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## Trial Bench Views: IAALS Report on Findings From a National Survey on Civil Procedure

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# **Trial Bench Views: IAALS Report on Findings From a National Survey on Civil Procedure**

**Corina Gerety\***

In the spring of 2010, the Institute for the Advancement of the American Legal System (“IAALS”) collected survey data on the American civil justice system from state and federal judges throughout the United States, as part of a joint effort with Northwestern University School of Law’s Searle Center on Law, Regulation, and Economic Growth (“Searle Center”). This report sets forth the collective opinions of respondent judges, as they bear on civil reform proposals developed by IAALS and the American College of Trial Lawyers Task Force on Discovery and Civil Litigation (“ACTL Task Force”).

## **Executive Summary**

This survey explored the opinions of a broad national sample of state and federal judges on general questions concerning the civil justice system. This Report provides a snapshot of collective judicial sentiment, focusing on some of the procedural reform proposals advanced by IAALS and the ACTL Task Force.<sup>1</sup> The goal of this effort was to get a sense of whether there is support for these reforms within the trial-level judiciary, viewing the landscape from the highest possible vantage point.

Survey respondents include 1,432 state trial judges and 293 federal trial judges (both Article III and magistrate judges). These respondents have extensive experience in their current positions, with the state judges averaging thirteen years and the federal judges averaging sixteen years in

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1. THE AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, 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 2-3 (2009) [hereinafter FINAL REPORT], *available at* <http://iaals.du.edu/library/publications/final-report-on-the-joint-project-of-the-actl-task-force-on-discovery-and-i>.

their present position. On average, these respondents spend more than half of their time on civil matters. A slim majority of the state trial judges operate under state civil rules of procedure that follow the federal model, either substantially or completely. Highlights of the survey appear below.

***Respondent trial judges support the principle of early and active judicial management, and believe that the pretrial conference can play an important role in that management.***

Majorities of state and federal trial judges agree that early judicial intervention in a case helps to narrow the issues and limit discovery. A majority of federal respondents (65 percent) also reported that promptly holding the Rule 16 pretrial conference leads to faster case resolution, indicating that such conferences are useful in identifying, narrowing, and informing the court of the issues. According to federal respondents, Rule 16 conferences improve time management and encourage settlement, as well. At least 70 percent of state and federal trial judges believe that the pretrial order should be entered at an early point and should control the litigation thereafter.

***Respondent trial judges support the principle of having a single judge handle each case.***

With respect to state respondents, approximately 85 percent of trial judges agree that one judicial officer should handle a case from start to finish (with the exception of settlement matters) and that the judge presiding at trial should handle all pretrial matters. With respect to federal respondents, three out of four trial judges agree that one judicial officer should handle a case through its life cycle, while a smaller majority (56 percent) agree that all pretrial matters should be handled by the presiding trial judge. Consistent with this principle, the most common “best uses” for magistrate judges cited by federal respondents involve a role that is separate from the litigation (settlement) or includes the entirety of the litigation (consent).

***Despite a belief that the civil justice system works better for some case types than others, respondent trial judges did not come to a clear consensus on the principle of case differentiation by rule.***

About 70 percent of all trial respondents agree that the civil justice system works well for certain types of cases but not others. Regarding the case types for which the system is working, state judges most commonly selected contracts, torts (generally), and personal injury, while federal judges most commonly selected civil rights, contracts, and personal injury. There was no consensus on the general proposition that one set of rules cannot accommodate every case type. Specifically with respect to discovery rules, respondents support differentiation based on case complexity at higher levels than differentiation based on the amount in controversy. State judges demonstrated more support for different sets of discovery rules than federal judges.

From more of a case management perspective, three-quarters of state judges agree that cases should be assigned according to the expertise of the judge. Federal judges are evenly divided on that issue (45 percent agreed; 45 percent disagreed).

***Respondent trial judges support the principle of early and firm trial settings.***

Two-thirds of state judges and almost three-quarters of federal judges indicated a belief that the trial date should be determined early in the case rather than after discovery is completed. In addition, there is a strong consensus (90 percent agreement) among all trial respondents that a firm trial date has the effect of more prompt case resolution. The same proportion of respondents reported that “[t]rial dates are credible in my court.”

***Concerning the principle that procedures should be designed to produce reasonably prompt resolutions, respondent trial judges identified the time required to complete discovery as the most significant cause of delay.***

A majority of all trial respondents believe that the civil justice system takes too long, and identified the following as “significant”

causes of delay: the time required to complete discovery; attorney requests for extensions and continuances; delayed rulings on pending motions; and court continuances of scheduled events. Both state and federal judges ranked the time to complete discovery as the most significant cause, while federal judges are more concerned with delayed rulings on pending motions than state judges. A majority of respondents reported that the parties regularly agree on the length of the discovery period, and they “almost never” or only “on occasion” reduce the agreed-upon period.

A solid majority professed to prioritize the timely resolution of discovery disputes, though most do not require a telephone conference with the court prior to the filing of a discovery motion. A significant portion of federal judges (30 percent) reported taking more than one month, on average, to rule on motions regarding expert discovery.

***On the concept that proportionality should be the most important principle applied to all discovery, respondent trial judges do not frequently tailor permitted discovery beyond the default provisions of the rules.***

Over 90 percent of state judges and over 75 percent of federal judges reported that they impose additional limits on the number of depositions “almost never” or only “on occasion.” Approximately 85 percent of both state and federal judges reported imposing such limits on the number of expert witnesses “almost never” or only “on occasion.” In addition, a majority of federal respondents (59 percent) indicated “almost never” invoking the proportionality provision in Rule 26(b)(2)(C) sua sponte to limit discovery.

***On the growing presence of electronically stored information, most respondent trial judges with electronic discovery (“e-discovery”) experience are confident in their ability to address e-discovery issues and positive about the effects of e-discovery on dispute resolution, though the scope of discovery was frequently cited as an area giving rise to disputes.***

Notably, over 60 percent of state judges and nearly one-third of federal judges have not had any cases raising e-discovery issues. Of those who have had an e-discovery case, exactly 60 percent of state

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judges and over 70 percent of federal judges are confident in their ability to address such issues. That means, however, that 40 percent of state judges and nearly 30 percent of federal judges lack this confidence. About 70 percent of all trial respondents with e-discovery experience agree that e-discovery has enhanced the ability to discover all relevant information.

Approximately half of federal respondents routinely discuss e-discovery matters at the Rule 16 scheduling conference, while half do not. Nearly two out of three federal judges indicated a belief that the 2006 e-discovery amendments to the Federal Rules have provided adequate guidance to resolve e-discovery disputes. The “scope of discovery” was indicated by the highest proportions of state and federal judges as an area giving rise to e-discovery disputes, while “spoliation” was indicated by the lowest proportions.

***Respondent trial judges support the principle that fact-based pleading can be a tool to focus litigation.***

While there was no consensus on the general proposition that notice pleading requires extensive discovery to narrow claims and defenses, majorities of state and federal judges agree that fact pleading is an effective tool to narrow the scope of discovery.

***Concerning settlement, a majority of respondent trial judges believe that the court should take an active role in the process and those who conduct settlement conferences overwhelmingly find them to be worthwhile.***

Exactly 70 percent of state judges and exactly 75 percent of federal judges agree that courts should take an active role in the settlement process. Nearly two out of three respondents indicated that they conduct settlement conferences, one form of active engagement. At least 90 percent of those who conduct the conferences reported that they are a good use of time and effort.

## I. Introduction

IAALS at the University of Denver is a national, non-partisan organization dedicated to improving the process and culture of the civil

justice system. Focusing on the needs of those who use the system, IAALS conducts research to identify problems and develop innovative, practical solutions.

Beginning in mid-2007, IAALS engaged in a Joint Project with the ACTL Task Force to examine “increasing concerns that problems in the civil justice system, especially those relating to discovery, have resulted in unacceptable delays and prohibitive expense.”<sup>2</sup> As part of this effort, IAALS administered a survey of the Fellows of the American College of Trial Lawyers (“ACTL Fellows Survey”) in 2008, to gain insight from attorneys with extensive trial experience.<sup>3</sup> The survey results, along with hundreds of hours of careful study, deliberation, and discussion, culminated in a “Final Report” containing proposed Principles for reform of the civil justice process (the “Principles”).<sup>4</sup> Notwithstanding its name, the Final Report was not intended to be the last word on the issue. Rather, the ACTL Task Force and IAALS unanimously recommended that the Principles “be made the subject of public comment, discussion, debate and refinement,” acknowledging that “[t]here is much more work to be done.”<sup>5</sup>

Accordingly, the inquiry could not end with the ACTL Fellows Survey, however informative and useful it may be. Along with the perspectives of other stakeholder populations, the judicial perspective would need to be explored.<sup>6</sup> Judges are at the heart of, and integral to, the civil justice system. They have a unique role as neutral decision makers and participate in a wide variety of cases involving diverse sets of litigants. A nationwide survey of judges provides a starting point for this

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2. *Id.* at 1.

3. *See* THE AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, INTERIM 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 (2008), *available at* <http://iaals.du.edu/initiatives/rule-one-initiative/research/interim-report-on-the-joint-project-of-the-actl-task-force-on-discovery-and>.

4. FINAL REPORT, *supra* note 1, at 3.

5. *Id.* at 3, 25.

6. Regarding the perspectives of other stakeholder populations, IAALS followed the ACTL Fellows Survey with a survey of Chief Legal Officers and General Counsel (a group of professionals not included in the original survey) to capture how businesses experience the American civil justice process. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL (2010), *available at* <http://iaals.du.edu/initiatives/rule-one-initiative/research/civil-litigation-survey-of-chief-legal-officers-and-general-counsel>.

exploration. Recognizing that evaluative surveys are necessarily subjective, IAALS nevertheless believes that judges can address how the process is working—and should have a stage on which to do so.

### A. *Methodology*

#### 1. Survey Development and Distribution

For the creation and administration of this survey, IAALS collaborated with the Searle Center. The Butler Institute, an independent social science research organization at the University of Denver, provided assistance in the analysis of the survey's findings. Partnership with the Searle Center provided access to the Center's judicial database of nearly 13,000 state and federal judges at both the trial and appellate levels. The database is perhaps the most comprehensive list of all judges in the United States.<sup>7</sup>

The survey had a simple purpose—to take advantage of this unique database to ask a series of general questions to the broadest possible sample. Accordingly, it was designed to provide a snapshot of collective judicial opinion at the macro level that will lay the groundwork for more targeted research on judges' assessments of the civil justice system and research on the system more generally. The survey was also designed to serve an additional function—to assess judges' views of some of the Principles for reform and how their views may be similar to or different from those of ACTL Fellows as found in the ACTL/IAALS survey. This Report focuses on the judges' opinions only, with comparison to the findings of the earlier ACTL Fellows Survey addressed in a separate report.<sup>8</sup>

The Searle Center database includes chambers mailing addresses for all of the judges, and email addresses for a subset of the judges. The final version of the survey instrument was produced in both paper and computerized formats (the computerized version utilized Qualtrics online

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7. The Searle Center conducted a large-scale review of its judicial database in June 2008. At that time, the database was compared to the lists of judges on the public websites of every state and federal court in the country and updated accordingly. Since then, it has been periodically updated. The information is primarily obtained from online searches, with approximately 99 percent from the courts' public websites.

8. See Corina Gerety, Institute for the Advancement of the American Legal System, University of Denver, *Excess and Access: Consensus on the American Civil Justice Landscape* (2011), available at <http://iaals.du.edu/library/publications/excess-and-access>.

survey software).<sup>9</sup> After obtaining approval from the Institutional Review Boards at both universities, the survey was sent to 12,896 judges in hard copy, and a universal link to the online version was emailed to 2,104 of those judges.<sup>10</sup> Each outreach was accompanied by a request for participation from the Searle Center, explaining the purpose of the study: to systematically collect and present the views of judges on the functioning of the civil justice system.<sup>11</sup> The survey was officially in the field for eleven days, from April 12, 2010, to April 23, 2010. However, responses were accepted for ten additional days, until May 3, 2010.

## 2. Survey Responses

There were a total of 1,995 useable responses to the survey, about three-quarters of which were received in paper format.<sup>12</sup> As the survey was sent to 12,896 judges, the response rate is roughly 15 percent. At a 95 percent confidence level, the overall substantive results are within a  $\pm 2.02$  percent margin of error. As will be explained below, this report discusses only the responses of the 1,725 trial judges (state and federal) in the survey. The Searle Center cannot provide the number of trial judges in its database, but even if we were to presume that the database consisted only of 12,896 trial judges, at a 95 percent confidence level, the 1,425 responses would be within a  $\pm 2.20$  percent margin of error.<sup>13</sup>

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9. To obtain a copy of the survey instrument, please contact the Searle Center via e-mail at [searlecenter@law.northwestern.edu](mailto:searlecenter@law.northwestern.edu), or IAALS via <http://iaals.du.edu/about-the-institute/contact-us/>.

10. It was not possible to provide a unique link to each potential participant due to distribution through the Searle Center's listserv (rather than through the online survey software). While it is unlikely that any of the judges filled out the survey both electronically and in hard copy, that possibility does exist.

11. The paper letter was signed by Paige Butler, Director of the Northwestern Law Judicial Education Program, and the e-mail was signed by Henry N. Butler, Searle Center Executive Director.

12. The Searle Center received the completed paper surveys, with one staff member removing all identifiers from each hard copy before passing it on for data entry. The Butler Institute maintained the online version and served as a contact point for respondents with technical questions. All data entry and verification functions were handled by the Searle Center, and the Center provided a clean data set to IAALS, absent all identifying information for respondents.

13. In interpreting the survey results, it should be noted that some judges may have been more or less inclined to consider participation in the study, depending upon their views of (and reactions to) the Searle Center and its activities.

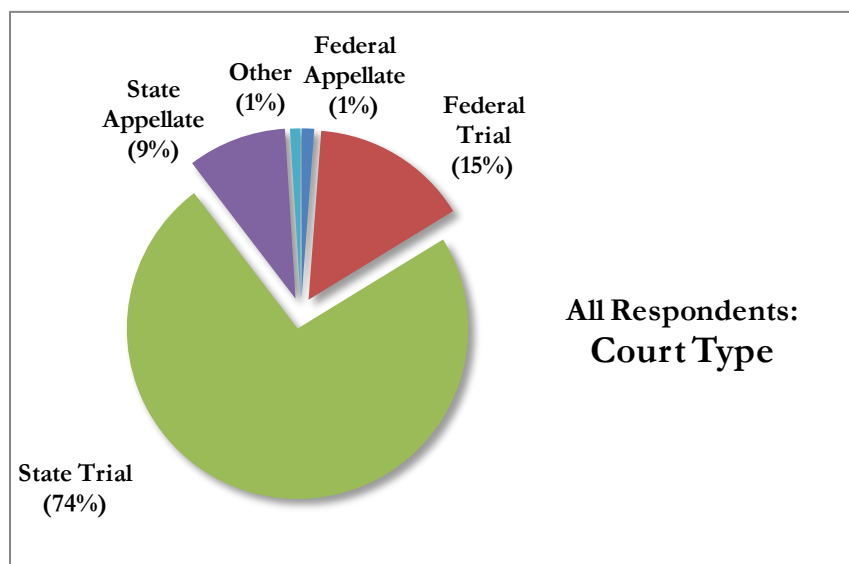
## B. *Demographics of Respondent Trial Judges*

### 1. Current Position

This Report focuses on the responses of trial judges to survey questions related to pretrial civil procedure. Figure 1 shows that just under 90 percent of all respondents are trial judges, with nearly three-quarters currently state trial judges and exactly 15 percent currently federal trial judges.<sup>14</sup>

The remaining 11 percent of respondents are appellate judges or fall into the “other” category.<sup>15</sup> The responses of trial judges are reported hereafter, unless otherwise indicated.

