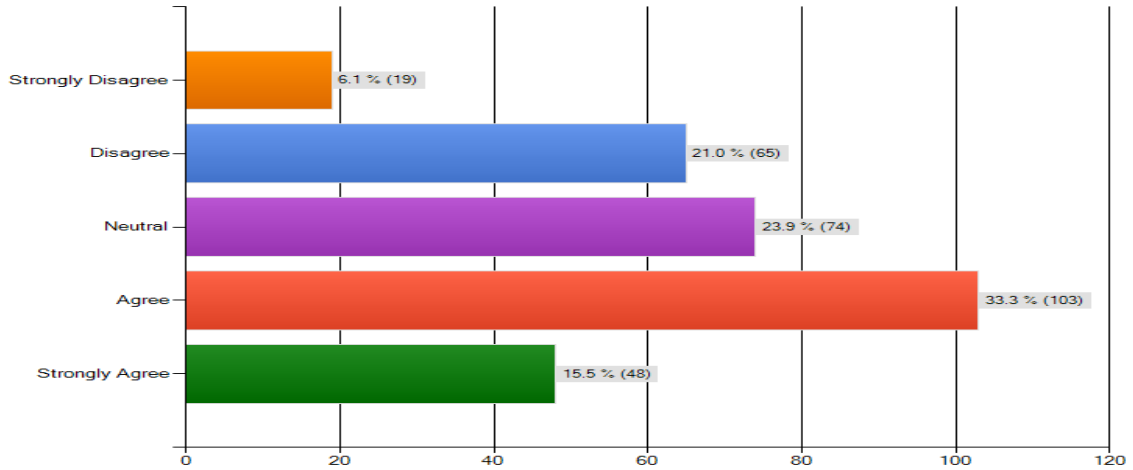
E. EXAMINATIONS FOR DISCOVERY

One of the major changes to the examination for discovery rules was the imposition of time limits on the conduct of an examination for discovery. Issues raised with respect to examinations for discovery were:

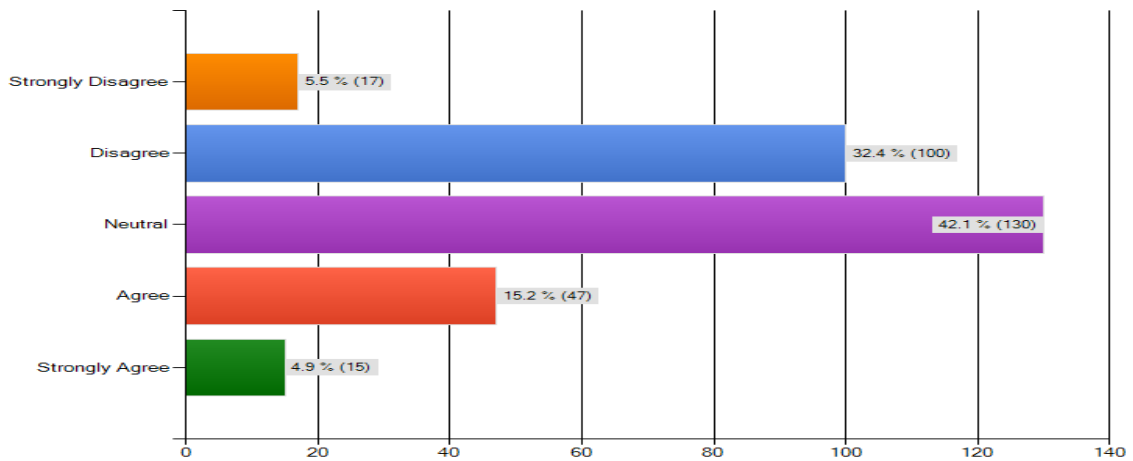
I have found the new time limits on examinations for discovery to make for more efficient and focused examinations for discovery.



I feel that time limits on examinations for discovery are unnecessary.



I have found that witnesses are slow to respond or otherwise obstructive in order to take advantage of the time limits on examinations for discovery.



The comments (51) with respect to the new time limits on examinations for discovery dealt with a variety of different points.

A number of comments (10) expressed a dislike of having one standard time limit no matter what the nature of the case is. The comments made particular reference to multi-party litigation, where several parties may have to share the 7 hours available to examine a witness, complex commercial cases where the issues may not be susceptible to proper discovery in that short a time, or cases where the witness requires an interpreter which slows down the discovery process significantly.

Two comments specifically expressed concern that, in the personal injury context, it was unfair that the same time limit would apply to both parties even where liability is not in issue.

