EXPEDITED TRIAL PROGRAMS IN FEDERAL COURT: WHY WON'T ATTORNEYS GET ON THE FAST TRACK?

Steven S. Gensler[*] *& Jason A. Cantone*[**]

The number of civil jury trials held in federal court has dropped dramatically over the last 50 years. At the same time, the cost of litigating in federal court has increased to the point where it may no longer be feasible to litigate smaller cases. These are troubling trends. In response, some courts created expedited trial programs that allow the parties to bypass the costliest parts of the litigation process and skip ahead to a short trial. By taking the "fast track," the parties can afford to litigate in federal court. And since the case is fast-forwarded to trial, dwindling trial rates get a badly needed boost. It seemed like a perfect solution to both problems. But the results have been disappointing. These fast-track programs have been mostly ignored, and they aren't generating trials. Why have fast-track programs failed to catch on in federal court? To try to answer that question, we surveyed attorneys where one of these programs was available. We asked them why they did not use it and whether they would ever consider using it in the future. Our data reveal a complex network of concerns that influence plaintiffs' and defense attorneys differently in different cases. In any particular case, one of the parties is likely to have at least one concern holding it back from giving consent. And if any party says no—for any reason—the fast track becomes a closed road. Our findings have important implications for the future of fast-track programs in federal court, and especially

* Gene and Elaine Edwards Family Chair in Law, University of Oklahoma College of Law. The authors would like to thank the Honorable Timothy D. DeGiusti, Chief Judge of the United States District Court for the Western District of Oklahoma, and Carmelita Shinn, Clerk of Court, for their invaluable assistance with this study. The authors would also like to thank the participants at the April 2019 NYU Civil Jury Project Workshop for their comments on our research and preliminary findings.

** Adjunct Professor, Department of Criminology, Law, and Society, George Mason University. This work was completed outside of the scope of Dr. Cantone's current employment at the Federal Judicial Center and any opinions within are the authors' own and not necessarily representative of the Federal Judicial Center.

their role in stemming the decades-long decline in the civil jury trial rate.

TABLE OF CONTENTS

I. INTRODUCTION

If federal judges gave parties the option of bypassing the full litigation process and moving quickly to a one-day trial, would the parties take it? That's the premise being tested by the expedited trial programs that have been adopted in federal courts around the country. The results have been disappointing to say the least. The attorneys don't use these programs when they are offered, and they aren't generating any trials.

Often referred to as "fast-track" programs, expedited trial programs allow the parties to secure a guaranteed early trial date, usually within six months, if they are willing to accept limits on matters like discovery and motion practice and try the case in no more than a day or two.[1] Fast-track programs respond to the concern that some parties may be settling cases they would prefer to try because they cannot afford to run the full federal litigation gauntlet.[2] Thus, fast-track programs are intended to serve two related goals. As a general goal, fast-track programs attempt to honor Rule 1's ideals by providing a "just, speedy, and inexpensive"[3] path to resolving the many smaller and simpler cases on the federal civil docket. And with the civil jury trial rate at an all-time low, fast-track programs are also viewed as a way of generating more civil jury trials.[4]

1. *See* Richard McMillan Jr. & David B. Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431, 431–32 (1985) (calling for voluntary fast-track procedures as an extension of ADR-based litigant autonomy principles).
2. *See infra* Part II.
3. FED. R. CIV. P. 1.
4. *See infra* Subpart II.C.

Despite their theoretical appeal, fast-track programs have struggled every time and everywhere they have been tried in the federal courts.[5] Most of them have been used only a handful of times over the course of many years.[6] One program has been in effect for seven years and has never been used.[7] And even when federal court fast-track programs have been used, they have not achieved the goal of generating more civil jury trials. To the best of our knowledge, all of the federal fast-track programs combined have yielded just one jury trial and one bench trial.[8] In every other case where they were used, the proceedings terminated without a trial, usually by settlement.[9]

Why aren't attorneys using the fast-track programs available in federal court? To try to answer that question, we surveyed attorneys that appeared in a court where one of the fast-track programs has been offered. Judge Timothy D. DeGiusti, a district judge in the Western District of Oklahoma, has offered a fast-track program in his civil cases since 2011.[10] We sent a survey to attorneys who had appeared in his civil cases that closed during the three years between January 1, 2016, and December 31, 2018.[11] We asked them whether they had used the fast-track program and if not, why not.[12] We received 133 responses from attorneys appearing in 115 different cases.[13]

The responses paint a complex and often puzzling picture. The attorneys expressed strong support for the *idea* of fast-track programs and, in the abstract, said that they would be willing to use them. In our sample, 54% of plaintiffs' attorneys and 76% of defense attorneys said that they would consider using the fast-track program in a future case.[14] However, the attorneys' actual use of the fast-track program is telling. In the 118 cases for which we have clear data, the fast track was proposed only twice, and it was rejected by the other side both times.[15] In short, the reason cases were not finding their way onto

---

5. *See infra* Part III. Fast-track programs have had better (though still modest) success in state court where they have predominantly been offered for simple tort cases involving less than $50,000. *See* NAT'L CTR. FOR STATE CTS., SHORT, SUMMARY AND EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS 6–7 (2012) (canvassing development and usage of fast-track programs in the state courts).

6. *See infra* Part III.

7. *See infra* Subpart III.C ("In the seven years the Western District's Individualized Trial Program has been in place, no set of attorneys has requested that it be used.").

8. *See infra* Part III (noting that the District of Minnesota had one bench trial and the District of Nevada had one jury trial under the Fast-Track Program).

9. *See infra* Part III.

10. *See infra* Subpart III.G.

11. *See infra* Part IV.

12. *See infra* Subpart IV.B.

13. *See infra* Subpart IV.C.

14. *See infra* Part V.

15. *See infra* note 306.

the fast track was that virtually none of the attorneys were even proposing that it be used in their cases.

Our data yield three major additional findings. First, there is no single concern or reason that is keeping attorneys from using fast-track programs.[16] There are many reasons. And in most cases, the attorneys cite to multiple reasons as factors in their decision.[17] Second, other than lack of awareness (cited frequently by attorneys on both sides), plaintiffs' attorneys and defense attorneys cite to different reasons for not using fast-track programs.[18] Plaintiffs' attorneys were most troubled by the presumptive limits on trial time, discovery, and page length of dispositive motion briefs.[19] Defense attorneys were not nearly as concerned with those factors, but they were three times more likely than plaintiffs' attorneys to say they simply did not want to accelerate the trial date.[20] Third, the responses we received from plaintiffs' attorneys varied significantly based on basis for jurisdiction.[21] Plaintiffs' attorneys in federal question cases cited process-related issues like the presumptive limits on discovery and page length of dispositive motion briefs as why they resisted using the court's fast-track program, and they overwhelmingly said they were unlikely to ever agree to use it in the future.[22] In contrast, plaintiffs' attorneys in diversity cases were much more likely to cite lack of awareness as why they didn't use the program, and they overwhelmingly said they *would* consider using a fast-track program in future cases.[23]

These findings suggest a mixed bag for the prospects for increasing usage. For the federal question docket, there may be little that can be done. The attorneys who represent federal question plaintiffs are largely aware of the fast-track program but oppose discovery limits, briefing limits, and limits on trial time—core elements of the program.[24] Greater awareness is unlikely to overcome those concerns.[25] The diversity docket is more puzzling. In many respects, the responses of plaintiffs' attorneys in diversity cases resembled the responses of defense attorneys. For both groups, the most common reason listed was simple lack of awareness.[26] And unlike in federal question cases, plaintiffs' attorneys in diversity cases were not nearly as concerned with the core features of fast-track

16. *See infra* Subpart V.B.4.
17. *See infra* Subpart V.B.4.
18. *See infra* Subpart V.B.4.
19. *Infra* Subpart V.B.4.
20. *Infra* Subpart V.B.4.
21. *See infra* Subpart V.B.4.
22. *See infra* Figure 3.
23. *See infra* Subpart VI.A.1.
24. *See infra* Subpart V.B.4.c.
25. *See infra* Subpart VI.A.1.
26. *See infra* Figure 6.

programs like limits on discovery, briefing, and trial time.[27] Indeed, when asked whether they would consider using a fast-track program in a future case, attorneys for both plaintiffs and defendants in diversity cases responded "yes" 83% of the time.[28] That suggests that usage rates in diversity cases could be increased meaningfully with more education and awareness.[29]

Other data points, however, suggest tempering optimism about the effect of greater awareness. Several districts have promoted their fast-track programs aggressively without increasing usage.[30] Some districts even send automatic notices alerting parties about the existence of the program but still get few or no takers.[31] Perhaps most sobering is the experience of one judge who required the attorneys to certify that they had discussed the program with their clients and abandoned his program after getting only three takers in four years.[32] So, while it appears lack of awareness is a significant obstacle—and leads to a default "no" when both parties are unaware—there are reasons to be skeptical that increased awareness will yield more cases where both parties say "yes."[33]

This Article proceeds in five parts. We begin, in Part II, by discussing the role of fast-track programs in federal court. Specifically, we explore how the "vanishing trial" phenomenon and the need to tailor the litigation process to the needs of different cases combined to inspire judges to adopt fast-track programs, principally for the smaller cases in the federal civil docket that seem to get overwhelmed by the scope and cost of the regular federal litigation process. Part III profiles the fast-track programs that have been adopted and provides data on their usage. Part IV introduces our survey. It describes the survey instrument, sets out our methodology, and provides a profile of the cases in our data set and the attorneys who responded. Part V presents our findings. Part VI analyzes our findings and considers the implications of our findings for the future of fast-track programs in federal court.

II. THE ROLE OF FAST-TRACK PROGRAMS IN FEDERAL COURT

Fast-track programs are a mechanism courts have developed to provide the parties with a faster and less expensive pathway to trial.[34] As we use the term, a fast-track program is one in which the parties can secure an early trial date, usually within six months, if they are

27. *See infra* Subpart V.B.
28. *See infra* Subpart V.B.6.c.
29. *See infra* Subpart VI.A.
30. *See infra* Subpart VI.A.1.
31. *See infra* Subpart III.E.
32. *See infra* Subpart III.F.
33. *See infra* Subpart V.B.6.B.
34. *See* McMillan & Siegel, *supra* note 1, at 433 (calling for voluntary fast-track procedures as an extension of ADR-based litigant autonomy principles).

willing to accept limits on matters like discovery and motion practice and try the case in a day or two. While the details of fast-track programs can vary significantly, they share three defining features. First, they offer the parties a bargain—accept certain conditions and you can have an early trial date.[35] Second, they are voluntary and require the consent of all parties.[36] And third, they are designed to get cases to *trial* quickly.[37] In other words, the goal is not just to reduce cost and delay for its own sake, but to do so with the specific goal of providing parties with smaller cases a viable pathway to trial.

In this Part, we begin by exploring two trends in federal litigation that, together, inspired courts and judges to create their fast-track programs. The first trend is the rapidly declining percentage of civil cases that reach a trial.[38] The second trend is a growing concern that federal procedure is a "one size fits all" scheme that is too costly and complex for the smaller and simpler cases in the federal docket.[39] Fast-track programs lie at the intersection of these trends. When judges have asked attorneys why so few civil cases reach trial, an all too frequent answer has been that the parties can't afford to get to trial because the process of getting there costs too much and takes too long.[40] That presented a tantalizing possibility—could we get more trials by creating a special scheme that lets the parties bypass the pretrial gauntlet and skip quickly ahead to their day in court?

A. The Vanishing Civil Jury Trial

The civil jury trial is a foundational part of the American legal system. During the ratification debates, a key argument against the proposed new constitution was its lack of any provisions expressly preserving the rights of citizens to have civil disputes resolved by a jury.[41] During the colonial era, the colonists came to view the civil

35. *See* NAT'L CTR. FOR STATE CTS., *supra* note 5, at 83 ("This approach normally employs incentives for litigants, such as the promise of an early trial date, priority placement on the court's trial calendar, or at least a firm trial date, in exchange for restrictions on the scope and the length of time to complete discovery.").

36. *See infra* Subpart III.B.

37. *See infra* Subpart VI.A.2.

38. *See* Patricia Lee Refo, *The Vanishing Trial*, 30 LITIG. 1, 1–2 (2004).

39. *See* Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 461 (2014) ("The one-size-fits-all approach to process in the civil litigation system is increasingly suspect in a society far more complex, specialized, and larger than ever before.").

40. *See infra* Subpart III.F.

41. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966) (describing the lack of a provision for civil juries as "a prominent part" of the Anti-Federalist argument against ratification); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 598 (1993) ("The omission of the civil jury

jury as a key protection against judicial abuse and oppression by English judges who reported to the Crown.[42] For a society that saw civil juries as instrumental to its liberty, the absence of clear jury rights in the proposed constitution alarmed many who feared that the government and elites (especially business creditors) might seek preferential treatment in the proposed federal courts.[43] That omission was quickly addressed with the adoption of the Seventh Amendment, preserving in federal court the rights of civil juries as they had existed at common law.[44]

Civil juries continue to play a key role constraining the power of the judiciary. Judges have, to be sure, acquired considerable power over their civil cases. Today, judges clearly have final authority to say what outcomes are permissible under the law.[45] But within those boundaries, juries decide the underlying facts and apply the governing legal standards.[46] What actually happened? Did the defendant act reasonably? Is the plaintiff also to blame? Those types of matters remain the province of civil juries. Thus, in modern times, the civil jury has evolved to become a forum for citizens to make more finely tuned policy judgments about which behaviors will or will not be tolerated in society.[47] As Professor Landsman put it, the civil jury "is the entity to which society has assigned a host of vital tasks, including the assessment of business morality, the protection of the consuming public, and the definition of a number of constitutional rights."[48]

The civil jury is also the forum in which lay citizens participate most directly in governance.[49] The people participate in government

---

triggered a firestorm of protest."); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 662 (1973) ("Even before the Philadelphia Convention adjourned, plans were being laid to attack the Constitution that was eventually proposed because of the absence of any guarantee of civil jury trial in the new federal courts.").

42. *See* Landsman, *supra* note 41, at 595–96.

43. *See id.* at 599–600; Wolfram, *supra* note 41, at 670–72.

44. U.S. CONST. amend. VII.

45. *See* FED. R. CIV. P. 50(a) (authorizing court to enter judgment as a matter of law); FED. R. CIV. P. 56 (authorizing court to enter summary judgment when undisputed facts show moving party is entitled to judgment as a matter of law).

46. *See* 2 STEVEN S. GENSLER & LUMEN N. MULLIGAN, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 23 (2020) (discussing roles of court and jury in context of motions for judgment as a matter of law).

47. *See* Landsman, *supra* note 41, at 581.

48. *Id.*

49. *See* Refo, *supra* note 38, at 58 ("The jury trial—with all of its faults—is democracy and self-governance in action. Beyond the passive act of voting, jury service may be the only opportunity most citizens have to participate in any aspect of government.") (statement by Ms. Refo, Chair of the ABA Section of Litigation, introducing the Section's "Vanishing Trial Project"); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK L. REV. 67, 69 (2006) ("The most stunning and successful experiment in direct popular sovereignty in all history is the American jury.").

mostly through their elected representatives.[50] When people serve on a civil jury, however, they dispense justice by directly applying the norms that society has set for itself.[51] It is the one forum where ordinary citizens can directly define the boundaries of right and wrong. It is the forum where ordinary citizens can directly see the law in action. For that reason, it is often said that serving on a jury is the best civics lesson a member of the public can get.[52]

In short, the civil jury has long been and remains a key part of our democracy. And yet the civil jury has been vanishing before our eyes.[53] As recently as 1982, over 6% of civil cases filed in federal court still terminated in a trial.[54] By 2001, the civil trial rate in federal court had dropped to 2%, with just 1.3% of those being jury trials.[55] According to the Administrative Office's official statistics, the civil trial rate dropped to 0.7% in 2019, with a civil jury-trial rate of just 0.5%.[56] As Professor Langbein put it, "we have gone from a world in which trials, typically jury trials, were routine, to a world in which trials have become 'vanishingly rare.'"[57]

Can the trend be stopped, or even reversed? In 2004, the American Bar Association Section of Litigation undertook a major project—The Vanishing Trial Project—to determine whether trials

---

50. *See* Benjamin Elisha Sawe, *What is a Representative Democracy?*, WORLDATLAS (Sept. 18, 2017), https://www.worldatlas.com/what-is-a-representative-democracy.html.

51. *See* Landsman, *supra* note 41, at 581.

52. Alexis de Tocqueville went so far as to describe the civil jury as a type of free "public school" in self-governance that allowed ordinary citizens to become "practically acquainted with the laws . . . ." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 364–65 (Francis Bowen ed., Henry Reeve trans., 2017); *see also Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1439 (1997) ("Another dimension to the instrumental democratic value of the civil jury is its function as an ad hoc school of government for citizens.").

53. For scholarship chronicling the decline in the civil jury trial rate during the past 80 years, see Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2132 (2018); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460–65 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1845 (2014).

54. *See* Langbein, *supra* note 53, at 524.

55. *See Table C-4—U.S. District Courts–Civil Statistical Tables for the Federal Judiciary (December 31, 2001)*, U.S. CTS., https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2001/12/31 (last visited Sept.13, 2020).

56. *See Table C-4—U.S. District Courts–Civil Statistical Tables for the Federal Judiciary (December 31, 2019)*, U.S. CTS., https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2019/12/31 (last visited Sept. 13, 2020) [hereinafter *Civil Statistical Tables for the Federal Judiciary (December 31, 2019)*].

57. Langbein, *supra* note 53, at 524.

were really declining and whether we should care.[58] The project concluded that the civil trial rate was indeed rapidly declining, and the Chair of the Section of Litigation, Patricia Refo, opined that "[t]he vanishing trial may be the most important issue facing our civil justice system today."[59] Since then, however, the civil trial rate in federal court has continued to decline, dropping again by more than a half (from 1.7% to 0.7%).[60] Leaders from the bench[61] and bar[62] continue to sound the alarm and search for ways to boost the number of civil jury trials. But as much as we mourn the decline in civil trials,[63] the numbers keep dropping with no end in sight.[64] And the search for something—anything—that can get more cases to trial continues.

B. Different Processes for Different Cases?

By and large, the same Federal Rules of Civil Procedure apply in all federal civil cases.[65] They are trans-substantive, meaning the

58. *See* Refo, *supra* note 38, at 1.

59. *Id.* at 58.

60. *See Table C-4—U.S. District Courts–Civil Statistical Tables for The Federal Judiciary (March 31, 2004)*, U.S. CTS., https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2004/03/31 (last visited Sept. 13, 2020); *Civil Statistical Tables for the Federal Judiciary (December 31, 2019)*, *supra* note 56.

61. *See* Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge's Lament Over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 111 (2010) (listing ways to bring back civil trials); Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 762 (2010) ("The present state of affairs makes plain that the federal district courts are not on the correct path. Returning to a trial model would be a significant step toward fulfilling the traditional expectations for the federal courts."); Young, *supra* note 49, at 89 (listing suggestions).

62. *See, e.g.*, Stephen D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 REV. LITIG. 431, 435 (2013) (discussing actions trial lawyers can take to revitalize jury trial practice). In 2015, Stephen Susman, founding attorney of Susman & Godfrey, founded the Civil Jury Project at NYU School of Law, a project dedicated to reinvigorating the civil jury trial in both state and federal courts. *See Directors*, CIV. JURY PROJECT, https://civiljuryproject.law.nyu.edu/about/directors/ (last visited Sept. 13, 2020).

63. *See* Engstrom, *supra* note 53, at 2132 ("So, trials are disappearing. That fact is as disturbing as it is consequential, and it has captured our collective attention, as we 'mourn' and 'lament' the civil trials' demise.").

64. Because we are focused on federal court fast-track programs, we have cited statistics from the federal courts. The decline in civil jury trials in state court has been just as pronounced, if not worse. *See id.* at 2131–32 (reporting state civil jury trial statistics).

