Western District of Wisconsin Bar Association
ANNUAL MEETING AGENDA
May 17, 2018

Annual Meeting and Luncheon at Madison Central Library
201 W. Mifflin Street, 3rd Floor Community Room

11:00 a.m. **Business Meeting of the Officers and Directors of the Bar Association and Pro Bono Fund**

12:00 p.m. **Annual WDBA Luncheon**
Keynote Speaker: Attorney Kimberley Motley,
International Litigator and Human Rights Advocate
Topic: Motley's Law: A New Age of Legal Representation

CLE Program at the U.S. District Courthouse
120 North Henry Street, **Room 250**

1:45-2:30 **What U.S. Practitioners Can Learn From International Law**
Speaker: Kimberley Motley, Motley Legal Services

2:30-3:00 **Federal Gerrymandering Litigation Update**
Speaker: Doug Poland, Rathje & Woodward, LLC

3:00-3:30 **Hot Topics in Employment Law**
Speakers: Danielle Schroder, Hawks Quindel, S.C.
and Tony McGrath, Jackson Lewis P.C.

3:30-3:40 **Demo of Juror Review of Electronic Evidence**
Speakers: Joshua Egstad, Director of IT for the Western District and
Tim O'Shea, U.S. Department of Justice

3:40-3:50 **Report on Patent Summits and Local Civil Procedure Changes**
Speaker: A.J. Bianchi, Michael Best & Friedrich LLP

3:50-4:00 **Clerk of Court's Report**

4:00-4:30 **Judges' Panel**

4:30-5:30 **Reception – Beverages and Hors D'oeuvres**

Western District of Wisconsin Bar Association

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Western District of Wisconsin Bar Association

Meeting Agenda

Thursday, May 17, 2018
11:00 AM – Madison Public Library – 3rd Floor

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1. Call to Order, Roll Call
2. Secretary's Report/Approval of Minutes of 2017 Annual Meeting

   Recommended Motion: to approve minutes of the 2017 Annual Meeting
3. Treasurer's Report for 2017-2018

   Recommended Motion: to approve Treasurer's Report for 2017-2018
4. Clerk of Court's Report (Peter Oppeneer)
5. President's Report
6. Committee Reports (if any)
   a. Newsletter
   b. Website
   c. Pro Se/Pro Bono
   d. Membership
   e. Courthouse Facilities
   f. Court Rules Practice and Procedure
   g. Criminal Justice
7. Nominating Committee Report
   a. Election of 2018-2019 Officers
   b. Election of Board Members
8. Other Business
9. Adjournment

MEMORANDUM

TO: All Members of the Western District of Wisconsin Bar Association
FROM: The Western District of Wisconsin Bar Association Nominating Committee
DATE: May 17, 2018
RE: Nominating Committee Report

This Nominating Committee Report constitutes the Slate of Candidates for Fiscal Year 2018-2019 for the Western District of Wisconsin Bar Association ("WDWBA"). The following are the nominees for Officer positions for Fiscal Year 2018-2019.

Officers/Executive Committee

President
Jennifer Gregor

Vice President/President-Elect
Emily Feinstein

Treasurer
David Zoeller

Secretary
A.J. Bianchi

Board of Governors

Pursuant to Article VII, Section 7.1, the Board of Governors consists of: a) the current President, Vice President, Secretary, Treasurer, and Immediate Past President; b) nine Members At Large; and c) the Clerk of the District Court. Except for Members At Large, those Board positions are held on an *ex officio* basis. All other former Presidents shall be members of the Board for a period not to exceed five (5) years.

The following are the nominees for Board of Governors positions for 2018-2019:

Term	**Board of Governors**
While holding position	Peter Oppeneer, Clerk of Court
While holding position	Jennifer Gregor, President
While holding position	Emily Feinstein, VP/President-Elect
While holding position	David Zoeller, Treasurer
While holding position	A.J. Bianchi, Secretary
While holding position	Ann Peacock, Immediate Past President

Members At Large

2015 - 2018	Jeffrey Mandell
2015 - 2018	Vacant
2015 - 2018	Deborah Meiners
2016 - 2019	Kelly Welsh
2016 - 2019	Vacant
2016 - 2019	Andrew DeClercq
2017 - 2020	Timothy M. O'Shea
2017 - 2020	Rachel Bachhuber
2017 - 2020	Anthony Trillo

Past Presidents

2013 - 2018	Richard Briles Moriarty
2015 - 2020	Jeffrey A. Simmons
2016 - 2021	Matthew Duchemin
2017 – 2022	Sarah Siskind

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Western District of Wisconsin Bar Association Pro Bono Fund, Inc.

Meeting Agenda

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   Recommended Motion: to approve Treasurer's Report for 2017-2018
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5. Other Business
6. Adjournment

MEMORANDUM

TO: All Members of the Western District of Wisconsin Bar Association
FROM: The Western District of Wisconsin Bar Association Nominating Committee
DATE: May 17, 2018
RE: Nominating Committee Report – Pro Bono Fund

This Nominating Committee Report constitutes the Slate of Candidates for Fiscal Year 2018-2019 for the Western District of Wisconsin Bar Association Pro Bono Fund ("WDWBA Pro Bono Fund").

By operation of the Bylaws of the WDWBA Pro Bono Fund, the officers and members of the Board of Governors of the Western District of Wisconsin Bar Association ("WDWBA") concurrently serve as officers and members of the Board of Governors of the WDWBA Pro Bono Fund.

On that basis, the following are the nominees for Officer and Board of Governor positions on the WDWBA Pro Bono Fund for Fiscal Year 2018-2019, with the understanding that any change in any position on the WDWBA would automatically effect a concurrent change in an associated position on the WDWBA Pro Bono Fund.

Officers/Executive Committee

President
Jennifer Gregor

Vice President/President-Elect
Emily Feinstein

Treasurer
David Zoeller

Secretary
A.J. Bianchi

Board of Governors

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The following are the nominees for Board of Governors positions for 2018-2019:

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While holding position	A.J. Bianchi, Secretary

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Past Presidents

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2016-2021	Matthew Duchemin

What U.S. Practitioners Can Learn From International Law

Kimberley Motley, Esq.
Motley Legal Services

May 17, 2018

Afghanistan Laws of Note

Information as it relates to Cases Litigated in Afghanistan

I. Lack of Notice - Afghanistan's Constitution Article 130

In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.

II. Exclusionary Rule - ICPC Article 7

The evidence which has been collected without respect of the legal requirements indicated in the law is considered invalid and the Court cannot base its judgment on it.

III. CPC - Article 21 Inadmissibility of Evidence and Documents

Approved by Parliament: January 26, 2014
Endorsed by President: February 23, 2014

(1) The obtained evidence which is inadmissible due to violating the provisions of this law or other enforced laws shall be taken out of the file and stamped. The evidence and documents shall be maintained separately from other evidence and documents.

(2) In all stages of the case proceedings, the prosecutor's office and court shall ensure the existence and lack of existence of evidence and documents set forth in paragraph (1) of this article.

IV. Right Against Double Jeopardy

A. Islamic Law and Shar'i'a Law □1) According to Article 1828 of the book of Mujalutulhakam – when the conditions and the proofs provided for a case the court cannot postpone or adjourn for another date, "when the condition and the reason of a decision provided the judge cannot adjourn or postpone the verdict for another time. □

B. UN Conventions to Which Afghanistan is a Signatory of □1) The UN Convention on Political and Civil Rights Article 14 states that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in

accordance with the law and penal procedure of each country.

V. Presumption of Innocence Violations

A. Islamic Law and Shari'a Law

1) According to Article 8 explanation In the book of Mujalutulhakam it explains presumption of innocence.

2) One of the important Principles of the Holy Koran is that every person is born innocent and if there is any charge the one who brings the charge or accuses another is the one who should prove their guilt.

B. Afghanistan Law

1) Afghanistan's Constitution Article 25 states that innocence is the original state.

2) ICPC Article 4 entitled Presumption of Innocence states that from the moment of the introduction of the penal action until when the criminal responsibility has been assessed by a final decision the person is presumed innocent. Therefore decisions involving deprivations or limitations of human rights must be strictly confined to the need of collecting evidence and establishing the truth.

3) UN Conventions 1) In addition to this, the UN Convention on Human Rights Article 11 states that everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense. 2) The UN Covenant on Political and Civil Rights Article 14(2) states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

VI. Defamation - Article 436

Defamation is the attribution of a certain incidence to someone else by one of the "public" means, such that if it were true, the accused would have been punished or degraded in the eyes of the people.

VII. Marriage

A. Afghanistan's Civil Code Article 70:

Marriage shall not be considered adequate until the male completed the age of 18 and the female the age of 16.

VIII. Adultery

A. Afghanistan's Penal Code Article 398

A person, defending his honor, who sees his spouse, or another of his close relations, in the act of committing adultery or being in the same bed with another and immediately kills or injures one or both of them shall be exempted from punishment for laceration and murder but shall be imprisoned for a period of not exceeding two years, as a "Tazeer" punishment.

B. Holy Quran Chapter 24 verse 4

And those who accuse chaste women and then do not produce four witnesses - lash them with eighty lashes and do not accept from them testimony ever after…

FEDERAL PARTISAN GERRYMANDERING LITIGATION UPDATE

Western District of Wisconsin Bar Association
May 17, 2018

Douglas M. Poland
Rathje & Woodward, LLC
dpoland@rathjewoodward.com

WHAT IS PARTISAN GERRYMANDERING?