Five comments expressed concern that a time limit encourages abuse of the process; for example:

Limiting discovery encourages abuse of that process, after-the-event disclosure and further expense to apply for more time for discovery = more cost to the litigant and more filing fees for court services for the additional applications for disclosure and discovery orders.

While I appreciate some time limits, it is certainly abused by some witnesses. I have and am bringing applications for more time, regularly.

Other comments (7) suggested that, in most circumstances where the 7 hours permitted is inadequate, the parties are ignoring the time limit by either explicit agreement or tacit consent.

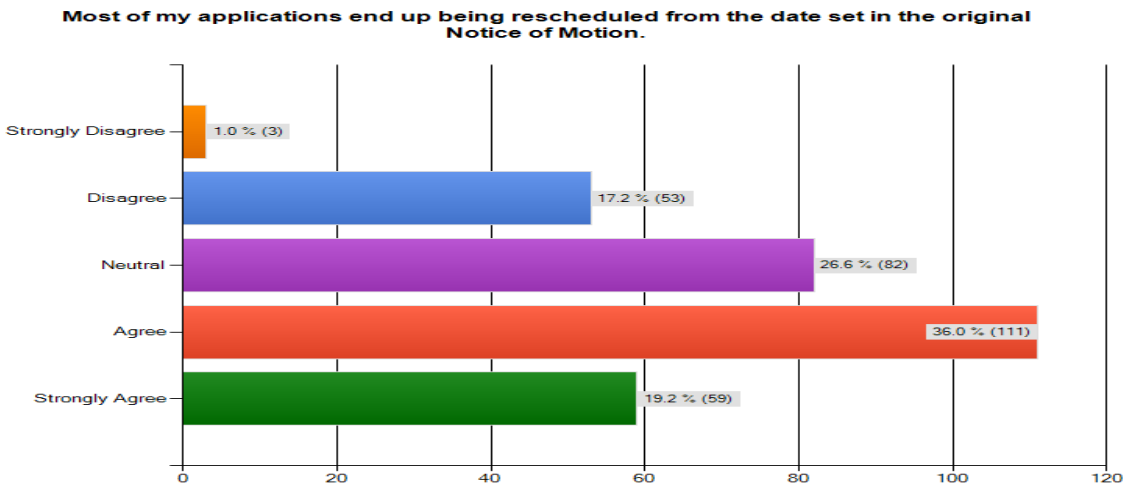
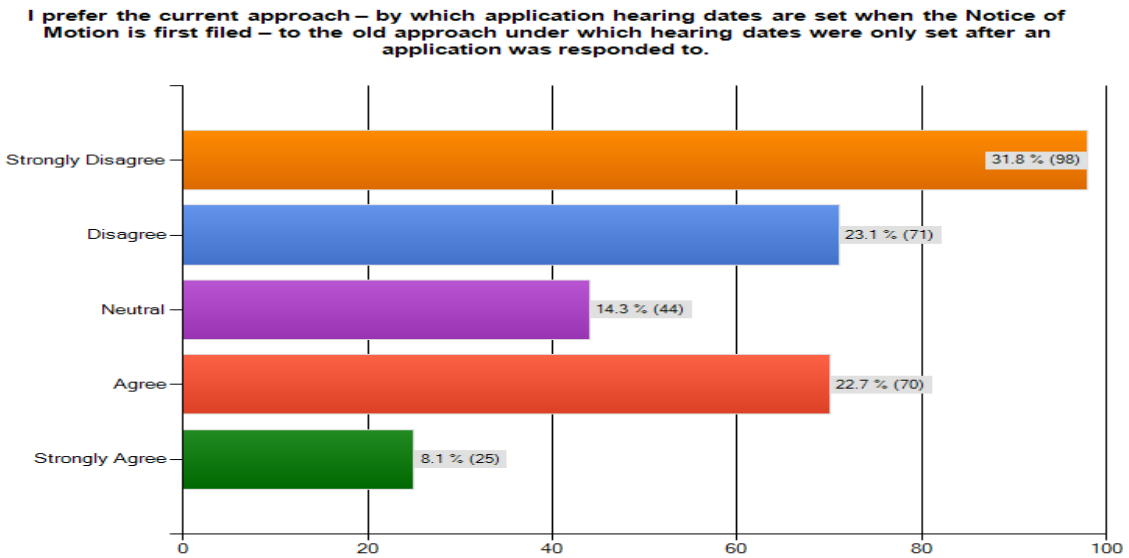
Other comments (4) focused on the idea that a time limit for examinations for discovery is unnecessary. In most cases, the cost of examination for discovery provides a substantial disincentive to unnecessary examinations. It would make more sense to allow counsel to decide for themselves how much discovery is necessary, while empowering the court to set case-specific limits if a party is abusing discovery rights.