65. FED. R. CIV. P. 1; FED. R. CIV. P. 81. There are some exceptions. For example, Rule 23 applies only to class actions and Rule 71.1 applies only to condemnation actions. *See, e.g.*, FED. R. CIV. P. 23; FED. R. CIV. P. 71.1. Also, certain categories of cases are exempted from the Rule 26(a) required disclosures and the Rule 26(f) discovery planning conference. *See, e.g.*, FED. R. CIV. P.

same rules apply to all of the different types of substantive claims that can be litigated in federal court, from diversity tort claims to federal civil rights claims.[66] And they are uniform, meaning that the same rules apply whether the case is big or small, complex or simple.[67]

Having a single set of rules for all cases has many benefits.[68] But it is certainly true that different cases have different procedural needs. Thus, a common criticism of federal civil procedure is that it is a "one size fits all" scheme.[69] One of the most prevalent criticisms is that modern federal procedure has been distorted by the adoption of procedures designed to meet the needs of the most complex cases on the federal docket.[70] In other words, the concern is that the federal

---

26(a)(1)(B) (exempting, for example, actions for review of an administrative record from initial disclosures). These exceptions are notable precisely because they are exceptions to an otherwise very uniform scheme.

66. *See* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376 (2010) (defining trans-substantivity).

67. *See id.* at 377 ("A procedural system is also uniform when the same rules apply regardless of the size or complexity of a case."). The Federal Rules of Civil Procedure are also uniform in the sense that they apply in all of the federal courts across the country. *See id.* at 376.

68. *See* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 704 (2010) (noting that trans-substantivity allows good practices developed in one setting to migrate to others and avoids the politics that substance-specific rules would introduce into the rulemaking process); *see also* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074–75 (1989); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244–47 (1989); Marcus, *supra* note 66, at 416 (defending trans-substantivity as a principle of allocating power between courts and legislatures); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 778–79 (1993).

69. *See* Malveaux, *supra* note 39, at 461 ("The one-size-fits-all approach to process in the civil litigation system is increasingly suspect in a society far more complex, specialized, and larger than ever before."); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 377–78 (2010); *see also* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON PROGRESS AND PROMISE 4 (2015) ("The 'one size fits all' approach of the current federal and most state rules should be discouraged."); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM, CIVIL CASEFLOW MANAGEMENT GUIDELINES 6 (2009) ("[T]he 'one size fits all' approach is not the most effective approach for all types of cases.").

70. *See, e.g.*, Brooke Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1010, 1041–42 (2016) (identifying the 2015 proportionality amendment as an example of the rulemakers needlessly amending the general rules in their "zeal to do something about high discovery costs in complex cases"); Alexander A. Reinert, *The Narrative of Costs, the Cost of Narrative*, 40 CARDOZO L. REV. 121, 128 (2018) ("The extreme cases drive the narrative and prompt reforms, and the

courts are currently built to handle "Cadillac" cases, not "Fords" or "Chevys."[71]

Can anything be done to align procedure with the needs of individual cases? There is actually a wide array of options to achieve that goal. Some of those options already exist within the current rules scheme. Others would require reform at the scheme level.

The first source of tailoring procedure to the needs of the case is often overlooked—it is the parties themselves. In practice, federal procedure is not nearly as monolithic as the "one size fits all" critique suggests. Much of what happens during the federal pretrial process results not from any mandate in the rules but from choices made by the parties. For example, nothing in the rules requires any party to take any discovery or file any dispositive motion.[72] In that sense, it may be more accurate to view federal procedure as supplying a uniform set of options; what the parties do with those options is up to them.[73] The parties always have the ability to tailor the procedure in any case to the needs of that case by how they choose to litigate. No rule demands that the parties litigate their "Ford" and "Chevy" cases as "Cadillac" cases.

The existing scheme contains a second and more visible source of tailoring procedure—the judge. The Federal Rules of Civil Procedure vest judges with vast power to manage the litigation process.[74] Indeed, the existing scheme *relies* on judicial case management.[75] The 2015 amendments to the civil rules doubled down on the judicial case-management model, a point emphasized by Chief Justice Roberts in his 2015 Year-End Report.[76] How active the judge should

---

impact of the reforms will be felt most in the cases in which there are minimal discovery costs."); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547 (1986) ("In our efforts to curb abuses and to police adversarial excesses and adjudicatory weakness in the 'Big Case,' we must be careful not to impose inappropriate burdens on the so-called 'ordinary case.'"); Subrin & Main, *supra* note 53, at 1850–51 (criticizing discovery reforms since the 1980s as being driven by problems associated with "mega cases" and as potentially increasing costs in ordinary cases).

71. *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 563 (2009) ("The Cadillac process they enshrine helps to drive out of federal court those who can afford only a Ford.").

72. With respect to discovery, the rules require only that the parties make specified initial disclosures and confer to prepare a discovery planning report. *See* FED. R. CIV. P. 26(a), (f). The rules do not require the parties to engage in any dispositive motion practice whatsoever.

73. *See* Gensler, *supra* note 68, at 699–700.

74. *See id.* at 677–83 (describing case-management amendments from 1983 through 2006).

75. *See id.* at 699 (explaining why the current rules scheme "requires active and meaningful case management").

76. *See* JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10 (2015), https://www.supremecourt.gov/publicinfo/year-end/2015 year-endreport.pdf ("Judges must be willing to take on a stewardship role,

be, and how much judicial tailoring is needed, are matters left to the judge's discretion based on the needs of the individual case.[77] In some cases, the court may conclude that little or no guidance or intervention is needed. In other cases, the court may get involved early and often.

Some believe that the tailoring process should be done at a more general, scheme-based level. It would be possible, for example, to develop different sets of rules for different types of cases.[78] The Prison Litigation Reform Act ("PLRA")[79] and the Private Securities Litigation Reform Act of 1995 ("PSLRA")[80] are two prominent examples of Congress enacting procedural legislation for specific types of cases. Recently, some courts have experimented with using special protocols in specific types of cases. For example, the Federal Judicial Center recently reported on the use of standard discovery protocols in lawsuits alleging adverse employment action.[81]

It would also be possible to develop different sets of rules for cases of different sizes.[82] In the early 2000s, the Advisory Committee on Civil Rules drafted a set of "Simplified Rules" to govern smaller and simpler cases, though the proposal was not pursued beyond the early

---

managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation.").

77. *See* FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 189 (6th ed. 2013) (discussing judge's discretion to determine the level and type of case management needed in any particular case).

78. *See* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716–17 (1988) (urging development of special rules that would apply in particular substantive areas, along with the regular rules to the extent they were not displaced); J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1771–73 (2012) (urging development of special rules for particular substantive areas); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 45–56 (1994).

79. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66.

80. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

81. *See* JASON A. CANTONE & EMERY G. LEE III, INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION: REPORT ON A PILOT PROJECT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE 7–9 (2018). For a discussion of the potential benefits of these types of protocols, see Steven S. Gensler & Lee H. Rosenthal, *Four Years After Duke: Where Do We Stand on Calibrating the Pretrial Process?*, 18 LEWIS & CLARK L. REV. 643, 654–55 (2014).

82. *See* Glover, *supra* note 78, at 1771 (urging development of simplified procedures for less complex cases); Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57, 97–98 (2018) ("[C]ertain simple or routine cases could be fast-tracked, allowing for expeditious merits adjudication."); Subrin, *supra* note 69, at 398–405 (strongly urging the creation of a "simple track" for smaller cases).

developmental stage.[83] In a related vein, former Advisory Committee member Judge William Schwarzer once proposed the idea of a federal "Small Claims" process to provide a streamlined litigation process for pro se litigants and represented parties with smaller claims.[84] At the other end of the spectrum, courts might develop special rules for especially complex cases.[85]

At a more comprehensive level, courts could adopt schemes that allocate cases to different litigation tracks based on various characteristics, including size and complexity. The federal courts have long expressed interest in differentiated case-management schemes, more commonly known as case-tracking schemes.[86] While the details of case-tracking schemes vary, they often create separate tracks for "simple" cases, "standard" cases, and "complex" cases.[87] The type and timing of case-management events are then presumptively determined by the track to which the case is assigned.[88] The concept of case-tracking got a major boost in 1990 when Congress enacted the Civil Justice Reform Act of 1990 ("CJRA").[89] The CJRA required every district to assess the state of the district's docket—with an eye on "identify[ing] the principal causes of cost and delay in civil litigation"[90]—and then implement a

83. *See* Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1796 (2002). The project "was put aside for lack of support." JUD. CONF. ADVISORY COMM. ON CIV. RULES & COMM. ON RULES OF PRACTICE & PROC., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 9 (2010), https://www.uscourts.gov/sites/default/files/report_to_the_chief_justice.pdf [hereinafter REPORT ON 2010 CONFERENCE ON CIVIL LITIGATION].

84. *See* William W. Schwarzer, *Let's Try a Small Claims Calendar for the U.S. Courts*, 78 JUDICATURE 221, 221 (1995).

85. For example, from 2011 to 2014 the Southern District of New York conducted a pilot project adopting special rules for complex civil cases. *See* Standing Order M10-468, 11-MISC-0388, *In re*: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York (S.D.N.Y. Nov. 14, 2014), https://nysd.uscourts.gov/sites/default/files/pdf/Complex_Civil_Rules_Pilot_14.11.14.pdf.

86. *See* COMM. ON COURT ADMIN. & CASE MGMT., CIVIL LITIGATION MANAGEMENT MANUAL 9 (2d ed. 2010) (discussing case-tracking as a case-management option courts might consider) [hereinafter CIVIL LITIGATION MANAGEMENT MANUAL]; FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 100 (1990) (expressing interest in case-tracking).

87. *See* CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 86, at 9. Case-tracking schemes also frequently create separate tracks for certain types of cases with specialized needs, like social security and bankruptcy appeals. *See id.*

88. *See* BUREAU OF JUST. ASSISTANCE, DIFFERENTIATED CASE MANAGEMENT 1 (1993) (describing a differentiated case management system as "a technique courts can use to tailor the case management process to the requirements of individual cases").

89. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990).

90. 28 U.S.C. § 472(c)(1)(C).

"civil justice expense and delay reduction plan."[91] One of the cost-and-delay reduction options the districts were required to consider (and could choose to implement) was the creation of a case-tracking system.[92] A number of federal districts still employ case-tracking schemes in which the court can assign cases that don't need active case management to a "Simple" or "Expedited" track.[93]

In summary, federal practice has lived in tension with itself since the adoption of the Federal Rules of Civil Procedure. With few exceptions, civil cases in federal court are all governed by a single set of rules. But the federal civil docket contains a wide range of cases with potentially very different procedural needs. Some mechanism must exist to ensure that cases get the "right" amount of procedure—not too much but not too little. As a default matter, the existing scheme relies on the parties and the judge to tailor the use of the rules to the specific needs of individual cases. But questions remain about whether, at least in some settings, it might be better to depart from the "one size fits all" approach and create different procedural schemes for different types of cases.

C. Fast-Track Programs and the Pursuit of Trials in Smaller Cases

Fast-track programs were developed to serve two important and related purposes. First, they provide a way for the court and the parties to tailor the litigation process to the needs of smaller and simpler cases.[94] Second, they create a more realistic opportunity for those smaller and simpler cases to be tried.[95] Those purposes are linked. The cost of the standard federal procedural system can quickly overwhelm small cases, making it unlikely they will keep going until trial.[96] By speeding things up and placing limits on the activities that drive up the cost, fast-track programs offer a way for smaller cases to get to trial before the parties exhaust their litigation budgets.

For decades, attorneys have complained that litigating in federal court costs too much and takes too long.[97] Some of that sentiment

---

91. *Id.* § 471.

92. *Id.* § 473(a)(1).

93. *See, e.g.*, E.D.Mo. L.R. 5.01; D.N.H. LR 40.1(a)(2); W.D. Tenn. LR 16.2(b)(3)(A).

94. *See* CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 86, at 9.

95. McMillan & Siegel, *supra* note 1, at 438–39.

96. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUD. CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY 73 (2009), https://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf [hereinafter FEDERAL JUDICIAL CENTER 2009 SURVEY].

97. *See* Miller, *supra* note 82, at 61–63 (tracing cost-and-delay reforms from the 1970s to the present); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1091, 1094

seems to be driven more by anecdote and impression than by data. Empirical studies consistently show that the federal litigation scheme works well in most cases.[98] But when asked, large percentages of attorneys are quick to agree that litigation is too expensive.[99] And to be sure, not all of the data is positive.[100] Probably the fairest interpretation of the available data is that the system is neither broken nor perfect. As the Advisory Committee reported to Chief Justice Roberts after the 2010 Civil Litigation Conference (the "Duke Conference"), there is no need to blow up the existing scheme and start over.[101] But we can—and should—continue to try to make improvements in those areas where problems are identified.

So, which parts of the federal civil docket contain problems of cost and delay? There seems to be a general consensus that complex cases are often the mostly costly and protracted.[102] But the data may point just as strongly to significant cost and delay problems in the smaller and simpler cases at the other end of the litigation spectrum. When

---

(2012) (providing an overview of complaints about cost and delay going back to the 1970s).

98. *See* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 768 (2010) ("[T]he limited empirical evidence that exists does not support the broad statement that litigation costs, in general, are out of control."); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1432–42 (1994) (examining empirical studies and concluding that the narrative of pervasive discovery abuse was a myth); Reda, *supra* note 97, at 1116 ("[T]he cost narrative is out of touch with the empirical data.").

99. *See* Lee & Willging, *supra* note 98, at 769. *See generally* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PRESERVING ACCESS AND IDENTIFYING EXCESS: AREAS OF CONVERGENCE AND CONSENSUS IN THE 2010 CONFERENCE MATERIALS 5 (2010) ("The collected survey research indicates a very strong consensus among nearly all respondent groups that broadly speaking, the civil justice system is too expensive.").

100. For example, over half of all attorneys (plaintiffs' and defense) reported that discovery costs had caused them to settle a case they would not have settled but for that cost. *See* FEDERAL JUDICIAL CENTER 2009 SURVEY, *supra* note 96, at 73 fig.47.

101. *See* REPORT ON 2010 CONFERENCE ON CIVIL LITIGATION, *supra* note 83, at 5 ("[T]here is no general sense that the 1938 rules structure has failed. While there is need for improvement, the time has not come to abandon the system and start over."); *see also* ROBERTS, *supra* note 76, at 4 ("The symposium . . . confirmed that, while the federal courts are fundamentally sound, in many cases litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts.").

102. *See* REPORT ON 2010 CONFERENCE ON CIVIL LITIGATION, *supra* note 83, at 3 ("The most costly cases tend to be the ones that are more complicated and difficult."). Whether those higher costs are necessarily excessive given the higher stakes is a different question. *Id.* ("One set of issues is whether the cases with the higher costs in the FJC studies are problematic, that is, whether the costs are disproportionate to the stakes."); *see also* Lee & Willging, *supra* note 98, at 768 ("Without a normative standard, it is impossible to say, in any meaningful way, that litigation is too expensive.").

the question is put in general terms, different groups of lawyers give different answers about whether litigation costs are proportional to the value of their cases.[103] But a substantial majority of plaintiffs' and defense attorneys agree that litigation costs are not proportional to the value of small cases.[104]

Fast-track programs are designed to address the concern that the existing federal litigation scheme has grown too complicated and too expensive for the many smaller and simpler cases that are also a part of the federal civil docket.[105] Just getting to a civil trial can be a years-long ordeal through far-ranging discovery and multiple rounds of dispositive motions. Post-verdict motions and appeals often add another layer of delay and expense. For a small case, these "ordinary" costs of litigating can quickly exceed the value of the case even if the parties are not engaging in excessive practices.[106] If parties with small cases can't afford the cost of even "ordinary" discovery and motion practice, they either will not bring their cases in the first place or, when squarely confronted with those costs in cases that are filed, fold their cards and settle.[107]

Fast-track programs are not just about cost and delay, however. They also intersect with the movement to save the civil trial from vanishing.[108] Fast-track programs reduce cost and delay by limiting some of the most expensive and time-consuming aspects of the pretrial process like discovery and motion practice.[109] And if the

103. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUD. CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE 10–11 (2010).

104. *See id.* (finding that a substantial majority of plaintiffs' and defense attorneys agreed that litigation costs are disproportionate to the value of small cases).

105. *See* Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 409 (2011) ("For many simple cases, discovery of the breadth permitted by the existing Federal Rules is not proportional, and its availability is an invitation to economic oppression."); Cooper, *supra* note 83, at 1796; Rebecca Love Kourlis & Brittany K.T. Kauffman, *The American Civil Justice System: From Recommendations to Reform in the 21st Century*, 61 KAN. L. REV. 877, 885 (2013) (discussing development of expedited processes for simple cases "so that parties can gain access to the system, and a jury or bench trial, in a way that is affordable and proportional"); *see also* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM, CIVIL CASEFLOW MANAGEMENT GUIDELINES 6 (2009) ("Results from the ACTL Survey suggest that the process is bloated and has no scaled-down version for cases demanding less expenditure.").

106. *See* Burbank & Subrin, *supra* note 105, at 409–10.

107. *See id.*

108. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS 1 (2012) ("As one response to these realities, various jurisdictions—both state and federal—have implemented an alternative process that is designed to provide litigants with speedy and less expensive access to civil trials.").

109. *See id.* at 6–7.

parties can get through the pretrial process quickly and cheaply, they can marshal their limited resources and actually try the case.[110]

On the surface, there would appear to be a significant market for fast-track programs. When the Federal Judicial Center ("FJC") conducted its 2009 survey of attorneys about practice under the Federal Rules of Civil Procedure, it asked whether the cost of litigating in federal court had caused any of their clients to settle a case they otherwise would have taken to trial.[111] Roughly 40% of the plaintiffs' attorneys surveyed and about 57% of the defense attorneys and attorneys with a mixed practice surveyed said it had.[112] A decade later, it seems certain that there are still civil cases the parties would prefer to try but end up settling because of the mounting litigation costs.

Anecdotally, one often hears attorneys reminisce about an earlier era when trial attorneys tried cases without the need (or even desire) to first learn everything possible through exhaustive discovery. Here too, the FJC's 2009 attorney survey provides an interesting empirical foundation. When asked whether the federal courts should test simplified procedures that could be applied in cases with the parties' consent, nearly 50% of plaintiffs' attorneys and over 60% of defense and mixed-practice attorneys said "yes."[113] Moreover, when asked whether they would recommend that their clients choose simplified procedures over the existing Civil Rules, roughly 40% said they "probably" would do so, and about 10% said they "definitely" would do so.[114]

Obviously, not everyone supported the prospect of a slimmed-down civil litigation process. Over 40% of plaintiffs' attorneys and about 25% of defense attorneys said they "definitely would not" or "probably would not" recommend simplified procedures to their clients.[115] But the larger point seems clear. *Many* attorneys lamented the cost and complexity of the federal pretrial scheme.[116] *Many* attorneys, representing both plaintiffs and defendants, said they would like the option of a streamlined process and would recommend it to their clients.[117] Judges reading the FJC report could be reasonably optimistic that they could get more cases to trial by making a fast-track program available for those attorneys and clients

110. *Id.* at 1, 6.
111. *See* FEDERAL JUDICIAL CENTER 2009 SURVEY, *supra* note 96, at 73.
112. *Id.*
113. *Id.* at 54. The FJC survey defined simplified procedure as including more detailed pleading, more disclosures up front, restricted discovery, reduced motion practice, and an early, firm trial date. *See id.* at 102. That definition is consistent with how simplified procedure schemes are typically framed. *See* Cooper, *supra* note 83, at 1796.
114. FEDERAL JUDICIAL CENTER 2009 SURVEY, *supra* note 96, at 56.
115. *Id.*
116. *See generally id.* at 54, 56, 73.
117. *See generally id.*

who would rather skip ahead to a quick trial than engage in drawn-out discovery and motion practice until they reached exhaustion and settled.

III. THE STRUGGLES OF FAST-TRACK PROGRAMS IN FEDERAL COURT

Most of the people involved in procedural reform long ago gave up any notion that there is a single fix or innovation that will cure all of the things that ail the litigation process. In that spirit, we don't think that any of the advocates for—or early adopters of—fast-track programs expected them to generate an instantaneous flood of new civil trials. Expectations were modest.[118] Clearly, not all cases would be good candidates. Probably most would not be. But some would be, and the expectation was that, within that population, a not-insignificant number of parties would take advantage of the opportunity that fast-track programs presented.[119] After all, the courts developed their fast-track programs because attorneys had *asked* for them and said they would use them if available.[120] But even those modest expectations proved to be far too optimistic.