WHAT IS PARTISAN GERRYMANDERING?

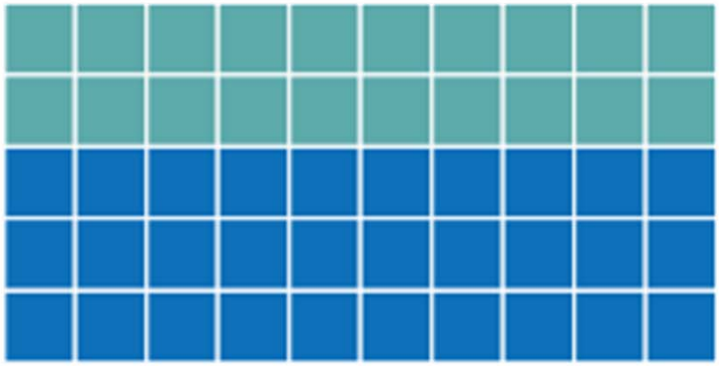
- The deliberate drawing of district lines to gain a systematic advantage for one political party over another

HOW TO GERRYMANDER: PACKING AND CRACKING

50 PRECINCTS

40% Teal

60% Blue

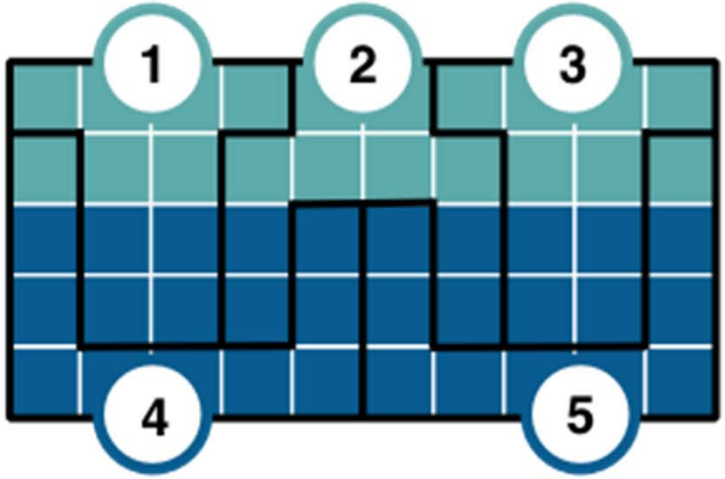


5 Districts

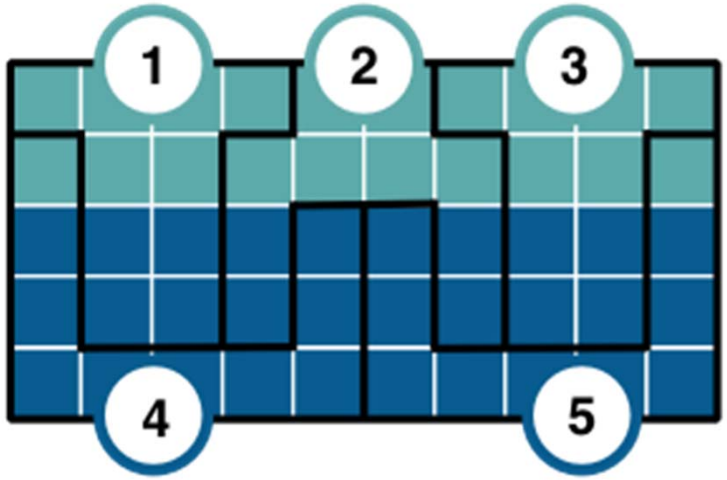
3 Teal

2 Blue

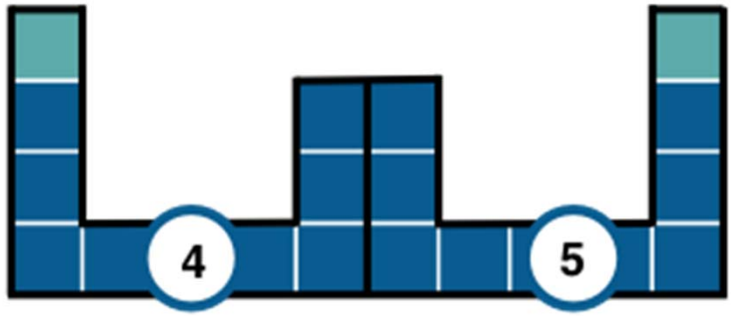