Two comments noted that time spent in an examination for discovery often plays a key role in forcing parties to face up to the realities a case, and in that way often leads to settlement, so that limiting discovery reduces this impetus toward settlement.

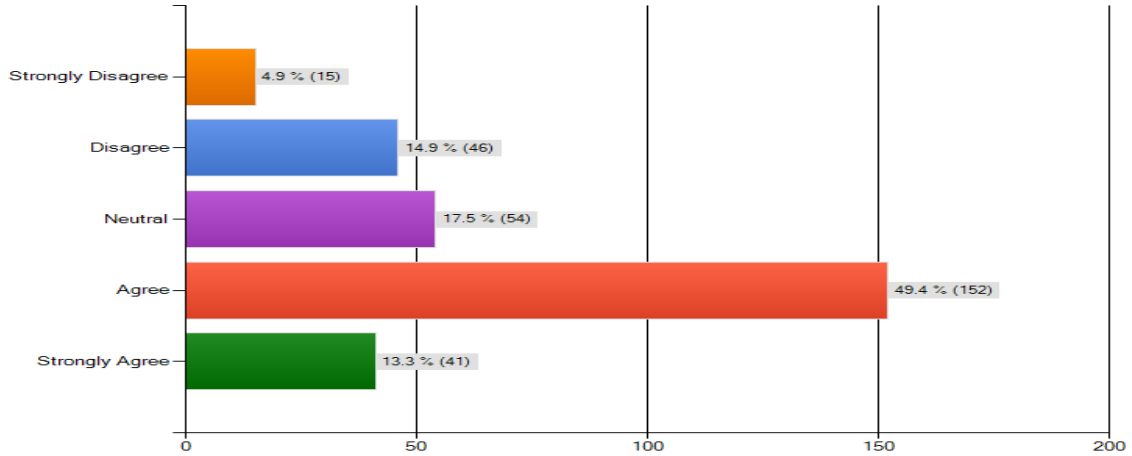
Two comments suggested that the imposition of time limits has been a positive step. Another comment suggested that if anything the time limits should be shortened, while yet another comment expressed concern that judges and masters are too lenient in allowing extensions of time.

F. CHAMBERS APPLICATIONS

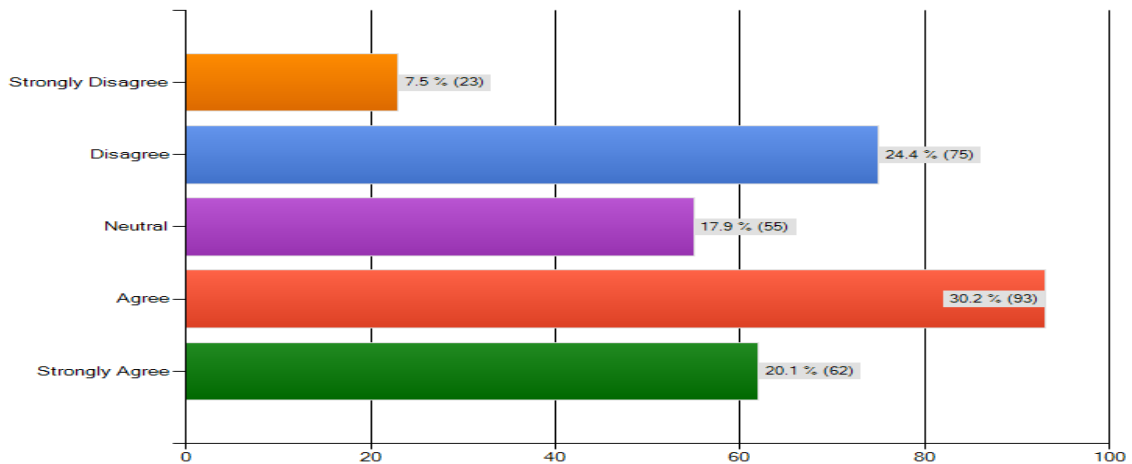
The Supreme Court Civil Rules made several changes to chambers practice, including a requirement that applications be filed and hearing dates set when an application is first brought – before service of the application on an opposing party, and that a detailed summary of a party’s position be provided at the time of the original application. Issues raised with respect to the changes to chambers practice include:



I find it useful to require the applicant to set out its full argument in the original Notice of Application.