This Part describes the fast-track programs currently or recently offered in the federal courts and reports on their usage rates.[121] Our research identified seven fast-track programs that are currently in effect or were in effect in the federal courts during the decade of the 2010s. Five of those programs were implemented on a district-wide basis, and all five are still in effect.[122] The other two were offered by individual judges, one of whom dropped his program after four years.[123] The information we provide about the features of these programs and their usage is current as of August 2019.

We include the details of these programs to show some of the variation they exhibit but also as a foundation for the larger observation that the details of the programs do not seem to affect usage rates. Factors such as whether the programs provide for a little more or a little less discovery, how they handle pretrial motions and

118. *See* Kourlis & Kauffman, *supra* note 105, at 890.

119. *See* FEDERAL JUDICIAL CENTER 2009 SURVEY, *supra* note 96, at 54, 56.

120. *See id.*

121. Our study covers only freestanding expedited trial programs; it does not cover differentiated case management ("DCM") schemes that have an "expedited case" track. We view those as distinct for two reasons. First, in case-tracking schemes, the tracking decision is typically made by the court, not the parties. Second, while some of the "expedited" tracks in those programs include specific limits on discovery and motions, the focus of DCM programs is typically on conserving the judge's management time, not on streamlining the process for the benefit of the parties. We did not identify any federal court DCM scheme that operates by letting the parties voluntarily elect a streamlined litigation process as a condition of securing a quick trial date. That being said, data about the usage of, and lawyers' attitudes about, expedited case tracks within a DCM scheme would also shed light on some of the issues addressed in this paper.

122. *See infra* Subparts III.A–III.E.

123. *See infra* Subparts III.F–III.G.

briefing, the amount of trial time allowed and how it is allotted, whether they restrict posttrial motions, and even whether they limit the availability of appeals do not seem to affect usage rates. They all failed to attract more than a handful of users at most.[124] Readers who do not need these details can skip this section and proceed to Part IV, which begins the discussion of our survey of attorneys who appeared in one of the courts with a fast-track program.

A. District of Minnesota

The District of Minnesota was the first federal court to offer an Expedited Trial Program, launching its program in 2001.[125] A brochure published by the District describes the program as "an alternative to traditional case processing" with "a shorter time period from filing to disposition" and with "[d]iscovery and motion practice . . . sharply limited . . . to reduce time and expense."[126] The brochure advises readers that "[a]ll parties and their attorneys are encouraged to use this new program for their civil cases."[127]

Like all the federal court fast-track programs, the District of Minnesota program is voluntary.[128] All parties must agree to participate and submit their agreement in writing.[129] Once the agreement is filed with the court, a pretrial conference is held within 30 days.[130] Discovery is limited to 120 days and each side is presumptively limited to 10 interrogatories, five document requests, five requests for admission, and two depositions, though these limits may be modified by party agreement or by the judge with good cause.[131] The parties are also presumptively limited to one expert per side.[132] Parties must obtain leave to file any pretrial motions, and briefing is limited to letter briefs of no more than two pages.[133] The trial is held within six months of the pretrial conference.[134] Each side is presumptively allowed eight hours for its full presentation, including opening and closing arguments.[135] The parties are

124. *See infra* notes 141–42, 162–63, 169, 187, 201–03, 213–19, 231–35 and accompanying text.

125. *See* U.S. DIST. CT. FOR THE DIST. OF MINN., EXPEDITED TRIALS (brochure describing and promoting program) (on file with author Steven S. Gensler).

126. *See id.*

127. *See id.*

128. *Id.*

129. U.S. DIST. CT. FOR THE DIST. OF MINN., RULES OF PROCEDURE FOR EXPEDITED TRIALS, r. 1 (on file with author Steven S. Gensler). The District of Minnesota's program states that it also applies if one of the parties invokes a pre-dispute agreement to resolve future disputes under it. *Id.*

130. *Id.* r. 4.

131. *Id.* r. 5–6.

132. *Id.* r. 7.

133. *Id.* r. 8–9.

134. *Id.* r. 10.

135. *Id.* r. 11.

guaranteed to receive a decision within 30 days after the case is submitted.[136]

The District of Minnesota has aggressively marketed its Expedited Trial Program. In addition to the brochure described above, the District lists the program in its standard Rule 26(f) form,[137] and the magistrate judges bring it up at their Rule 16 conferences.[138] Periodically, the District has undertaken publicity campaigns to increase awareness and stimulate interest.[139] Despite all of these steps, the District's Expedited Trial Program has never caught on. Most of the District's judges reported never having a case use it.[140] A docket search could identify only five cases that had used it in over 18 years.[141] Only one of those cases went to a bench trial, resulting in a verdict for the defendant on its contract counterclaim.[142] Three of those cases terminated without a trial and one is still pending.

B. Northern District of California

The Northern District of California implemented its Expedited Trial Procedure in 2011.[143] The implementing General Order describes an "Expedited Trial" as "a consensual, binding trial before a jury or before a judge with limited discovery and limited rights to appeal."[144] The order explains that the Expedited Trial Procedure "is meant to offer an abbreviated, efficient and cost-effective litigation and trial alternative" and, in its opening line, states that "[t]he court encourages parties to agree to an expedited trial." The program was developed by a committee appointed by then chief judge Vaughn R. Walker.[145] The committee included six judges from the Northern

136. *Id.* r. 12.

137. *Rule 26(f) Report and Proposed Scheduling Order (Non-Patent Cases)*, DIST. MINN. 1, https://www.mnd.uscourts.gov/sites/mnd/files/forms/Rule26f-report-non_patent.pdf (last visited Sept. 13, 2020).

138. Email from Judge Joan N. Ericksen, Dist. Ct. J., U.S. Dist. Ct. for the Dist. of Minn., to Steven S. Gensler, Gene & Elaine Edwards Fam. Chair in L., Univ. of Okla. Coll. of L. (Mar. 27, 2019, 4:51 PM) (on file with author Steven S. Gensler).

139. Email from Judge Joan N. Ericksen, Dist. Ct. J., U.S. Dist. Ct. for the Dist. of Minn., to Steven S. Gensler, Gene & Elaine Edwards Fam. Chair in L., Univ. of Okla. Coll. of L. (Mar. 26, 2019, 5:01 PM) (on file with author Steven S. Gensler).

140. *Id.*

141. All docket searches and examinations of the federal court docket data discussed within this article were performed by the first author of this article.

142. Spiniello Cos. v. Infrastructure Techs., Inc., No. 11–1128 (JJK), 2012 WL 4758041, at *1, *14 (D. Minn. Oct. 4, 2012).

143. U.S. DIST. COURT FOR THE N. DIST. OF CAL., GENERAL ORDER NO. 64: EXPEDITED TRIAL PROCEDURE, Attachment D, https://www.cand.uscourts.gov/generalorders [hereinafter "N.D. Cal. Gen. Order 64"].

144. *Id.* at Attachment A.

145. News Release, U.S. Dist. Ct. for the N. Dist. of Cal. (July 18, 2011) (on file with author Steven S. Gensler). At the time, Judge Walker was also serving

District of California and 11 attorneys from a wide variety of practices.[146] In a news release announcing the launch of the program, Committee Chair Judge William Alsup stated: "We expect there is a demand in some cases for streamlined and expedited trials, with attendant savings in cost and risk, so we are providing this option upon stipulation by all parties. A broad-based committee worked hard to develop a good template."[147]

The parties must consent to participate in the program and get court approval.[148] Once a consent form is filed, the case is set for an initial expedited trial conference within 30 days.[149] Discovery is limited to 90 days and the parties are presumptively limited to 10 each of interrogatories, document requests, and requests for admission and 15 hours of depositions, though these limits may be modified by the court or by party agreement.[150] Each side is presumptively limited to one expert.[151] Parties must seek leave to file pretrial motions, sought via a letter not to exceed one page.[152] If allowed, motions must be made by a letter not to exceed three pages, with replies by a letter of no more than one page.[153]

Trial will be held within six months after the agreement is approved by the court.[154] Each side is allowed three hours to present evidence, with the court deciding how much time to allot for openings and closings.[155] Posttrial motions are significantly restricted; parties may file posttrial motions only to seek costs and fees, to correct a judgment for clerical error, to conform the verdict, to enforce the judgment, and to seek a new trial on the limited grounds of misconduct by the judge or jury or corruption or fraud during the proceedings.[156] Appeals are presumptively limited to review of a denial of a new trial motion made on the aforementioned grounds; all other grounds for appeal are presumptively waived.[157]

As discussed earlier, the program was developed with participation from the local legal community and launched with some

---

as a member of the Civil Rules Advisory Committee. Judge Walker's membership on the Civil Rules Advisory Committee coincided with the 2010 Duke Conference on Civil Litigation.

146. N.D. Cal. Gen. Order 64, *supra* note 143, at Attachment A.

147. *Id.*

148. *Id.* at r. 2; News Release, *supra* note 145.

149. N.D. Cal. Gen. Order 64, *supra* note 143, at r. 6; News Release, *supra* note 145.

150. N.D. Cal. Gen. Order 64, *supra* note 143, at r. 6, 8; News Release, *supra* note 145.

151. N.D. Cal. Gen. Order 64, *supra* note 143, at r. 9.

152. *Id.* r. 10.

153. *Id.*

154. *Id.* r. 11.

155. *Id.* r. 12.

156. *Id.* r. 13.

157. *Id.* r. 15.

measure of fanfare.[158] The District's Standard Joint Case Management Statement and Proposed Order, which parties must fill out and submit to the court, specifically mentions the program and directs the parties to consider whether the case might be handled under the Expedited Trial Procedure.[159] Nonetheless, the District's Expedited Trial Program has struggled to find takers. One of the judges of the district polled all 30 of the current district and magistrate judges and found that parties have formally consented to use the program only twice across the eight years the program has been offered.[160] Both were diversity cases with claimed damages of less than $100,000, and both settled before trial.[161]

C. Western District of Washington

The Western District of Washington implemented its Individualized Trial Program in 2012.[162] The program is set forth as Local Rule 39.2 in the Western District's Local Civil Rules.[163] It was inspired by the Northern District of California's Expedited Trial Procedure and is closely modeled on that program.[164] Its provisions regarding the timing and restrictions on discovery, experts, trial scheduling, time allotted per side at trial, and posttrial motions and appeals are the same as those in the Northern District of California's program.[165] Participation in the program is voluntary and requires the consent of all parties.[166]

---

158. News Release, *supra* 145.

159. *See* U.S. DIST. CT. FOR THE N. DIST. OF CAL., JOINT CASE MANAGEMENT STATEMENT & [PROPOSED] ORDER, ¶ 16, https://www.cand.uscourts.gov/forms/civil-forms/.

160. Email from Judge Lucy Koh, Dist. Ct. J., U.S. Dist. Court for the N. Dist. of Cal. to Steven S. Gensler, Gene & Elaine Edwards Fam. Chair in L., Univ. of Okla. Coll. of Law (Apr. 18, 2019, 3:29 CST) (on file with author Steven S. Gensler). A docket search also identified only two cases. The docket search also identified a third case in which the parties had initially expressed interest. However, when prompted by the judge to file the paperwork, the parties instead submitted an update saying they had reconsidered and would not be consenting.

161. Email from Judge Lucy Koh, *supra* note 160.

162. *Western District of Washington: Local Civil Rule Changes*, UNIV. OF DENVER, https://iaals.du.edu/western-district-washington-local-civil-rule-changes (last visited Sept. 13, 2020).

163. *See* W.D. Wash. Civ. R. 39.2, https://www.wawd.uscourts.gov/sites/wawd/files/WDWA_Local_Civil_Rules_Clean_01.01.20.pdf.

164. Email from Judge Ricardo S. Martinez, C.J., U.S. Dist. Court for the W. Dist. of Wash., to Steven S. Gensler, Gene & Elaine Edwards Fam. Chair in L., Univ. of Okla. Coll. of Law (May 9, 2019, 5:49 PM) (on file with author Steven S. Gensler).

165. *Compare* W.D. Wash. Civ. R. 39.2, *supra* note 163, *with* N.D. Cal. Gen. Order 64, *supra* note 143. The major difference is that the Western District of Washington's program does not restrict pretrial dispositive motions and, for nondispositive motions, incorporates an expedited motion procedure developed and made available in all civil cases for discovery disputes. *See* W.D. Wash. Civ. R. 37(a)(2).

166. W.D. Wash. Civ. R. 39.2, *supra* note 163.

The Western District of Washington's program has struggled to catch on, to say the least. In the seven years the Western District's Individualized Trial Program has been in place, no set of attorneys has requested that it be used.[167]

D. Western District of Pennsylvania

The Western District of Pennsylvania initiated its Pilot Program for Expedited Litigation in 2014.[168] The stated purpose of the program is "to offer parties the option of alternative, abbreviated, efficient, and cost-effective litigation and trial" in cases that are "relatively simple and do not require lengthy and expensive pretrial and trial proceedings."[169] The program was developed by a special Expedited Trial Subcommittee composed of two district judges, two court administrators, and six local attorneys.[170] One of the district judges who was on the Expedited Trial Subcommittee, Judge Cathy Bissoon, has served as the face of the program and has spoken numerous times about it to the bar.[171] The program has a dedicated link on the District's website, and many of the judges reference it as an option in their initial case management orders.[172]

Participation is voluntary and requires the consent of all parties.[173] Discovery must be completed within 90 days and each side is presumptively limited to 10 each of interrogatories, document requests (including requests to nonparties), and requests for admission, and 15 hours of depositions.[174] Requests for email searches are limited to two custodians and five search terms.[175] Each side is presumptively limited to one expert.[176] Summary-judgment

---

167. E-mail from Ricardo Martinez, C.J., U.S. Dist. Court for the W. Dist. of Wash., to Steven S. Gensler, Gene & Elaine Edwards Fam. Chair in L., Univ. of Okla. Coll. of L. (May 9, 2019, 5:56 PM) (on file with author Steven S. Gensler). A docket search also identified no cases.

168. *See Expedited Civil Litigation*, U.S. DIST. CT. FOR THE W. DIST. PA., https://www.pawd.uscourts.gov/expedited-civil-litigation (last visited Sept. 13, 2020) (listing March 7, 2014 as the date of Pilot Program for Expedited Civil Litigation).

169. *Pilot Program for Expedited Civil Litigation*, U.S. DIST. CT. FOR THE W. DIST. OF PA., https://www.pawd.uscourts.gov/sites/pawd/files/expedited-trial-revised-december-2013.pdf (last updated Mar. 7, 2014) [hereinafter "W.D. Pa. Pilot Program Rules"].

170. *See* Tracy Carbasho, *Expedited Civil Litigation Program to Benefit Litigants and Attorneys*, 17 ATTORNEYS J. 1, 10 (2012).

171. E-mail from Judge Cathy Bissoon, Dist. Ct. J., U.S. Dist. Ct. for the W. Dist. of Pa., to Steven S. Gensler, Gene & Elaine Edwards Fam. Chair in L., Univ. of Okla. Coll. of L. (July 30, 2019, 11:00 AM) (on file with author Steven S. Gensler).

172. *Id.*

173. W.D. Pa. Pilot Program Rules, *supra* note 169, at r. 1.

174. *Id.* r. 6, 8.

175. *Id.* r. 8.

176. *Id.* r. 9.

motions are not allowed.[177] Other pretrial motions are allowed only with leave of court and, if allowed, all motions, responses, and replies are capped at three pages.[178] The case will be set for trial within six months after the initial Expedited Trial Conference.[179] Each side is allowed three hours to present evidence, with the court deciding how much time to allow for opening and closing arguments.[180] Documents may be admitted at trial without authentication.[181] Posttrial motions are limited but include renewed motions for judgment as a matter of law and new trial motions asserting as grounds not just fraud and misconduct but also instructional error.[182] Appeals are limited to grounds previously raised in a proper posttrial motion; all other grounds for appeal are waived.[183]

At the time the Pilot Project was launched, the judge and attorney members of the Expedited Trial Subcommittee were optimistic that it would prove to be an attractive option for some percentage of the cases in the District's civil docket.[184] But, as with the other districts with similar programs, that has not proved to be the case in practice. In the roughly five years the Pilot Project has been in place, Judge Bissoon reports that it has been used in only seven cases, and all of them terminated without a trial.[185]

E. District of Nevada

The District of Nevada adopted its Short Trial Program in 2014.[186] It is modeled after a similar program first adopted in the Nevada state court system in 2000.[187] The stated purpose of the District of Nevada's program is "to expedite civil trials (both bench trials and jury trials) through procedures designed to control the length of the trial, including, without limitation, restrictions on discovery, the use of smaller juries, and time limits for presentation

177. *Id.* r. 10.
178. *Id.*
179. *Id.* r. 11.
180. *Id.* r. 12.
181. *Id.*
182. *Id.* r. 13.
183. *Id.* r. 15.
184. *See* Carbasho, *supra* note 170, at 1–2 (reciting comments from committee members).
185. *See* E-mail from Judge Cathy Bissoon, *supra* note 171. A docket search confirmed that the program was used in several of these cases and did not locate any additional cases.
186. U.S. DIST. CT. DIST. OF NEV., GENERAL ORDER 2013-01: FIRST AMENDED ORDER, *IN RE* SHORT TRIAL RULES (D. Nev. Mar. 13, 2014) [hereinafter "D. Nev. Short Trial Rules"].
187. Telephone Interview with Judge William G. Cobb, Mag. J., U.S. Dist. Ct. for the Dist. of Nev.

of evidence."[188] Participation requires the written consent of all parties and court approval.[189]

The District of Nevada's Short Trial Program is focused mostly on the trial itself. The Short Trial Rules do not address pretrial motion practice or set fixed restrictions on discovery but instead state that the extent to which discovery may be taken is left to the discretion of the presiding judge.[190] Trials under the program are set for within 150 days after the case is assigned to the presiding judge.[191] Each side is allowed nine hours to present their case.[192] Parties are allowed to quote directly from depositions and interrogatory answers, and they may introduce documents without a foundational or authenticating witness unless a colorable challenge on those grounds is raised in advance.[193] The rules encourage the introduction of expert testimony through reports rather than oral testimony.[194] Posttrial motions are limited to motions for fees and costs, motions to correct the judgment for clerical error, motions to conform the verdict, and motions for new trial,[195] but the rules expressly preserve the parties' rights to appeal.[196]

The District provided legal education outreach when the program was first introduced.[197] The District's Case Management/Electronic Case File ("CM/ECF") system automatically sends out a notice with the heading "NOTICE OF GENERAL ORDER 2013-1 AND OPPORTUNITY FOR EXPEDITED TRIAL SETTING," alerting parties to the existence of the program and providing instructions for how to apply.[198] But in the five years it has been in effect, the program has drawn little interest.[199] A docket search identified only four cases in which the program has been used. However, one of those cases did result in a jury trial.[200]

---

188. D. Nev. Short Trial Rules, *supra* note 186.
189. *Id.* r. 4.
190. *Id.* r. 7.
191. *Id.* r. 11.
192. *Id.* r. 18.
193. *Id.* r. 13, 14, 15.
194. *Id.* r. 17.
195. *Id.* r. 24.
196. *Id.* r. 26.
197. *See* CLARK CNTY. BAR ASS'N, U.S. DISTRICT COURT SHORT TRIAL RULES UPDATE (2013).
198. Telephone Interview with Judge Cam Ferenbach, Maj. J., U.S. Dist. Court for the D. of Nev. (July 25, 2019).
199. *Id.*
200. *See* Dentino v. Moiharwin Diversified Corp., No. 2:16-cv-00904-VCF, 2016 WL 7676030 (D. Nev. Nov. 30, 2016). *Dentino* involved claims asserting that the defendant failed to comply with the disclosure requirements of the Fair Debt Collection Practices Act. *Id.* The jury found for the plaintiff and awarded statutory damages in the amount of $300, *id.*, with the court then awarding statutory attorney's fees in the amount of $28,110.50. Dentino v. Moiharwin Diversified Corp., No. 2:16-cv-00904-VCF, 2017 WL 187146 (D. Nev. Jan. 17, 2017).