**Figure 1**  
*n* = 1942



14. The survey did not request further information concerning particular or specialized positions within the state or federal systems, and thus the variety of experience within each of these groups is unknown. The survey was sent to federal magistrate judges, but not to state magistrate judges.

15. Of the twelve respondents in the “other” category, nine are retired.

The respondent trial judges have extensive judicial experience. State trial judges indicated being in their current position an average of thirteen years (median twelve years), and federal trial judges indicated being in their current position an average of sixteen years (median fifteen years). In addition, 22 percent of state trial judges previously sat in a different court, for an average of seven years of prior experience,<sup>16</sup> and 35 percent of federal trial judges did so, for an average of ten years prior judicial experience. Of all trial respondents with previous judicial experience (424), exactly half served as a state trial judge of one kind or another.

## 2. Current Caseload

Respondents were asked to estimate the percentage of time they spend per month on a civil docket, a criminal docket, and other matters. Figure 2 shows that, on average, these judges spend more time on civil matters than on criminal or other matters. This is especially the case for federal trial respondents, whose time per month is heavily skewed toward civil matters. Indeed, the median reported in Figure 2 shows that one-half of the federal respondents spend at least 70 percent of their time on civil matters. The figure for state trial respondents is lower, but it still shows a substantial amount of time devoted to civil matters. It should be noted that these numbers represent the respondents' own assessments of their time and not their actual docket composition or the dockets of judges more generally. In addition, judges with heavier civil caseloads are probably more likely to answer a survey on civil litigation.

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16. The varying ways in which states organize their court systems provide for a wide array of judicial offices at different types and levels of courts, including different types and levels of trial courts. Although the survey did not explore the issue, it is possible that in some states lawyers enter the judiciary at the lowest level and work their way up the hierarchy.

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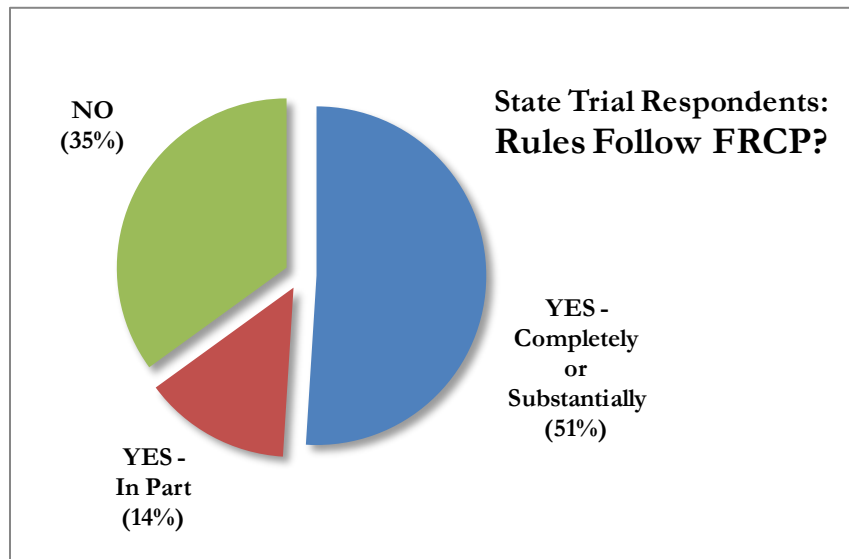
Figure 2  
*n* = 1,294; 280

Trial Respondents: Monthly Time Allocation						
	<i>CIVIL MATTERS</i>		<i>CRIMINAL MATTERS</i>		<i>OTHER MATTERS</i>	
	Mean	Median	Mean	Median	Mean	Median
<i>State</i>	52 percent	40 percent	37 percent	40 percent	11 percent	0 percent
<i>Federal</i>	66 percent	70 percent	29 percent	25 percent	5 percent	0 percent

### 3. Applicable Civil Procedure Rules

The survey sought to get a sense of the procedural rules that state respondents apply to their civil cases. As shown in Figure 3, a slim majority of state trial respondents have state rules that follow the Federal Rules of Civil Procedure (“FRCP” or “Federal Rules”), either completely or substantially, but exactly 35 percent have state rules that do not follow the federal model. The survey did not ask respondents to name their specific state rules, nor did it obtain information on how their particular rules are similar to or diverge from the FRCP. Accordingly, the extent to which this issue affected responses to any of the other survey questions is unknown.

Figure 3  
 $n = 1412$



## II. The Survey Results

The survey results reported here are those that provide insight into whether the trial-level judiciary, broadly speaking, supports the kinds of changes found in the Principles for reform set forth in the Final Report of the Joint Project of IAALS and the ACTL Task Force.<sup>17</sup> Because the survey was created around the previous ACTL Fellows Survey and not the Final Report itself, the questions do not reflect the Principles precisely, and certain issues may be only indirectly addressed. However, this survey effort does contribute to the ongoing substantive discussion that the Final Report was designed to generate. For each issue, the relevant language from the Final Report is quoted in italics.

The responses of state and federal trial judges are reported separately. While the survey can highlight similarities between these two groups, it did not yield sufficient information to explore or explain any differences in responses. Accordingly, this Report does not attempt to provide answers to the “why” questions. Any reasonable hypotheses will need to be explored through further studies.

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17. See FINAL REPORT, *supra* note 1.

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*A. Early and Active Judicial Involvement*

**“[T]he better procedure is to involve judges early and often. Early judicial involvement is important because not all cases are the same . . . . The goal is the just, cost-effective and expeditious resolution of disputes.”**

*1. The Effects of Early Involvement*

The survey contained two questions on the effects of early judicial intervention. Together, they show that respondents view such involvement as a useful tool for the identification of the essential claims and defenses, which may result in more focused discovery.

*a. Issue Identification*

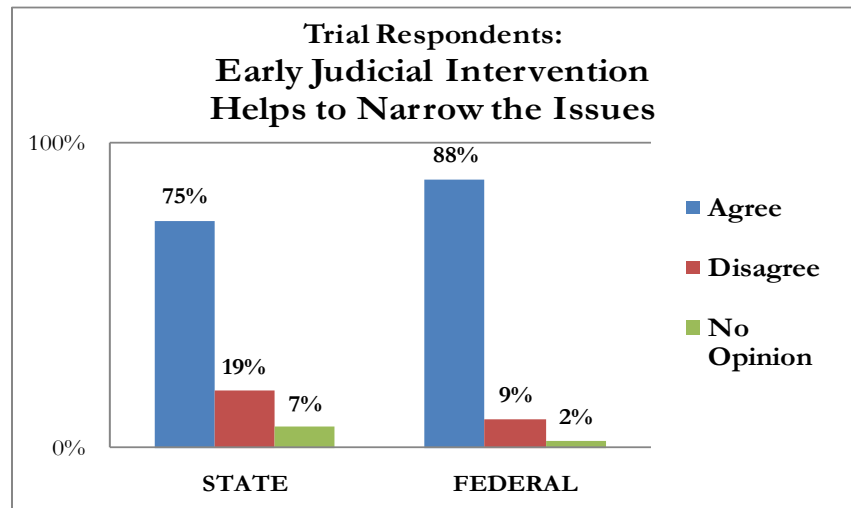
**“All issues to be tried should be identified early.”**

Strong majorities of trial respondents agreed that “[i]ntervention by judges early in the case helps to narrow the issues,” while only one in five state judges and only one in ten federal judges expressed disagreement with that proposition.<sup>18</sup> See Figure 4.

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18. Questions employing an agreement scale provided five options: strongly disagree, disagree, no opinion, agree, and strongly agree. The “agree” and “strongly agree” categories are collapsed into one category for reporting purposes, unless otherwise noted. The same is true for the “disagree” and “strongly disagree” categories.

Figure 4  
 n = 1368; 287



b. *Focused Discovery*

**“[The Principles] permit limited discovery proportionally tied to the claims actually at issue, after which there will be no more.”**

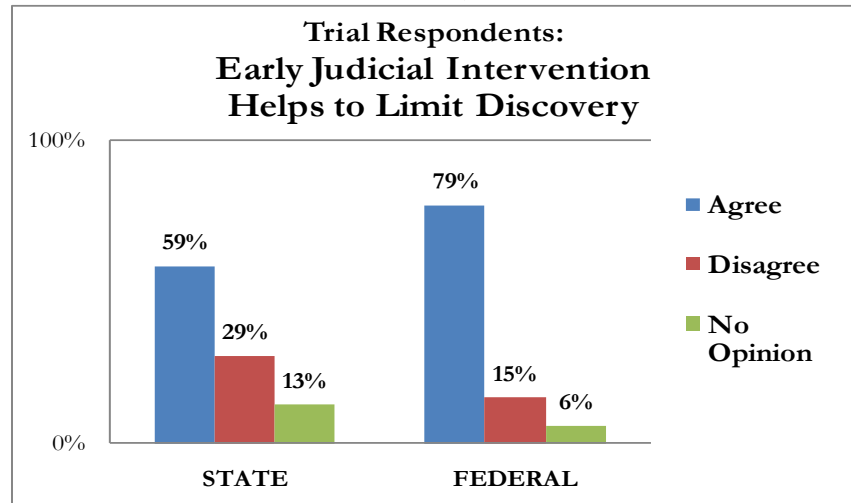
Majorities of trial respondents also agree that “[i]ntervention by judges early in the case helps to limit discovery.” Federal judges expressed higher levels of agreement than state judges, though the reason for this is not known. See Figure 5.

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Figure 5  
 n = 1361; 286



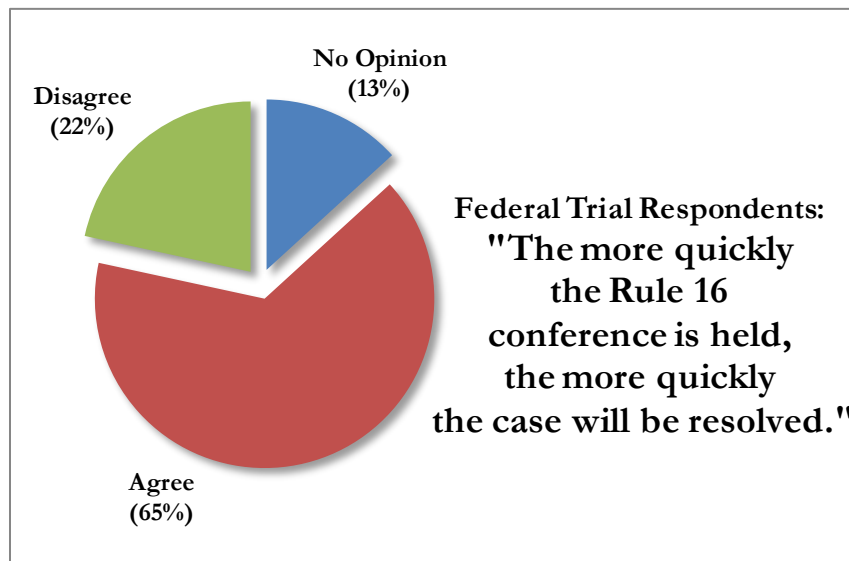
## 2. The Role of Pretrial Conferences

### a. *Timing*

**“Initial pretrial conferences should be held as soon as possible in all cases and subsequent status conferences should be held when necessary.”**

With respect to Rule 16 pretrial conferences in the federal system, slightly more than 55 percent of federal trial respondents “set the Rule 16 conference” within sixty days from the date of filing, while only 1 percent set the conference 180 days or more from the date of filing. Moreover, nearly two-thirds of federal trial judges indicated that holding these conferences earlier leads to faster resolution of cases. See Figure 6, which reports only on federal respondents.

Figure 6  
 $n = 273$



b. *Effects*

**“[Pretrial conferences] are useful for keeping the judge informed about the progress of the case and allowing the court to guide the work of counsel . . . those conferences should identify pleading and discovery issues, specify when they should be addressed and resolved, describe the types of limited discovery that will be permitted and set a timetable for completion.”**

The survey inquired about the effects of Rule 16 pretrial conferences in the federal system. Figure 7 shows effects that were identified by a majority of federal trial judges. Consistent with the above language from the Final Report, the most commonly reported effects are “informs the court of the issues in the case,” “identifies the issues,” and “improves time management.”

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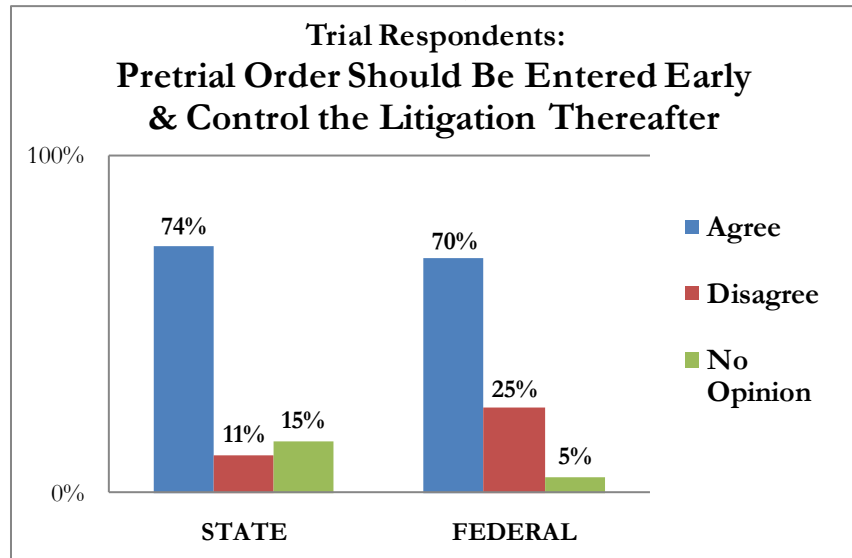
Figure 7  
*n* = 293

<b>Federal Trial Respondents: Effects of Rule 16(a) Pretrial Conferences Identified by a Majority</b>	
<b>Effect</b>	<b>Percent Citing</b>
Informs the court of the issues	72 percent
Identifies the issues	68 percent
Improves time management	58 percent
Encourages settlement	56 percent
Narrows the issues	55 percent
Shortens the time to case resolution	54 percent

*c. Pretrial Orders*

With respect to pretrial orders, at least 70 percent of both state and federal trial respondents expressed support for the sentiment that the pretrial order “should be entered at an early point in the litigation and should control the litigation from that point forward.” See Figure 8.

Figure 8  
 n = 1012; 273



All of the above data should encourage judges, attorneys, and litigants to make prompt and effective use of Rule 16 pretrial conferences for case management purposes.

### B. *One Case, One Judge*

One idea expressed in the Final Report is that efficient and effective case management is best achieved by the consistent involvement of a single judge.