I preferred the old system under which an Outline was prepared after an application was responded to and only where an application was contested.



The changes to chambers procedure provoked a large number of comments (85), many of which were very detailed. These three comments reflect many of the themes appearing in numerous other comments:

It is actually called a Notice of Application now, not a Notice of Motion. I guess whoever drafted the questions misses the old rules re motions too. Under the old rules you could issue a simple motion without setting a specific date or preparing a lengthy outline of argument. In many cases that was enough to get the other side moving in a productive direction. The notice of application process under the new rules requires you to put together a full argument at the outset and pay a filing fee, which means more time preparing the materials and a fee paid to the court and filing fees for an agent or Court Services Online for an application which may never need to go ahead. Costs to launch an application are much more front-end loaded than under the old rules. I also prefer the old rules approach of setting a date after the other side is aware of the motion and possibly having a conversation about time

estimate and issues before setting a hearing date and picking a time estimate for the hearing. This meant less chance of adjournments and more filings, agent fees and contested applications associated with that. It also seems that the volume of business the registries are doing (Vancouver and New West) in terms of chambers applications is noticeably higher now than it was under the new rules, and registry staff has commented that all of the extra filings the new process requires means much more work for them now than was the case under the old rules ...this at a time when the provincial government appears to be cutting back or not hiring registry staff and other court administration positions generally. Chambers seems to be busier and a higher chance of getting bumped than was the case under the old rules. I STRONGLY prefer the chambers application process under the old rules to the process under the new rules. The new process costs more and takes longer. One positive thing to say about the new process is that in some cases requiring parties to think out an argument to support the relief they are applying for is useful, particularly in cases where the matter is destined to go before a master or judge. That could be accomplished with a revised form of Outline which requires fact and legal basis to be set out. This is an area of the new rules which I believe is badly in need of significant reform.

Setting out the full argument in the original Notice of Application requires the applicant to anticipate the defence to the application. It increases costs to the client as the applicant has to draft the full argument before he she or it knows whether the respondent will consent to the application. While I appreciate that one should make an effort to ascertain the respondent's position before drafting an application the reality is that ICBC counsel often say you'll have to make an application and once the work is done say, Ok I'll consent but no costs. My current solution to the issue is we ought to have an exemption in Fast Track cases from the full argument requirement on the theory that if there is so little money at stake the drafting of a full argument ought not be imposed on the applicant.

The new system seems to have created a backlog of chambers applications in Vancouver. It has also discouraged cooperation between counsel.

There were three comments reflecting general approval of the changes. Additional comments indicated specific support for the requirement that argument be included in the Notice of Application (7 comments), and specific support for the changes to the notice periods (2 comments).

Several other comments (12) expressed a preference for the prior chambers system; for example:

The old rules made way more sense. There is no point in setting the date and time for hearing until the respondent responds. Also many applications that are started get resolved between the parties without the need for hearing. Before, the registry would never handle them. Now they handle them twice: once when you set the hearing and the other to adjourn the hearing. I can think of no good reason why the chambers procedure was changed

Many comments (17) expressed concern that requiring an argument to be set out in the Notice of Application was a poor idea, as the time and expense required to prepare the argument often turns out to have been unnecessary if the application is not opposed (in whole or in part). Examples of comments with respect to this issue include:

It makes no sense to require a party to provide a full argument prior to seeing the other side's material in response. It is like saying that the parties must rely only upon their opening statement in a trial. It might shorten the process but it does nothing to assist the administration of justice.

It is a waste of resources to have to set out a full argument on a Chambers application before it's clear the issue is truly contested. If the intent was to weed out unnecessary notices of applications, I haven't seen that be the result to-date.

The new system requires an applicant to undertake considerable time and effort to prepare both an application and supporting arguments which may, in the result, end up being a completely wasted effort. I liked the old system which allowed you to file a basic application to get someone's attention, or where it was necessary to force a response to an issue, without having to incur significant cost to clients to do so. I have found the cost of chambers applications to my clients has increased significantly under the new rules, which seems to me to be contrary to the motivation behind the new rules.

Several comments (24) expressed concern about the requirement that a date be set for hearing before the application is filed or served, leading to regular adjournments, much back and forth between counsel, and greater cost to the parties. Examples of comments with respect to this issue include:

By requiring hearing dates to be set when the motion is filed, the Rules have encouraged aggressive and uncooperative counsel to unilaterally schedule hearings, forcing parties who are unavailable to apply for adjournments. The number of unnecessary adjournment applications has dramatically increased.