TEAL WINS



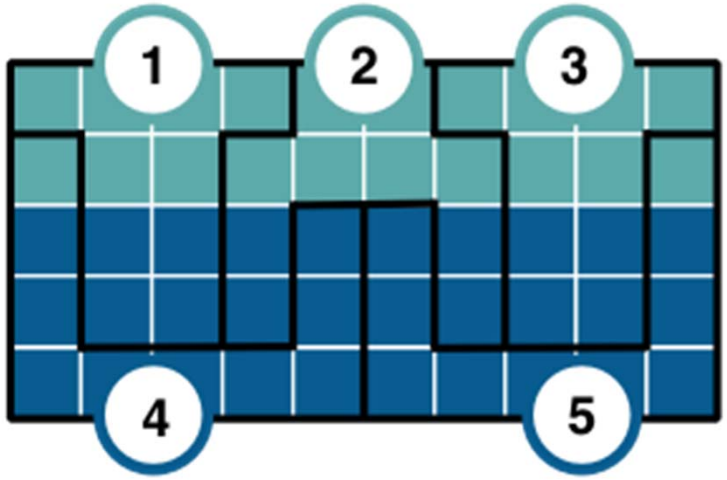
PACKING



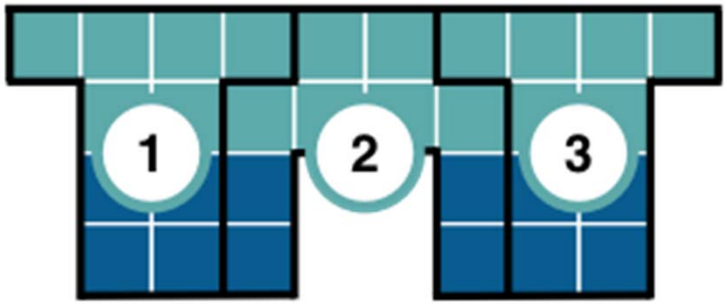
THE PACKED DISTRICTS



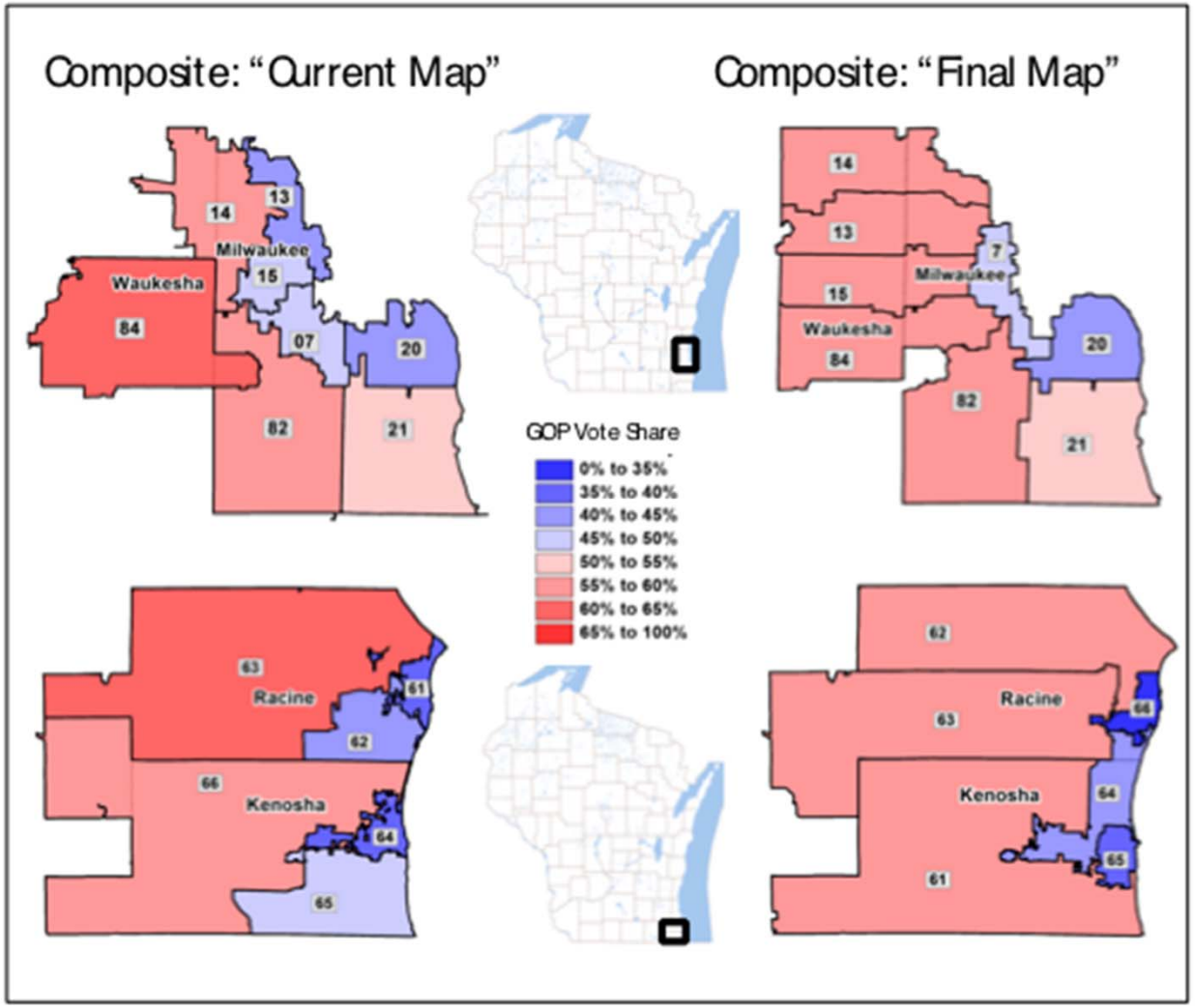
CRACKING



THE CRACKED DISTRICTS

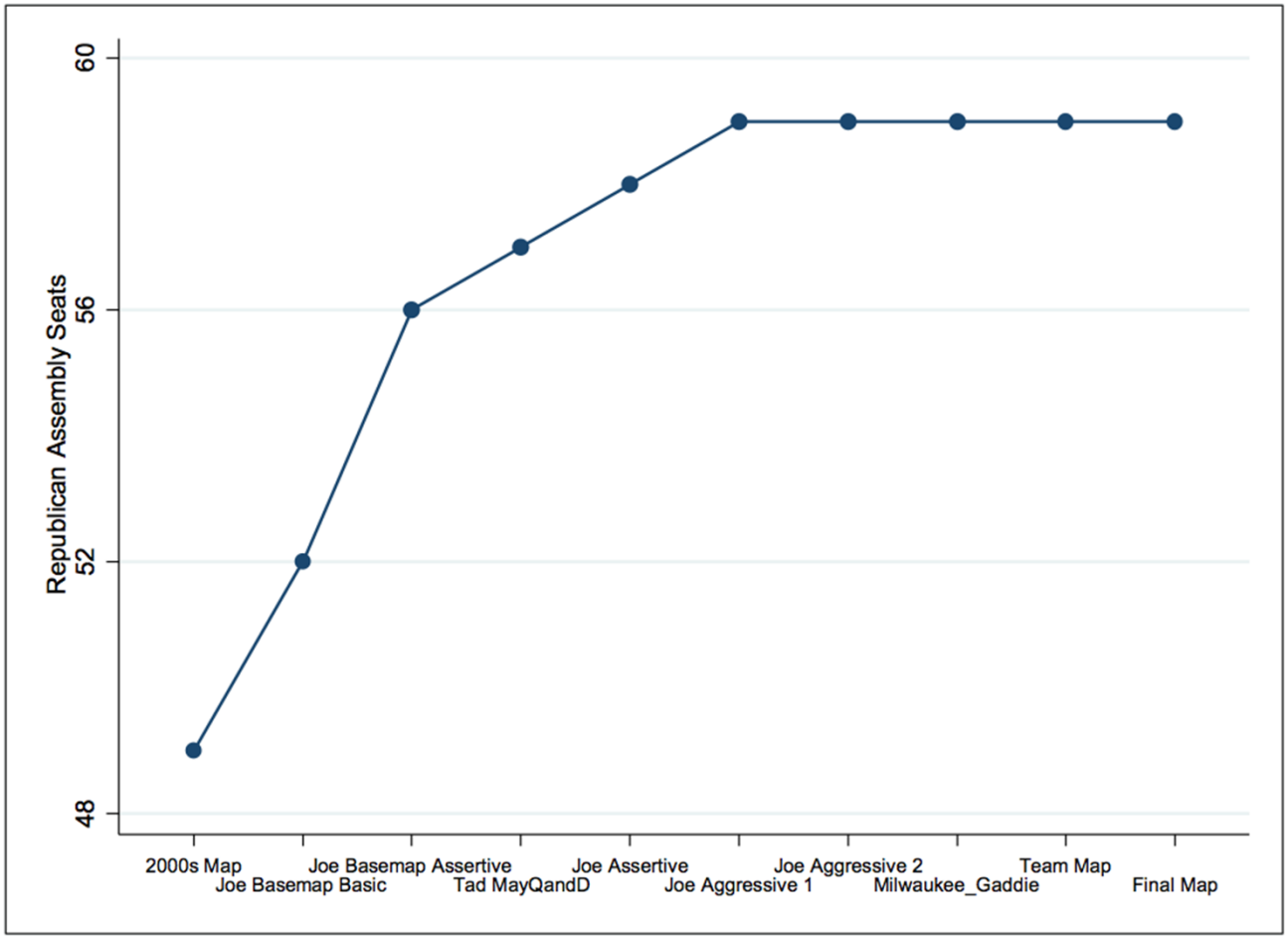


PACKING AND CRACKING - EXAMPLES



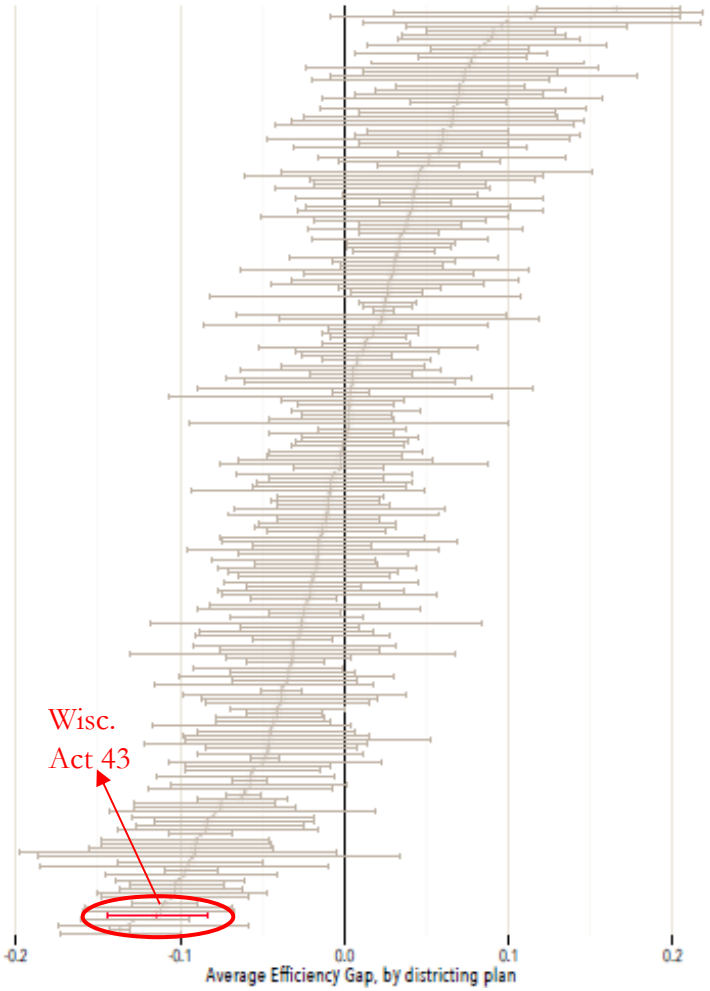
PROVING OUR CASE: PARTISAN INTENT

No. of seats for Republicans (of 99)