#### 1. Number of Judicial Officers

**“A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.”**

As shown in Figure 9, large majorities of trial respondents agree with the statement that “[o]ne judicial officer should handle a case from start to finish (excluding settlement matters).” Notably, over 35 percent of state judges and nearly 40 percent of federal judges expressed strong

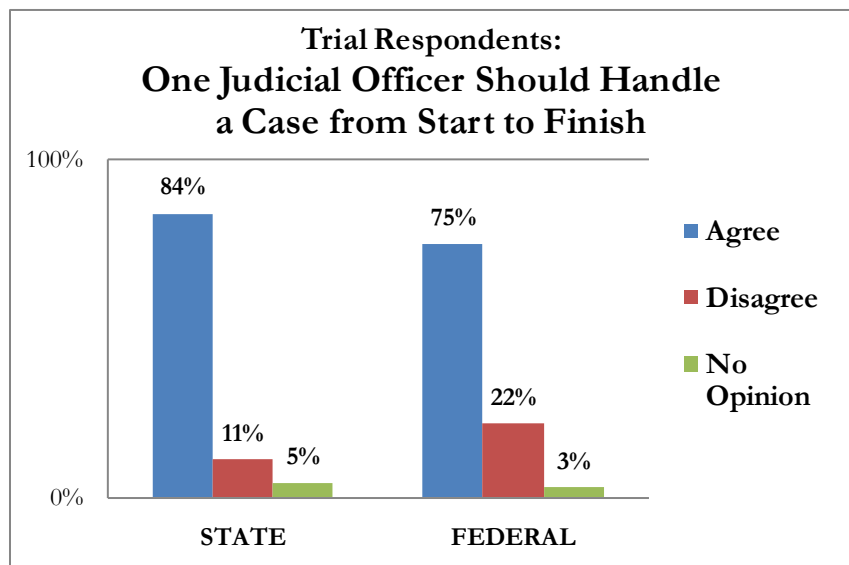
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agreement with the proposition, while only 1 percent of state judges and 4 percent of federal judges strongly disagreed.

**Figure 9**  
*n* = 1366; 288

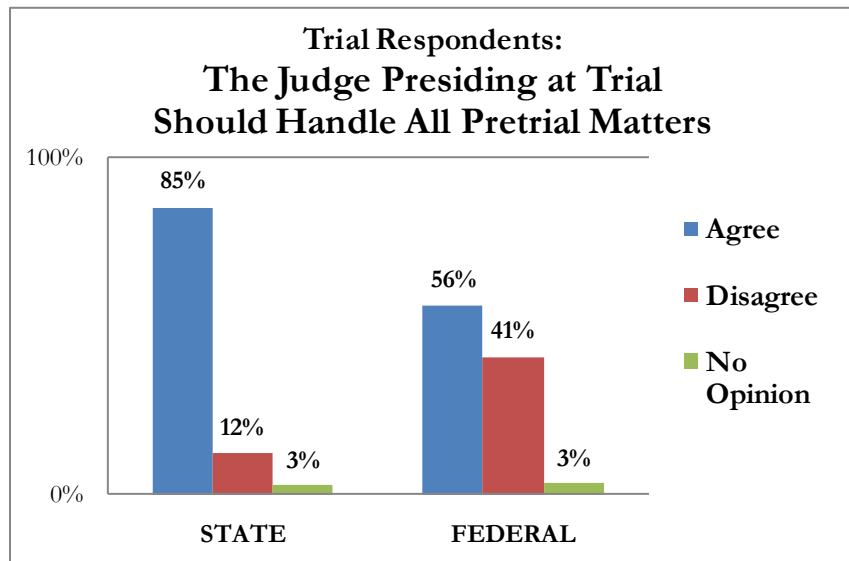


## 2. Handling of Pretrial Matters

**“Judges who are going to try cases are in the best position to make pretrial rulings on evidentiary and discovery matters and dispositive motions.”**

As shown in Figure 10, exactly 85 percent of state trial respondents agreed with the statement that “[t]he judge who is going to try the case should handle all pretrial matters.” Nearly 40 percent expressed strong agreement, while only 1 percent expressed strong disagreement. A majority of federal trial respondents also agreed, although there was not such a strong consensus within that group. Nevertheless, 28 percent expressed strong agreement, while only 6 percent expressed strong disagreement. Considering state and federal trial judges combined, exactly 80 percent believe that the judge presiding at trial should handle all pretrial issues.

Figure 10  
 n = 1365; 287



### 3. Role of Magistrate Judges

The above views on the one-case-one-judge principle beg the question of the role of magistrate judges in the federal system. With respect to federal trial-level judges, the survey was distributed to both Article III and magistrate judges, but the instrument did not provide a mechanism to gauge the relative sizes or distinguish the responses of these two groups. Accordingly, questions relating to the role of federal magistrate judges include the collective opinions of both.

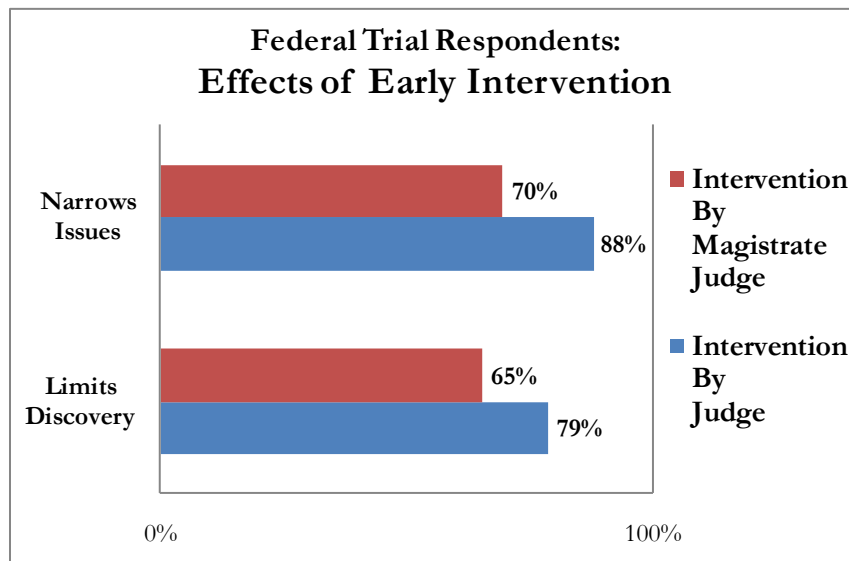
Figure 11 shows the responses of federal trial respondents on the effects of early intervention by magistrate judges as compared to judges. Approximately two-thirds of federal judges indicated that early intervention by magistrate judges narrows the issues and limits discovery; however, this is smaller than the portion who believe that intervention by judges has these effects.

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Figure 11  
 n = 287; 280; 286; 278



The survey asked respondents to indicate the “best uses” of magistrate judges. The question provided six response options and allowed for selection of all that apply, including an “other” category with an opportunity to specify a best use not enumerated (giving the examples of social security matters and guilty pleas). The “best uses” most commonly indicated by federal trial judges were “conduct settlement conferences” and “referral filing through trial (consent).”<sup>19</sup> These judges were least enthusiastic about “special referral” for discrete issues<sup>20</sup> and “referral for all pre-trial matters only.”<sup>21</sup> See Figure 12 for the distribution of all responses.<sup>22</sup> Of those who selected the “other” option,

19. See FED. R. CIV. P. 73.

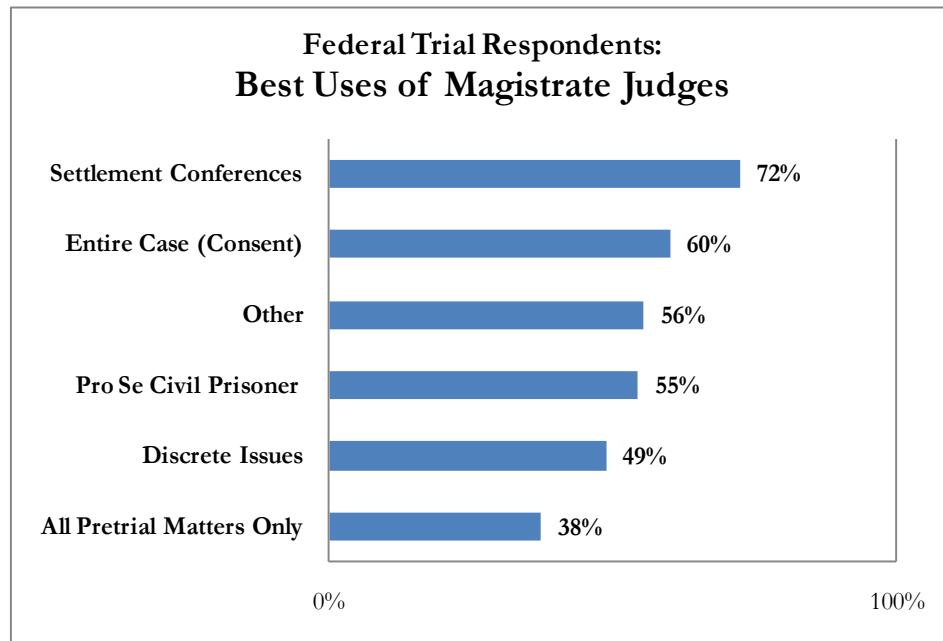
20. The specific wording of this option was: “Special referral – assigned matters motion by motion or for a certain portion of the pretrial process (e.g., discovery motions).”

21. The specific wording of this option was “Referral for all pre-trial matters only – Rule 16 conference through the issuance of final pretrial order.”

22. The survey did not provide an option for “no best uses of magistrate judges.” Accordingly, the reported *n* represents the total number of federal trial respondents, not the total providing an answer to the question, as those respondents who do not believe that there are any “best uses” of magistrate judges would not have made any selection but should not be considered to have skipped the question. This means, however, that those respondents who legitimately skipped the question are counted in the calculated

only about one-third provided a written response and the listed examples of social security matters and guilty pleas were the most common additions.<sup>23</sup>

**Figure 12**  
*n* = 293



Considering the responses to this question as a whole, the picture is relatively consistent with the one-case-one-judge principle. The most common “best uses” for magistrate judges cited by federal trial respondents (both Article III and magistrate judges) involve a role that is either separate from the litigation (settlement) or includes the entirety of the litigation. The least common responses involve only limited portions of the litigation.

percentages.

23. None of the other uses provided by those who wrote in the “other” answer blank were cited by more than 10 percent of that group.

*C. Differing Treatment When Appropriate*

**“The ‘one size fits all’ approach . . . is useful in many cases but rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.”**

*1. Need for Differentiation Based on Case Type*

About 70 percent of all trial respondents agreed with the statement that “[t]he civil justice system works well for certain types of cases but not others,” with nearly identical response patterns for state and federal judges. The survey also asked respondents to indicate the types of cases for which the system works well, providing twenty response options and allowing for selection of all that apply. These options included an “other” category and the ability to specify a case type not listed.

Figure 13 sets out the responses of state and federal trial judges. For a case type selected by a majority of a particular group as one for which the system works well, the number is not bold font; otherwise, the number is indicated in bold. In assessing these numbers, it is important to keep in mind that the enumerated response categories are quite broad and may be ambiguous to a certain extent. It is also important to consider that certain types of cases are more prominent in certain courts or in certain respondents’ realm of experience. As one respondent wrote: “I am not familiar enough with the ones I have not checked to offer an opinion.”

Figure 13  
 $n = 1432; 293^{24}$

<b>Trial Respondents: “The civil justice system works well for the following types of cases. . .”</b>		
	<i>Percent of State Indicating</i>	<i>Percent of Federal Indicating</i>
Administrative Law	<b>35 percent</b>	<b>43 percent</b>
Antitrust	<b>19 percent</b>	<b>44 percent</b>
Civil Rights	<b>44 percent</b>	70 percent
Complex Commercial	<b>36 percent</b>	53 percent
Construction	<b>49 percent</b>	<b>39 percent</b>
Contracts	77 percent	70 percent
Employment Discrimination	<b>44 percent</b>	61 percent
Insurance Disputes	61 percent	59 percent
Intellectual Property	<b>28 percent</b>	<b>42 percent</b>
Labor Law	<b>30 percent</b>	<b>45 percent</b>
Maritime	<b>16 percent</b>	<b>41 percent</b>
Oil and Gas	<b>22</b>	<b>30</b>

24. The survey did not provide an option for those who do not believe the system works well for any type of case, and these respondents would not have selected any of the options but should not be considered to have skipped the question. Accordingly, the reported  $n$  represents the total number of trial respondents, not the total providing an answer to the question. This means that those respondents who skipped the question entirely are counted in the calculated percentages.

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	<b>percent</b>	<b>percent</b>
Personal Injury	75 percent	63 percent
Product Liability	61 percent	59 percent
Professional Malpractice	59 percent	<b>47 percent</b>
Real Property	70 percent	<b>48 percent</b>
Securities	<b>20 percent</b>	<b>43 percent</b>
Torts (generally)	77 percent	62 percent
Torts (mass)	<b>28 percent</b>	<b>38 percent</b>
Other	<b>7 percent</b>	<b>10 percent</b>

Of state respondents who wrote in the “other” response option (ninety-nine), the most common response was family law. Of federal respondents who wrote in the “other” response option (twenty-nine), a majority specified bankruptcy.

A handful of judges stated that the system works well for all cases, while a handful stated that it does not work particularly well for any cases. One respondent noted: “To the extent that discovery costs are excessive in virtually all types of cases, the system doesn’t work well for any type of case.” Several judges commented that smaller cases are priced out of the system because they cannot “bear the expense the rules entail,” while several judges cited small or simple cases as ones for which the system works well. A couple of respondents indicated that the answer depends on the quality of the attorneys involved: “Civil justice . . . is largely attorney driven. Competency of counsel is vital.” Another noted that “it is not possible to make generalizations by case type.”

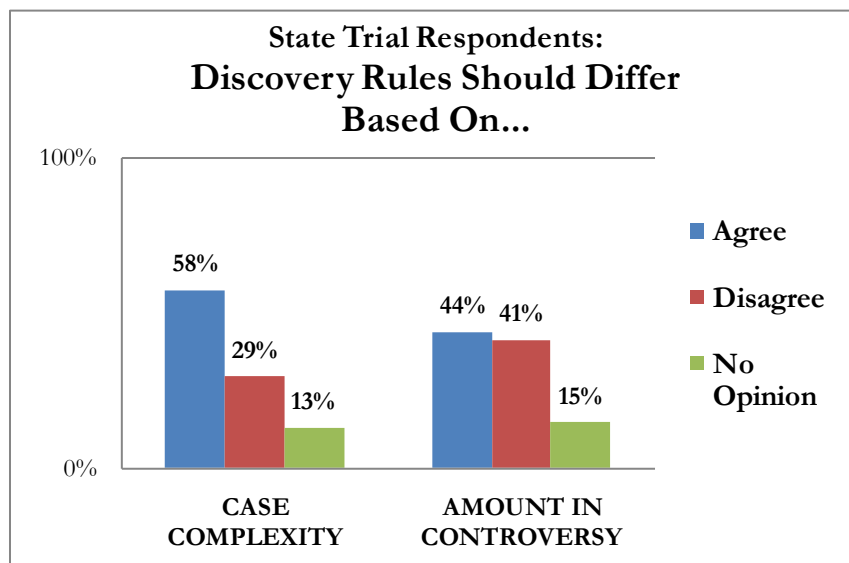
## 2. Different Discovery Rules

There was no consensus among trial respondents on the general statement that “[o]ne set of Rules cannot accommodate every case type.” Exactly half of state respondents agreed, but 55 percent of federal

respondents disagreed. Considering all trial judges together, 47 percent agreed and 39 percent disagreed.

Trial respondents expressed higher levels of support for different discovery rules based on the complexity of the case than based on the amount in controversy. A majority of state judges agreed that “[t]here should be different discovery rules based on the complexity of the case,” while this group split on the statement that “[t]here should be different discovery rules based on the amount in controversy.” Federal judges were evenly divided on differentiating rules based on case complexity, while exactly 60 percent disagreed that the rules should differ depending on the amount in controversy. See Figures 14a and 14b.