I find it counter to the overriding principles of the court Rules to require fixing a court date and including it in the Notice of Application, when we do not even know if the application will be consented to. This causes unnecessary expense to my clients, most of whom have modest incomes. Adjournments are often necessary, especially when dealing with unrepresented litigants.

In my opinion, the changes to the rules regarding Chambers applications are the worst part of the new rules. I often have to adjourn my applications. And many lawyers will wait to the last minute to tell you they need an adjournment or they will wait to the last minute to try to settle to put pressure on you. Senior lawyers have told me this is the way the rule used to be and they had to change it because of the problems it caused. I don't understand why they went back to the old way when they knew it didn't work.

Several comments (4) focused on the need to file applications before service, resulting in both filing fees and agents' fees. For example:

The shift to filing motions with fixed dates for hearing was done as a cash grab by the government. It did not serve any interest of litigants or the bar. It makes for more paperwork for the registry in receiving, filing and inputting data concerning motions that may never be heard. The previous system had some flaws in terms of overly generous response times, but had the advantage of allowing litigants to exchange materials out of the public eye, discuss their positions and refine them and then decide whether they had to go to court over an issue.

Other comments expressed displeasure with the requirements of the Notice of Application form to separate out facts and argument; for example:

The current application form is unwieldy and duplicative. Setting out the facts in an affidavit, then copying those facts into the 'facts' section, is a waste of effort. Argument involves facts, so the effective way of setting out argument is by combining the law and facts together - not by having the facts at the front, and the 'legal basis' at the back. This new format always requires that I redraft my argument just prior to chambers, which is a huge amount of work, and costs my clients a lot of money.

Several comments (8) noted that the courts regularly end up accepting revised written applications from the parties at the hearing of the application, notwithstanding the prohibition in SCCR 8-1(16), although the comments differed on whether this was a problem:

Despite the new rules, in most chamber applications there continues to be a written submission provided to the court. I see nothing wrong with that.

Unfortunately, counsel continued to arrive on the hearing date with new legal argument and authorities not cited in their Notice of Application, thus defeating the purpose of requiring full argument in the original Notice of Application.

Several comments (5) expressed concern that, since the new rules have come into force, it has been difficult to get long chambers applications heard. There are now delays of many months in some registries, and at least one respondent suggested there may be a causal connection between the rule changes and the delays:

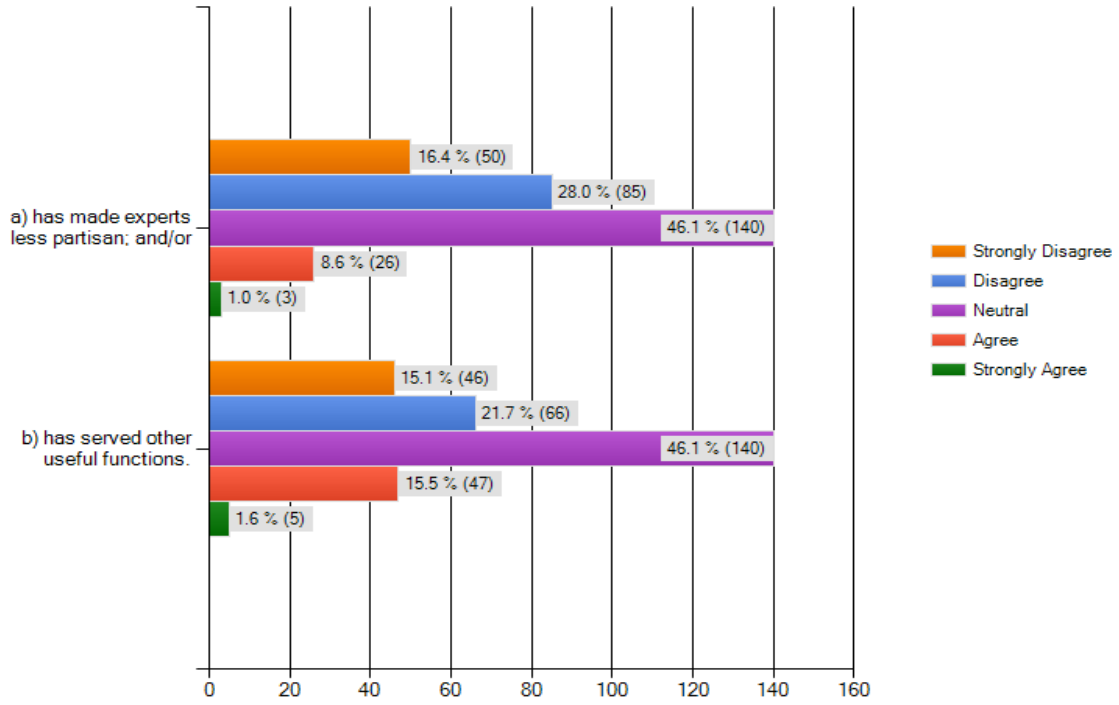
There is far too much done early on, without seeing the other side's material, and by the time you file, you have spent thousands, have your heels dug in and are ready to roll, and it is too late to go back and sort things through cooperatively.