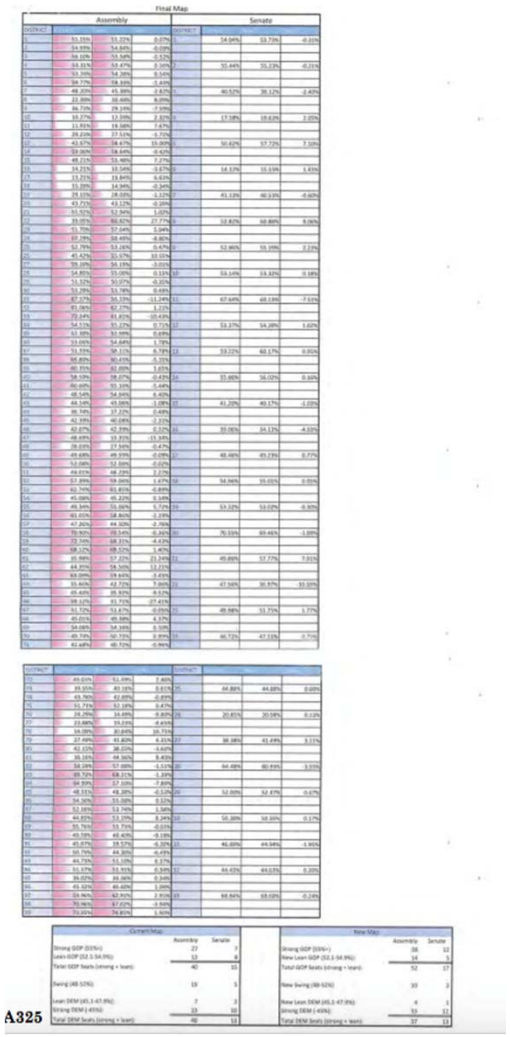


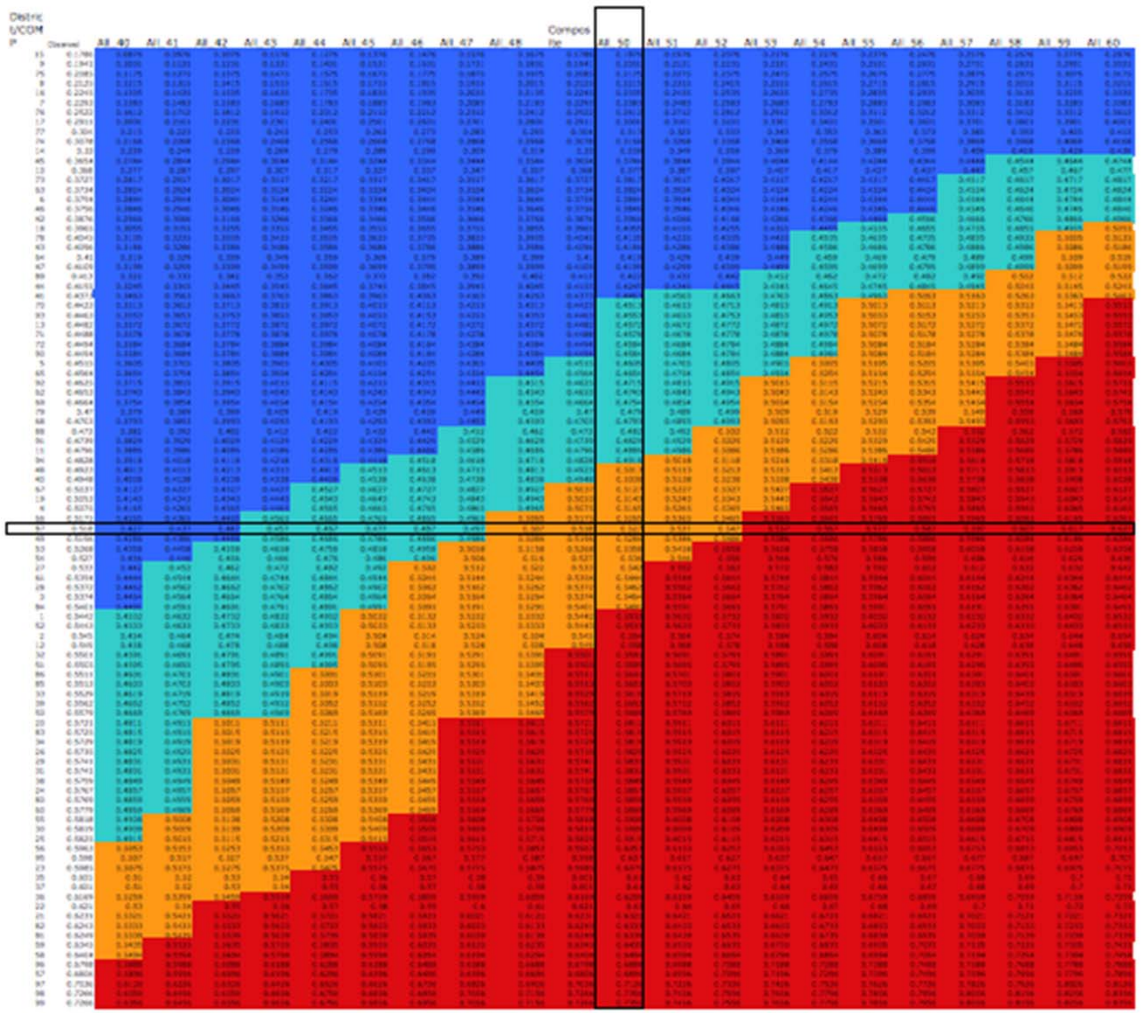
Draft redistricting plans made by the State

PROVING OUR CASE: PARTISAN EFFECT

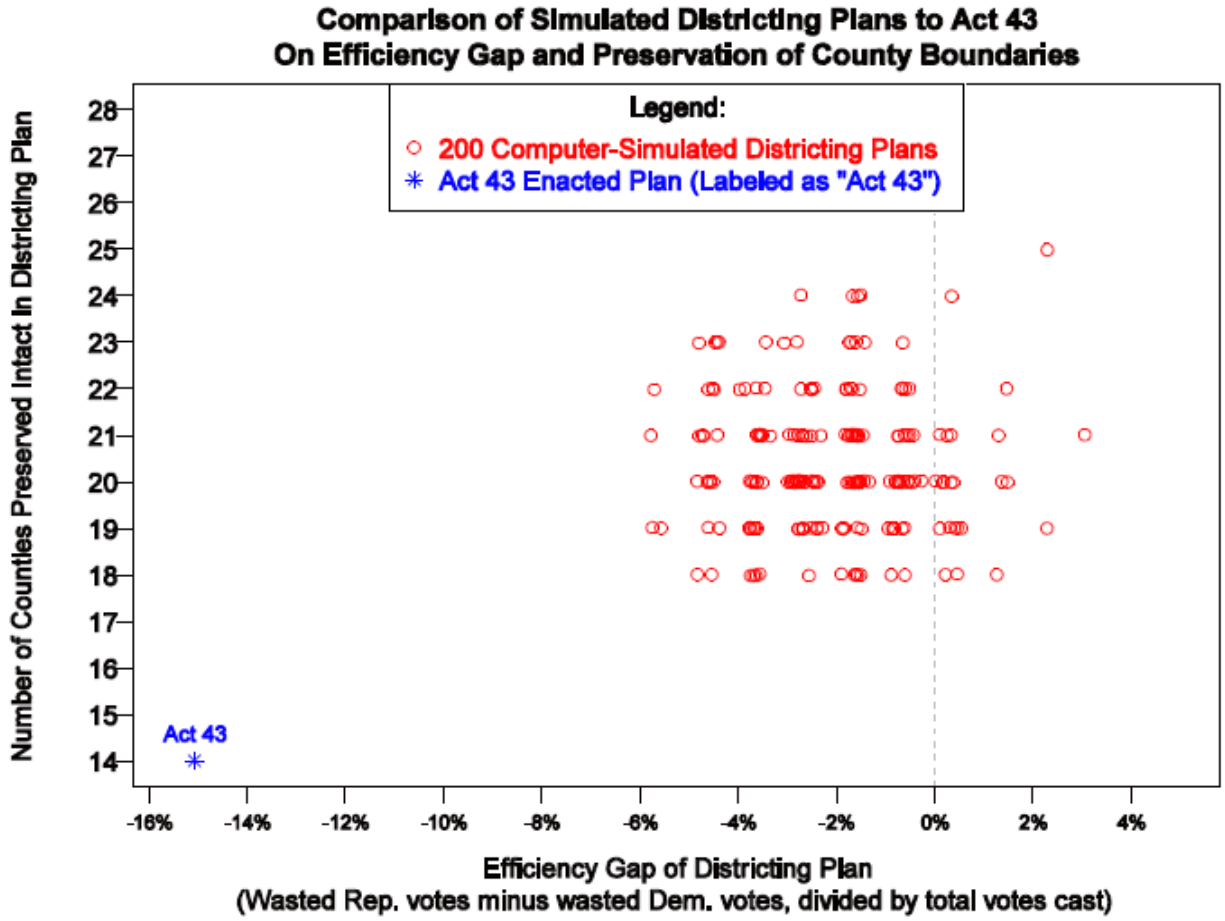


PROVING OUR CASE:
PARTISAN EFFECT - DURABILITY





NO JUSTIFICATION: DR. CHEN'S SIMULATIONS



SCOTUS!

WHAT'S NEXT?

- June 25, 2018 - Last date for SCOTUS to issue orders during current term
- August 14, 2018 - WI Partisan Primaries
- November 6, 2018 - WI General Election

OTHER CASES

- *Benisek v. Lamone* (MD)
- *Common Cause v. Rucho* (NC)
- *League of Women Voters of Michigan v. Johnson* (MI)
- *League of Women Voters of Pennsylvania v. Commonwealth/Corman v. Torres* (PA)

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION
ANNUAL MEETING AND CLE PROGRAM
MAY 17, 2018

FEDERAL GERRYMANDERING LITIGATION UPDATE

I. LEGAL BACKGROUND

A. Adopting Legislative Districts in Wisconsin.

1. Reapportionment of state legislative districts is a responsibility constitutionally vested in the state government. *See, e.g., Growe v. Emison*, 507 U.S. 25, 34 (1993). Although some states have chosen to vest the power to redistrict in a neutral body designed specifically to perform that function, *see Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2661–62 & n.6 (2015), in Wisconsin, that responsibility rests with the bicameral legislature composed of the Wisconsin State Senate and the Wisconsin State Assembly. Wis. Const. art. IV, §§ 1, 3.

2. According to Wisconsin law, "[t]he state is divided into 33 senate districts, each composed of 3 assembly districts. Each senate district shall be entitled to elect one member of the senate. Each assembly district shall be entitled to elect one representative to the assembly." Wis. Stat. § 4.001.