F. Judge David Campbell (D. Ariz.)

Judge David Campbell, a district judge in the District of Arizona, offered an Expedited Trial Program in his civil cases for four years, from 2010 to 2014.[201] Judge Campbell started his program while he was serving as a member of the Civil Rules Advisory Committee.[202] He did so because he believed there were cases in his civil docket that did not need the full pretrial process to be ready for trial and for which the parties "just needed their day in court."[203] Judge Campbell believed that many of these cases were settling because of high litigation costs and hoped that his Expedited Trial Program might provide a viable pathway to trial in those cases.[204]

Judge Campbell's program presumptively dispensed with almost all aspects of the federal pretrial process. It eliminated discovery and motion practice, though parties were permitted to propose limited discovery or other modifications at the case management conference.[205] In return, the parties would get a firm trial date within four or five months of the initial case management conference.[206]

To ensure that both the attorneys *and their clients* were aware of the program, Judge Campbell required the attorneys to develop two budgets: one if the case proceeded under the expedited trial program and the other for full litigation.[207] He required the attorneys to certify in their Rule 26(f) reports that they had presented both budgets to their clients before a decision was made on whether to elect the expedited trial option.[208] Judge Campbell believed that the cost difference alone would entice some clients to instruct their attorneys to put their cases on the fast track to trial.[209]

Judge Campbell dropped his program in 2014 for lack of use.[210] Over the course of four years, it was offered in approximately 600 cases.[211] In most cases, neither side expressed any interest in using

---

201. David G. Campbell, *Declining Jury Trials*, 4 JURY MATTERS (Civil Jury Project at NYU School of Law, New York, N.Y.), June 2019, at 3.

202. *David G. Campbell*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., https://iaals.du.edu/profile/david-g-campbell (last visited Sept. 13, 2020). Judge Campbell went on to serve as Chair of the Civil Rules Advisory Committee and currently serves as Chair of the Standing Committee on Rules of Practice and Procedure. *Id.*

203. *See* Campbell, *supra* note 201, at 2–3.

204. *Id.*

205. Email from Judge David G. Campbell, Senior Dist. Ct. J., U.S. Dist. Ct. for the D. of Ariz., to Steven S. Gensler, Gene & Elaine Edwards Fam. Chair in L., Univ. of Okla. Coll. of L. (Feb. 14, 2020, 11:43 CST) (on file with author Steven S. Gensler); *see also* Campbell, *supra* note 201, at 3.

206. *See* Campbell, *supra* note 201, at 3.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

it.[212] In about 10 to 20% of the cases, one side was willing to use the program, but the other side would not agree.[213] Ultimately, only three cases opted into Judge Campbell's expedited trial program.[214] But two of them later backed out, and the other one settled.[215] After four years and no expedited trials, Judge Campbell, as he put it, "ended the experiment."[216]

G. Judge Timothy D. DeGiusti (W.D. Okla.)

Judge Timothy DeGiusti, a district judge in the Western District of Oklahoma, began offering an expedited trial option in his civil cases in 2011.[217] The stated purpose of the option is "to provide alternatives which may reduce the costs and time involved in federal civil litigation."[218] The option is posted under his name in the "Chambers Rules" menu of the court's website, with a link titled "Fast Track Procedures."[219]

To participate in Judge DeGiusti's program, the parties must consent in writing and obtain court approval.[220] Upon being approved for the fast-track option, the case is assigned a firm trial date within about 180 days.[221] The parties are given up to 150 days to complete discovery.[222] Each side is presumptively limited to 30 document requests, 25 each of interrogatories and requests for admission, and 25 hours of depositions, though the parties may seek more by agreement subject to court approval.[223] Motion practice is not restricted, though special page limits apply to briefs supporting or responding to dispositive motions.[224] Each side is presumptively limited to one expert.[225] At trial, each side is limited to 12 hours for

212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. Steven S. Gensler & Timothy D. DeGiusti, *Survey Results: Why Won't Lawyers Get on the Fast Track?*, 4 JURY MATTERS (Civil Jury Project at NYU School of Law, New York, N.Y.), Aug. 2019, at 4.
218. U.S. DIST. CT. FOR THE W. DIST. OF OKLA., OPTIONAL FAST TRACK PROCEDURE FOR CIVIL CASES ASSIGNED TO JUDGE DEGIUSTI (Jan. 24, 2017), http://www.okwd.uscourts.gov/wp-content/uploads/Judge-DeGiusti-FAST-TRACK-PROCEDURE.pdf [hereinafter DeGiusti Fast Track Rules].
219. *See Chambers Rules*, U.S. DIST. CT. FOR THE W. DIST. OF OKLA., http://www.okwd.uscourts.gov/rules-procedures/chambers-rules/ (last visited Sept. 13, 2020).
220. DeGiusti Fast Track Rules, *supra* note 218, at r. 1.
221. *Id.* r. 2.
222. *Id.*
223. *Id.* r. 3.
224. *Id.* r. 4. Briefs supporting or responding to motions to dismiss may not exceed 15 pages. *Id.* Briefs supporting or responding to summary-judgment motions may not exceed 25 pages. *Id.*
225. *Id.* r. 6.

the presentation of its case.[226] His fast-track rules have an explicit "Escape Clause" provision whereby any party may seek leave to withdraw upon a showing of good cause, which includes unanticipated discovery needs.[227]

In the eight years Judge DeGiusti's fast-track program has been in place, parties have agreed to use it only three times.[228] In one case, a Fair Labor Standards Act ("FLSA") case asserting claims for minimum wage and overtime violations, the parties later jointly moved to withdraw from the program.[229] In another case, a personal injury case removed from state court, the parties settled before trial.[230] The third case, a prisoner pro se civil rights case, settled shortly before the scheduled trial.[231] Since 2011, Judge DeGiusti still has not had a fast-track case go to trial.[232]

IV. SURVEYING ATTORNEYS ABOUT USING THE FAST TRACK

Why are federal court fast-track programs so rarely used? To try to answer that question, we conducted a closed-case survey of attorneys who appeared in civil cases before Judge DeGiusti during the three-year period between January 1, 2016, and December 31, 2018.[233] As detailed above, Judge DeGiusti has offered a fast-track option since 2011 but has had only three cases agree to use it in eight years.[234] We worked with Judge DeGiusti and his chambers' staff to develop the survey and identify the attorneys to be contacted. We conducted the survey over the course of three weeks in April 2019.

We begin this Part by describing our survey methodology and the survey instrument. We then provide a profile of the responses we received. We start with a profile of the attorneys who responded. We then provide a profile of the cases in the sample. We report our findings in Part V.

A. Who We Contacted

Our survey examines civil cases before Judge DeGiusti that terminated during the three-year period between January 1, 2016, and December 31, 2018. We limited the survey to relatively recently

226. *Id.* r. 7.
227. *Id.* r. 11.
228. A docket search was conducted by Judge DeGiusti's docket clerk and was confirmed by author Steven S. Gensler.
229. *See* Acosta v. Kchao, No. 5:18-CV-00807 (W.D. Okla. Aug. 21, 2018).
230. *See* Wright v. Kohl's Dep't Stores, No. 5:13-CV-00259 (W.D. Okla. Sept. 18, 2013).
231. *See* Chichakli v. Dir. of the Fed. Bureau of Prisons, No. 5:15-CV-00687 (W.D. Okla. Aug. 6, 2018).
232. *See supra* notes 228–31.
233. Unless otherwise noted for Parts IV and V, the raw data and survey results are on file with author Steven S. Gensler.
234. *Kchao*, No. 5:18-CV-00807; *Chichakli*, No. 5:15-CV-00687; *Wright*, No. 5:13-CV-00259.

closed cases to better capture the full experience of the attorneys from filing to termination. Estimates indicated that the three-year time period we selected would generate a sufficient sample size without including too many cases where the events we would be asking about were a distant memory.[235]

We started by generating a list of all of Judge DeGiusti's civil cases that terminated between 2016 and 2018. That list numbered 646 cases. We then excluded habeas cases and benefits appeals because, while they are civil cases, they generally do not follow the typical civil case practices and procedures. We also excluded cases with pro se plaintiffs.[236] Finally, we excluded cases that terminated under circumstances where the decision to opt into the fast-track program realistically would not have yet occurred. For example, we excluded cases that were terminated before the defendant appeared.[237] In that situation, attorneys for plaintiffs had little reason to begin case scheduling, and there was no adverse party to consent to the program.[238] As another example, we also excluded cases that were immediately remanded, sent to arbitration, or quickly transferred—including a large number of cases that were transferred pursuant to a multidistrict litigation ("MDL") consolidation—because they were unlikely to have involved any serious thought about case scheduling before they were transferred.[239] After these and similar exclusions, we were left with a survey case population of 272 cases.

---

235. The cases in the sample were filed between 2010 and 2018. However, only 12 attorneys of the 544 contacted (about 2%) were asked about cases filed before 2013. Most of the cases (57%) in our sample were filed in 2015 and 2016 combined. Four percent of cases were filed in 2018.

236. While pro se cases are eligible for Judge DeGiusti's program—and indeed one of the three cases to use it was a pro se prisoner civil rights case—we excluded them because we knew we would be sending the survey as an online link via email, and practice in the Western District of Oklahoma historically has been to communicate with pro se litigants by regular mail. A quick sample confirmed that the court did not have current email addresses for the pro se litigants. While we typically did have email addresses for the other parties, we concluded that it would be best to exclude those cases altogether rather than seek data only from one side in a particular case. Those exclusions reduced our data set to 409 cases.

237. Most of these cases terminated when the plaintiff voluntarily dismissed prior to serving the defendant. However, this situation also includes cases where the defendant was served but did not appear, leading to a default judgment for the plaintiff.

238. Even if some of the plaintiffs in those cases might have developed views about using the fast track, those cases still presented the problem that we could seek data only from one side because no defendant had appeared.

239. We also excluded a large set of cases that were transferred *to* Judge DeGiusti as the transferee judge overseeing consolidated pretrial proceedings in an MDL case. While MDL cases are not technically ineligible for Judge DeGiusti's fast-track program, they are practically ineligible both because of their complexity, the extreme unlikelihood of getting consent from all parties, and the fact that the presumption remains that the individual cases will be transferred back to their district of origin for trial. *See* Lexecon Inc. v. Milberg Weiss Bershad

We then developed the list of attorneys to whom the survey would be sent. In general, we identified attorneys by accessing the docket sheets in those cases on Westlaw and selecting the first attorney listed for each party.[240] For each sampled case, we selected only one attorney from the plaintiff's side and only one attorney from the defendant's side to achieve a balanced sampling frame for planned analyses by party type.[241]

As expected, some attorneys represented parties in more than one civil case that terminated before Judge DeGiusti between 2016 and 2018. While we selected only one attorney per side for each sampled case, we did not limit how many surveys an individual attorney received. A total of 69 attorneys received a survey for more than one case. Two attorneys received surveys for 12 cases each. Although we were concerned that attorneys receiving multiple surveys might be less likely to complete *any* surveys, we did not adjust our sampling plan and remove duplicate names. This was partly because the surveys asked about case-strategy decisions in specific cases—so the attorneys' responses might vary from one case to another—and partly because we wanted to focus on lead counsel who might have better information about the case-strategy decisions that were made. As discussed below, we accounted for those multiple responses in generating our profile of the responding attorneys, and we were pleasantly surprised by the response rate of the attorneys who received the largest number of surveys.[242] Overall, we believe our sampling approach achieved a generalizable sample of attorneys with civil cases before Judge DeGiusti that terminated between 2016 and 2018.

B. What the Survey Included

We sent the survey by email to the addresses the attorneys provided to the court as counsel in those cases.[243] The email explained the nature and purpose of the survey and invited them to

---

& Lerach, 523 U.S. 26, 40 (1998) (noting that transfer under the MDL statute is for pretrial purposes and transferee court lacks authority to transfer case to itself for trial).

240. On occasion we supplemented that by examining docket sheets on PACER, but we attempted to keep that to a minimum because of expense. All docket searches were performed by the first author.

241. When there were multiple plaintiffs or multiple defendants, we generally selected the first attorney listed for the first listed plaintiff or defendant. We departed from this protocol in cases where listing of counsel clearly indicated that a different attorney was responsible for the case.

242. *See infra* Subpart IV.C.

243. In advance of sending the invitations, we separately emailed the attorneys who would be receiving multiple survey invitations to explain that each survey was for a specific case and avoid potential misunderstanding about whether they were duplicate requests. This email was for information purposes only and did not include a link to the survey.

participate.[244] The email specified that participation was purely voluntary and that Judge DeGiusti would not have access to data identifying who chose to participate or not.[245]

The responding attorneys first responded to a set of questions about their background and experience and the type of client the attorney represented in the named case.[246] The survey then asked the attorneys about their decision whether to participate in Judge DeGiusti's fast-track option.[247] The survey specifically asked the attorneys whether they had *proposed* using the option and, if not, why not.[248] The survey also asked attorneys whether any other party had proposed using the option and, if so, whether they had opposed it and why.[249]

The heart of the survey was a set of questions directed at the attorneys who responded that they either did not propose using the fast-track option or did not consent after it was proposed by another party.[250] Attorneys were first asked to select among nine potential factors in their decision to not use the fast-track option.[251] If the attorneys selected that the amount of discovery allowed was not sufficient, they were then asked to provide a more specific reason (e.g., the presumptive limit of 25 hours of deposition per party).[252] Further questions explored what discovery was actually taken in the case and how the case terminated.[253]

The survey concluded with a set of prospective questions.[254] The first question asked whether the attorneys would ever be likely to propose using the fast-track option (or agree to use it if proposed by another party) in a future case.[255] The survey then posed two open-ended questions asking the attorneys if there were any changes that could be made to the program that would make them more inclined

244. A link was provided to the survey instrument, hosted on the Qualtrics system operated by the University of Oklahoma. The study was approved by the University of Oklahoma Institutional Review Board.

245. Three follow-up emails were sent to attorneys who had not responded to the survey within the 15-day survey window. In conjunction with the first follow-up invitation, the Western District of Oklahoma posted a notice on its website announcing that the survey was being undertaken. We asked the Clerk of Court to do so because some of the attorneys contacted had inquired, in various ways, about whether the email invitation was a potential act of phishing or other cybersecurity concern. Both follow-up emails then instructed invitees that they could confirm the genuineness of the survey by visiting the Court's official website.

246. *Infra* Appendix A.

247. *Infra* Appendix A.

248. *Infra* Appendix A.

249. *Infra* Appendix A.

250. *Infra* Appendix A.

251. *Infra* Appendix A; *see also infra* Figure 3.

252. *Infra* Appendix A; *see also infra* Figure 4.

253. *Infra* Appendix A.

254. *Infra* Appendix A.

255. *Infra* Appendix A.

to want to use it, and whether they had any comments about Judge DeGiusti's program or fast-track programs generally.[256]

C. Response Rate and Sample

We received a total of 133 responses to the survey for a total response rate of 24%, which is considered to be a very good response rate for attorney surveys of this type. The responses covered 115 unique cases and were submitted by 89 different attorneys.[257] As discussed *infra,* while most attorneys only responded to one survey about one specific case, 17 attorneys submitted surveys for more than one case. In fact, the two attorneys who received the largest number of surveys (12) submitted separate surveys for all 12 of their cases. The following sections present a profile of the responding attorneys and the cases in the sample. Please note that the denominator used varies depending on whether the profile is of the attorneys who submitted at least one survey response (89), of the cases for which a response was submitted by either side or both sides (115), or of all of the responses received in total (133).

1. Profile of Responding Attorneys

The survey respondents were split nearly evenly between attorneys who primarily represent plaintiffs and attorneys who primarily represent defendants. The overall 133 responses came from 74 (55%) attorneys who represented plaintiffs and 59 (44%) attorneys who represented defendants in the surveyed case. However, the two attorneys who submitted the largest number of surveys (12 each) both represented plaintiffs in all 12 of their surveyed cases. When we included each attorney only once, of the 89 attorneys who responded, 47 (53%) represented a defendant and 42 (47%) represented a plaintiff in the sampled cases.[258] The following data about the backgrounds of the attorneys themselves uses this sample of 89 unique attorneys.

The responding attorneys represented a good cross section of practice settings. When asked about their law practice setting, the attorneys were generally from small-sized private firms of 2–10 attorneys (37%, or 33) or medium-sized private firms (25%, or 22). Additionally, 18% (16) were solo practitioners, 12% (11) worked in a private firm of 51–200 attorneys, 7% (6) worked for the government, and 1% (1) worked at a private firm of more than 200 attorneys.

The attorneys were also split between who they most often represented. As shown in Figure 1, about half of the responding attorneys stated that in all or nearly all cases they represented

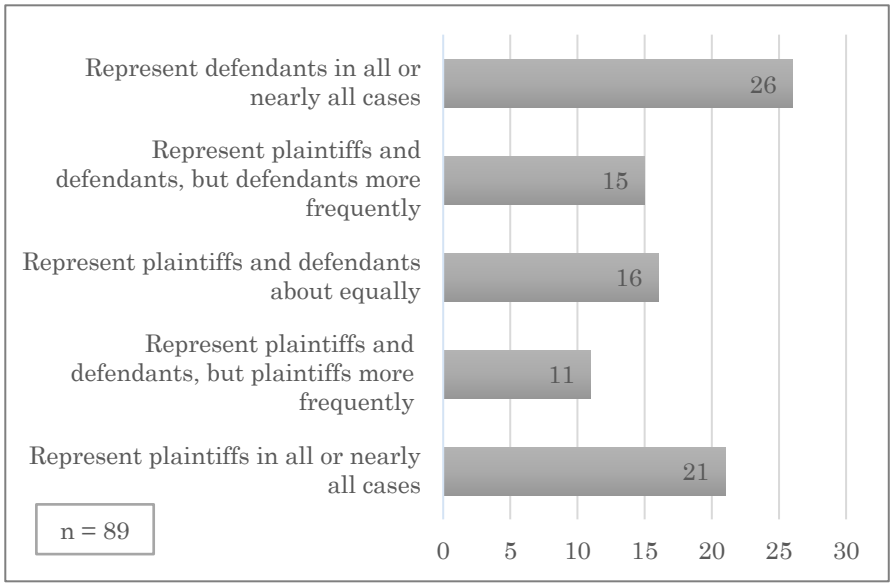
256. *Infra* Appendix A.

257. We received a survey response from both the plaintiff's attorney and the defense attorney in 18 cases.

258. No attorney completed a survey as counsel for both a plaintiff and a defendant.

defendants (29%, or 26) or plaintiffs (24%, or 21).[259] The remaining half of the responding attorneys either represented plaintiffs and defendants about equally (18%, or 16), or represented both but either defendants (17%, or 15) or plaintiffs (12%, or 11) more frequently.[260]

FIGURE 1. PARTY REPRESENTATION BY SURVEYED ATTORNEYS



Almost half of the attorneys (40%, or 36) stated that they primarily practiced in state and federal court about equally, while more than half stated that they primarily practiced in either state court (33%, or 29) or federal court (25%, or 22). Only 2% (2) stated they exclusively practice in federal court.[261]

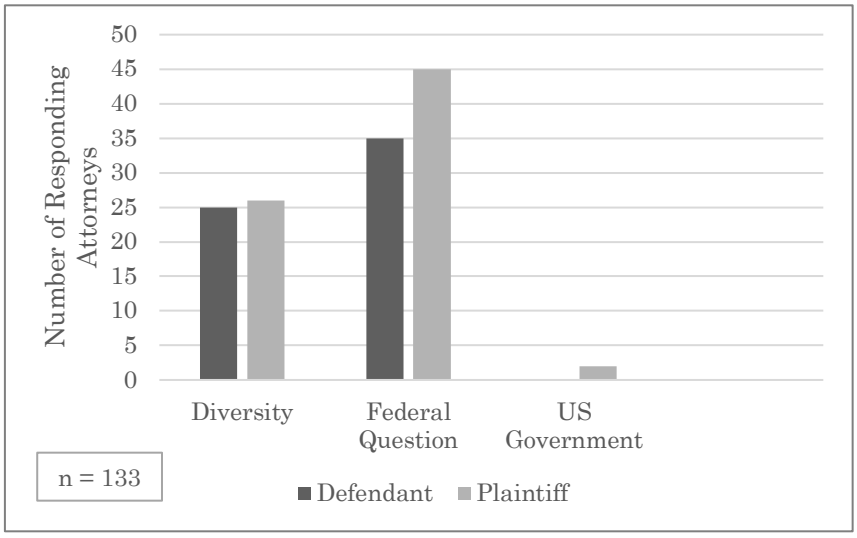
The responding attorneys had a wide range of years of practice experience, as of the time of the survey. Most reported having practiced for 11–20 years (38%, or 24), with the remaining having practiced for 21–30 years (25%, or 22), 31 or more years (19%, or 17), 5–10 years (15%, or 13), or less than 5 years (3%, or 3).