Figure 14a  
*n* = 1130; 1128

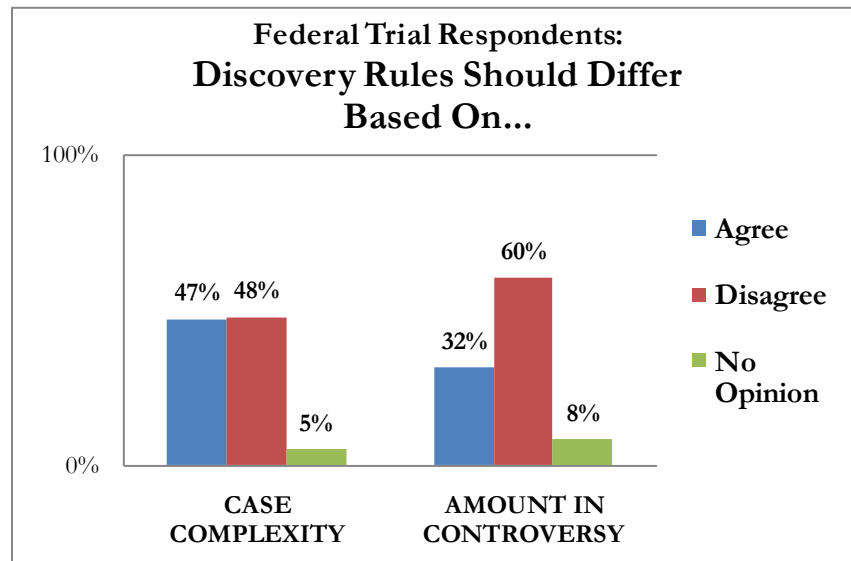


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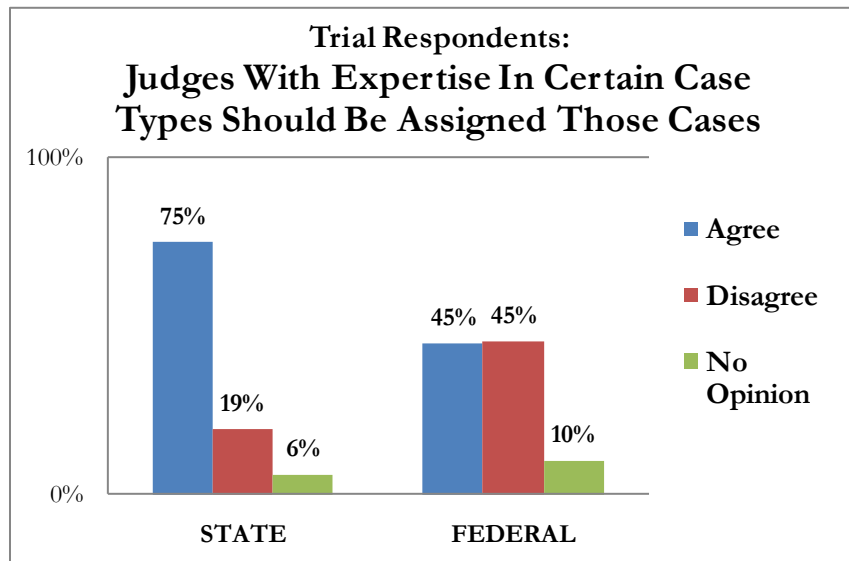
Figure 14b  
 $n = 280; 280$



### 3. Judicial Assignment

From more of a case management perspective, the survey asked whether “judicial officers with expertise in certain types of cases should be assigned to those cases.” Three-quarters of state trial respondents agreed with this method of assignment, while there was no consensus among federal trial respondents on the issue. Further research might provide an explanation for this difference. See Figure 15.

Figure 15  
 n = 1360; 287



#### D. Prompt Resolution

Nearly 65 percent of all trial respondents agreed with the general statement that the “civil justice system takes too long.” Again, the response pattern of state and federal trial judges was similar.

##### 1. Delay Generally

**“The concept of just resolution should include procedures . . . that will produce a reasonably prompt [and] reasonably efficient . . . resolution.”**

The survey inquired into the factors that “cause significant delay in the litigation process.” Four possible causes of delay were enumerated, along with the option to provide a cause not listed. The survey instructed respondents to select all factors that apply and to rank the factors that cause significant delay on a scale from 1 (most significant cause of delay) to 5 (least significant cause of delay).

As shown in Figure 16, a majority of trial judge respondents indicated that each of the listed options constitutes a significant cause of

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delay. In terms of the magnitude of the delay, both state and federal judges find, on average, that the time required to complete discovery is the most significant cause of delay, followed by attorney requests for extensions of time and continuances. Delayed rulings on pending motions appear to be more of a concern for federal respondents than for state respondents.

Figure 16  
 $n = 1432; 293^{25}$

Trial Respondents: Causes of Significant Delay in Litigation				
	Portion Indicating Significant Cause of Delay		Average Ranking <sup>26</sup> 1 = most significant 5 = least significant	
	<i>State Trial</i>	<i>Federal Trial</i>	<i>State Trial</i>	<i>Federal Trial</i>
<i>Time required to complete discovery</i>	82 percent	84 percent	1.80	1.70
<i>Attorney requests for extensions &amp; continuances</i>	83 percent	85 percent	1.92	2.14
<i>Delayed rulings on pending motions</i>	65 percent	75 percent	3.58	2.98
<i>Court continuances of scheduled events</i>	67 percent	65 percent	3.47	3.61
<i>Other</i>	18 percent	14 percent	3.44	3.22

There were three issues consistently cited by both state and federal respondents who indicated an “other” cause of significant delay. First, they referenced a lack of judicial resources, along with an insufficient number of judges to handle heavy caseloads that include criminal dockets. Second, they referenced attorney behavior, such as inadequate planning, accepting too many cases, inattention to pending cases, procrastination, laziness, or using the legal system (including

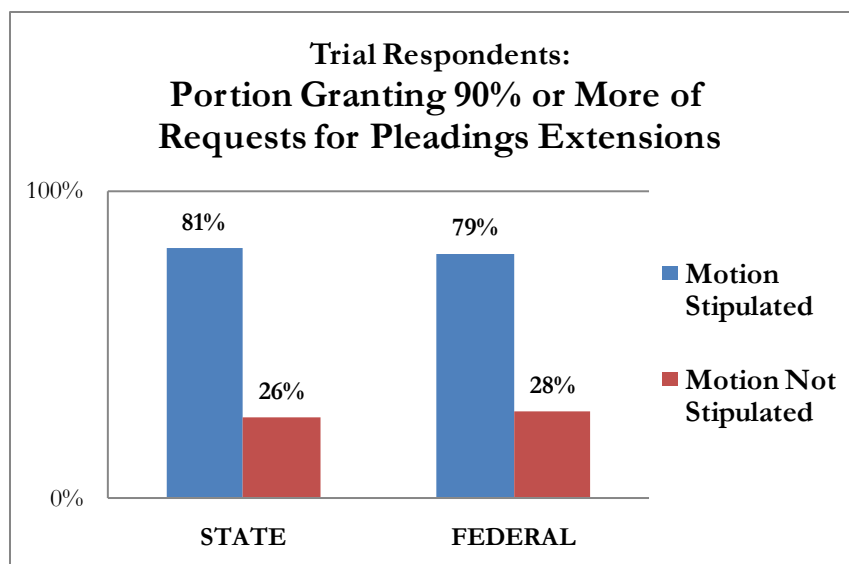
25. The survey did not provide an option for “no significant causes of delay.” Accordingly, the reported  $n$  represents the total number of trial respondents, including those who skipped the question, as there is no way to separate that group from respondents who do not believe there is any one cause of significant delay.

26. The number of state trial respondents who provided a ranking for each possibility (in the order contained in the figure): 1129; 1136; 916; 945; 243. The number of federal trial respondents who provided a ranking for each possibility (in the order contained in the figure): 240; 237; 213; 186; 36.

discovery and motions practice) for strategic advantage. Third, they referenced passive rather than active case management, noting that delay can be reduced by setting and enforcing appropriate deadlines.

An IAALS docket study in eight federal districts found that motions to extend the time to answer were filed in almost 40 percent of cases, which “stall[s] a case almost immediately after it has begun.”<sup>27</sup> As shown in Figure 17, strong majorities of trial court respondents grant 90 percent or more pleadings extensions when the parties have stipulated to the request, but over one-quarter also grant 90 percent or more of motions without a stipulation. Fewer than one in ten trial court respondents indicated granting less than half of stipulated motions, while about one-quarter indicated granting less than half of unstipulated motions.

**Figure 17**  
*n* = 1357; 1343; 287; 288



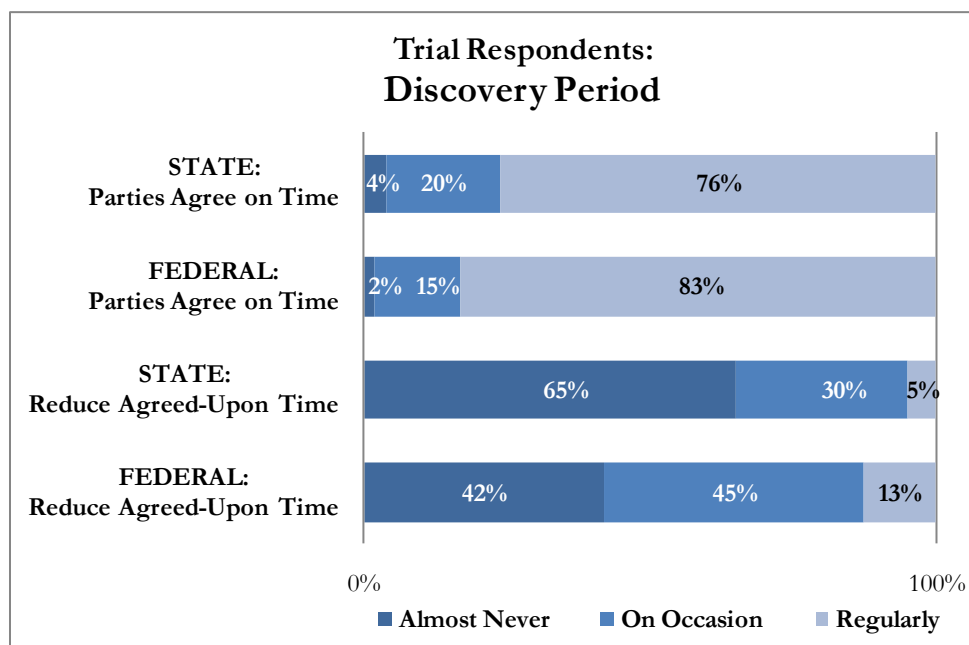
27. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 55 (2009), available at <http://iaals.du.edu/initiatives/rule-one-initiative/measurement/civil-case-processing-in-the-federal-district-courts>.

## 2. Timely Completion of Discovery

**“At the first pretrial conference, the court should set a realistic date for completion of discovery . . . and stick to [it], absent extraordinary circumstances.”**

With respect to the length of the discovery period, more than three out of four trial respondents indicated that the parties regularly “agree about the proper amount of time needed to conduct discovery,” and only 5 percent of state judges and 13 percent of federal judges regularly reduce the agreed-up amount of time. A majority of state respondents “almost never” reduce the agreed discovery period, while federal respondents are more likely to do so “on occasion.” See Figure 18.

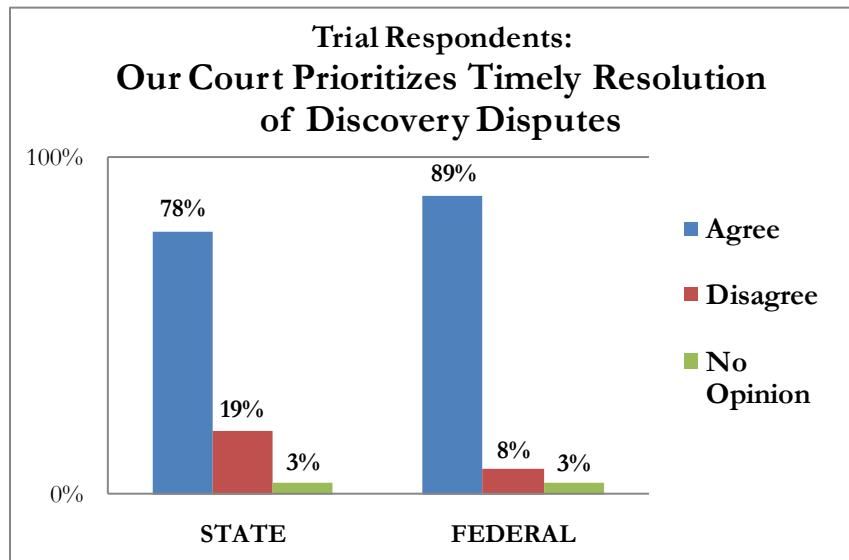
**Figure 18**  
*n* = 1223; 272; 1220; 271



With respect to delay caused by discovery disputes, strong majorities of state and federal trial respondents agreed that “[o]ur court

prioritizes the resolution of discovery disputes on a timely basis.” See Figure 19. Indeed, 37 percent of federal judges and 19 percent of state judges expressed strong agreement with this statement.

Figure 19  
 $n = 1386; 287$



Despite the fact that almost 90 percent of federal judges indicated prioritizing timely resolution of discovery disputes, nearly 20 percent reported taking an average of one month or more to rule on motions to compel and exactly 30 percent reported an average of one month or more to rule on expert discovery motions. See Figure 20. State judge respondents appear to do better, which is consistent with responses on the significance of “delayed rulings on pending motions” as a cause of delay (refer to Figure 16).

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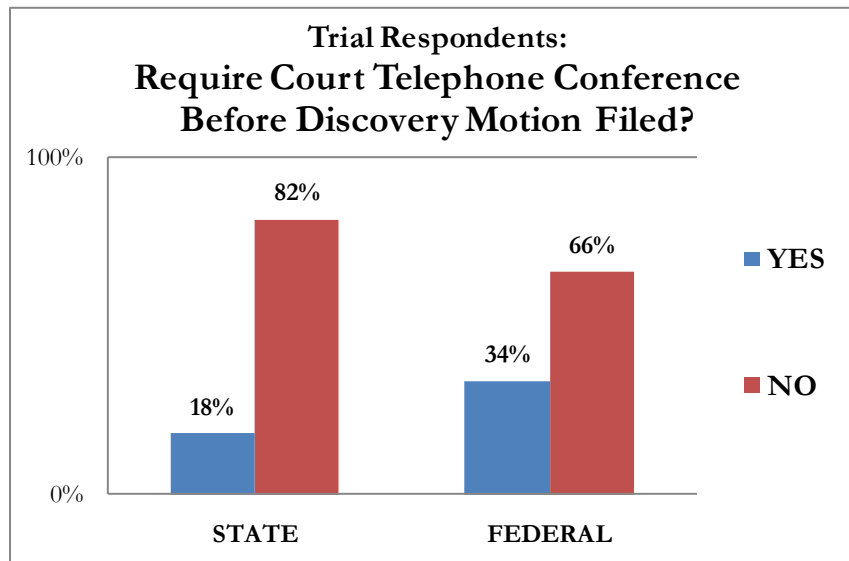
Figure 20  
*n* = 1363; 275; 1338; 270

Trial Respondents: Portion Reporting an Average Time to Rule of 30 Days or More		
	<i>State</i>	<i>Federal</i>
Motion to Compel	12 percent	19 percent
Motion re: Expert Discovery	16 percent	30 percent

The difference between federal respondents who indicated prioritizing the timely resolution of discovery disputes (89 percent) and those who reported an average time to issue rulings on such motions in less than thirty days (81 percent for motions to compel and 70 percent for motions on expert discovery) does not necessarily reflect a disconnect between perception and reality. For example, a lack of judicial resources—referenced by commenting respondents as a significant cause of delay—might affect resolution times even if the issue is a court priority. Certainly, the complex interplay of delay issues cannot be answered by this survey; rather, deeper and more targeted research is necessary.