3. The Wisconsin Constitution directs the Wisconsin legislature, "[a]t its first session after each enumeration made by the authority of the United States," to "apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, § 3. The Wisconsin Constitution also imposes specific requirements for reapportionment plans.

    a) Assembly districts are "to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable." Id. § 4. With respect to political subdivisions, a prior federal district court observed that, "[a]lthough avoiding the division of counties is no longer an inviolable principle, respect for the prerogatives of the Wisconsin Constitution dictate that wards and municipalities be kept whole where possible." *Baumgart v. Wendelberger*, Nos. 01-C-0121 & 02-C-0366, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002). The Wisconsin Constitution further requires that "no assembly district shall be divided in the formation of a senate district." Wis. Const. art. IV, § 5.

b) In addition to the state constitutional requirements, federal law requires state legislatures to ensure that districts are approximately equal in population, so that they do not violate the "one-person, one-vote" principle embedded in the Equal Protection Clause of the Fourteenth Amendment. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Further, states also must comply with § 2 of the Voting Rights Act of 1965, which focuses on preserving the voting power of minority groups. 52 U.S.C. § 10301; *see also Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

4. Redistricting laws in Wisconsin are enacted, in large measure, in the same manner as other legislation, specifically, by way of bills originating in either house of the legislature, see Wis. Const. art. IV, § 19. A bill must then "be presented to the governor," who can sign or veto the bill. Wis. Const. art. V, § 10.

B. Recent History of Legislative Redistricting in Wisconsin.

1. **1980 Census** - The plan that had been enacted in 1972 could no longer satisfy the constitutional requirement of "one-person one-vote." *See Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 631 (E.D. Wis. 1982). The Wisconsin legislature, which had a Democratic majority, adopted a redistricting plan, but it was vetoed by the Republican governor. Consequently, a federal district court was asked to devise a remedy. *See id.* at 632–33. Upon reviewing several plans submitted by legislators and interest groups, the court "reluctantly concluded" that it could "be more faithful to the goals of reapportionment" by drafting its own plan. *Id*. at 637. In doing so, the court focused on ensuring population equality, avoiding the dilution of racial minority voting strength, and keeping communities of interest together. *Id*. at 637–39. This "AFL-CIO Plan" remained in effect for one election in 1982. As a result of that election, the Democratic Party held control of both houses of the Wisconsin legislature and also gained the governor's office. The legislature passed, and the governor signed, a new apportionment plan that lasted for the rest of the decennial period. *See* 1983 Wis. Sess. Laws 633.

2. **1990 Census** - The Wisconsin government again was divided between two political parties. *See Prosser v. Elections Bd*., 793 F. Supp. 859, 862 (W.D. Wis. 1992). The Democratic Party controlled both houses of the Wisconsin legislature while the governor was a Republican. *Id*. "For that or other reasons, no bill to reapportion the legislature had been enacted into law" by January 1992, leading several Republican legislators to challenge the existing apportionment plan (adopted in 1983) "as unconstitutional and violative of the Voting Rights Act." *Id*. As a result, the federal court was asked to draft a new plan. The court "asked the parties at the outset whether they had any objection ... to [the court's] selecting the best of the submitted plans rather than trying to create [its] own plan," but because the plans bore "the marks of their partisan origins" *id*. at 865, the Court used parts of one Republican plan and one Democratic plan. The court plan preserved the strengths of the partisan plans, "primarily population equality and contiguity and compactness," while "avoid[ing] their weaknesses." *Id*. at 870. The plan remained in effect through the 2000 election.

3. **2000 Census** – The Wisconsin legislature again was divided and unable to agree upon a redistricting plan. *Arrington v. Elections Bd*., 173 F. Supp. 2d 856, 862 (E.D. Wis. 2001). In an ensuing law suit, the federal district court determined that "the existing Wisconsin Assembly and Senate districts," which had not been redrawn since 1992, were "violative of the 'one person, one vote' standard." *Baumgart*, 2002 WL 34127471, at *1. A new plan was therefore necessary. The court considered sixteen plans that had been submitted by legislators and other interest groups, but "found various unredeemable flaws" in all of them. *Id*. at *6. The court therefore drew a plan "in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations." *Id*. at *7. In making these changes, the court attempted to "maintain[] municipal boundaries and unit[e] communities of interest." *Id*. The "Baumgart Plan" was in effect from 2002 until 2010.

4. **2010 Census** - In 2010, for the first time in over forty years, the voters of Wisconsin elected a Republican majority in the Assembly, a Republican majority in the Senate, and a Republican Governor. This uniformity in control led the Republican leadership to conclude that a legislatively enacted redistricting plan was possible. Even before 2011 Wis. Act 43 was passed (in July 2011), a complaint was filed in federal court challenging the plan on constitutional and statutory grounds, including under Section 2 of the Voting Rights Act. *See Baldus v. Members of the Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 846–47 (E.D. Wis. 2012). The court concluded that the plan did not violate the "one-person, one-vote" principle, nor did it violate the Equal Protection Clause by "disenfranchise[ing]" voters who were moved to a new Senate district and were unable to vote for their state senator for another two years. *Id*. at 849–51, 852–53. However, the court did find that the plaintiffs were entitled to relief on their claim that Act 43 violated Section 2 of the Voting Rights Act by diluting the voting power of Latino voters in Milwaukee County, and it ordered the State to redraw these districts. *Id*. at 859. The remainder of Act 43, however, remained intact and governed the 2012 and 2014 Assembly elections.

C. The Federal Constitutional Context – Equal Protection and Voting Districts.

1. The constitutionality of legislative apportionments is governed by the Equal Protection Clause of the Fourteenth Amendment, which requires that, in electing state representatives, the votes of citizens must be weighted equally. If an apportionment scheme violates the principle of one-person, one-vote, it must be justified on the basis of other, permissible, legislative considerations. *Reynolds v. Sims*, 377 U.S. 533 (1964).

    a) The right to vote "is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id*. at 561– 62.

    b) "Most citizens" exercise their "inalienable right to full and effective participation in the political process" by voting for their elected representatives. Id. at 565. "Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature." *Id*.

    c) "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, ... the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Id*. at 565–66 (citations omitted).

    d) Court requires "that a State make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable." *Id.* at 577.

        (1) Later cases set a 10% threshold: an apportionment plan with a maximum population deviation between the largest and smallest district of 10% is presumptively constitutional; larger disparities create a prima facie case of discrimination, and the State must justify its plan. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

D. The Federal Legal Context – Partisan Gerrymandering Case Precedent.

1. In *Gaffney v. Cummings*, 412 U.S. 735 (1973) the Supreme Court held that "[s]tate legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment," commenting that a districting plan may create multimember districts acceptable under equal population standards, but that may nevertheless be invidiously discriminatory because they are employed "to minimize or cancel out the voting strength of racial ***or political*** elements of the voting population." Id. at 751–52 (emphasis added).

    a) The Court was "unconvinced" that the Connecticut plan at issue violated the Fourteenth Amendment, observing that Connecticut's Apportionment Board had sought to "achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties," by implementing a "political fairness" plan. The Court saw no constitutional impediment to the State's considering partisan interests in this way. *Id*. at 752–53.

    b) But the Court made clear that drawing legislative districts along political lines "is not wholly exempt from judicial scrutiny under the Fourteenth Amendment." *Id*. at 754. Relying on its vote-dilution cases, it gave as an example "multimember districts [that] may be vulnerable" to constitutional challenges "if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized." *Id*.

    c) "Beyond this," the Court continued, it had "not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Id*.

2. *Davis v. Bandemer*, 478 U.S. 109 (1986).

    a) Indiana Democrats challenged the 1981 state reapportionment plan passed by a Republican-controlled legislature, alleging that the plan was intended to disadvantage Democrats in electing representatives of their choosing, in violation of the Equal Protection Clause. In November 1982, before the case went to trial, elections were held under the new plan.

    b) The district court "sustained an equal protection challenge to Indiana's 1981 state apportionment on the basis that the law unconstitutionally diluted the votes of Indiana Democrats." *Id*. at 113 (plurality opinion).

    c) The Supreme Court reversed. A majority of the Court first concluded that the issue before the Court, like those in the one-person, one-vote cases and in the vote-dilution cases, "is one of representation" and "decline[d] to hold that such claims [we]re never justiciable." *Id*. at 124.

d) Turning to the standard to be applied, a majority of the Court agreed that the "plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id*. at 127. A majority of the Court also believed that the first requirement—intentional discrimination against an identifiable group—had been met, observing that, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id*. at 129.

e) The plurality rejected "the District Court's legal and factual bases for concluding that the 1981 Act visited a sufficiently adverse effect on the appellees' constitutionally protected rights to make out a violation of the Equal Protection Clause." *Id*. at 129. The Court rejected "any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id*. at 130.

f) The plurality held "that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice" also did "not render that scheme constitutionally infirm." *Id*. at 131. Instead, the Court held that "an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id*. at 132–33.

g) Applying this standard, the plurality concluded that "this threshold condition" had not been met. *Id*. at 134. It observed that the district court had relied "primarily on the results of the 1982 elections" in which Democratic candidates had garnered "51.9% of the votes cast statewide," but secured only 43 seats. *Id*. Republicans, however, had received only "48.1% ... yet, of the 100 seats to be filled, Republican candidates won 57." *Id*. The plurality held that "[r]elying on a single election to prove unconstitutional discrimination" was "unsatisfactory," citing a lack of evidence that (1) the 1981 Act prevented the Democrats from "secur[ing] ... sufficient vote[s] to take control of the assembly"; (2) "the 1981 reapportionment would consign the Democrats to a minority status in the Assembly throughout the 1980's"; or (3) "the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census." *Id*. at 135–36.

3. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

a) In *Vieth*, the Court addressed an action filed by Democratic voters in Pennsylvania challenging the state legislature's new congressional districting plan.

b) Justice Scalia, writing for a plurality, reviewed the Court's opinion in *Bandemer*: "Over the dissent of three Justices, the Court held in *Davis v. Bandemer* that, since it was "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided," 478 U.S., at 123, such cases were justiciable. ..." There was no majority on that point. Four of the Justices finding justiciability believed that the standard was one thing . . . [and] two believed it was something else . . . . The lower courts have lived with that assurance of a standard (or more precisely, lack of assurance that there is no standard), coupled with that inability to specify a standard, for the past 18 years. *Id*. at 278–79. In the plurality's view, "[e]ighteen years of judicial effort with virtually nothing to show for it justif[ied] ... revisiting the question whether the standard promised by *Bandemer* exists," leading them to conclude that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged," and, therefore, that "political gerrymandering claims are nonjusticiable." *Id*.

c) Justice Kennedy concurred in the judgment, "agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed," but "not foreclos[ing] all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Id*. Justice Kennedy believed that "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id*. at 307. Moreover, he noted specifically that the First Amendment, not the Equal Protection Clause, that would provide the framework within which political gerrymandering claims should be analyzed. *See id.* at 314.

d) Justices Stevens, Souter, Breyer, and Ginsberg dissented, and would hold partisan gerrymandering claims justiciable.

4. *League of United Latin American Citizens v. Perry* ("*LULAC*"), 548 U.S. 399 (2006).

a) In 2002, Republicans gained control of both houses of the Texas legislature and enacted legislation that re-drew congressional districting lines, resulting in the Republicans securing 21 seats with 58% of the vote in statewide races, compared to the Democrats' 11 seats with 41% of the vote. Shortly after the plan was enacted, some Texas voters mounted both statutory and constitutional challenges to it. In the constitutional challenge, the plaintiffs claimed that a decision to enact a new redistricting plan mid-decade, "when solely motivated by partisan objectives, violates equal protection and the First Amendment because it serves no legitimate public purpose and burdens one group because of its political opinions and affiliation." Id. at 416–17.

b) The Supreme Court disagreed. Justice Kennedy, joined by Justices Souter and Ginsburg, opined that "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights." *Id*. at 418. Justice Kennedy further noted that although there is no constitutional requirement of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best. Nevertheless, a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority." *Id*. at 419.

c) Justice Stevens, in a separate opinion, reiterated the view of impartiality that he had articulated in *Vieth*. He observed that "the Fourteenth Amendment's prohibition against invidious discrimination[] and the First Amendment's protection of citizens from official retaliation based on their political affiliation" "limit the State's power to rely exclusively on partisan preference in drawing district lines." *Id*. at 461. He explained: "The equal protection component of the Fourteenth Amendment requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm a politically disfavored group is not a legitimate interest. Similarly, the freedom of political belief and association guaranteed by the First Amendment prevents the State, absent a compelling interest, from 'penalizing citizens because of their participation in the electoral process, ... their association with a political party, or their expression of political views.' These protections embodied in the First and Fourteenth Amendments reflect the fundamental duty of the sovereign to govern impartially." *Id*. at 461–62.

d) Justice Breyer also wrote separately to describe why he believed that the plan violated the Equal Protection Clause: "[B]ecause the plan entrenches the Republican Party, the State cannot successfully defend it as an effort simply to neutralize the Democratic Party's previous political gerrymander. Nor has the State tried to justify the plan on nonpartisan grounds, either as an effort to achieve legislative stability by avoiding legislative exaggeration of small shifts in party preferences or in any other way. In sum, "the risk of entrenchment is demonstrated," "partisan considerations [have] render[ed] the traditional district-drawing compromises irrelevant," and "no justification other than party advantage can be found." *Id*. at 492.

e) Justices Souter and Ginsburg adhered to their view, set forth in *Vieth*, as to the proper test for political gerrymandering, but concluded that there was "nothing to be gained by working through these cases on th[at] standard" because, like in *Vieth*, the Court "ha[d] no majority for any single criterion of impermissible gerrymander." *Id*. at 483.

f) Chief Justice Roberts, joined by Justice Alito, agreed with Justice Kennedy "that appellants ha[d] not provided a reliable standard for identifying unconstitutional political gerrymanders," but took no position as to "whether appellants ha[d] failed to state a claim on which relief can be granted, or ha[d] failed to present a justiciable controversy." *Id*. at 492–93.

g) Justices Scalia and Thomas reiterated their view that the voters' political gerrymandering claims were nonjusticiable. *See id.* at 511.

II. STATUS OF CURRENT CASES

A. Recent Federal District Court Rulings.

1. *Whitford v. Gill* (W.D. Wis.)

a) In July 2015, twelve Wisconsin voters (including UW Law School Professor Emeritus Bill Whitford) brought an action claiming that 2011 Wisconsin Act 43 (the statute adopting legislative districts) violates their First Amendment rights of association and Fourteenth Amendment rights to equal protection as regular Democratic voters by enacting a districting plan that "systematically dilutes the voting strength of Democratic voters statewide." The case was filed under a statute that requires a three-judge panel to preside. Seventh Circuit Judge Kenneth Ripple, Western District Judge Barbara Crabb, and Eastern District Chief Judge William Griesbach were assigned to hear the case.

b) The case was tried in May 2016. On November 21, 2016, in a 2-1 opinion (Judge Griesbach dissenting), the three-judge panel held that Act 43 "was intended to burden the representational rights of Democratic voters throughout the decennial period by impeding their ability to translate their votes into legislative seats" and "had its intended effect," and struck down the plan as unconstitutional. 218 F. Supp. 3d 837 (W.D. Wis. 2016).

c) The panel endorsed the plaintiffs' straightforward set of requirements for evaluating partisan gerrymandering claims: (1) intent to advantage one political party over the other (cutting out for the long-term those of a particular political affiliation); (2) unconstitutional effect (a significant and durable imbalance favoring the map-drawing party); and (3) the absence of neutral justification for the district lines. Id. at 885. The panel found that the second element (evaluating the unconstitutional effect) was satisfied by the fact that, in 2012, the Democrats garnered 51.4% of the statewide vote, but secured only 39 seats in the Assembly—or 39.3% of the seats; and in 2014, the Democrats garnered 48% of the statewide vote but won only 36 seats—or 36.4% of the seats. Id. at 902. The panel viewed the unconstitutionality of these effects as bolstered by the "Efficiency Gap," a metric proposed by the *Whitford* plaintiffs for quantifying the partisan advantage any particular plan creates by measuring the relative difference in the parties' "wasted votes." ("Wasted votes" are votes either cast for the winning candidate in excess of the votes the candidate needed to win the election, or votes cast for the losing candidate.) The Efficiency Gap ("EG") is calculated by adding across all the districts in the map the number of votes cast for each party's losing candidates, and the number of votes cast for each party's winning candidates in excess of the 50% that assures victory. Next, a party's wasted-vote total is subtracted from the other party's wasted-vote total, and the difference is divided by the total number of votes in the election. (By convention, a negative EG denotes a Republican partisan advantage, and a positive EG Democratic partisan advantage.)

d) There is almost always some gap between one party's wasted votes and another's, but a neutral map tends to waste votes in similar proportion for both parties, at least over time. Thus, a low EG (either positive or negative) indicates that each party has an equal opportunity to translate its vote share into seats in the legislature, a concept known as "partisan symmetry." A higher EG (again, either positive or negative) indicates that one side has wasted votes at a greater rate than the other, which indicates partisan asymmetry. Asymmetry over time suggests imbalance in the map—e.g., where one side's voters are densely concentrated (i.e., packed" into single districts where they win by a huge margin) or thinly spread (i.e., "cracked" into multiple districts they inevitably lose).

e) The *Whitford* plaintiffs proposed that to measure unconstitutional partisan effect, a court should use a 7% EG as a threshold, where an EG greater than 7% (positive or negative) would require the map- drawers to demonstrate a neutral justification for the districts as drawn. (In the Wisconsin elections held under Act 43, the pro-Republican EG came in significantly higher: 13% in 2012, and 10% in 2014. The panel viewed these numbers as indicative of an unconstitutional effect, but not dispositive. But it concluded, based on other evidence and analysis, including a series of alternative maps and electoral scenarios simulated by plaintiffs' experts (under which the EGs ranged within a few percentage points of zero), that the disparities in results would persist over time (*id*. at 906, 909) and cannot be explained by neutral, non-discriminatory factors, such as Wisconsin's political geography or inherent advantage. *Id*. at 921-26.

f) On January 27, 2017, the district court ordered: (i) that the defendants are enjoined from using the districting plan embodied in Act 43 in all future elections; and (ii) that the defendants have a remedial redistricting plan for the November 2018 election, enacted by the Wisconsin Legislature and signed by the Governor, in place no later than November 1, 2017. 2017 WL 383360, at *3 (W.D. Wis. Jan. 27, 2017).

g) The defendants and the Wisconsin Legislature applied to the US Supreme Court to stay the judgment and order below. On June 19, 2017, the Court granted the stay. 137 S. Ct. 2289.