Finally, three respondents expressed concern about the need to prepare an Application Record for even very simple applications – this being an expense that should only be forced on the parties for more complicated applications.

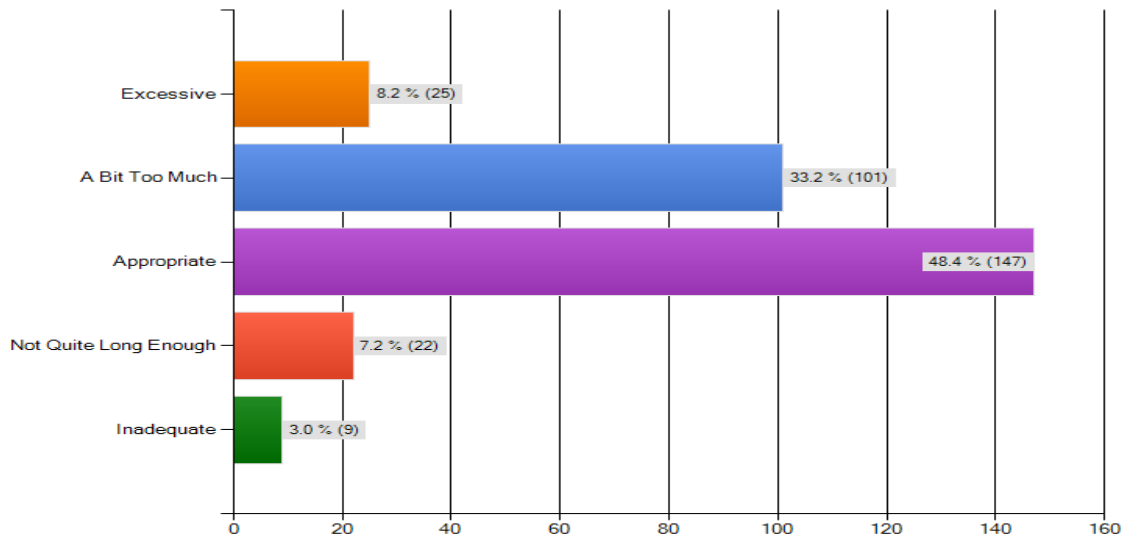
G. EXPERT REPORTS

The Supreme Court Civil Rules made several changes to the practice governing expert reports. Issues raised with respect to these changes are:

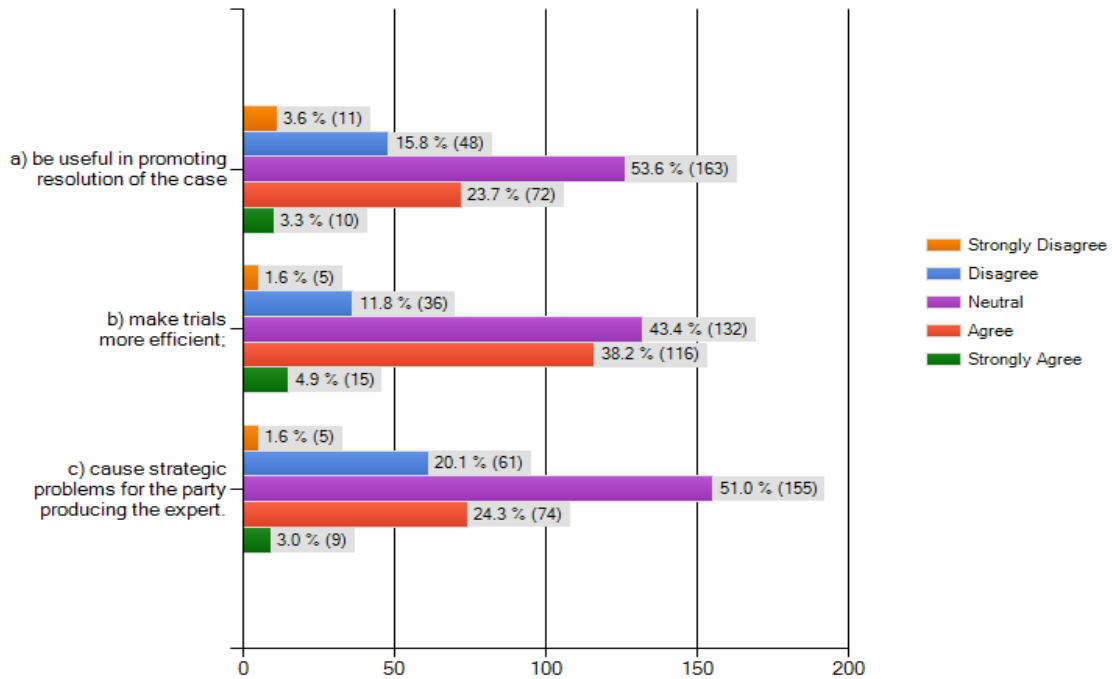
I have found that requiring experts to certify their awareness of their duty to the Court:



I have found the new 84 day time limit to be:



I have found the requirement to produce the expert's file in advance of trial to:



Only 42 survey respondents added comments with respect to expert reports, and a number of those comments indicated that the respondents had little or no experience to date with the expert report rule. Of those who provided substantive comments, one indicated general approval of the rule changes and another indicated approval of the move to standardize the general content of an expert report. Four other comments gave specific approval of the new requirement for pre-trial production of an expert's file. However, one respondent noted that, with the detailed disclosure obligations, "it's made it often necessary to retain 2 experts – one to advise on cross-examination of the opposing expert and one whose file has to be wholly disclosed".

There were several comments on the extended deadlines for delivery of expert reports. The largest group of comments (7) expressed concern that the new deadlines are too early. Those comments referred in particular to the 84 days, but one respondent also noted that the fact that the deadline is counted from the start of trial – and not from the date when the evidence is to be tendered – exacerbates the effect of the early deadline. One comment expressed concern that the deadlines were not early enough.

Three comments also expressed concern that, while different dates are given for initial and "responding" reports, it is not always clear when a defendant's report is responding and when it is not. Some expressed concern that judges would allow defence reports to be submitted whether or not they were truly responding. Others suggested that instead of referring to

“responding” reports, the earlier deadline should be for the plaintiff (or whoever bears the onus of proof on an issue) with the later deadline being for the opposing party.

Some respondents commented on the new requirement that an expert certify that he or she “has a duty to assist the court and is not to be an advocate for any party”. All seven comments expressed doubt that the requirement to give this certification has changed the approach of the experts; for example:

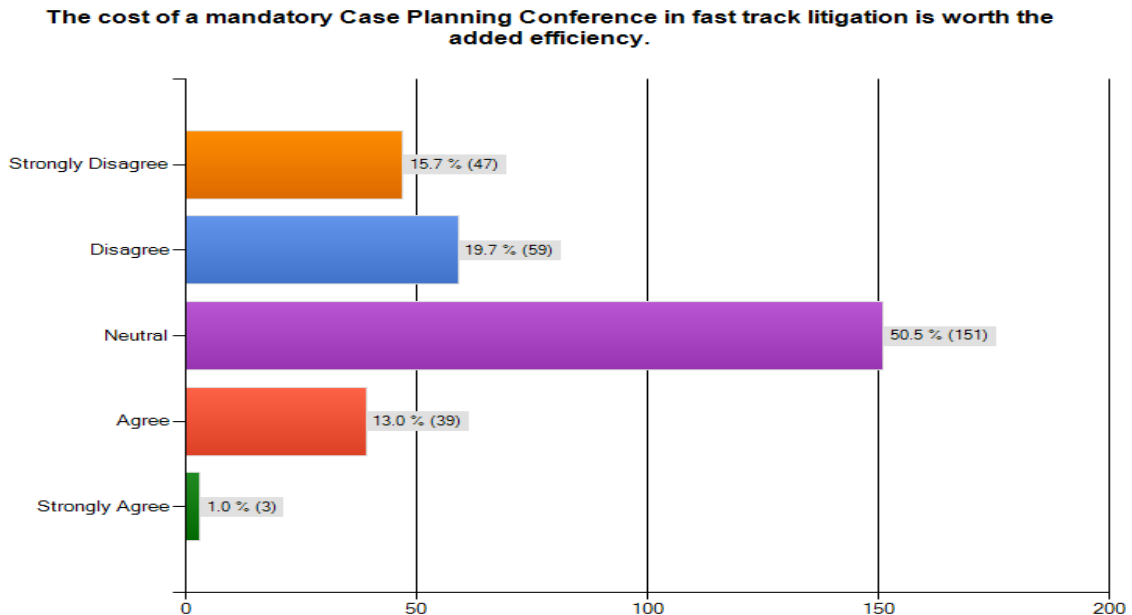
I think the changes to the certification of the expert have changed nothing. The experts who were partisan remain partisan.