One possible response to the delay caused by discovery disputes is to require a telephone conference with the court prior to the filing of a motion, for the purpose of resolving issues quickly and informally. Most trial respondents have not imposed this requirement, although one of every three federal judges has done so. See Figure 21.

Figure 21  
 n = 1359; 275



### 3. Early Determination of Firm Trial Dates

**“At the first pretrial conference, the court should set . . . a realistic trial date and should stick to [it], absent extraordinary circumstances.”**

With respect to when the trial date ought to be determined, majorities of both state and federal trial respondents believe the date should be set sooner than later. As shown in Figure 22a, two-thirds of state judges agreed that trial should be set “early in the case,” and a comparable number disagreed that the setting should wait until after discovery is completed. As shown in Figure 22b, the pattern is similar but stronger among federal judges, approximately three-quarters of whom support an early determination of the trial date.

Figure 22a  
n = 1374; 1370

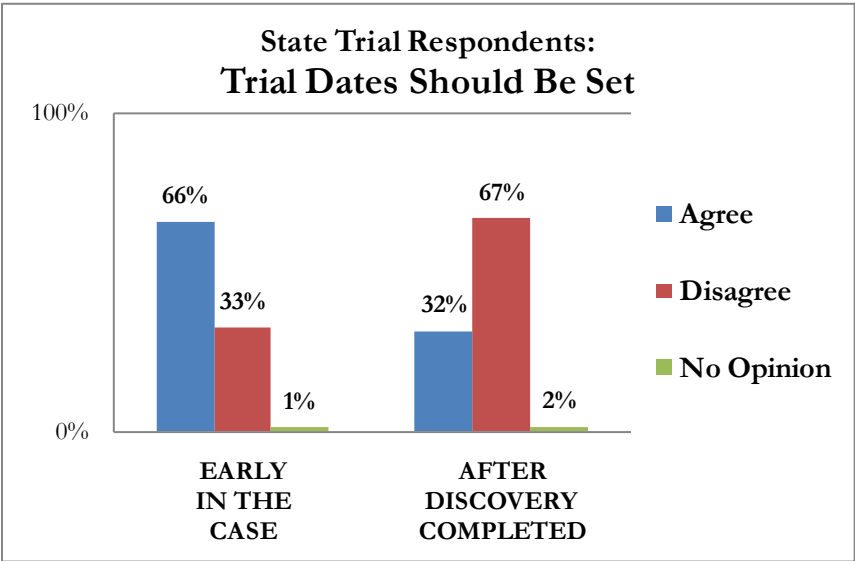
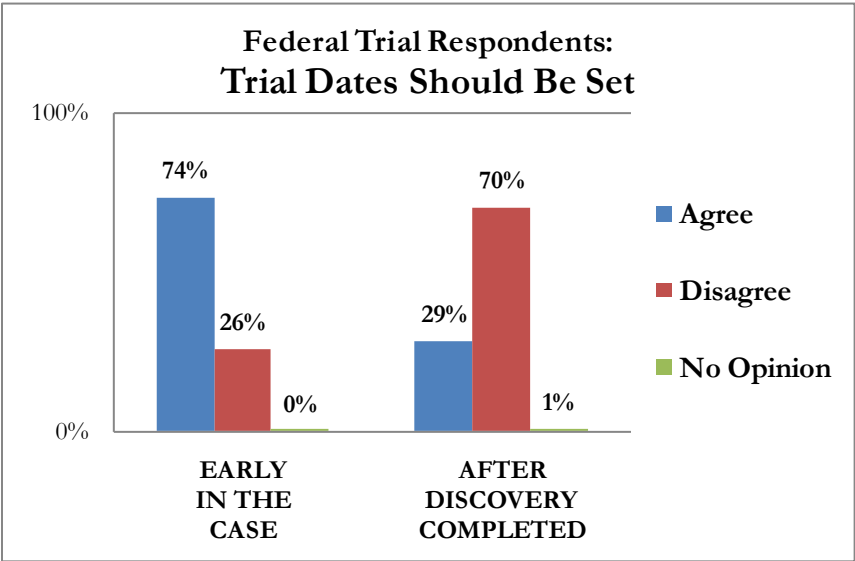
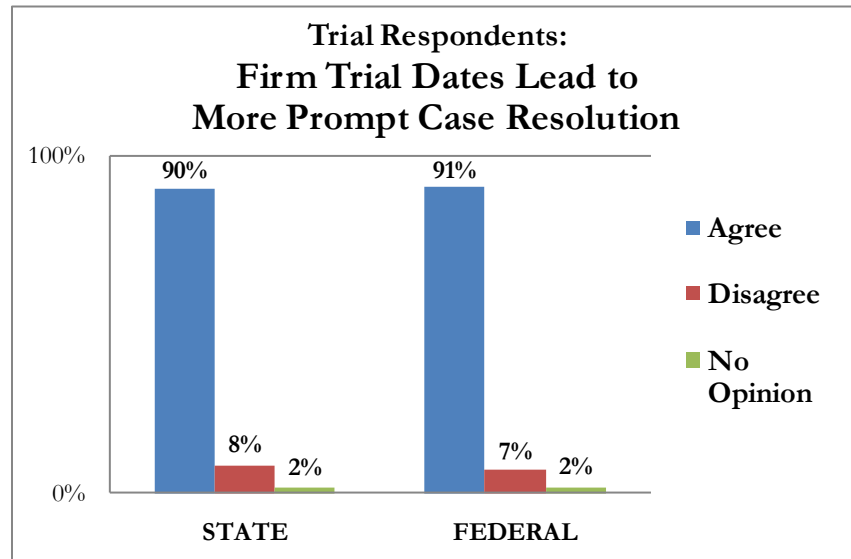


Figure 22b  
n = 288; 287



With respect to trial continuances, there is strong support for the proposition that maintaining the original trial date reduces delay. Nine out of ten trial respondents agreed that firm trial dates have the effect of a “more prompt resolution of a case.” See Figure 23.

Figure 23  
 $n = 1375; 288$



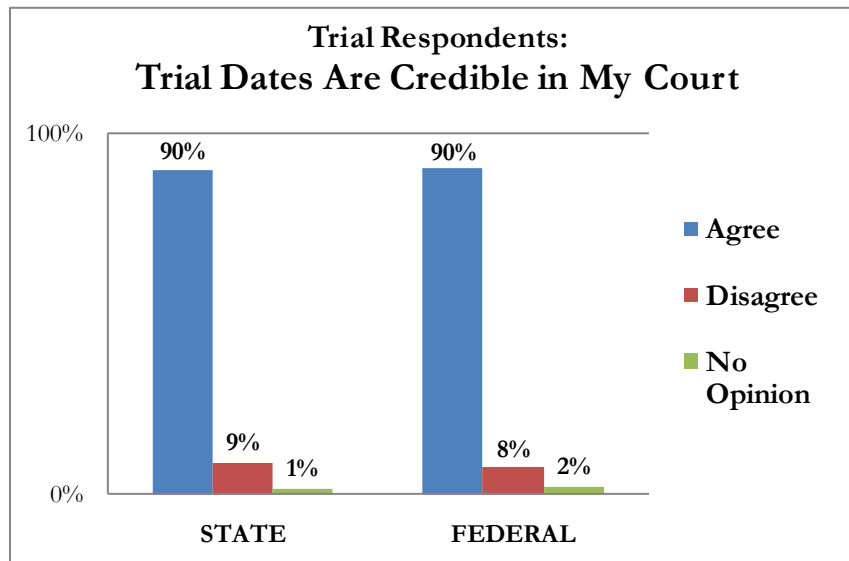
Moreover, with respect to their own practices, exactly 90 percent of all trial respondents believe that “[t]rial dates are credible in my court.” See Figure 24.

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Figure 24  
 n = 1370; 288

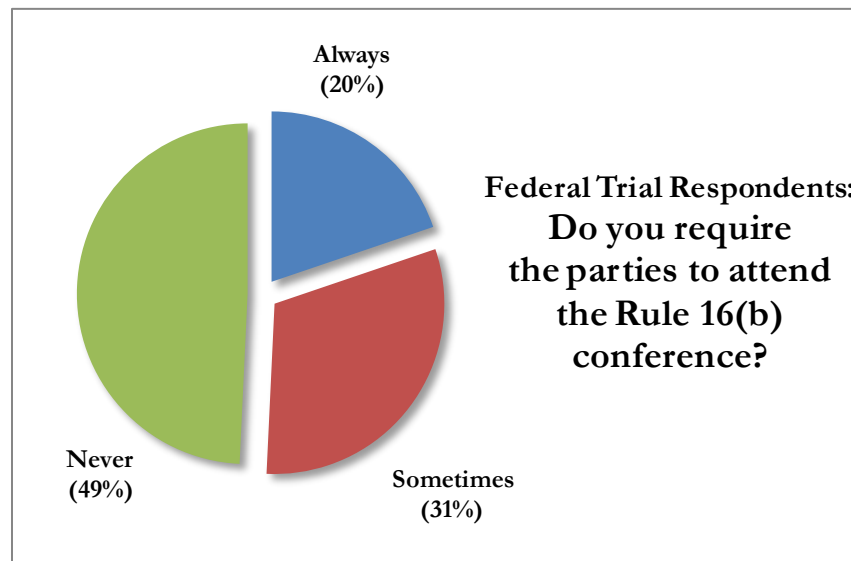


There is remarkable consistency between state and federal trial judges on all of the issues related to trial settings.

#### 4. Increased Involvement of the Parties

One theory for reducing delay generally is to keep the parties themselves informed and engaged on scheduling matters. With respect to federal Rule 16 scheduling conferences, nearly half of federal trial respondents “never” require the parties to attend, approximately one-third “sometimes” impose this requirement, and one in five “always” require the parties’ attendance. See Figure 25.

Figure 25  
 $n = 268$



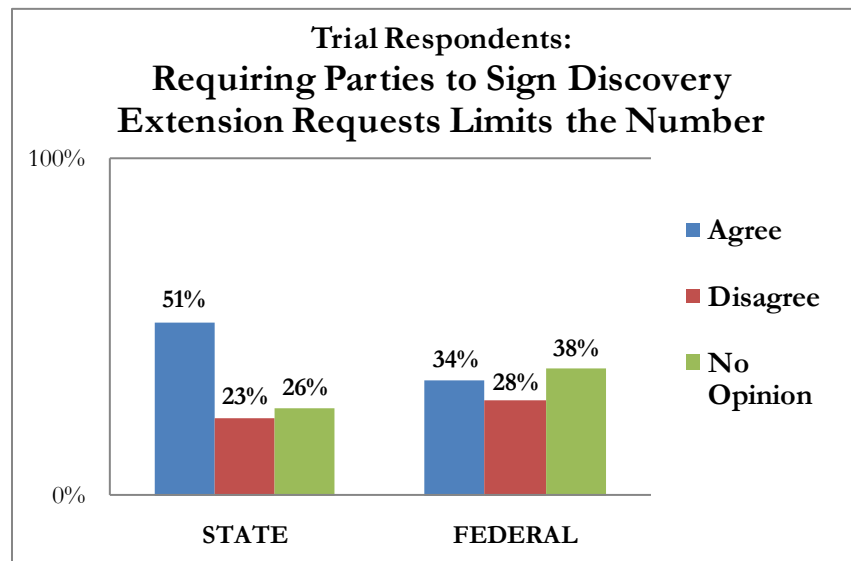
The survey asked whether “[r]equiring parties to sign all requests for extension of discovery periods limits the number of those requests.” As shown in Figure 26, there was not a strong consensus among trial respondents on this issue. Moreover, a significant portion (including a plurality of federal judges) indicated having “no opinion.” Nevertheless, a slim majority of state judges agreed that the policy has the effect of limiting requests to extend discovery.

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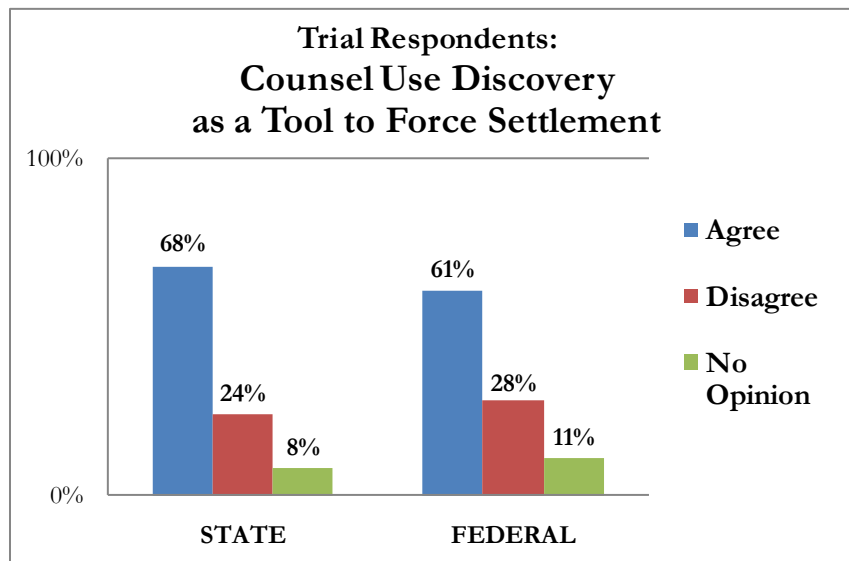
Figure 26  
 $n = 1377; 287$



E. *Streamlined Discovery*

Approximately two-thirds of state and federal trial respondents agree with the general proposition that “[c]ounsel use discovery as a tool to force settlement.” See Figure 27. This lends support to the idea that the current discovery process may prevent some parties from having their day in court.

Figure 27  
 n = 1385; 286



#### 1. Communication and Cooperation

**“Parties should be required to confer early and often about discovery . . . . ‘There is nothing inherent in [the adversary system] that precludes cooperation . . . to achieve orderly and cost effective discovery of the competing facts on which the system depends.’”<sup>28</sup>**

FRCP 26(f) requires parties to meet and confer for the purpose of discovery planning, prior to determination of the pretrial schedule. Over 80 percent of federal trial respondents reported enforcing this requirement “regularly,” while about one in ten respondents do so “on occasion” and about one in ten do so “almost never.” See Figure 28. Although the question did not specify the universe of cases to be considered (e.g., all cases or cases in which the parties do not meet and

28. See FINAL REPORT, *supra* note 1, at 21 (quoting *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 361 (D.Md. 2008)).