To find out what role these attorneys were playing in the cases in our sample, we examined the party represented by the basis for jurisdiction.[262] As shown in Figure 2, we received responses from both plaintiffs' and defense attorneys in both federal question and diversity cases. Out of the 133 total responses we received, 80 were

259. *Infra* Figure 1.
260. *Infra* Figure 1.
261. As this was a survey based on cases filed in federal court, attorneys were not given the option to state that they practice exclusively in state court.
262. *Infra* Figure 2.

submitted by attorneys in federal question cases, with 45 (34%) of those responses submitted by attorneys representing the plaintiff and 35 (26%) submitted by attorneys representing the defendant.[263] We received a total of 51 responses from attorneys in diversity cases, split almost equally between attorneys representing the plaintiff (20%, or 26) and attorneys representing the defendant (19%, or 25). The two attorneys in U.S. government cases both represented the plaintiff.[264]

FIGURE 2. SURVEY RESPONSES BY PARTY REPRESENTED AND BASIS OF JURISDICTION



2. Profile of Cases in the Sample

The attorneys also responded to questions about the cases themselves, allowing us to form a profile of the cases in the sample. As explained above, the 133 responses came from 115 different cases.[265] We received responses from both sides in 18 cases. We included only one attorney response for each case to prevent double counting from biasing our results. For the 18 cases with responses from both sides, we examined the responses to make sure they were consistent.

We tracked basis of subject-matter jurisdiction by the designation entered on the civil cover sheet by the party invoking

263. *Infra* Figure 2.
264. *Infra* Figure 2.
265. *See supra* Subpart IV.C.

federal jurisdiction.[266] Of the 115 cases, 67 (58%) invoked federal question jurisdiction, 46 (40%) invoked diversity jurisdiction, and 2 (2%) predicated federal jurisdiction on the basis that the federal government was a defendant.

We also tracked the types of cases by the nature of suit ("NOS") code as entered by the filing party on the civil cover sheet. Within the 67 cases that invoked federal question jurisdiction, almost all the cases were identified as civil rights (70%) or labor (e.g., FLSA, FMLA) (13%) cases. More specifically, about half (45%) of the cases were civil rights employment cases and about 9% were FLSA cases. Within the 46 cases that invoked diversity jurisdiction, roughly half (54%) were contract cases and less than half (41%) were torts and property cases. The remaining two cases were either civil rights (2%) or other (2%). More specifically, about one-quarter (28%) of the diversity cases were insurance disputes, and about another one-quarter (24%) fell into the "contract: other contract" category. Motor vehicle torts cases (13%) were the third most common type within the set of diversity cases.[267]

In two-thirds of the cases (67%), the attorneys noted that the case was voluntarily dismissed pursuant to settlement, followed at a distance by summary judgment (13%), voluntarily dismissed not pursuant to settlement (8%), other (8%), dispositive pleading motion (4%), and trial (1%).[268] Although the outcomes are similar when comparing the diversity and federal question jurisdiction cases, the case was slightly more likely to be voluntarily dismissed pursuant to settlement in federal question cases than diversity cases (73% vs. 62%). The only trial in the sample was from one of the two cases in which jurisdiction was based on the status of the federal government as a defendant.

V. SURVEY FINDINGS ON ATTORNEY DECISIONS

This Part describes the survey data about the attorneys' decisions whether to use Judge DeGiusti's fast-track option. None of the 115 cases in the sample proceeded under the option. In the vast majority

266. In cases originally filed in federal court, this designation would have been made by the plaintiff. In cases removed to federal court, it would have been made by the defendant. We did not attempt to verify the accuracy of those entries. At times, we did notice that a case designated as a diversity case appeared to raise federal claims, and vice versa. However, the incidence of such situations appeared to be low enough that we are assuming any errors will balance out.

267. As a comparison, during the twelve-month period ending December 31, 2018, 22% of private cases filed in the Western District of Oklahoma were civil rights cases and 21% were contract cases, the two most common types of private civil cases. *See* ADMIN. OFF. OF THE U.S. CTS., TABLE C-3—U.S. DISTRICT COURTS—CIVIL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (Dec. 31, 2018), https://www.uscourts.gov/statistics/table/c-3/statistical-tables-federal-judiciary/2018/12/31. While this time frame is not a direct comparison, it mirrors the two most common types of cases examined in our survey.

268. In 107 of the 115 cases, at least one attorney provided a case outcome.

of the cases, neither side proposed using it. In a small number of cases (we can't say for sure how many), the fast-track option was (or may have been) proposed by one side but rejected by the other. We first present that data in the aggregate. We then break the data down according to the party represented and the basis for jurisdiction, exploring some statistically significant differences in the responses based on those categories.

A. Fast-Track Usage

None of the cases examined in this research proceeded under the fast-track option. This was not surprising, as only three cases had used the fast-track option since it was first offered in 2011.[269] Two of those cases were ineligible for the survey because they did not close during the three-year time period between 2016 and 2018.[270] The third case was not included in the survey because the plaintiff proceeded pro se and the court did not have an email address for him on file.[271]

What was surprising, however, was that 13 of the attorney responses indicated that their case did proceed under the fast-track option. We examined the dockets for those cases and confirmed that those survey responses had been marked in error.[272]

B. The Decision Whether to Use the Fast-Track Option

This Subpart presents the survey data pertaining to the attorneys' decisions about whether to use Judge DeGiusti's fast-track option. We break it down into six topics: (1) whether the attorney was aware of the fast-track option; (2) whether the attorney discussed the option with his or her client; (3) whether either party proposed using the fast-track option; (4) what factors contributed to the decision not to use the fast-track option; (5) for attorneys that cited concerns about the presumptive discovery limits, which specific limits contributed to that concern; and (6) whether the attorneys would be likely to propose using, or agree to use, a fast-track option in a future case. We present

269. Communication with Judge Timothy D. DeGiusti, C.J., U.S. Dist. Ct. for the W. Dist. of Okla. A docket search confirmed this number. *Supra* note 232.

270. One case terminated in 2013. Wright v. Kohl's Dep't Stores, No. 5:13-CV-00259 (W.D. Okla. Mar. 14, 2013). Another case was still pending as of December 31, 2018. Acosta v. Kchao, No. 5:18-CV-00807 (W.D. Okla. Aug. 21, 2018).

271. Chichakli v. Dir. of the Fed. Bureau of Prisons, No. 5:15-CV-00687 (W.D. Okla. Aug. 6, 2018).

272. Two attorneys responding to multiple surveys were responsible for about half of these erroneous responses. One plaintiff's attorney completed all four of the surveys he was sent, marking each as being part of the fast-track option. In one of those four cases, there was evidence on the docket that the plaintiff had requested the fast-track option, but nothing on the docket indicates that the defendant agreed, and the court never entered an order placing the case in the fast-track option.

aggregate data for all these topics. We also explore differences in the responses based on the party represented (plaintiff or defendant) and basis for jurisdiction (federal question or diversity) where they were statistically significant.

1. Awareness of the Fast-Track Option

We asked the attorneys whether they were aware of the fast-track option at the start of the case, when initial case-management decisions were being made.[273] After accounting for attorneys responding to the survey for more than one case, plaintiffs' attorneys and defense attorneys provided equivalent responses. Half of the attorneys (51% of plaintiffs' attorneys and 50% of defense attorneys) stated they were aware of the option at the start of the case.[274]

Attorneys in federal question cases were more aware of the fast-track option (60%, or 24) than attorneys in diversity cases (40%, or 19). Plaintiffs' attorneys in federal question cases were more likely to be aware of the fast-track option than any other group. For example, 67% of plaintiffs' attorneys in federal question cases reported awareness of the fast-track option, compared to 36% of plaintiffs' attorneys in diversity cases.[275] In contrast, there was less of a difference in awareness of the fast-track option for defense attorneys between federal question (54%, or 19) and diversity (46%, or 11) cases.

2. Discussion with Client

We asked the attorneys whether they had discussed the fast-track option with their clients.[276] Overall, 39 (29%) of the responding attorneys indicated that they had discussed the option with their clients, while 94 (71%) indicated that they had not.[277] This did not differ based on the party represented or basis for jurisdiction.

Attorneys who said they had discussed the option with their clients then responded to a list of five options and were asked which option best described their client's views about the fast-track option after that discussion.[278] Of the 37 attorneys who responded to that

273. *Infra* Appendix A.

274. Across all attorneys in all examined cases, 79 attorneys (59%) stated that they were aware of the fast-track option at the start of the case when initial case-management decisions were being made. Although plaintiffs' attorneys were more likely to say they were aware of the option (67%, or 49) than defense attorneys (50%, or 30), this difference disappeared when accounting for attorneys responding to the survey for more than one case.

275. This difference was statistically significant when all responses were included. However, when each attorney was only included once in the sample, statistical significance ceased though the trend remained.

276. *Infra* Appendix A.

277. Including each attorney only once, the trend remains: 32% indicated they had discussed the program with their clients, compared to 69% who indicated they had not.

278. *Infra* Appendix A.

question,[279] the most common response, selected by about half of the attorneys (49%, or 18), was that the client had no strong opinion either way and left it to the attorney to decide whether to participate. Only a handful of the attorneys reported that their clients instructed them to either participate (16%, or 6) or not participate (19%, or 7) in the fast-track option. The attorneys did not differ in whether they had discussed the option with their clients, or in their report of their client's views, based on the party represented or basis for jurisdiction.

3. Did Either Party Propose Using the Fast-Track Option

We asked the attorneys whether they or any other party had proposed using the fast-track option in the case in question.[280] Overwhelmingly, the answer was no.

The data are clear in the 119 responses we received from attorneys who said their case did not proceed on the fast track. Under the survey question flow, if the response stated that the case did not proceed on the fast track, the attorney was then asked to state whether anyone had proposed using the fast track.[281] In that cohort, 117 of the 119 attorneys stated that neither party proposed using the fast track. Only two attorneys stated that it was proposed, and in both of those cases, it was rejected by the other side.[282]

A different component of our data is harder to interpret. Under the survey question flow, if the response stated that the case did proceed on the fast track, the attorney was then asked to state *which side* first proposed using it.[283] As noted earlier, 13 survey responses stated that the case in question had proceeded on the fast track. Of this group, one attorney did not answer the follow-up questions. The remaining 12 responses split between five responses stating that the other side first proposed the fast-track option and seven responses stating that the responding attorney had first proposed it.[284]

On the surface, this data would indicate that the fast-track option was both *proposed* and *agreed to* in those 13 cases. However, we know that none of those cases actually proceeded on the fast track, so we know that no *agreement* to use the fast-track program was reached.[285] Given that the responding attorneys erroneously marked those cases

279. Two attorneys who said that they had discussed the program did not answer the follow-up question.

280. *Infra* Appendix A.

281. *Infra* Appendix A.

282. In one case it was proposed by the plaintiff's attorney; in the other case it was proposed by the defense attorney.

283. *Infra* Appendix A.

284. Those seven responses came from only three attorneys. One plaintiff's attorney responded that he had proposed the fast track in four of the cases (which appeared to be related to each other), and another plaintiff's attorney reported that he had proposed the fast track in two of his cases.

285. Judge DeGiusti has confirmed that he has never rejected a joint request by the parties to use the fast-track program. *See also supra* Subpart III.G.

as having used the fast-track program, one might infer that the responding attorneys misunderstood the program and the survey, and that the program was not proposed by either side in any of those cases. But we cannot rule out the possibility that *one* of the parties proposed using the fast-track program in those cases.

If we assume that a proposal to use the fast-track option was in fact made in all 12 of the cases for which the responding attorney answered the follow-up question specifying which side purportedly made the proposal (a high overestimate), then the total number of cases in which one side proposed using the fast-track option rises to 14 out of 115, or just over 12%. But that still means that, counting the attorneys on both sides, at most only 14 out of 230 attorneys—about 6%—ever proposed using the fast-track option.

4. What Factors Contributed to the Parties Not Using the Fast-Track Option

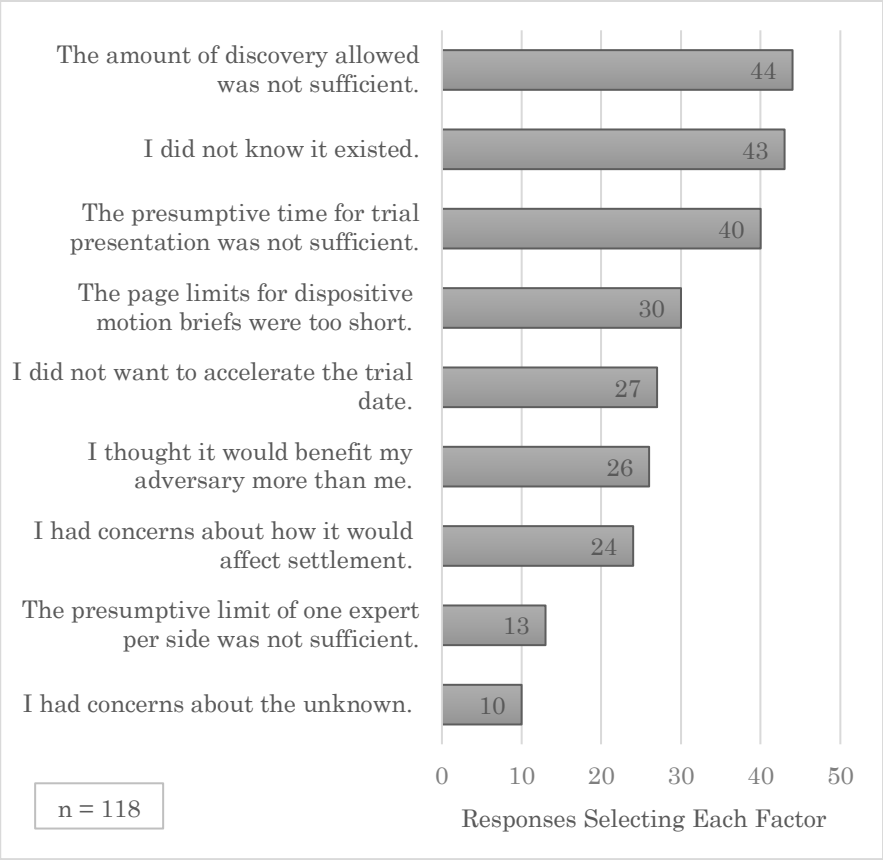
Attorneys who indicated that they had not proposed using the fast-track option, or rejected another party's proposal to do so, were then asked to select among nine provided factors that might have played a role in that decision.[286] We first present the data in the aggregate. We then compare the responses given by attorneys for plaintiffs and defendants, and we also explore how the responses varied based on whether the case was brought under federal question or diversity jurisdiction.

a. Aggregate Data

Attorneys were provided with nine potential factors that could have played a role in the decision not to use the fast-track option.[287] Attorneys were asked to select all that applied in the specific case for which they were providing a response.[288] We received responses to this question from 118 attorneys. Figure 3 provides a chart of the reasons selected, in descending order according to frequency.

286. *Infra* Appendix A.
287. *Infra* Appendix A.
288. *Infra* Appendix A.

FIGURE 3. FACTORS AFFECTING DECISION TO USE FAST-TRACK OPTION (FREQUENCY OF RESPONSES)



Responses from the 118 attorneys generated three clusters based on frequency. In the top cluster, three factors were selected in at least one-third of the responses.[289] They were, in order of how often they were selected, that the fast-track option did not provide for sufficient discovery (37%, or 44), that the attorney was not aware of the fast-track option (36%, or 43), and that the presumptive time limit of 12 hours per side for trial presentation was not sufficient (34%, or 40).[290]

In the middle cluster, four factors were selected in a small range of between 20% and 25% of responses.[291] Thirty attorneys (25%) selected that the page limits on motion briefs were too short.[292] Additionally, 27 attorneys (23%) selected that they did not want to accelerate the trial date, 26 attorneys (22%) selected that they

289. *Supra* Figure 3.
290. *Supra* Figure 3.
291. *Supra* Figure 3.
292. *Supra* Figure 3.

thought it would benefit their adversary more than it would benefit them, and 24 attorneys (20%) selected that they had concerns about how it would alter the dynamics of settlement.[293]

Two factors were selected significantly less often than the most common factors. Only 13 attorneys (11%) selected that the presumptive limit of one expert per side was not sufficient and 10 attorneys (9%) selected that "it was different" and they had "concerns about the unknown."[294]

On average, the responding attorneys identified two factors that contributed to their decision not to use the fast-track option for each case. This ranged from two attorneys selecting none of the factors to one attorney selecting seven. Overall, 42 attorneys (36%) indicated that three or more factors played a role in their decision not to use the fast-track option.

b. Differences Based on Party Represented

We then performed additional analyses to determine if the factors differed between the 62 plaintiffs' attorneys and 56 defense attorneys who answered this question. Indeed, some of the factors differed based on the party represented at a statistically significant level, as noted herein.

Plaintiffs' attorneys were significantly more likely than defense attorneys to select that:

- The presumptive time allotted for trial presentation (12 hours) was not sufficient (51% vs. 16%);
- The presumptive amount of discovery allowed was not sufficient (49% vs. 25%);
- The presumptive page limits for dispositive motion briefs were too short (34% vs. 16%);
- They had concerns about how the program would alter the dynamics of settlement (30% vs. 11%); and
- That using the program would benefit their adversary more than it would benefit them (30% vs. 14%).[295]

Defense attorneys were significantly more likely than plaintiffs' attorneys to select that they did not know the fast-track option existed (46% vs. 28%) and that they did not want to accelerate the trial date (35% vs. 12%).[296]

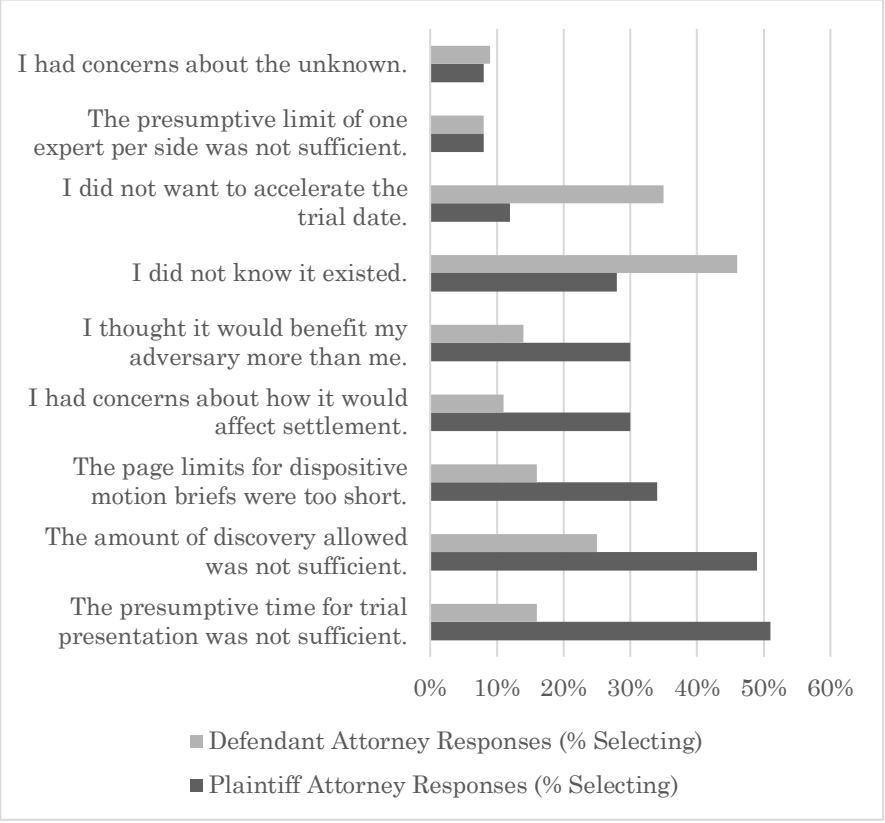
There was no difference regarding the presumptive limit of one expert per side being sufficient or whether they had concerns about the unknown. However, this was unsurprising given that these two factors were the least selected across all attorneys.[297]

---

293. *Supra* Figure 3.
294. *Supra* Figure 3.
295. *Infra* Figure 4.
296. *Infra* Figure 4.
297. *Supra* Figure 3.