2. *Benisek v. Lamone* (D. Md.)

a) Republican voters in Maryland alleged that Maryland's partisan gerrymander of the Sixth Congressional District violates their First Amendment rights because it purposefully and effectively eliminated their voting power as Republican voters and therefore unconstitutionally retaliated against them for their political expression. The plaintiffs characterized their claim as a First Amendment retaliation claim, requiring them to prove:

(1) That the officials responsible for creating the challenged district had a specific intent to retaliate against them based on political views. This would require the plaintiffs to prove that the responsible officials were motivated by a desire to retaliate against them because of their speech or other conduct protected by the First Amendment, and that they redrew the lines of the challenged district with the specific intent to impose a burden on the plaintiffs and similarly situated citizens because of how they voted or the political party with which they were affiliated.

(2) That they suffered an injury in the form of non-de minimis vote dilution, i.e., that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a demonstrable and concrete adverse effect on their right to have an equally effective voice in the election of a representative. (Notably, the *Benisek* plaintiffs' effects test is based on the intent of the responsible officials to flip the district from Republican control to Democratic control, as contrasted with the *Gill* plaintiffs' effects test, which is based on the concept of partisan asymmetry.)

b) On August 24, 2017, the district court denied the plaintiffs' motion for a preliminary injunction, and stayed the proceedings further pending the US Supreme Court's ruling in *Gill v. Whitford*.

c) On August 25, 2017, the plaintiffs filed a notice of appeal to the US Supreme Court. The Court postponed further consideration of jurisdiction until hearing oral argument. The plaintiffs/appellants raised the following questions for consideration by the US Supreme Court:

(1) Is plaintiffs' First Amendment retaliation challenge to the 2011 partisan gerrymander of Maryland's Sixth Congressional district justiciable?

(2) Did the majority below err in holding that, to establish an actionable injury in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must prove that the gerrymander has dictated and will continue to dictate the outcome of every election held in the district under the gerrymandered map?

(3) Did the majority below err in holding that the Mt. Healthyburden-shifting framework is inapplicable to First Amendment retaliation challenges to partisan gerrymanders?

(4) Regardless of the applicable legal standards, did the majority below err in holding that the present record does not permit a finding that the 2011 gerrymander was a but-for cause of the Democratic victories in the district in 2012, 2014, or 2016?

3. *Common Cause, et al. v. Rucho, et al.* (M.D.N.C.)

a) Two groups of plaintiffs (Common Cause and the League of Women Voters of North Carolina) brought partisan gerrymandering claims alleging that the state-wide Congressional districting plan in North Carolina was a pro-Republican gerrymander that violated the First Amendment, Fourteenth Amendment (Equal Protection Clause), and Article I, Sections 2 and 4 of the US Constitution.

b) The case was tried in a one-week trial in October 2017. The district court issued an opinion on January 9, 2018, holding "that the 2016 Plan violates the Equal Protection Clause because the General Assembly enacted the plan with the intent of discriminating against voters who favored non-Republican candidates, the plan has had and likely will continue to have that effect, and no legitimate state interest justifies the 2016 Plan's discriminatory partisan effect. We also conclude that the 2016 Plan violates the First Amendment by unjustifiably discriminating against voters based on their previous political expression and affiliation. Finally, we hold that the 2016 Plan violates Article I by exceeding the scope of the General Assembly's delegated authority to enact congressional election regulations and interfering with the right of "the People" to choose their Representatives." 279 F. Supp. 3d 587, 608 (M.D.N.C. Jan. 9, 2018)

c) The district court ordered the State to submit a remedial district plan no later than January 29, 2018, along with specific materials relating to the drafting of the new plans. *Id.* at 691. The district court further held that it would appoint a Special Master to assist with drafting a remedial district plan, if the State did not submit a new plan by January 29, or if its new plan did not satisfy Constitutional requirements. *Id.*

d) On January 18, 2018, the Chief Justice granted the application for a stay of the district court's ruling. 138 S.Ct. 923.

B. Recent US Supreme Court Arguments.

1. *Gill v. Whitford* (Oct. 3, 2017)

a) Transcript: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_bpm1.pdf

b) Audio: https://www.oyez.org/cases/2017/16-1161

2. *Benisek v. Lamone* (March 28, 2018)

a) Transcript: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-333_3e04.pdf

b) Audio: https://www.oyez.org/cases/2017/17-333

C. Other Federal Court Cases.

1. *League of Women Voters of Michigan v. Johnson* (E.D. Mich.)

   a) On December 22, 2017, the League of Women Voters of Michigan and eleven Democratic voters filed a complaint alleging that Michigan's 2011 state legislative and congressional maps are unconstitutional partisan gerrymanders in violation of the First and Fourteenth Amendments. The plaintiffs argue that the legislature unconstitutionally marginalized Democratic constituencies by cracking and packing Democratic voters while efficiently spreading Republican voters across safe Republican districts.

   b) On January 23, Defendant Secretary of State Ruth Johnson filed a motion to stay further proceedings pending the US Supreme Court's resolution of *Gill v. Whitford* and *Benisek v. Lamone*, and a motion to dismiss for a lack of standing. On March 14, the court denied the defendant's motion to stay. The court held oral argument on the defendant's motion to dismiss on March 19, and a decision on that motion is now pending.

D. State Court Cases.

1. *League of Women Voters, et al. v. Commonwealth of Pennsylvania, et al.* (Pa. Sup. Ct.) (Order issued Jan. 22, 2018; Opinion issued Feb. 7, 2018)

   a) On December 29, 2017, after a one-week trial, a Pennsylvania Commonwealth Court judge held that the state's congressional districting plan, the Congressional Redistricting Act of 2011, 25 P.S. §§ 3596.101, violated the Pennsylvania Constitution's provision requiring all elections to be "free and equal" by giving Republican candidates an unfair advantage.

   b) The Pennsylvania Supreme Court expedited briefing and oral argument, which it heard on January 19, 2018.

   c) On January 22, 2018, the Pennsylvania's Supreme Court struck down the state's congressional map as an extreme partisan gerrymander that violated the state's Constitution. *League of Women Voters v. Commonwealth*, 175 A.3d 282 (Pa. Jan. 22, 2018). The state Supreme Court found that politicians had drawn the map with precision to favor the Republican Party and disfavor Democratic Party voters. This, the Court held, violated the Pennsylvania Constitution's guarantee that "Elections shall be free and equal," since maps designed to favor one party over another are inherently unequal. The Court invited the state legislature to submit a new congressional districting plan for approval by the Governor.

d) On January 26, the defendants and proposed intervenors filed an application to US Supreme Court Associate Justice Alito to stay the Pennsylvania action, arguing, in part, that the Court's rulings in *Whitford* and *Benisek* could impact the proceedings in Pennsylvania. On February 5, Justice Alito denied the application for a stay.

e) On February 7, 2018, the Pennsylvania Supreme Court issued its opinion, providing its legal analysis supporting its January 22 order. *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. Feb. 7, 2018). Although significant, the Pennsylvania court's opinion is unlikely to impact partisan gerrymandering cases brought under the Federal Constitution, such as *Whitford*.

(1) The Pennsylvania court's ruling is based solely on a Pennsylvania Constitutional provision — the Free and Equal Elections Clause — that the court recognized "has no federal counterpart." By contrast, the *Whitford* plaintiffs' claims, and the district court's ruling finding 2011 Wisconsin Act 43 to be an unconstitutional partisan gerrymander, are based on the State of Wisconsin's violation of the Federal Constitution, specifically, the First Amendment and the Fourteenth Amendment's Equal Protection Clause.

(2) The standard that the Pennsylvania court enunciated under the Pennsylvania Constitution is one that the district court rejected in *Whitford*. The Pennsylvania court held that compliance with Pennsylvania's Free and Equal Elections Clause requires a court to determine whether in drawing congressional district lines, traditional redistricting criteria (such as compactness, contiguity, population equality, and respecting municipal and county boundaries) were subordinated to extraneous considerations such as conferring an unfair partisan advantage on one political party. The court identified compliance with these criteria as a "floor" for measuring compliance with the Pennsylvania Constitution; however, it did not further identify just how a plaintiff might go about proving "subordination" of these criteria to other considerations such as partisan gerrymandering. In *Whitford*, the State of Wisconsin argued to the district court that compliance with Wisconsin's Constitutional and traditional redistricting criteria should be sufficient to satisfy Federal Constitutional requirements. The district court, however, rejected that assertion, instead adopting the plaintiffs' three-part test.