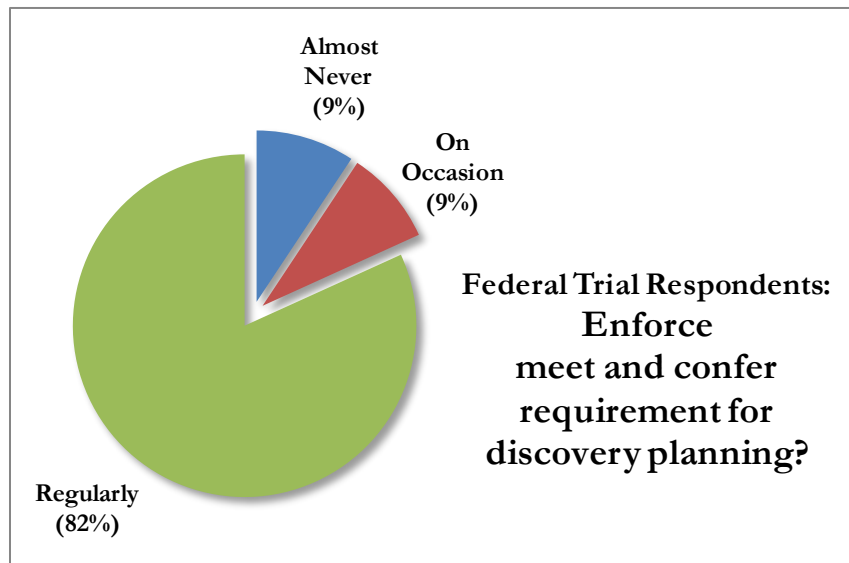
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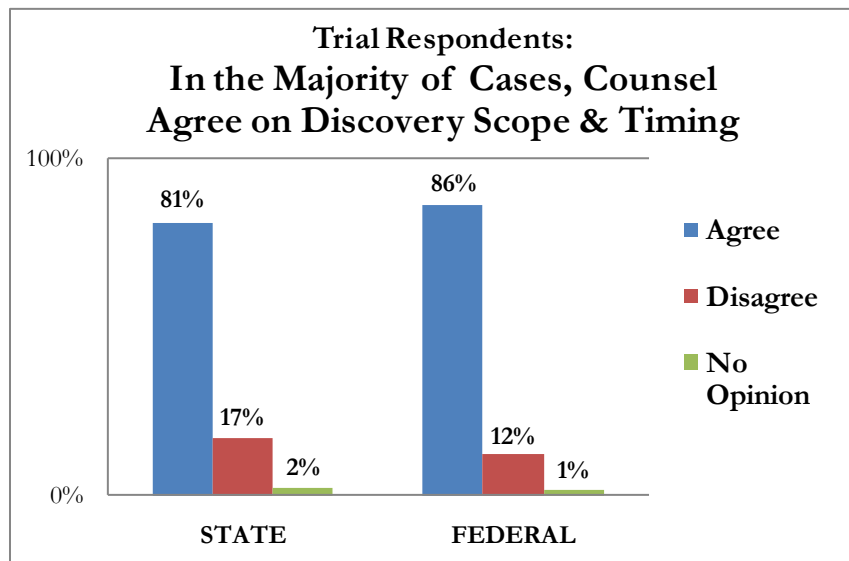
confer as required), this result does tend to support the proposition that federal judges consider the conference to be an important step in the process.

**Figure 28**  
 $n = 269$



Over 80 percent of state and federal trial respondents indicated that “counsel agree on the scope and timing of discovery” in the majority of cases. See Figure 29. Although it is not possible to gauge specific levels of agreement from this information, it can be said that more than four out of five respondents perceive disagreement between counsel on discovery scope and timing in only a minority of cases.

Figure 29  
 n = 1387; 288



## 2. Proportionality

**“Proportionality should be the most important principle applied to all discovery. . . . Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.”**

Proportionality encompasses the idea that discovery should be tailored to the circumstances and needs of a particular case, which might involve limitations beyond the provisions of the rules. The survey asked respondents the frequency with which they place such limitations on the number of depositions and the number of expert witnesses. While the questions did not specify the universe of cases to be considered (e.g., all cases or cases in which such limitations would be appropriate), the results do indicate that court-imposed limits are not a frequent occurrence.

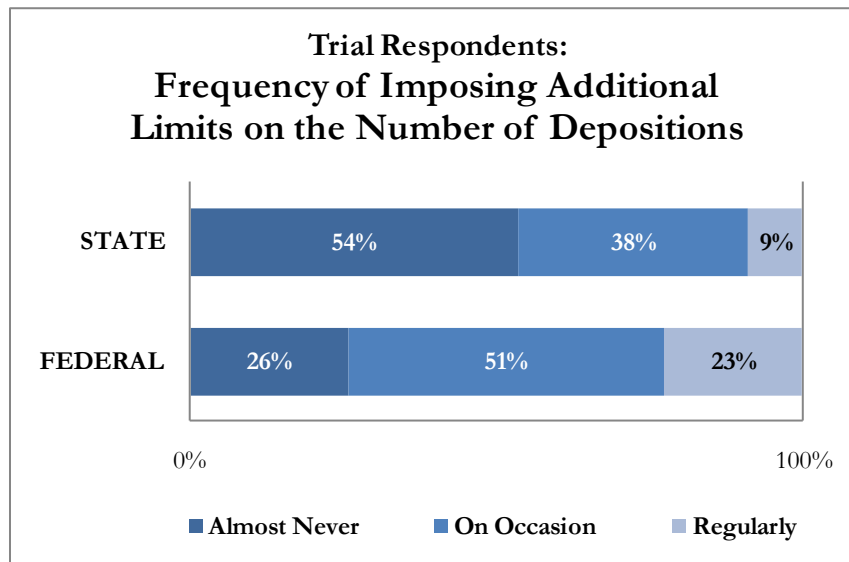
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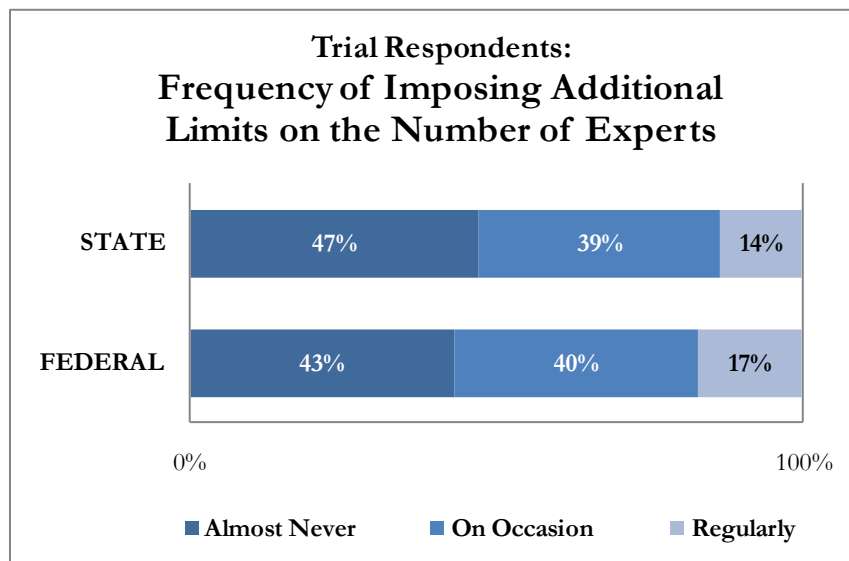
As shown in Figure 30, almost one-quarter of federal trial respondents indicated “regularly” imposing additional limits on the number of depositions, as compared to about 10 percent of state trial respondents. Over 75 percent of federal judges and over 90 percent of state judges limit depositions only “on occasion” at most.

**Figure 30**  
*n* = 1084; 265



With respect to imposing additional limits on the number of expert witnesses, the responses of federal and state trial respondents were similar, with a plurality reporting “almost never” doing so. See Figure 31.

**Figure 31**  
*n* = 1200; 267



It should be noted that the specific state rules providing for the number of depositions and expert witnesses, under which state respondents operate, are unknown from the information provided in the survey, and the number allowed may already be quite limited.<sup>29</sup> Accordingly, it is difficult to draw any conclusions from the survey results. Moreover, this survey does not answer any questions as to why judges generally adhere to the guidelines of their respective rules.

Federal Rule 26(b)(2)(C) mandates that the court limit the scope of discovery otherwise permitted under the rules upon a determination that the discovery sought is, *inter alia*, not proportionate to the dispute. Consistent with the above data, a majority of federal trial respondents reported that they “almost never” invoke this rule on their own initiative. Nevertheless, about 30 percent reported invoking the rule *sua sponte* at least “on occasion.” See Figure 32.

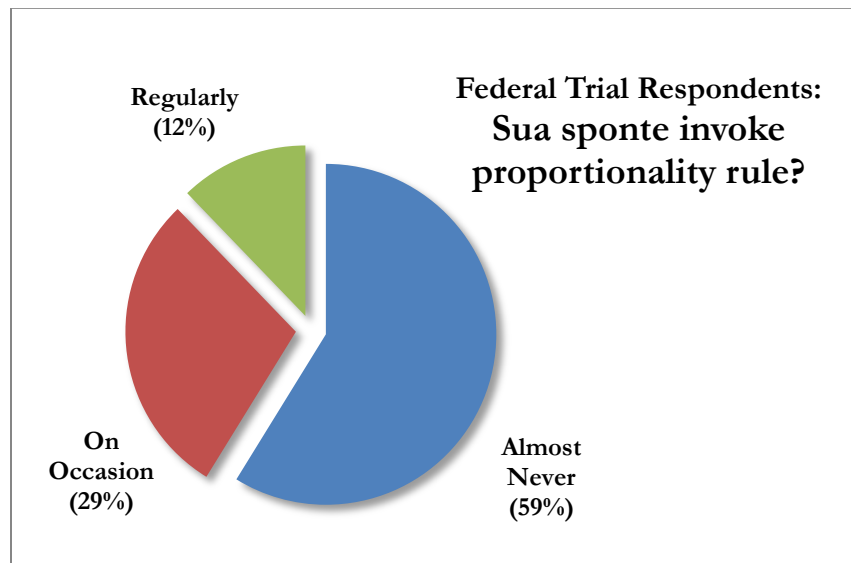
29. For example, Arizona’s rules limit the number of independent expert witnesses to one per side per issue. *See* ARIZ. R. CIV. P. 26(b)(4)(D).

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**Figure 32**  
*n* = 262



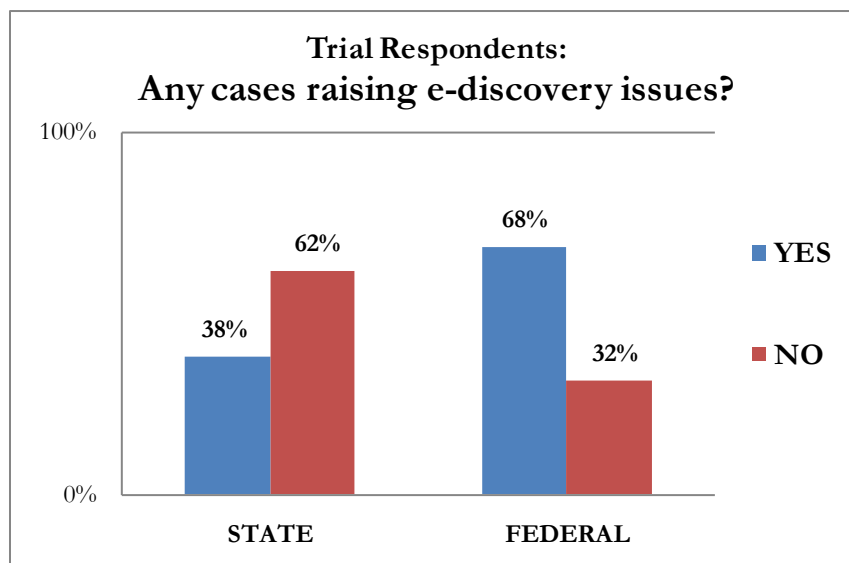
Again, these results are difficult to interpret due to the lack of a standard baseline (e.g., all cases, cases in which disputed discovery is disproportionate, or cases in which disputed discovery is disproportionate and the parties themselves fail to invoke the rule). Regardless, the data do support the idea that the court's invocation of Rule 26(b)(2)(C) is not frequent.

### 3. Addressing Electronic Discovery

A good portion of the Final Report relates to the growing presence of electronically stored information (“ESI”) in litigation and the accompanying challenges for discovery. With respect to this issue, initially, the survey asked whether respondents have had any cases raising e-discovery issues. As shown in Figure 33, the responses of state and federal respondents are effectively mirror images. About two-thirds of state trial judges reported not having an e-discovery case, while about two-thirds of federal judges reported having at least one such case. This question is demographic, and cannot be used to extrapolate levels of e-discovery in each court. Nevertheless, it does tend to support the perception that e-discovery is more prevalent in federal court than in

state court. In fact, it may be surprising that over 30 percent of federal trial respondents have not had any cases that raise e-discovery issues.

**Figure 33**  
*n* = 1361; 285



All of the results for the following three survey questions on e-discovery are limited to the portion of respondents who have had an e-discovery case (refer to Figure 33), as these respondents are most qualified to speak to the state of e-discovery.

**“E-discovery is a tool which, used properly, can assist with the just resolution of many disputes; however, used improperly, e-discovery can frustrate the cost-effective, speedy and just determination of almost every dispute.”<sup>30</sup>**

30. FINAL REPORT, *supra* note 1, at 15 (quoting Berkley Sells & Tajesh Adhihetty, *E-discovery: You Can't Always Get What You Want*, INT'L LITIG. NEWS (Int'l Bar Ass'n Legal Practice Div., U.K.), Sept. 2008, at 33, 35-36).

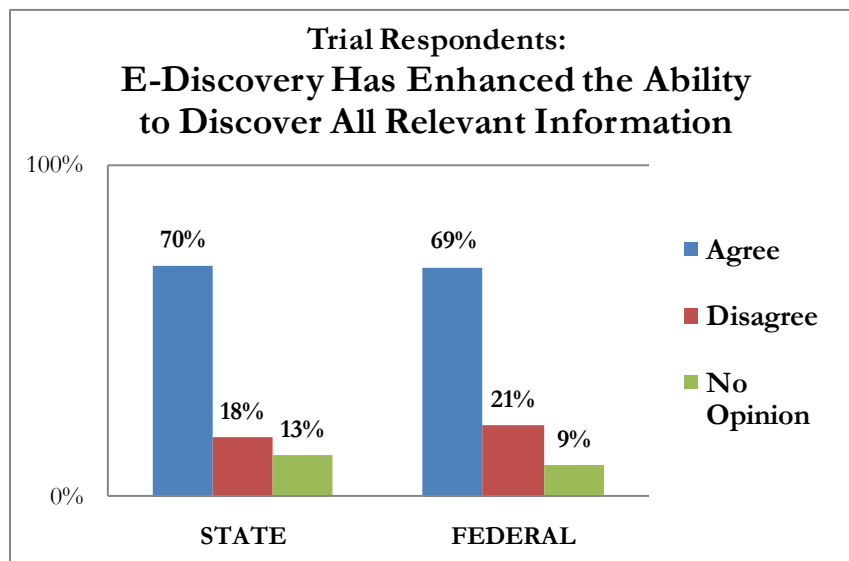
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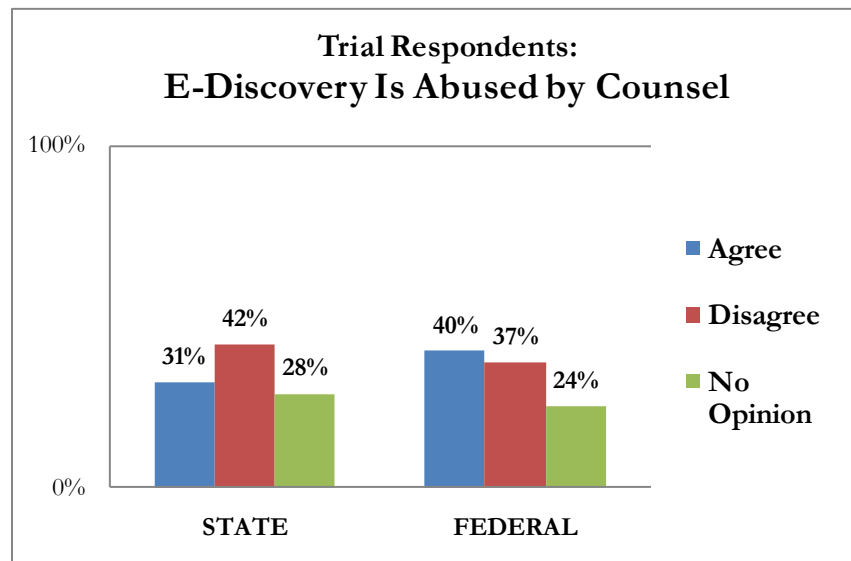
Trial respondents acknowledged that e-discovery has benefits for the truth-seeking process. Of those who have had an e-discovery case, about 70 percent of state and federal judges agreed that “[e]-discovery has enhanced the ability of counsel to discover all relevant information,” while only about one in five expressed disagreement with that statement. See Figure 34.