When the frequencies are compared by party type side by side, it becomes clear that plaintiffs' attorneys and defense attorneys have very different concerns. As shown in Figure 4, plaintiffs' attorneys most often selected factors related to discovery and argument, while defense attorneys most often selected lack of awareness and not wanting to accelerate the trial date.[298] No factor was selected by more than one-third of plaintiffs' attorneys and more than one-third of defense attorneys.[299] In fact, for seven of the nine factors, one side was significantly more likely to select the factor than the other side.[300]

FIGURE 4. FACTORS AFFECTING DECISION TO USE FAST-TRACK OPTION (BY PARTY REPRESENTED)



c. Differences Based on Grounds for Jurisdiction

We also examined the responses for differences on the basis for subject-matter jurisdiction. The attorneys that received these

298. *Infra* Figure 4.
299. *Infra* Figure 4.
300. *Infra* Figure 4.

questions were split into those representing a party in federal question (61%, or 71) and diversity (39%, or 45) cases.[301]

As shown in Figure 5, attorneys in diversity cases were significantly more likely than attorneys in federal question cases to state that they did not know the fast-track option existed (51% vs. 28%) and that the presumptive limit of one expert per side was not sufficient (24% vs. 3%, though only 11% of attorneys selected this option).[302]

Attorneys in federal question cases were significantly more likely than attorneys in diversity cases to select that the presumptive time allotted for trial presentation was not sufficient (42% vs. 20%) and that they thought using the fast-track program would benefit their adversary more than it would benefit them (30% vs. 11%).[303]

There were no statistically significant differences between attorneys in diversity and federal question cases on whether the amount of discovery allowed was sufficient, whether the page limits for dispositive motion briefs were too short, concerns about the dynamics of settlement, that the fast-track program was different and they had concerns about the unknown, and that they did not want to accelerate the trial date.[304]

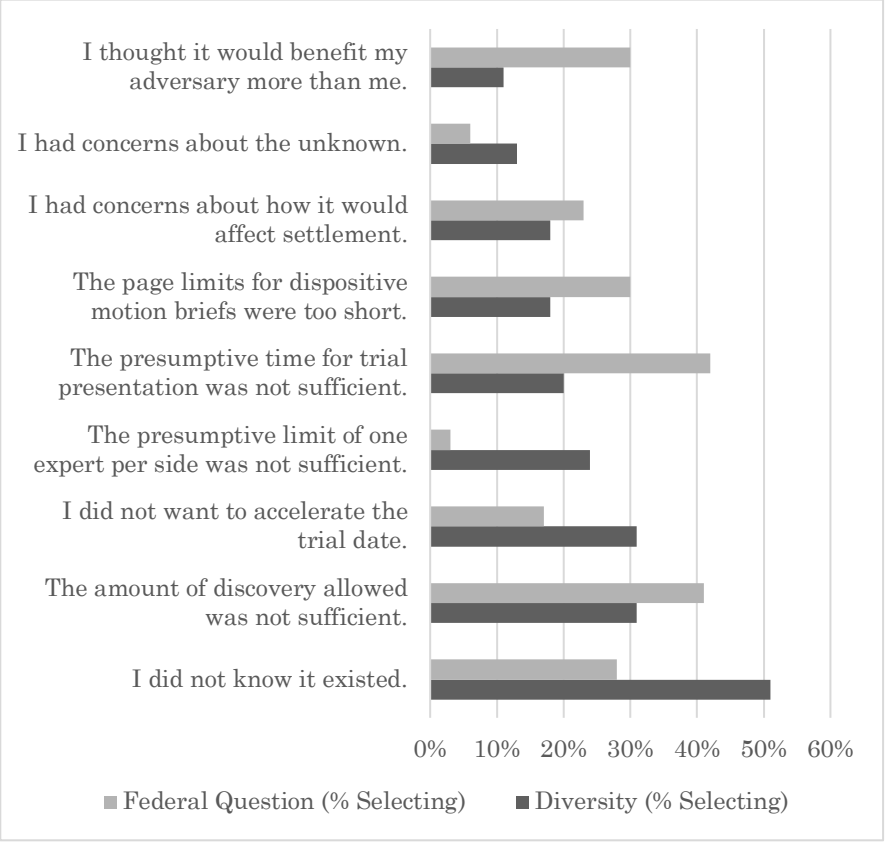
301. The analyses did not include the two cases with the U.S. government as the defendant, as the two cases do not likely provide interpretable, generalizable statistical data.

302. *Infra* Figure 5.

303. *Infra* Figure 5.

304. *Infra* Figure 5.

FIGURE 5. FACTORS AFFECTING DECISION TO USE FAST-TRACK OPTION (BY BASIS FOR JURISDICTION)



We then examined the interaction between the party represented and grounds for jurisdiction and found statistically significant differences in the reasons given *by attorneys for plaintiffs*, but only one minor difference in the reasons given by attorneys for defendants.

Most importantly, plaintiffs' attorneys in diversity cases were much less aware of the fast-track option than plaintiffs' attorneys in federal question cases. Nearly 60% of plaintiffs' attorneys in diversity cases answered that they did not know about the option, compared to about 10% of plaintiffs' attorneys in federal question cases.[305] As will be discussed later, plaintiffs' attorneys in diversity cases were much more likely to express a general interest in ever using a fast-track program than plaintiffs' attorneys in federal question cases.[306] Combined, this pair of findings suggests a valuable role for increased education, since the cohort of plaintiffs' attorneys that is most

305. *Infra* Figure 6.
306. *See infra* Subpart V.B.6.c.

interested in using the program is also the cohort that is least knowledgeable about it.

Plaintiffs' attorneys also differed in the reasons they gave for not using the fast-track option in the case. The following factors were selected by at least one-third of plaintiffs' attorneys in federal question cases:

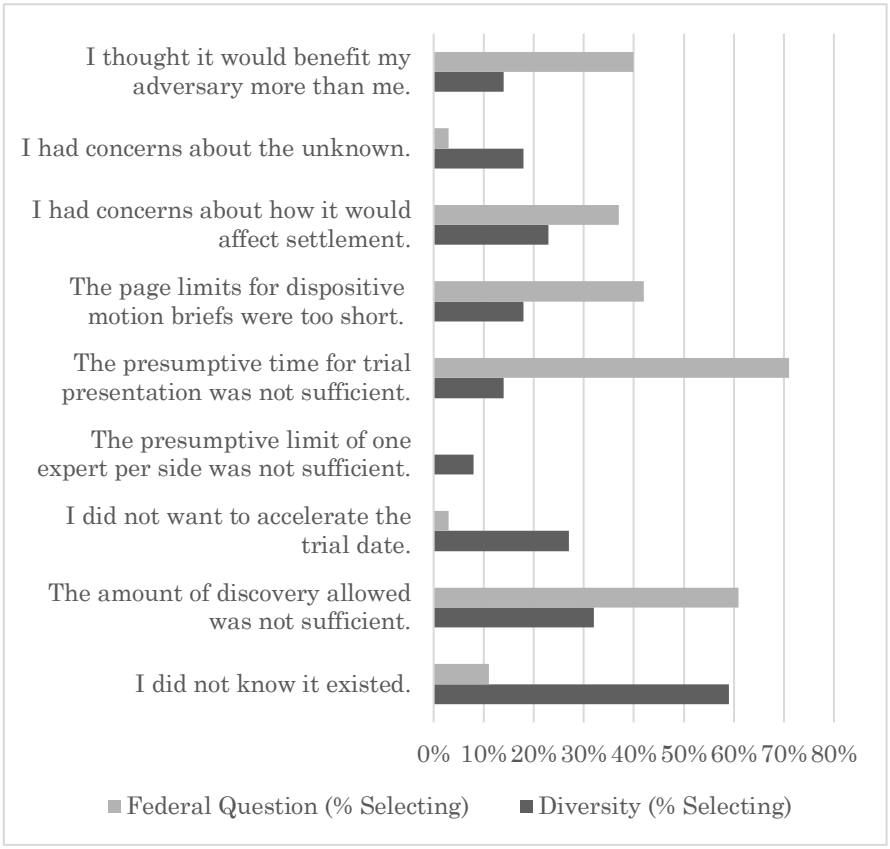
- The presumptive time allotted for trial presentation (12 hours per side) was not sufficient (71%, or 27);
- The presumptive amount of discovery allowed was not sufficient (61%, or 23);
- The presumptive page limits for dispositive motion briefs were too short (42%, or 16);
- I thought using the fast-track program would benefit my adversary more than it would benefit me (40%, or 15);
- I had concerns about how the fast-track program would alter the dynamics of settlement (37%, or 14).[307]

In contrast, the only factor selected by at least one-third of plaintiffs' attorneys in diversity cases was "I did not know it existed" by 59% (or 13) attorneys.[308] The next factor most commonly selected by these attorneys was that the "amount of discovery allowed was not sufficient."[309] Still, plaintiffs' attorneys in diversity cases were significantly less likely to select this factor than plaintiffs' attorneys in federal question cases (32% vs. 61%).[310]

As shown in Figure 6, when the frequencies of factors selected by plaintiffs' attorneys in federal question and diversity cases are compared side by side, it becomes clear that these two sets of plaintiffs' attorneys have very different concerns. Plaintiffs' attorneys in federal question cases reject using the fast-track option because they oppose several of the core features of the program, most commonly the presumptive time allotted for trial presentation and the amount of discovery allowed.[311] In contrast, plaintiffs' attorneys in diversity cases don't appear to consistently oppose the core features of the fast-track program; they just aren't aware of the option.[312]

307. *Infra* Figure 6.
308. *Infra* Figure 6.
309. *Infra* Figure 6.
310. *Infra* Figure 6.
311. *Infra* Figure 6.
312. *Infra* Figure 6.

FIGURE 6. FACTORS AFFECTING PLAINTIFFS' ATTORNEYS DECISIONS TO USE FAST-TRACK OPTION (BY BASIS FOR JURISDICTION)



The responses given by the defense attorneys did not vary much according to basis for jurisdiction. For example, the reason most often selected by all defense attorneys—lack of awareness of the fast-track option—was noted by 49% of the attorneys in federal question cases and 44% in diversity cases. The only other reason selected by more than one-third of the defense attorneys was not wanting to accelerate the trial date; it was cited by 35% of defense attorneys in federal question cases and 33% in diversity cases. There was one statistically significant difference with respect to the sufficiency of the presumptive limit of one expert per side. While that factor was cited by only 14% (8) defense attorneys overall, it was selected by 26% (6) of the defense attorneys in diversity cases, but only 6% (2) in federal question cases.

5. Drilling Down on Concerns About Discovery Limits

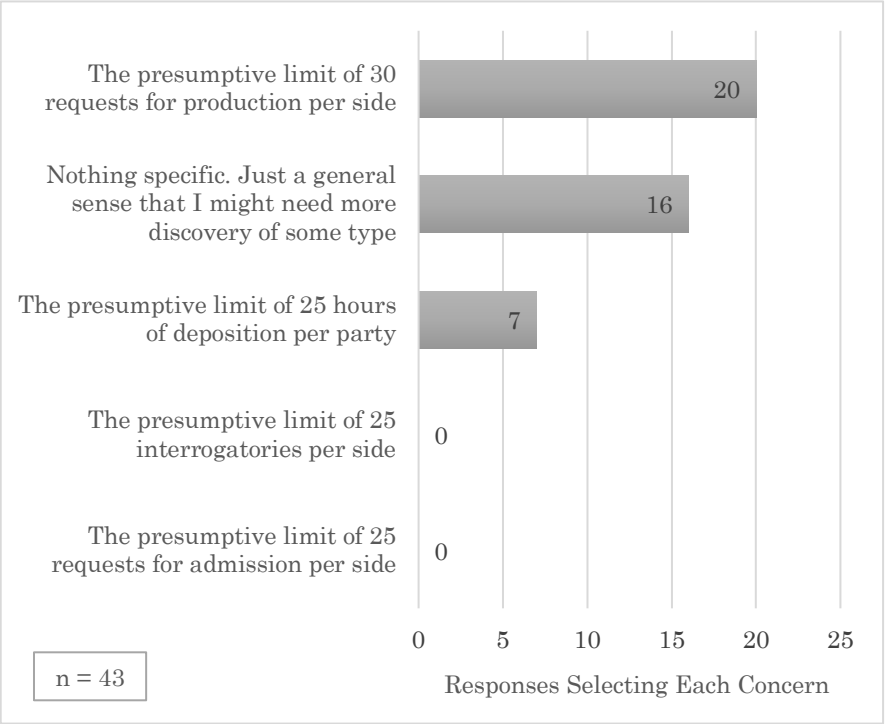
A total of 44 attorneys responded that the discovery limits were a factor in their decision not to use the court's fast-track option.[313] Those attorneys were then asked to state which specific limits played a role.[314] The question presented five options and asked the attorneys to check all that were a factor.[315] We received 43 responses. Here too, we present the data in the aggregate and then explore statistically significant differences in the responses based on the party represented and basis for jurisdiction.

a. Aggregate Results

The data show that the attorneys were mostly concerned about discovery limits in general and limits on requests for production in particular. As shown in Figure 7, only two of the discovery limit options were checked by at least one-third of the responding attorneys.[316] Just under half (47%, or 20) of the attorneys said they were concerned about the presumptive limit of 30 requests for production.[317] And just over one-third (37%, or 16) said that there was no specific limit that troubled them, but rather that they had a general sense that they might need more discovery of some type than the fast-track program presumptively allows.[318] The only other option checked by any of the responding attorneys was the presumptive limit of 25 hours of depositions, which was checked by about 16% (7) of the attorneys.[319] Neither of the other two options—the presumptive limit of 25 interrogatories and the presumptive limit of 25 requests for admission—was checked by any responding attorney.[320]

313. *Supra* Figure 3.
314. *Infra* Appendix A.
315. *Infra* Appendix A.
316. *Infra* Figure 7.
317. *Infra* Figure 7.
318. *Infra* Figure 7.
319. *Infra* Figure 7.
320. *Infra* Figure 7. The lack of concern about these two limits is not surprising because they duplicate limits already imposed in all cases in the Western District of Oklahoma. A presumptive limit of 25 interrogatories is imposed by Rule 33 of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 33(a)(1). And while Federal Rule 36 contains no limit on the number of requests for admission a party may serve, *see* FED. R. CIV. P. 36, a presumptive limit of 25 requests for admission is imposed by Local Civil Rule 36.1. *See* W.D. Okla. L. Civ. R. 36.1, http://www.okwd.uscourts.gov/wp-content/uploads/local_rules_6-22-2018A.pdf.

FIGURE 7. CONCERNS ABOUT DISCOVERY LIMITS
(FREQUENCY OF RESPONSES)



b. Differences Based on Party Represented

We then compared the responses by the party represented. We note at the outset that we are dealing with a small sample size, especially for defense attorneys. Of the 43 responses to this question, 30 were from plaintiffs' attorneys and only 13 were from defense attorneys. Nonetheless, the data show some significant differences based on the party represented.

Sixty percent (18) of the plaintiffs' attorneys said they were concerned with the presumptive limit of 30 requests for production, compared with only 15% (2) of defense attorneys. On the other hand, 69% (9) of the defense attorneys cited "Nothing specific. Just a general sense that I might need more discovery of some type," compared to only 23% (7) of plaintiffs' attorneys. In other words, defense attorneys were most worried about a general risk they might have to forego desired discovery, whereas plaintiffs' attorneys were distinctly focused on the concern that they would be handcuffed by the presumptive limit on document requests. Attorneys for both sides were equally (but less) concerned about the presumptive limit on hours of depositions (17% of plaintiffs' attorneys; 15% of defense attorneys).

c. Differences Based on Grounds for Jurisdiction

We also compared the responses based on the grounds for jurisdiction. As with the party differences, we again have a small sample here of 28 responses from federal question cases and 14 responses from diversity cases.[321]

Attorneys in federal question cases were significantly more likely to indicate that the presumptive limit of 30 requests for production was a factor in their decision, while attorneys in diversity cases were significantly more likely to indicate that it was nothing specific. For attorneys in federal question cases, about two-thirds (65%, or 18) selected a concern with the presumptive limit of 30 requests for production per side; 29% (8) selected the nothing specific, general sense reason; and 7% (2) selected the presumptive limit of 25 hours of deposition per party. For attorneys in diversity cases, half (50%, or 7) selected the nothing specific option, while 36% (5) selected the deposition limit and 14% (2) selected the production request limit.

We then performed analyses to examine the interaction between the represented party and grounds for jurisdiction. Again, any analyses of interactions rely on an even smaller sample and these analyses should be interpreted with caution. We received 29 responses from plaintiffs' attorneys in diversity and federal question cases.[322] The specific concerns about discovery limits differed based on type of jurisdiction. Plaintiffs' attorneys were much more likely to cite the presumptive limit of 30 requests for production in federal question cases (77%) than in diversity cases (14%). In contrast, plaintiffs' attorneys were much more likely to cite the presumptive limit of 25 hours of depositions in diversity cases (43%) than in federal question cases (9%). Similarly, plaintiffs' attorneys were more likely to cite "Nothing specific. Just a general sense that I might need more discovery of some type" in diversity cases (43%) than in federal question cases (14%). In many ways, the concerns expressed by diversity plaintiffs' attorneys are much closer to those expressed by all defense attorneys than with federal question plaintiffs' attorneys.

We received 13 responses from defense attorneys in diversity and federal question cases. While the specific concerns cited by the attorneys did not significantly differ based on type of jurisdiction, the small number of responses is particularly evident here. For example, while none of the six defense attorneys in federal question cases noted the presumptive limit of 25 hours of deposition per party, 29% of defense attorneys in diversity cases did. However, this was only two out of seven attorneys. Likewise, 83% of defense attorneys in federal question cases, compared to 57% in diversity cases, selected the

321. One case with a U.S. government defendant was not included in this analysis, but it is included in the party type analysis.

322. As noted above, this data set includes a total of 30 responses from plaintiffs' attorneys, but we have excluded one of those cases from this analysis because jurisdiction was based on the U.S. being a party.

nothing specific option, but the difference was five versus four attorneys. One defense attorney in each jurisdictional type selected the presumptive limit on document requests.

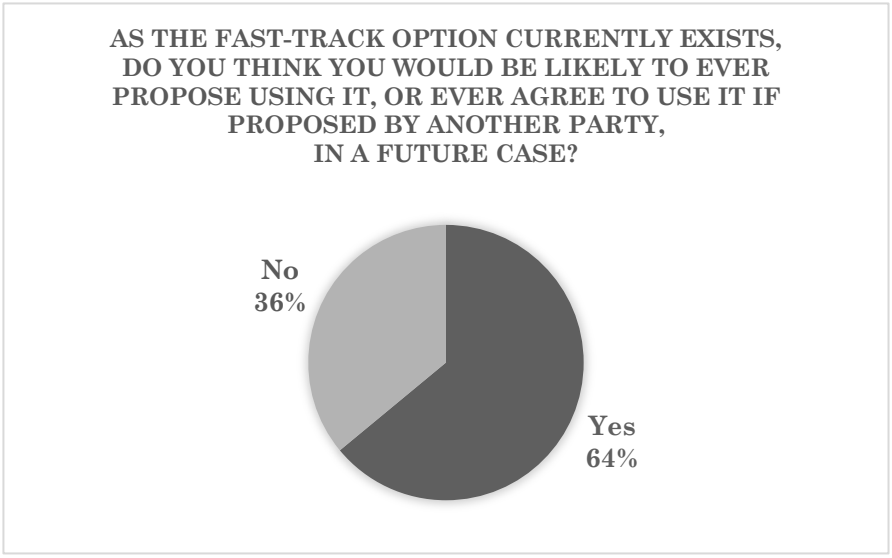
6. Future Usage

Regardless of how they answered the previous survey questions about usage in the specific case, all responding attorneys were asked to state whether they would be likely to ever propose using a fast-track program, or ever agree to use one if proposed by another party, in a future case.[323] We received a total of 127 responses to this question. We first present the data in the aggregate and then explore statistically significant differences in the responses based on the party represented and basis for jurisdiction.

a. Aggregate Results

One of the most positive findings from the survey was that 81 of the 127 attorneys (64%) who responded to this question expressed support for using the court's fast-track program in the future.[324] As shown in Figure 8, only 46 responding attorneys (36%) said they were unlikely to ever be willing to use it.[325] So, at least in the abstract, Judge DeGiusti's fast-track program remains a viable option for roughly two-thirds of the responding attorneys.