Advocates remain advocates, although some experts now try too hard to appear neutral and do not give their honest opinion in an effort to appear neutral.

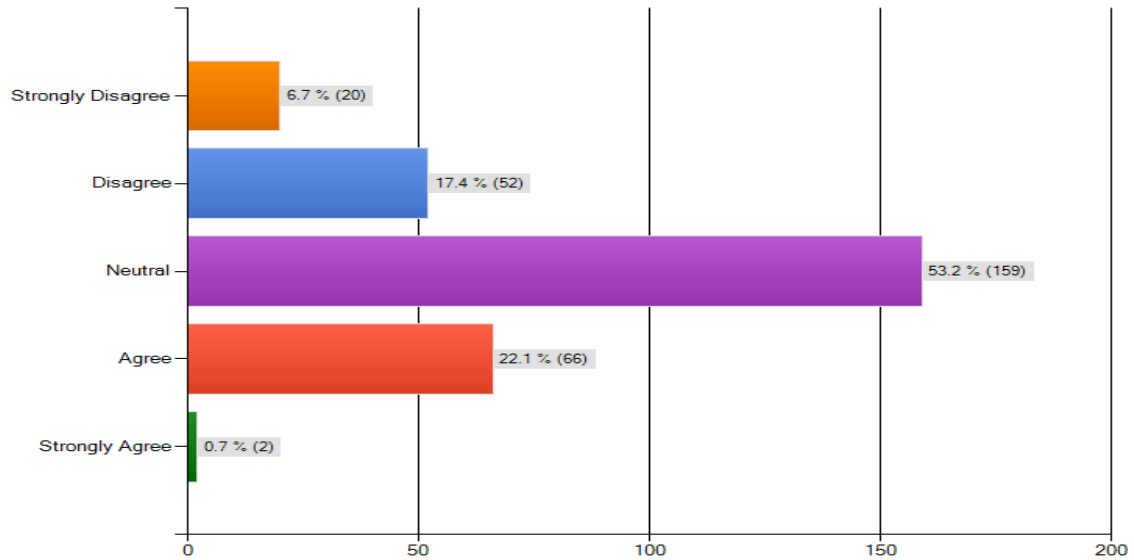
Finally, one comment expressed concern at the loss of the previous ability to provide a written summary by counsel of what an expert’s opinion evidence would be, instead of a full expert report – which makes it more costly to get expert evidence before the court and causes delays.

H. FAST TRACK LITIGATION RULES

The Supreme Court Civil Rules provided new procedures for “fast track” cases. Issues raised with respect to these changes were:



The Fast Track Litigation rules are generally used in appropriate cases.



Two major issues are reflected in the comments on the fast track rules.

A number of comments (6) reflected concerns about the mandatory case planning conference in fast track litigation matters, including the increased cost of participating in such a conference, the delays in getting one scheduled, and the inability to get much done at one.

The other area of comment (7) is a concern that parties place cases in the fast track process inappropriately. A number of the comments in this regard seem to relate to personal injury litigation, and the concerns seem to arise with respect to both plaintiffs and insurers; for example:

I had ICBC use it when the plaintiff wasn't even diagnosed as to why she had low back pain radiating down her leg to her toes. Testing takes months to obtain in our medical system, and Fast Track is so inappropriate, unless the person has healed to as good as they're going to be

In personal injury litigation, plaintiffs appear to use fast track almost exclusively to limit discovery (the search for the truth) and to avoid juries where the plaintiff has glaring credibility problems that are far more likely to be overlooked by a judge than by a jury (again, not helping the search for the truth). Fast track has no place in personal injury actions.

Three comments expressed a need for clarity on whether a case is appropriate for fast track if either criterion (value less than \$100,000; trial length 3 days or less) are met or whether both had to be met.

Other comments expressed concern that the fast track rules are too restrictive in their timelines, that it's too easy to derail cases from the fast track procedures, and that the fast track procedure does not actually lead to earlier trial date.

Finally, two comments expressed the view that it would be better to increase the jurisdiction of the Small Claims court and have the Supreme Court focus on more complex matters.