Figure 34  
n = 505; 192



The survey asked respondents who have had an e-discovery case whether “e-discovery is being abused by counsel.” It should be noted that the term “abuse” was not defined in the survey. Moreover, the question provided an agreement scale rather than a frequency scale, which may have made answering difficult for respondents who find that abuse occurs at a particular rate but not always or as a general matter. Given these ambiguities, it is not surprising that the responses of trial respondents split. A plurality of state judges disagreed that counsel are abusing e-discovery, although approximately 30 percent agreed. Federal judges exhibited the opposite response pattern, with a plurality agreeing and over 30 percent disagreeing. Approximately one-quarter of both groups indicated having no opinion, which could reflect either deficiencies in the question or a lack of knowledge concerning what is occurring outside of the courtroom. See Figure 35.

Figure 35  
 n = 505; 191



**“If the parties cannot agree, the court should make an order governing electronic discovery as soon as possible. . . . We call on courts to hold an initial conference promptly after a complaint is served, for the purpose of making an order . . .”**

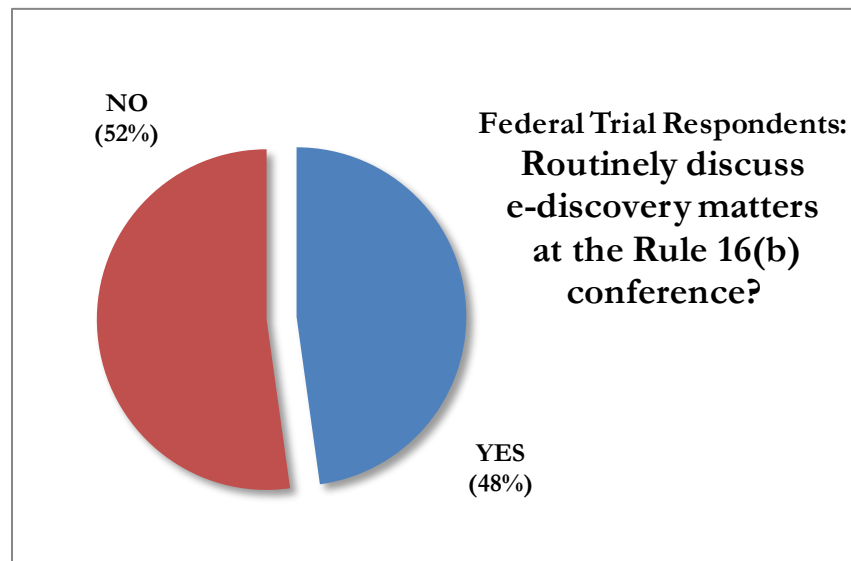
Although the survey did not address the idea of an early conference on e-discovery, it did ask whether federal trial respondents “routinely discuss e-discovery matters with counsel” at the Rule 16(b) pretrial conference. Over half of federal judges with e-discovery experience indicated that they do not make this conversation a routine aspect of scheduling conferences. See Figure 36.

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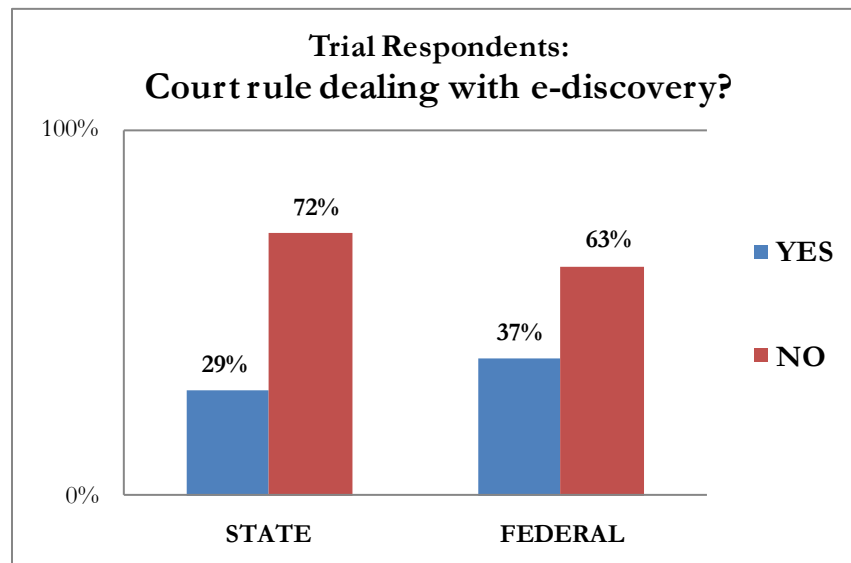
Figure 36  
 $n = 178$



**“Unfortunately, the rules as now written do not give courts any guidance about how to deal with electronic discovery.”**

A majority of trial respondents with e-discovery experience indicated that their court does not have a “rule dealing with e-discovery.” A slightly greater portion of federal judges reported having such a rule than state judges. See Figure 37. It should be emphasized that these numbers represent respondent experiences, and are not reflective of the actual percentage of courts having an e-discovery rule.

**Figure 37**  
 $n = 487; 179$



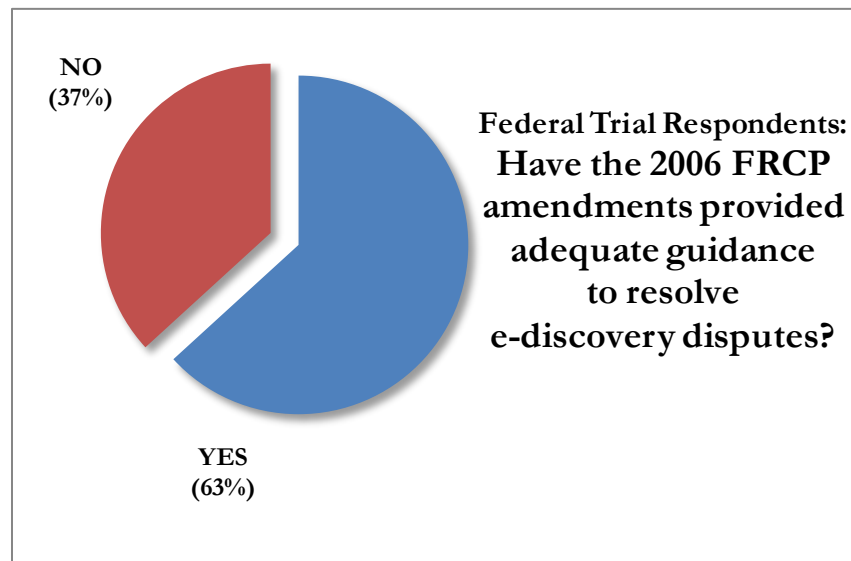
The survey asked whether the 2006 e-discovery amendments to the Federal Rules have provided respondents with “adequate guidance to resolve e-discovery disputes.” The same proportion of federal judges who reported that their court does not have an e-discovery rule—two out of three—indicated a belief that the amendments have provided adequate guidance for dispute resolution. See Figure 38.

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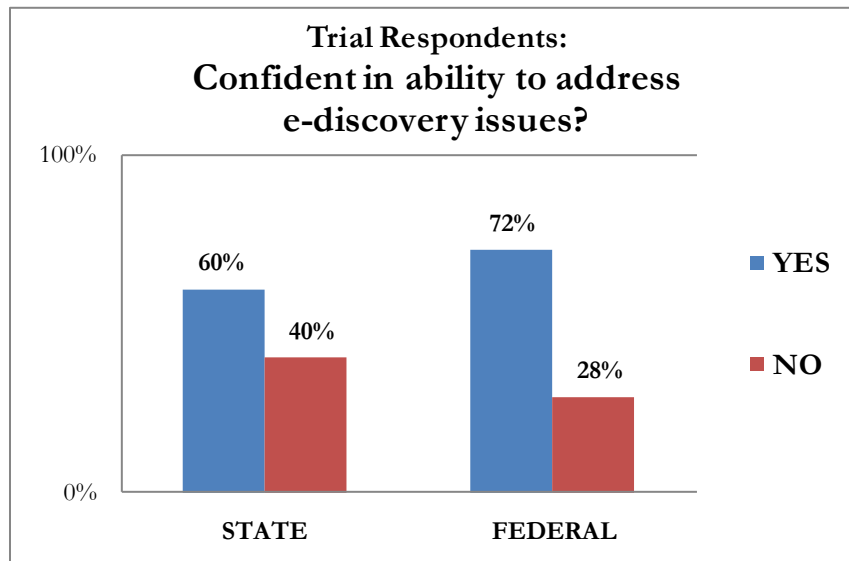
Figure 38  
 $n = 171$



**“At a minimum, courts making decisions about electronic discovery should fully understand the technical aspects of the issues they must decide, including the feasibility and expense involved in complying with orders relating to such discovery.”**

The survey asked trial respondents whether they are confident in their “ability to address e-discovery issues.” A majority of both state and federal judges answered in the affirmative. However, it is striking that exactly 40 percent of state judges and over one-quarter of federal judges who have had an e-discovery case indicated a lack of confidence in their ability to address e-discovery issues. See Figure 39.

Figure 39  
 n = 494; 181

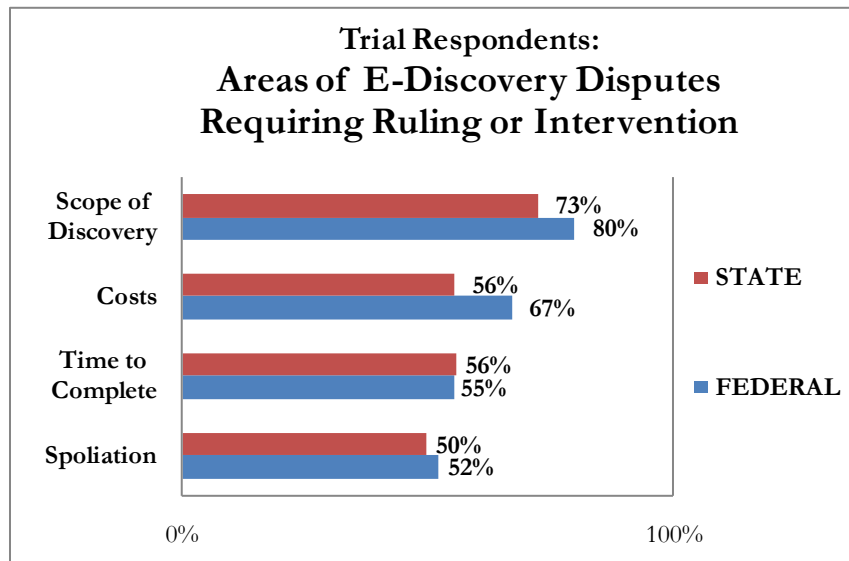


**“Electronic information is fundamentally different from other types of discovery in the following respects: it is everywhere, it is often hard to gain access to and it is typically and routinely erased.”**

The survey asked respondents to identify the areas of e-discovery that are giving rise to disputes requiring a ruling or other court intervention, and instructed the selection of all that apply. There were four specific response options, along with an “other” field. As shown in Figure 40, each response option was selected by at least half of state and federal trial judges with e-discovery experience. “Scope of discovery” was indicated by the highest portion of respondents as an area giving rise to disputes, while “spoliation” was indicated by the lowest portion.<sup>31</sup>

31. The Sedona Conference defines the term spoliation as “the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation, or audit. Courts differ in their interpretation of the level of intent required before sanctions may be warranted.” THE SEDONA CONFERENCE® WORKING GRP. ON ELEC. DOCUMENT RETENTION & PROD. (WG1) RFG + GRP., THE SEDONA CONFERENCE® GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION

Figure 40  
 n = 520; 195



Only 5 percent of state respondents and 8 percent of federal respondents selected “other.” The other area most commonly mentioned was privilege and confidentiality. Search terms, as well as the method and form of production, were also noted.

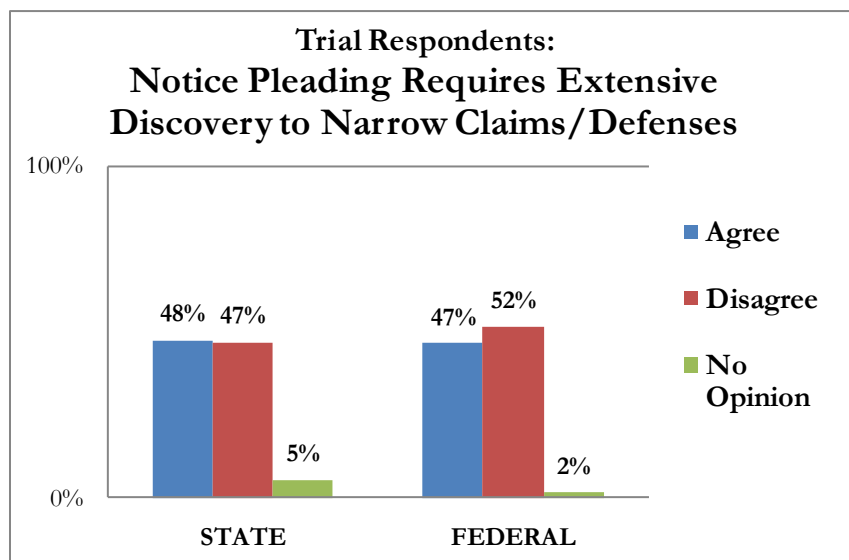
#### F. *Pleadings as a Tool to Focus Litigation*

**“Pleadings should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party’s claims or affirmative defenses. . . . One of the primary criticisms of notice pleading is that it leads to more discovery than is necessary to identify and prepare for a valid legal dispute.”**

MANAGEMENT 48 (3d ed. 2010), available at <http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf>.

As shown in Figure 41, there was no consensus among trial respondents on the general statement that “[n]otice pleading requires extensive discovery in order to narrow the claims and defenses.” This may reflect genuine disagreement, or it may be due to ambiguities in the question. For example, it is unclear whether federal respondents considered “notice pleading” before or after the Supreme Court’s most recent interpretation of Rule 8.<sup>32</sup> In addition, because the answer may be case-dependent, a frequency scale rather than an agreement scale might have been more appropriate for this question.