FIGURE 8. SUPPORT FOR THE FAST-TRACK OPTION (ACROSS ALL RESPONSES)



323. *Infra* Appendix A.
324. *Infra* Figure 8.
325. *Infra* Figure 8.

b. Differences Based on Party Represented

When we compared the responses given by plaintiffs' attorneys with the responses given by defense attorneys, however, we found a significant difference. Defense attorneys were significantly more likely to say they would propose or agree to use the fast-track option in a future case (75%) than were plaintiffs' attorneys (54%). Because all parties must agree to participate in fast-track programs in federal court, the practical effect is that even if increased education boosts awareness of the fast-track program to 100%, it will be a viable option in, at most, half of the cases.

c. Differences Based on Grounds for Jurisdiction

Finally, we compared the responses on the basis for subject-matter jurisdiction and again found a significant difference. Attorneys in diversity cases were significantly more likely to state they would be likely to propose or agree to use a fast-track program in a future case (83%, or 40), as compared to attorneys in federal question cases (52%, or 40).

We found a major and statistically significant difference within the cohort of plaintiffs' attorneys. While 83% of plaintiffs' attorneys in diversity cases said they would be likely to propose or agree to use a fast-track program in a future case, only 39% of plaintiffs' attorneys in federal question cases said they would. In contrast, defense attorneys expressed support for using a fast-track program in the future in both federal question cases (70%) and diversity cases (83%).

VI. ANALYSIS OF SURVEY FINDINGS AND IMPLICATIONS FOR FUTURE USAGE AND REFORM

In this Part, we analyze the survey findings and discuss the implications of those findings at two levels. First, we discuss what the survey findings tell us about the future of fast-track programs, and in particular what, if anything, might be done to increase usage of them. Second, we discuss what the survey findings might tell us about the role of fast-track programs in achieving two current goals of procedural reform: (1) tailoring the level of procedure to the needs of individual cases; and (2) increasing the number of civil jury trials.

A. Findings and Implications for Fast-Track Usage and Reform

Our data suggest that one of the main factors limiting the usage of fast-track programs is that attorneys do not know they are available. That finding suggests that usage might be increased by efforts to raise awareness. But our data suggest other reasons why we should temper our expectations that increased awareness might lead to increased usage. First, lack of awareness is not the only factor

driving lack of use.[326] Rather, attorneys cite many factors for why they are not using fast-track programs.[327] Second, while attorneys on both sides continue to express interest in fast-track options generally,[328] it is quite possible that the features of fast-track programs appeal to plaintiffs' and defense attorneys in different sets of cases. If those sets of cases don't overlap—or overlap only a little—then no amount of education and marketing is likely to significantly increase usage.

1. Awareness and Education

The data suggest that one of the main reasons attorneys are not using the fast-track program is that they do not know about it. In the 119 cases in which the attorneys reported that the case did not proceed on the fast track, almost half of the defense attorneys and over a quarter of the plaintiffs' attorneys said they were not aware of the program.[329] Lack of awareness appears to be a particular obstacle in diversity cases; over half of all responding attorneys in this cohort indicated they were not aware of the program.[330] Lack of awareness appears to be particularly acute among plaintiffs' attorneys in diversity cases. Nearly 60% of the plaintiffs' attorneys in diversity cases stated they were not aware of the program.[331] These data suggest that usage might be increased by raising awareness of the program, especially with attorneys in cases where interest might be expected to be higher.

Increased awareness may have little effect in some types of cases. For example, plaintiffs' attorneys in federal question cases were the group that was most likely to report being aware of the program (67%), but they were also the group most likely to say they would not consider using it in a future case (39%). It makes sense that these attorneys were more aware of the fast-track program because they are likely to be repeat players in federal court and therefore knowledgeable about local federal practice. It also makes sense that these attorneys are the least likely to want to use a fast-track program. Many federal law claims (e.g., employment discrimination) involve questions of intent that turn on circumstantial evidence.[332] We ought not be surprised if plaintiffs' attorneys in many federal question cases are reluctant to self-impose limits on the discovery, briefing, and trial time often needed to withstand summary judgment and prove their claims at trial. If plaintiffs' attorneys bringing federal

326. *Supra* Figure 3.
327. *Supra* Figure 3.
328. *Supra* Figure 8.
329. *Supra* Figure 4.
330. *Supra* Figure 5.
331. *Supra* Figure 6.
332. *See, e.g.*, Laina Rose Reinsmith, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After* Reeves v. Sanderson Plumbing Products, 55 VAND. L. REV. 219, 226, 229–30 (2002).

question cases view the core features of fast-track programs as working against their interests, then efforts to increase awareness are unlikely to generate more usage in those cases.

Increased awareness appears to have the greatest promise in diversity cases. Fully 83% of plaintiffs' attorneys (20 out of 24) and 39% of defense attorneys (17 out of 44) in diversity cases said they would consider using the fast-track program in a future case. Yet only 46% of defense attorneys and just 36% of plaintiffs' attorneys in diversity cases reported being aware of the court's fast-track program. These data suggest the possibility that many more diversity cases might find their way into the fast-track program if the parties knew it existed.

It makes sense to us that attorneys in diversity cases might be less aware of a specialized federal-court program like the fast-track program. By definition, diversity cases involve nonfederal (typically state-law) claims.[333] The attorneys who litigate state-law tort and contract claims may practice in federal court infrequently, and perhaps involuntarily in removed cases. Attorneys who have only an occasional case in federal court might fail to notice a fast-track program, especially one being offered specifically by that judge.

At the same time, we would be wise to temper optimism that increased awareness will lead to significantly increased usage. Several of the districts we studied reported that they aggressively publicized and marketed their programs with little effect.[334] Districts or judges have included their fast-track options in their standard pre-case-management order to increase visibility with little effect.[335] Perhaps the most sobering data point comes from Judge Campbell's experience in the District of Arizona. To ensure that the attorneys *and the parties* were aware of his option, he required that the attorneys prepare alternate budgets—one for the standard litigation process and one under his fast-track program—and certify that they had shared those budgets with their clients.[336] Assuming those certifications were valid, Judge Campbell's program had 100% awareness but still got few takers.[337]

---

333. 28 U.S.C. § 1332.

334. *See, e.g.*, *supra* Subpart III.A (describing that the District of Minnesota marketed its Expedited Trial Program through a brochure, standard Rule 26(f) form, and multiple publicity campaigns, and the option was raised by a judge in the Rule 16 conference); *supra* Subpart III.D (noting that the Western District of Pennsylvania markets its program through a link on the District's website, references in case management orders, and Judge Bissoon's speaking engagements).

335. *See, e.g.*, *supra* Subpart III.D.

336. Campbell, *supra* note 201, at 3.

337. *Id.* It should be noted, however, that Judge Campbell's program presumptively eliminated all discovery and motion practice (though the parties could propose an alternative that included some limited discovery). *Id.* It is

Nonetheless, the point remains that parties who do not know that a fast-track program exists cannot opt into it, especially if attorneys are not discussing it with their clients. It is true, of course, that fully informed parties might still say "no." But awareness is the essential first step in giving the parties a chance to say "yes."

2. General Interest Versus Interest in a Specific Case

One of the enduring puzzles of fast-track programs is the apparent disconnect between the data about general interest in fast-track programs and the data on actual usage. Time and again, attorneys have expressed significant interest in trimmed-down litigation processes that are faster, less expensive, and offer the chance to quickly get to trial.[338] As discussed earlier, half of the attorneys in the FJC's 2009 survey said they either "probably" or "definitely" would recommend using a simplified procedures scheme to their clients.[339] In our survey, 64% of the attorneys said it was "likely" that they would propose or agree to use the court's fast-track program in a future case.[340] But the data from the federal-court programs we examined across the country clearly show that the parties rarely choose to use fast-track programs when given the option.[341]

What explains the difference between what attorneys say about their interest in fast-track programs and their actual choices? One possible explanation for this divergence is that attorneys are overreporting their interest. We suspect, however, that the attorneys are expressing sincere interest, but in an ideal-case sense. In other words, we suspect that when attorneys say they would like the option of a trimmed-down litigation process, what they really mean is that they can imagine situations in which that option might be preferable to the regular litigation process. But when forced to think about whether any particular case is a good fit, attorneys find few cases to be good candidates. And that universe of cases shrinks even more when one considers that both sides must conclude that the needs of that specific case align with the promised benefits of a trimmed-down litigation process.

Our data suggest that the fundamental problem is that resistance to using fast-track programs in specific cases is a function of many factors, not just one.[342] Certain factors, like limits on discovery or trial time, or not wanting to accelerate the trial date,

---

possible that a similar scheme for making sure the parties knew about the cost-savings of a fast-track program might yield more interest in programs that limit—but do not presumptively eliminate—discovery and motion practice.

338. *See* FEDERAL JUDICIAL CENTER 2009 SURVEY, *supra* note 96, at 54, 56 figs. 29 & 31.

339. *Id.* at 56 fig. 1.

340. *Supra* Figure 1.

341. *See supra* Part III.

342. *See supra* Figure 3.

stand out as being of greatest concern.[343] But seven of the nine reasons we asked about in the survey were selected by at least 25 attorneys.[344] In other words, it appears that attorneys have a long list of reasons that might lead them to say "no" to using a fast-track program. And if either of the parties finds a reason to say "no," the fast track becomes a closed road.

The timing of the decision might exacerbate the problem. By their nature, fast-track programs ask parties to make commitments limiting the scope and scale of the litigation process at the start of the case.[345] But that is also the point in the case when the attorneys have the least information about their own cases and their opponents' cases. Cautious attorneys might well be reluctant to commit to limits on core aspects of the litigation process before they have more information to assess whether those limits might prove to be harmful to their cases.[346] The safer path is to let the regular litigation process play out, reserving the option of later asking the judge to impose limits as more information about their impact becomes available. While we did not gather data specifically addressing this issue, the impact of timing and uncertainty is suggested by the data showing that 37% of the attorneys who responded that the discovery limits were a factor stated they did not have any specific aspect of discovery in mind but rather had a "general sense" that they might need more discovery of some type later.[347]

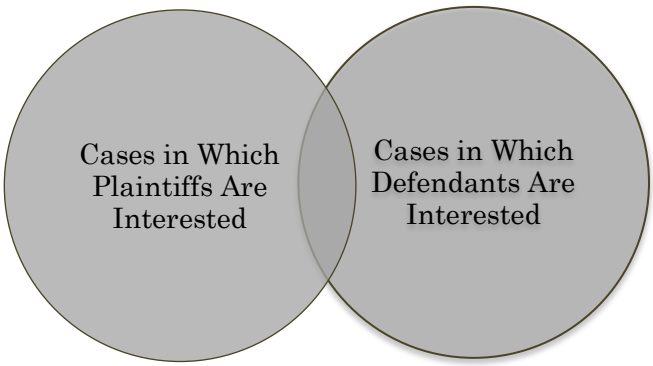
3. A Non-intersecting Venn Diagram?

Another possible explanation for the disconnect between attorneys' statements about general interest and actual usage is that plaintiffs' attorneys and defense attorneys might be genuinely interested in using fast-track programs but for different sets of cases. In other words, the features that might make a fast-track process appealing to a defense attorney in a particular case might lead a plaintiff's attorney to be opposed to it, and vice versa. A case in which the defendant is happy to skip discovery, for example, might be one where discovery is critical for the plaintiff. Conversely, a case in which the plaintiff is willing to skip dispositive motions might be precisely the type in which dispositive motions are standard practice for the defense. If plaintiffs' and defense attorneys view the features

343. *See supra* Figure 3.
344. *Supra* Figure 3.
345. *See, e.g.*, N.D. Cal. Gen. Order 64, *supra* note 143.
346. To address those types of concerns, Judge DeGiusti's fast-track program has a provision literally titled "Escape Clause" that allows parties to seek leave to withdraw from the program "upon a showing of good cause, including consideration of necessary, unanticipated discovery." *See* DeGiusti Fast Track Rules, *supra* note 218, at r. 11. He granted the only such request he has received. Nonetheless, attorneys might be reluctant to rely on an escape mechanism that requires the judge's permission.
347. *See supra* Subpart IV.C.5.a.

of fast-track programs as being generally "pro plaintiff" or "pro defendant" depending on the type of case,[348] then a Venn diagram of their interest in using a fast-track program in those cases might appear as two circles that overlap only at the edges.

FIGURE 9. VENN DIAGRAM
(SHOWING POSSIBLE AREA OF OVERLAPPING INTEREST)



One way of testing this hypothesis would be to compare the responses given by plaintiffs' and defense attorneys in the same case. Because our data set produced responses from both sides in only 18 cases, however, we don't have a sufficient sample size to perform that analysis. Future work in this area might focus on getting responses from both sides to determine whether there are certain types of cases that are more likely to generate interest from both plaintiffs' and defense attorneys.

4. Mismatch with the Federal Docket?

Another possible explanation for the disconnect between attorneys' stated interest in fast-track programs and actual usage could be that the federal docket might not contain many of the types of cases the attorneys have in mind when they express that interest. Fast-track programs are often seen as most suitable to "smaller" cases—ones in which the amount in controversy is not large enough to justify the cost of the regular federal pretrial process. For example, some might think of an $80,000 diversity tort or contract case as being the paradigm candidate for using a fast-track program to bypass the

348. Some features of fast-track programs might have a symmetrical impact on plaintiffs' and defense attorneys. For example, it may be that cases in which plaintiffs can get by with a single expert are the same cases in which defendants will need only one expert. For features with a symmetrical impact, plaintiffs' and defense attorneys might be expected to have similar views about whether those features were appropriate for the case in question.

pretrial process and move quickly to trial.[349] But how many $80,000 diversity suits are being brought in federal court at all? It may be that fast-track programs work best in the types of small-dollar lawsuits (say, under $50,000) that get litigated in state court. In this regard, it may be instructive that fast-track programs have had better (but still mostly modest) success in state courts where they have been targeted at small-dollar tort actions.[350]

5. The Features of the Programs Do Not Seem to Matter

One of our more surprising findings is that attorney interest did not seem to vary based on the features of the programs we studied. For example, Judge Campbell's program was highly restrictive, providing for no discovery and no pretrial motions.[351] It is possible that his program got few takers because of those strict limits.[352] But Judge DeGiusti's fast-track program has comparatively modest restrictions on discovery and only limits the page length of dispositive motion briefs (not the ability to file them), and his program also has had few takers.[353] Similarly, the District of Nevada's "Short Trial" program technically does not have limits on pretrial discovery (it leaves the scope of discovery to the discretion of the judge) and has limits on posttrial motions but not pretrial motions.[354] It too has had few takers.[355]

These data might suggest that attorneys are reacting to the existence of limits rather than the size of them. That is to say, an attorney who believes that discovery under the regular rules is to her client's advantage may be unwilling to give up *any* discovery that she might otherwise be entitled to. Similarly, an attorney who believes that dispositive motion practice will benefit him may be unwilling to

349. It is true that many federal question cases seek monetary damages of less than $75,000. In an employment discharge action, for example, a plaintiff's monetary damages from being fired might be low if the plaintiff soon obtained a new job paying a similar salary. Under federal discrimination law, however, prevailing plaintiffs can recover their attorney's fees incurred in winning the case, and those fees are not limited by the amount of the plaintiff's monetary damages. Thus, plaintiffs' attorneys with strong cases may conclude that the "costs" of pretrial discovery and motion practice are strategically valuable and worth incurring because they add settlement value and can be recovered from the defendant after trial.

350. *See* NAT'L CTR. FOR STATE CTS., *supra* note 5, at 82 (noting that state-court programs are typically designed for "relatively simple, lower-value cases with genuine disputes with respect to liability, damages, or both").

351. Campbell, *supra* note 201, at 3.

352. As noted earlier, Judge Campbell's program allowed the parties to propose limited discovery or other modifications at the Rule 16 Case Management Conference. *Id.* However, no parties ever proposed such a modification, nor were they receptive to it when Judge Campbell raised the issue with them. *See* Email from Judge David G. Campbell, *supra* note 205.

353. *See* DeGiusti Fast Track Rules, *supra* note 218, at r. 3, 4.

354. *See* D. Nev. Short Trial Rules, *supra* note 186, at r. 7, 24.

355. *See* Telephone Interview with Judge Cam Ferenbach, *supra* note 198.

give up any of that advantage. These possible effects might be exacerbated by the timing of the decision; if attorneys cannot confidently predict whether they might be giving up a small advantage or a large one, the cautious path will be to assume they would be giving up a large advantage and then opt for the regular litigation process.

6. Is Lack of Trial Experience Causing Attorneys to Misjudge the Impact of Fast-Track Limits?

As the number of jury trials declines, so too does the number of attorneys with significant trial experience. Some see this as having created a negative feedback loop.[356] Because there are fewer trials, attorneys have less experience trying cases.[357] Because they have less experience trying cases, they are quicker to settle—and therefore try even fewer cases.[358]

A lack of trials and trial experience might also be driving attorneys to engage in unnecessary discovery. Responding to the hypothesis that rising discovery costs have caused the decline in jury trials, Judge Higginbotham wondered if the conventional wisdom might have the causal relationship backwards:

> One might invert the hypothesis and contend that the decline in trials is responsible for the increased demands of discovery. Consider the loss of the vital sense of relevance and discipline when preparing a case in the shadow of a meaningful trial date. Add in a generation of litigators who have no trial experience and are ill equipped to sort through relevant information in discovery. Young attorneys without trial experience may insist on excessive discovery out of fear of missing something, because they cannot know what will be useful at trial.[359]

Others have also observed that lawyers with little or no trial experience are prone to over-discovery because they overestimate how much of the information obtained will ever be used and lack the experience needed to know "if something is worth fighting about."[360]

This phenomenon might also explain why so many attorneys seem so reluctant to use fast-track programs. Attorneys may be misjudging the impact of reduced discovery because they don't have the trial experience to realize that most of the information they plan to gather will never be used. Coming at it from the other direction, because they don't have a confident sense of how arguments will play

356. *See, e.g.*, Anderson, *supra* note 61, at 110.
357. *Id.*
358. *Id.* ("The phenomenon then feeds on itself as more and more lawyers—having no courtroom experience—settle cases, at least in part, because of the fear of going to trial.").
359. Higginbotham, *supra* note 61, at 750.
360. *See* Susman & Melsheimer, *supra* note 62, at 438.

out in court or what evidence they will need to convince a judge or jury, they seek comfort by taking discovery of everything just in case.

B. Implications for Procedural Reform

Fast-track programs are designed to serve two related purposes. One purpose is to tailor the litigation process to the needs of the case.[361] The other purpose is to generate more civil trials.[362] Unfortunately, the existing fast-track programs are not significantly achieving either of these objectives and may not hold much promise of doing so in the future.

1. The Limits of Voluntary Schemes

As discussed in Part II, the Federal Rules of Civil Procedure are uniform and trans-substantive, meaning that the same rules apply to all cases regardless of their size, complexity, or subject matter.[363] But not all cases are the same, and there is a longstanding concern that the federal litigation process has grown too bulky and complex for the smaller and simpler cases that still make up a sizable part of the federal civil docket.[364] Fast-track programs can be understood as a method of tailoring the litigation process to better fit the needs of smaller and simpler cases. Parties with "Chevy-sized" cases can opt out of the "Cadillac" rules and into a "Chevy-sized" set of procedures.