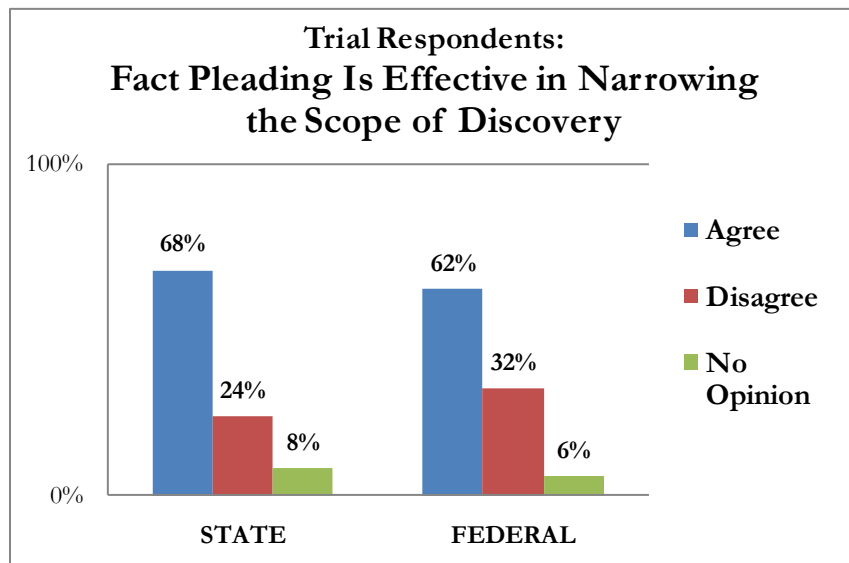
**Figure 41**  
*n* = 1386; 273



Nevertheless, majorities of both state and federal trial respondents do agree that “[f]act pleading is an effective tool to narrow the scope of discovery.” See Figure 42.

32. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Figure 42  
 n = 1379; 271



*G. Dispositive Motions as a Tool to Reduce Delay and Expense*

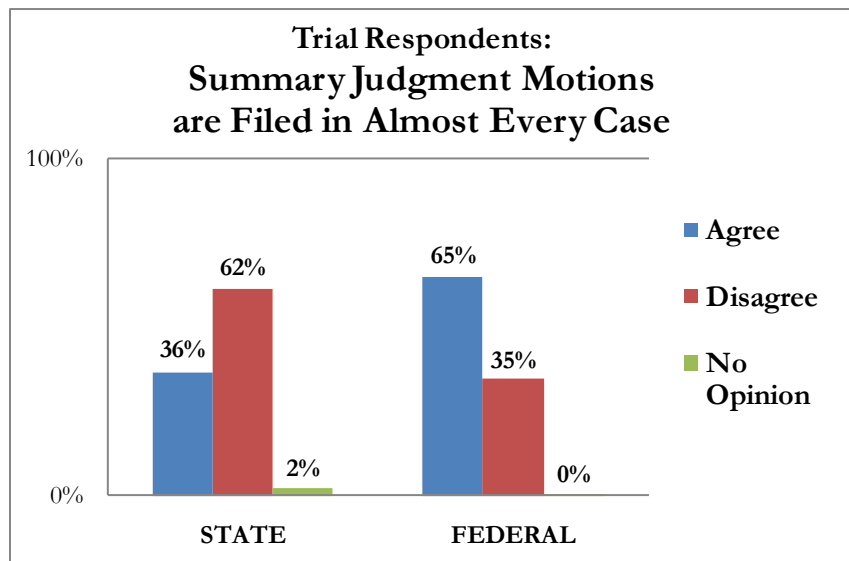
The Final Report did not recommend a specific Principle relating to dispositive motions. Due to the diversity of viewpoints related to this procedure, a consensus formed only around the purpose of such motions, set forth as follows.

**“Dispositive motions before trial identify and dispose of any issues that can be disposed of without unreasonable delay or expense before, or in lieu of, trial. . . . This subject deserves further careful consideration and discussion.”**

The survey sought to get a sense of the extent to which summary judgment is simply a routine aspect of the process. With respect to the statement that “[s]ummary judgment motions are filed in almost every case,” state and federal judges exhibited opposite response patterns. Approximately two out of three state trial judges disagreed, while the same portion of federal trial judges indicated agreement. See Figure 43.

This information tends to support the proposition that summary judgment practice is more prevalent in federal court than in state court.

**Figure 43**  
*n* = 1361; 288



**“The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.”<sup>33</sup>**

The survey asked respondents to assess the statement that “[s]ummary judgment motions delay the litigation process.” As shown in Figure 44, only one in three state trial respondents agreed, while about two-thirds disagreed. Federal trial respondents were evenly divided on the issue. In answering this question, it is unclear whether respondents considered the entire universe of civil cases or only those cases involving summary judgment motions. Nevertheless, these data appear to be consistent with the responses on the prevalence of summary judgment

33. See FINAL REPORT, *supra* note 1, at 23 (quoting MANUAL FOR COMPLEX LITIGATION (Fourth) § 11.34 (1994)) (stating that “[i]t is important to decide summary judgment motions promptly; deferring rulings on summary judgment motions until the final pretrial conference defeats their purpose of expediting the disposition of issues.”).

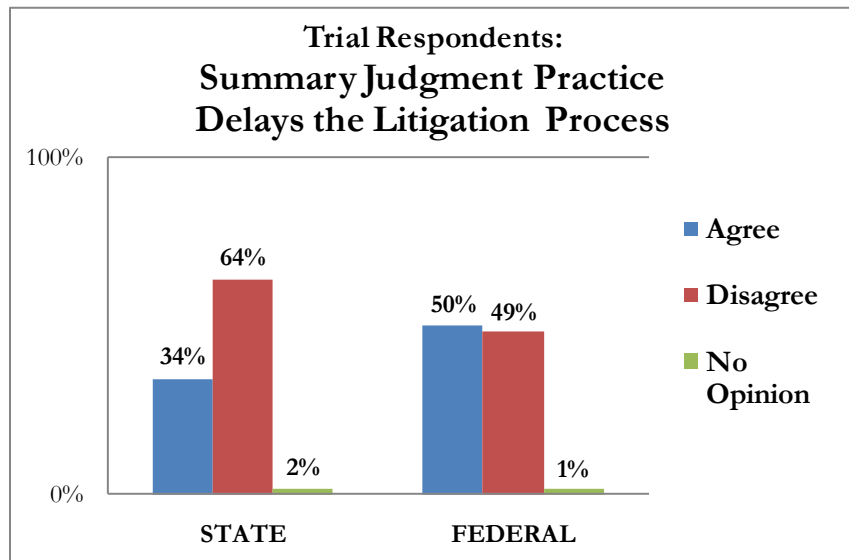
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practice in each court (Figure 43), as well as the rankings on rulings on pending motions as a significant cause of delay (Figure 16). More research is required before any definitive conclusions can be made.

Figure 44  
n = 1,364; 287



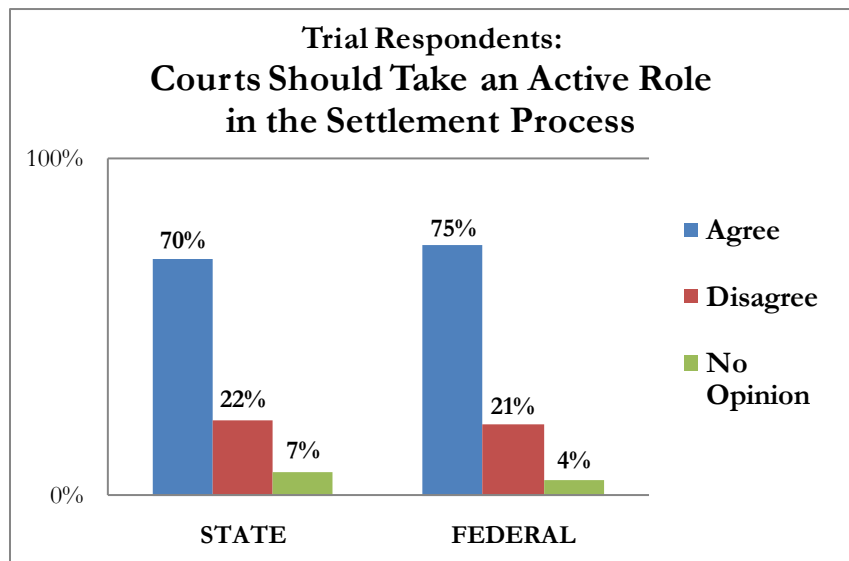
#### H. *The Court's Role in the Settlement Process*

**“Courts are encouraged to raise the possibility of mediation or other form of alternative dispute resolution early in appropriate cases. Courts should have the power to order it in appropriate cases at the appropriate time, unless all parties agree otherwise.”**

Nearly the same proportion of state and federal trial respondents—70 percent or more—agreed with the proposition that “[c]ourts should take an active role in the settlement process.” Approximately one in five judges disagreed. See Figure 45. There are a number of possible explanations for this pattern, such as acknowledgement of the reality that most cases do not go to trial or a

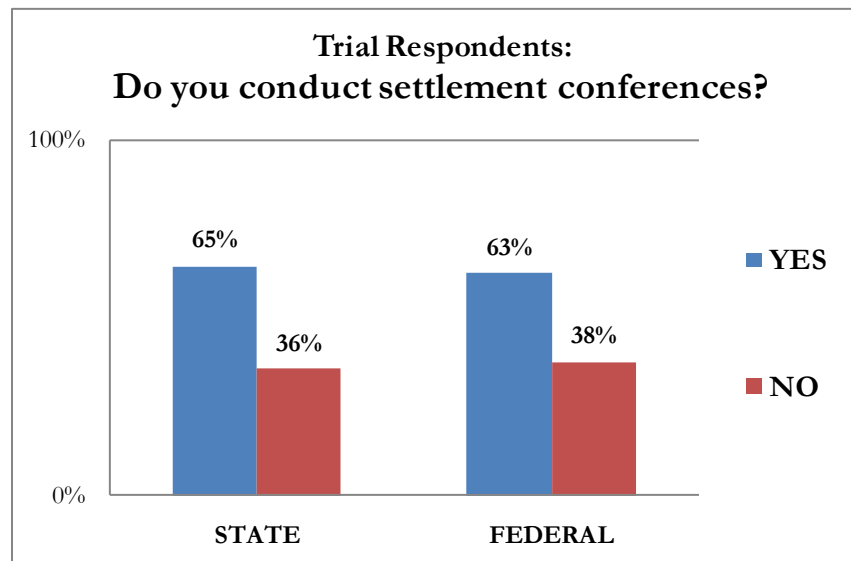
view that judges are in the business of dispute resolution. However, the reasons cannot be determined with the information from the survey.

**Figure 45**  
 $n = 1290; 280$



The settlement conference is one form of active judicial involvement in the settlement process. The survey asked respondents to report whether they conduct such conferences. Here, again, the responses of state and federal judges were nearly identical. As shown in Figure 46, nearly two-thirds answered affirmatively, while over one-third indicated that they do not conduct such conferences. Though interesting for demographic purposes, this information does not illuminate why any particular judge or group of judges does or does not engage in this activity. For example, in some instances, it may have to do with job structure rather than the perceived value of the process.

**Figure 46**  
*n* = 1337; 285



To a limited degree, the survey probed the perceived value of the settlement conference process, by asking respondents to evaluate the statement that “[s]ettlement conferences are a good use of my time and effort.” There was a marked difference in responses between judges who conduct settlement conferences and those who do not, as shown in Figures 47a and 47b. State and federal trial respondents who do conduct the conferences overwhelmingly find them to be beneficial, while those who do not were more likely to disagree or have no opinion on the issue. This is clearly an area that warrants more targeted research.

Figure 47a  
 $n = 856; 404$

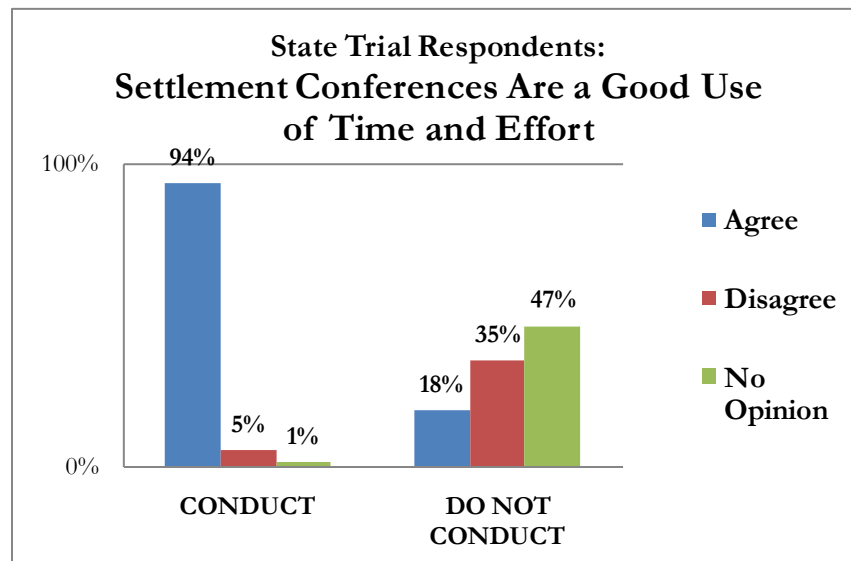
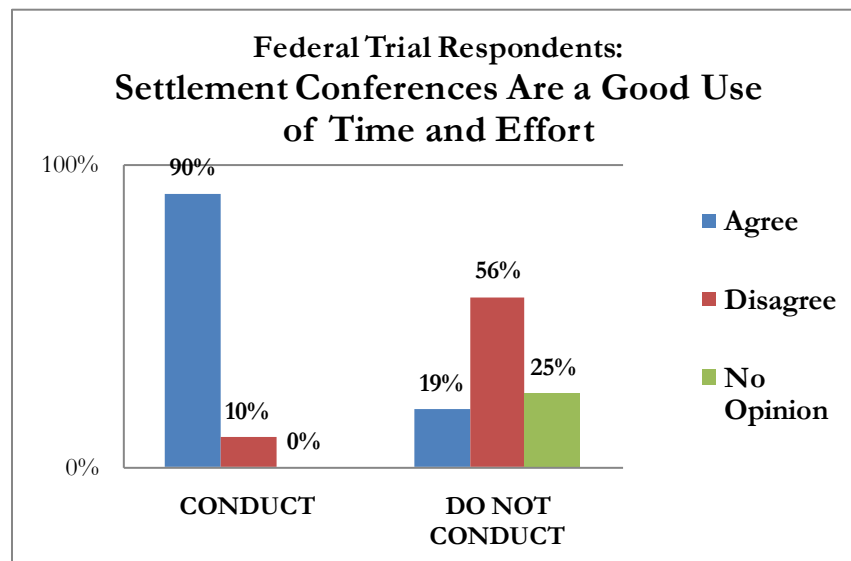


Figure 47b  
 $n = 176; 94$



### III. Conclusion

This survey provides some important feedback from judges concerning the direction set by IAALS and the ACTL Task Force following administration of the ACTL Fellows Survey, as it asked about many of the same issues that ultimately led to the recommendations in the Final Report. It provides a high-level view of aggregate judicial sentiment in the country, and should be viewed in context with other empirical studies on the civil justice system. Further research can provide data that differentiates between different types of judges, is more targeted to specific Principles, and can be analyzed so as to probe more deeply into the complex interplay of issues.

IAALS sincerely thanks all of the individuals and organizations who dedicated precious time, effort, and energy to make this study possible. We look forward to processing this information in conjunction with other efforts to understand and improve the American civil justice system.