If parties chose to use fast-track programs for their small cases, it would alleviate some of the pressure on rulemakers to provide different sets of rules for different types of cases. Similarly, successful voluntary fast-track programs could take some of the pressure off judges to use their case-management authority to limit discovery in smaller cases to achieve proportionality. Unfortunately, the data clearly show that the attorneys are not using voluntary fast-track programs when they are made available.[365]

What lesson should we draw from the unwillingness of parties to opt for streamlined procedures? One might take a market-based view and conclude that streamlined procedures must be not just unwanted but ill-advised. As the argument would go, if streamlined procedures were a good idea, then parties would use them. That approach, however, assumes that the parties are weighing the costs and benefits properly. It also defines virtue solely from the perspective of the litigants and ignores systemic or institutional benefits.

If one believes, however, that streamlined procedures are a better alternative for those small cases, then the failure of voluntary fast-track programs might suggest that the federal courts should revisit the idea of creating a special set of *mandatory* rules for smaller and

361. *See* BUREAU OF JUST. ASSISTANCE, *supra* note 88, at 1.
362. *See* NAT'L CTR. FOR STATE CTS., *supra* note 5, at 74–77.
363. *See supra* notes 65–67 and accompanying text.
364. *See supra* notes 68–70 and accompanying text.
365. *See supra* Parts IV & V.

simpler cases.[366] The parties would not have to agree to use them; indeed, the parties would have no choice in the matter. For the good of the parties and the court system, the court would automatically use them in cases to which they applied.[367] To that end, prominent voices like Professor Arthur Miller, Professor Stephen Burbank, and Professor Stephen Subrin have recently urged the development of a special track for smaller and simpler cases.[368] For that approach to succeed, however, several obstacles will need to be overcome.

The first obstacle is that the federal bench and bar both have been lukewarm at best about case-tracking schemes. Of the six pilot districts that announced plans to implement case-tracking schemes as part of the CJRA, five either never followed through or created them but then placed virtually all of the cases on the Standard Track.[369] A study conducted by the RAND Institute for Civil Justice concluded that the judges were effectively reverting to the individual case-management model even when case-tracking schemes were formally put in place.[370] Attorneys seem more receptive to case tracking generally but resist having *their* cases placed on the small-case track, feeling like they are getting a lesser form of justice.[371] It is hard to see who would lead the charge to create a mandatory, simplified procedures, small-case track in federal court.

---

366. For example, in 2013 the Texas Supreme Court promulgated a special rule for "Expedited Actions." *See* TEX. R. CIV. P. 169. Rule 169 is mandatory and puts limits on discovery and trial time in cases in which the claimants affirmatively plead they are seeking only monetary relief of $100,000 or less in the aggregate. *Id.* The Texas Supreme Court made its rule mandatory even though all of the advisory groups that had been working on the project had recommended that it be a voluntary program. *See* Michael Morrison et al., *Expedited Civil Actions in Texas and the U.S.: A Survey of State Procedures and a Guide to Implementing Texas's New Expedited Actions Process*, 65 BAYLOR L. REV. 824, 852 (2013).

367. The scheme could give judges discretion to not apply the simplified rules or to vary them. But that would come with its own costs. Given the reaction of lawyers to the voluntary schemes, it seems likely that lawyers would file many motions seeking relief from the scheme.

368. *See* Burbank & Subrin, *supra* note 105, at 409; Miller, *supra* note 82, at 97–98; Subrin, *supra* note 69, at 398–405.

369. *See* JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 49–50 (1996).

370. *Id.*

371. *See* REPORT ON 2010 CONFERENCE ON CIVIL LITIGATION, *supra* note 83, at 9 (explaining that the "simplified rules" project was discontinued in part because experience with case-tracking schemes showed that "few lawyers would opt for a simplified track and that many would seek to opt out if initially assigned to it"); CIVIL RULES ADVISORY COMM., MINUTES, MEETING OF OCTOBER 16-17, 2000, at 23–27, https://www.uscourts.gov/sites/default/files/fr_import/CV10-2000-min.pdf (discussing that attorneys resisted use of the expedited tracks in E.D. Mo. and S.D.N.Y.); *see also* Subrin, *supra* note 69, at 403 (recognizing that many will oppose mandatory simple-track rules as "second-rate justice," though rejecting the premise as unfounded).

The second obstacle is that efforts to develop "small-case" tracks in federal court have always struggled to identify cases in the federal docket that everyone agrees should get "less" procedure.[372] Small-case tracks in state courts often exist for simple contract or tort cases with damages of less than $75,000.[373] There are no such cases in federal court because of the $75,000 amount in controversy requirement for diversity jurisdiction. There are, of course, a sizable number of federal question cases with damages of less than $75,000. But civil rights and employment attorneys bristle at the idea that such cases are "small" or "simple," and they especially resist the idea that they might lose the opportunity to take full discovery in those cases.[374] One supporter of creating a "simple-case" track has suggested the exclusion of any case where fee shifting would be available.[375] That would exclude the bulk of the federal question cases. The main point is that a meaningful "small-case" track must be defined in a way to capture a significant number of cases. That will not be easy. As Professor Miller put it, "politics and pressure groups will rear their ugly heads."[376]

While all of this might sound a bit disheartening, there may be a positive message lurking in the clouds. Perhaps the fact that attorneys resist simplified procedures should be seen not as a vote against simplified procedures but as a vote of confidence in the existing federal procedural scheme. Attorneys on both sides clearly view many features of the civil rules as providing advantages and protections they do not want to give up (though the features they cling to may be different).[377] For all of the complaints lodged against the existing rules, maybe the fact that attorneys are so reluctant to opt out of them is a sign that, by and large, the existing scheme isn't so bad after all.

---

372. The same difficulties surfaced when the Civil Rules Advisory Committee considered developing a set of "simplified" rules for smaller and simpler cases. *See* Cooper, *supra* note 83, at 1798–99.

373. *See* NAT'L CTR. FOR STATE CTS., *supra* note 5, at 6–7 (chart showing program features); *id.* at 2 (noting that the state-court programs "are designed specifically for factually and legally straightforward cases involving lower-value damage awards"); Laurie Kratky Doré, *If You Build It, Will They Come? Designing Iowa's New Expedited Civil Action Rule and Related Civil Justice Reforms*, 63 DRAKE L. REV. 401, 420–21 (2015) (listing range of threshold amounts and stating that Iowa picked $75,000 to reach but not exceed the amount-in-controversy requirement for federal diversity jurisdiction). For an international comparative perspective, the United Kingdom's Fast Track is for claims between £10,000 (claims below that go to a Small Claims Track) and £25,000. *See* CPR § 26.6(3)–(4), https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part26. Based on August 2019 exchange rates, that equates to claims of roughly between $15,000 and $40,000.

374. *See* Subrin, *supra* note 69, at 403.

375. *Id.* at 400.

376. *See* Miller, *supra* note 82, at 106.

377. *See generally* LEE & WILLGING, *supra* note 103.

2. The Quest to Increase the Number of Civil Trials

If one of the goals of fast-track programs is to increase the number of civil trials in federal court, we know that is not happening. Even when the parties opt into fast-track programs, those cases are still not going to trial.[378] To our knowledge, only two fast-track cases have resulted in trials, one a jury trial[379] and the other a bench trial.[380]

We can only speculate about why this has happened. In theory, fast-track programs should produce more trials because the parties will have avoided much of the pretrial costs that are believed to drive parties to settle.[381] But another major factor in the declining trial rate is that modern discovery is a powerful engine for educating the parties about the facts and the expected evidence, which the parties then use to price their claims and settle.[382] Fast-track programs typically restrict but do not eliminate discovery.[383] Faced with those discovery limits, the attorneys might be expected to focus their efforts on getting the most critical information from the most valuable sources. It may be that the litigants are finding that focused discovery from core sources is enough for them to price their claims and settle.[384] If that is the case, it is good news for those who have argued that proportionality in discovery can be achieved by taking an iterative approach that begins with the so-called "low hanging fruit."[385] But it may be bad news for those who hope that focused discovery will lead to more trials.

---

378. *See supra* Part III.

379. Dentino v. Moiharwin Diversified Corp., No. 2:16-cv-00904-VCF, 2016 WL 7676030 (D. Nev. Nov. 30, 2016); *see supra* Subpart III.E.

380. Spiniello Cos. v. Infrastructure Techs., Inc., No. 11–1128 (JJK), 2012 WL 4758041, at *1, *14 (D. Minn. Oct. 4, 2012); *see supra* Subpart III.A.

381. *See* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 323–30 (1991); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUDS. 1, 12–17 (1984).

382. *See* Langbein, *supra* note 53, at 570 ("[T]he drafters of the Federal Rules . . . did not foresee that the package of discovery techniques that they devised—interrogatories, documentary discovery, and sworn depositions—would constitute a truth-revealing process so powerful that it would ultimately displace not only the older pleading-based pretrial, but also the trial."); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUDS. 943, 951 (2004) (explaining that discovery produces settlements by providing information that parties use to value the claims).

383. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 108, at 6–7.

384. *See* Gensler & Rosenthal, *supra* note 81, at 662–63 (discussing benefits of iterative approach to discovery that begins with the core information from the key sources); Lee H. Rosenthal & Steven S. Gensler, *A Report from the Proportionality Roadshow*, 100 JUDICATURE 14, 15–16 (2016) (same).

385. *See* Gensler & Rosenthal, *supra* note 81, at 663.

Another possibility is that fast-track programs have an ironic design flaw. As discussed earlier, there is a sense among many that the decline in jury trials has created a generation of "litigators" without trial experience, who then settle their cases because they aren't confident in their trial skills, which then further decreases the number of civil trials.[386] One of the purposes of fast-track programs is to counteract that negative feedback loop by offering attorneys an opportunity to gain trial experience, with the idea being that attorneys will be more willing to do so in their smaller, lower-stakes cases.[387] But to make the trial of smaller cases feasible, fast-track programs typically restrict the discovery allowed.[388] In doing so, perhaps fast-track programs are inadvertently making the prospect of trial more intimidating. Attorneys without much trial experience might be particularly uncomfortable with the idea of going to trial without the safety blanket of knowing all the potential evidence in advance. It is true that most of that information will never come up at trial and can be harmlessly left undiscovered. But that's something attorneys learn by trying cases. The vicious cycle rears its ugly head again.

Whatever the reasons, it is probably safe at this point to conclude that fast-track programs offer little hope of significantly boosting the number of civil trials in federal court. That does not mean they can't be a *part* of the solution. Just as there is no single reason civil trials have been on the decline, it may require the cumulative impact of many reform efforts to reverse the trend of the vanishing trial. But we probably should not expect fast-track programs to play more than a minor role in the campaign.

VII. CONCLUSION

If federal judges gave parties an option to bypass most of the cost and fuss of the pretrial process and skip ahead to a one-day trial, would the parties take it? We now know the answer is a resounding (and disappointing) no. Every time and everywhere they have been offered, fast-track programs have been largely ignored and rarely used. We now also have some important insights into why they aren't used. Attorneys have a wide range of concerns, many of which go to the core features of fast-track programs. They don't want to give up discovery or face motions restrictions. They are worried about limits on experts and trial time. And some (generally defense attorneys) simply don't think that speeding things up will help them.

Some of our data paint a more encouraging picture. Many attorneys said that lack of awareness contributed to their decision not

386. *See* Anderson, *supra* note 61, at 101; Higginbotham, *supra* note 61, at 750.

387. *See* NAT'L CTR. FOR STATE CTS., *supra* note 5, *passim*.

388. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 108, at 6–7.

to use the fast-track program. And a significant majority of attorneys said they'd consider using a fast-track program in the future should the right opportunity arise, especially in diversity cases. These findings suggest that courts might increase usage of their fast-track programs with more outreach to the bar.

Those efforts should be encouraged, but we should be careful to temper expectations. Districts have engaged in significant efforts to publicize and promote their fast-track programs in the past, all with little effect. Fast-track programs seem to appeal to lawyers more from a distance than up close. When faced with the choice in a specific case, and when having to make that choice early in the lawsuit when matters are least certain, one of the attorneys always seems to find a reason to stay on the regular path. And when either side says no, the fast track is closed.

In the meantime, all of the stakeholders in the federal litigation system should continue to think about how to provide for meaningful access to litigants in small cases. Maybe the answer is that the litigants don't need any help because they are already factoring the small stakes into their decisions about what to do (and not do) in those cases. Maybe the answer is that judges are already providing—and are best suited to provide—whatever help is needed through wise judicial case management. Or maybe the answer is that small cases are suffering and in desperate need of a mandatory special scheme to keep costs in control and offer a realistic chance at trial. If that is the case, however, we face difficult questions about what that scheme might look like and which cases will be put in it.

APPENDIX A

FAST TRACK SURVEY

Q1 Consent to Participate in Research at the University of Oklahoma

OU-NC IRB Number: 10557 Approval Date: 03/29/2019

You are invited to participate in research about the use of expedited trial programs (sometimes called "Fast Track" programs) in federal court. Specifically, you will be asked questions about the Fast Track option offered by U.S. District Court Judge Timothy DeGiusti in his civil cases. If you agree to participate, you will **complete this online survey.** There are no risks or benefits. Your participation is voluntary and your responses will be confidential. Only the researchers will have access to identifiable data. After removing all identifiers, we might share your data with other researchers or use it in future research without obtaining additional consent from you. Judge DeGiusti will not have access to identifiable data or to data indicating who did or did not participate in the survey.

Even if you choose to participate now, you may stop participating at any time and for any reason. Data are collected via an online survey system that has its own privacy and security policies for keeping your information confidential. No assurance can be made as to their use of the data you provide.

If you have questions about this research, please contact:

Professor Steven S. Gensler
University of Oklahoma College of Law
(405)325-7889
sgensler@ou.edu

You can also contact the University of Oklahoma – Norman Campus Institutional Review Board at 405-325-8110 or irb@ou.edu with questions, concerns or complaints about your rights as a research participant, or if you don't want to talk to the researcher.

By providing information to the researcher(s), I am agreeing to participate in this research. *I also affirm that I am at least 18 years old (if not, you cannot participate).*

Q2 Which of the following best describes your law practice setting? (Check one)

- Solo practitioner (1)
- Private firm of 2-10 attorneys (2)
- Private firm of 11-50 attorneys (3)
- Private firm of 51-200 attorneys (4)
- Private firm of more than 200 attorneys (8)
- Legal staff of for-profit entity (5)
- Legal staff of non-profit entity (6)
- Government (7)

Q3 How many years have you practiced law? (Check one)

- Less than 5 years (1)
- 5 to 10 years (2)
- 11 to 20 years (3)
- 21 to 30 years (4)
- 31 or more years (5)

Q4 In the named case, did you represent a plaintiff or defendant? (Check one)

- Plaintiff (1)
- Defendant (2)
- Other (3)

Q5 Do you primarily represent plaintiffs, defendants, or both? (Check one)

- Represent plaintiffs in all or nearly all cases (1)
- Represent plaintiffs and defendants, but plaintiffs more frequently (2)
- Represent plaintiffs and defendants about equally (3)
- Represent plaintiffs and defendants, but defendants more frequently (4)
- Represent defendants in all or nearly all cases (5)

Q6 In your litigated cases, do you primarily practice in state court, federal court, or both? (Check one)

- Primarily state court (1)
- State court and federal court about equally (2)
- Primarily federal court (3)
- Exclusively federal court (4)

Q7 Which of the following best describes your client in this case? (Check one)

- Natural person (individual) (1)
- Small for-profit entity (2)
- Mid-sized for-profit entity (3)
- Large national or multinational for-profit entity (4)
- Non-profit entity (5)
- Private educational institution (6)
- Agency of a state or local government (7)
- Agency of the federal government (8)

Q8 What was your primary arrangement with your client regarding payment for your services? (Check one)

- Hourly fees (1)
- Contingent fee (2)
- Salaried employee of client (including government) (3)
- Other (4)

Q9 At the start of the case, when initial case-management decisions were being made, were you aware of Judge DeGiusti's Fast Track option?

- Yes (1)
- No (2)

Q10 Did you discuss the Fast Track Option with your client in this case?

- Yes (1)
- No (2)

Display This Question:
If Did you discuss the Fast Track Option with your client in this case? = Yes

Q11 Which of the following best describes your client's views about the Fast Track Option after that discussion?

- Instructed you not to participate (1)
- Generally not in favor but left it to you to decide whether to participate (5)
- No strong opinion either way and left it to you to decide whether to participate (2)
- Interested but left it to you to decide whether to participate (3)
- Instructed you to participate (4)

Q12 Did this case proceed under the Fast Track Option?

- Yes (1)
- No (2)

Skip To:
Q14 If Did this case proceed under the Fast Track Option? = No

Q13 Who first proposed that the case proceed under the Fast Track Option?

- I did (1)
- Another party did (2)
- Skip To: Q21 If Who first proposed that the case proceed under the Fast Track Option? = I did
- Skip To: Q21 If Who first proposed that the case proceed under the Fast Track Option? = Another party did

Q14 Did you or any other party propose that the Fast Track Option be used in this case?

- Yes (1)
- No (2)

Skip To:
Q18 If Did you or any other party propose that the Fast Track Option be used in this case? = No

Q15 Who proposed it?

- I did (1)
- Another party did (2)

Skip To:
Q17 If Who proposed it? = Another party did

Q16 Why was it not used?

- I could not get one or more of the other parties to agree to use it (1)
- The parties agreed to use it but the Court would not approve (2)

Skip To:
Q21 If Why was it not used? = I could not get one or more of the other parties to agree to use it

Skip To: Q21
If Why was it not used? = The parties agreed to use it but the Court would not approve

Q17 Why was it not used?

- I was not willing to use it (1)
- One or more of the other parties was not willing to use it (2)
- The parties agreed to use it but the Court would not approve (3)

Skip To:
Q21 If Why was it not used? = One or more of the other parties was not willing to use it

Skip To:
Q21 If Why was it not used? = The parties agreed to use it but the Court would not approve

Q18 Based on your prior responses, you either decided not to propose using the Fast Track Option in this case, or rejected it after another party proposed using it. Which of the following factors played a role in that decision? (Check all that apply)

- I did not know it existed (17)
- The amount of discovery allowed was not sufficient (15)
- The page limits for dispositive motion briefs were too short (4)
- The presumptive limit of one expert per side was not sufficient (6)
- The presumptive time allotted for trial presentation (12 hours per side) was not sufficient (7)
- I had concerns about how it would alter the dynamics of settlement (9)
- It was different and I had concerns about the unknown (10)
- I thought it would benefit my adversary more than it would benefit me (12)
- I did not want to accelerate the trial date (14)

Display This Question:
If Based on your prior responses, you either decided not to propose using the Fast Track Option in t. . . = The amount of discovery allowed was not sufficient

Q19 You indicated that the limits on discovery were a factor in your decision. Which of the following limits played a role in you concluding that the discovery allowed might not be sufficient? (Check all that apply)

- The presumptive limit of 25 hours of deposition per party (1)
- The presumptive limit of 25 interrogatories per side (2)
- The presumptive limit of 25 requests for admission per side (3)
- The presumptive limit of 30 requests for production per side (4)
- Nothing specific. Just a general sense that I might need more discovery of some type (5)

Q20 Were there any other factors that played a role in your decision not to propose, or agree to use, the Fast Track Option? (If so, please describe)

Q21 Please state (estimate if you can) how many depositions you took in this case.

- None (1)
- 1 to 3 (2)
- 4 or more (3)
- I can't recall (4)

Q22 Please state (estimate if you can) how many interrogatories you served in this case.

- None (1)
- 1 to 25 (2)
- More than 25 (3)
- I can't recall (4)

Q23 Please state (estimate if you can) how many document requests you served in this case.

- None (1)
- 1 to 30 (2)
- More than 30 (3)
- I can't recall (4)

Q24 How did your case conclude?

- Trial (1)
- Summary judgment (2)
- Dispositive pleadings motion (3)

- Voluntarily dismissed pursuant to settlement (4)
- Voluntarily dismissed not pursuant to settlement (5)
- Other (6)
- I don't know because I stopped serving as counsel before the case concluded (7)

Q25 As the Fast Track Option currently exists, do you think you would be likely to ever propose using it, or ever agree to use it if proposed by another party, in a future case?

- Yes (1)
- No (2)

Q26 Are there any changes to the Fast Track Option that would make you more inclined to want to use it?

Q27 Do you have any other comments about Judge DeGiusti's Fast Track Option or Fast Track options generally?

Q28 Would you be willing to speak with Professor Gensler if he has follow up questions?

- Yes (1)
- No (2)