(3) The Pennsylvania court's subjective "subordination" standard falls short of the type of judicially discernible and manageable standard for adjudicating partisan gerrymandering claims demanded by US Supreme Court precedent, provided by the plaintiffs in *Whitford*, and adopted by the district court in that action. Although the Pennsylvania court recognized "the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative," it simply did not address what has not been mere "possibility" - but reality – in since 2011. The *Whitford* district court directly confronted that reality by adopting the type of quantitative, data-driven standard necessary to meaningfully evaluate partisan bias in districting plans created with contemporary methods.

f) In its opinion, the Pennsylvania court noted that the legislature had failed to submit a new proposed districting plan to the Governor, and ruled that as a remedy, it would turn to a nationally recognized redistricting expert to assist in developing a redistricting plan that would comply with State and Federal Constitutional Standards. The court adopted the expert's plan on February 19. *League of Women Voters v. Commonwealth*, No. 159 MM 2017 2018 WL 936941 (Pa. Feb. 19, 2018).

g) On February 21, the legislature filed a second application to US Supreme Court Associate Justice Alito for a stay, arguing that the Pennsylvania Supreme Court's actions had violated the Elections Clause of the US Constitution. Justice Alito denied the application on March 19. 138 S.Ct. 1323

2. *Corman, et al. v. Torres, et al.* (W.D. Pa.)

a) On February 21, 2018, Republican state legislators and members of Congress filed a complaint in federal court claiming that the Elections Clause of the Federal Constitution (Art. I, § 4, cl. 1), which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," does not allow Pennsylvania's Supreme Court to enforce the state Constitution, and that the Pennsylvania Supreme Court's new map is a partisan gerrymander in favor of Democrats. The plaintiffs sought immediate injunctive relief: (A) prohibiting the defendants from implementing the Congressional districting plan crafted by the Pennsylvania Supreme Court; and (B) directing the Pennsylvania Department of State to conduct the 2018 May congressional primary and subsequent general election in accordance with the boundaries contained within the 2011 Plan.

b) The district court saw things differently: "The Plaintiffs seek an extraordinary remedy: they ask us to enjoin the Executive Defendants from conducting the 2018 election cycle in accordance with the Pennsylvania Supreme Court's congressional redistricting map and to order the Executive Defendants to conduct the cycle using the map deemed by the Pennsylvania Supreme Court to be violative of the Commonwealth's constitution. In short, the Plaintiffs invite us to opine on the appropriate balance of power between the Commonwealth's legislature and judiciary in redistricting matters, and then to pass judgment on the propriety of the Pennsylvania Supreme Court's actions under the United States Constitution."

c) On March 19, the same day as Justice Alito denied the emergency stay application, the district court dismissed the plaintiffs' complaint on standing grounds. 287 F. Supp. 3d 558 (M.D. Pa. 2018).

HOT TOPICS IN EMPLOYMENT LAW

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HOT TOPICS IN EMPLOYMENT LAW

- Always a lot going on in employment law.

- Three specific issues that are particularly "hot."
  - Sexual Harassment
    - "Me Too" Movement
  - Americans With Disabilities Act
    - Recent Seventh Circuit Cases
  - Fair Labor Standards Act
    - Administrative Changes
    - Continued Litigation

SEXUAL HARASSMENT – "ME TOO"

- The #MeToo movement has had a tremendous social and cultural impact.
- Awareness campaign
- Examples:
  - Taylor Swift- "I am not going to let you or your client make me feel like this was my fault."
  - Harvey Weinstein- Fired from his own company (the Weinstein Company), which planned on changing its name and then declared bankruptcy
  - Matt Lauer – Fired from NBC News' "Today" show after complaints of inappropriate sexual behavior
  - Amazon Studios- Executive Roy Price suspended for making advances toward Hollywood producer (then resigned)
    - Accuser says "Women inspire women to come forward."

SEXUAL HARASSMENT

- 2016 report from an EEOC Task Force found that anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace.
- From FY 2010 to FY 2017, the EEOC received more than 12,000 charges of sex-based harassment each year.
- 32% of approximately 84,000 charges received by the EEOC in FY 2017 included allegations of workplace harassment.
- 46% alleged sex-based harassment.
- 16.5% filed by males.
- In FY 2017 the EEOC recovered more than $125 Million for workers who alleged harassment.

SEXUAL HARASSMENT

- November 2017 - The EEOC issued guidelines with 5 core principles for preventing and correcting harassment:
  - Committed and engaged leadership;
  - Consistent and demonstrated accountability;
  - Strong and comprehensive harassment policies;
  - Trusted and accessible complaint procedures; and
  - Regular, interactive, live training tailored to the audience and the organization.
- The guidelines also include checklists based on these principles to assist employers in preventing and responding to workplace harassment.
- The practices outlined are not legal requirements under federal employment discrimination laws, but the EEOC believes they may enhance employers' compliance efforts.

https://www.eeoc.gov/eeoc/publications/promising-practices.cfm

SEXUAL HARASSMENT

- There are legal protections against sexual harassment.
- A sexually hostile or abusive work environment is a form of sex discrimination under Title VII. 42 U.S.C.S. § 2000e *et seq*.
- Two servers at IHOP proved sexual harassment in the workplace when a manager made a number of crude sexual comments, propositioned them for sex, grabbed a server's butt, and pressed his pelvis against a server's body. *EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 432-433 (7th Cir. 2012).
- May also prevail in demonstrating a "sexist" rather than "sexual" hostile work environment. *See Passananti v. Cook Cty.*, 689 F.3d 655, 658 (7th Cir. 2012) (there was sufficient evidence for the jury to conclude that the supervisor's repeated use of the term "bitch" amounted to a hostile work environment based on sex).

SEXUAL HARASSMENT

- "Me Too" is primarily a social/cultural movement, not a legal one.
  - In an interview with *The Atlantic* magazine, Justice Ruth Bader Ginsburg noted the lurking due process issue: "The person who is accused has a right to defend herself or himself, and we certainly should not lose sight of that."
- Nothing in the law has changed since "Me Too" came to light.
  - *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).
  - Title VII targeted towards "discrimination" and not intended to be a "general civility code" for the American workplace.
  - "We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."

SEXUAL HARASSMENT

- Statute of limitations: 180 or 300 days. 42 U.S.C. §2000e–5.
- "Severe and pervasive" standard.
  - *Lee v. Dairyland Power Coop.*, 17-cv-50-wmc (W.D. Wis. Mar. 20, 2018).
  - "Crude and objectionable" comments about female employee's outfits and body not severe or pervasive.
  - "Under current law, 'occasional vulgar banter, tinged with sexual innuendo of coarse or boorish workers' generally does not create a work environment that a reasonable person would find intolerable.'" (*citing Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 788 (7th Cir. 2007)).
- *Faragher/Ellerth* Defense.
  - The employer took reasonable care to prevent and promptly correct the offending behavior; and
  - The employee unreasonably failed to take advantage of corrective opportunities provided by the employer.

AMERICANS WITH DISABILITIES ACT

- Familiar "reasonable accommodation" requirement for disabled employees.
- What is (and is not) a reasonable accommodation?
  - Law designed to be flexible.
  - Many different kinds of disabilities.
- Goal of reasonable accommodation is to allow disabled employee to perform the job.
- Line of 7th Cir. cases pushing back on the idea that extended leaves are required as reasonable accommodations.

AMERICANS WITH DISABILITIES ACT

- Most recently, *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017).
  - "[A] long-term leave of absence cannot be a reasonable accommodation."
  - "ADA is an antidiscrimination statute, not a medical-leave entitlement."
  - "An employee who needs long-term medical leave cannot work and thus is not a 'qualified individual' under the ADA."
  - Rejected EEOC's position that extended leave is reasonable accommodation in certain circumstances.
- Supreme Court denied *certiorari.*

AMERICANS WITH DISABILITIES ACT

- But…
  - EEOC continues to take position that leaves of absence may constitute reasonable accommodation in certain circumstances.
  - Disabled employees entitled to equal access to employer's leave policy.
  - A modified schedule – including intermittent time off or a short leave of absence (days or weeks) – may be appropriate. *Severson v. Heartland Woodcraft, Inc.,* 872 F.3d 476, 481 (7th Cir. 2017); 42 U.S.C. § 12111(9).
  - Consider the specific facts of your case
    - *EEOC v. S&C Elec. Co.*, No. 17 C 6753, 2018 U.S. Dist. LEXIS 60737, (N.D. Ill. Apr. 10, 2018) (denying defendant's motion to dismiss where employee was on a long term leave of absence (12 months) and was terminated when the employee attempted to return to work).

AMERICANS WITH DISABILITIES ACT

- Wisconsin law may differ.
  - "A medical leave of absence might be considered a reasonable accommodation where there is some reason to believe that the leave of absence will assist the employee in achieving recovery and will ultimately result in the employee's ability to return to work." *Janocik v. Heiser Chevrolet*, ERD Case No. 9350310 (LIRC Nov. 21, 1994)
  - *See Target Stores v. LIRC*, 217 Wis. 2d 1, 576 N.W.2d 545 (1998) (a temporary leave to permit medical treatment over a relatively short period of time, which, if successful, will remove the difficulty in performing job-related responsibilities, may be a reasonable accommodation)

FAIR LABOR STANDARDS ACT

- *Encino Motorcars v. Navarro*, U.S. Supreme Court, No. 15-415.
  - "[W]orkers at car dealerships known as 'service advisers' who sell parts and services are exempt from mandatory overtime pay."
  - Rejected long-held principle that FLSA exemptions should be construed narrowly.
  - Case will likely have far-reaching impact in future litigation and agency actions.
- Tip Pooling.
  - Recent federal budget bill bars "supervisors or managers" from retaining tips.
  - Allows for tip pooling with "back of house" and other non-tipped roles.
  - Recent DOL guidance on how to interpret new rules.

FAIR LABOR STANDARDS ACT

- Salary basis flip-flops.
  - Since 2004: $23,660/year ($455/week)
  - Obama administration: $47,476 ($913/week) → Stayed
  - Trump DOL is engaging in rulemaking to set new salary basis
    - Expectation is low $30,000 range
- DOL Opinion letters are back.
  - 2010 – Obama admin stopped issuing opinion letters based on specific facts.
  - Preferred to issue broader admin interpretations describing DOL's views of the law.
- Payroll Audit Independent Determination program ("PAID").
  - Self-audit program
  - Employer can avoid penalties and liquidated damages
  - What about state law claims?

FAIR LABOR STANDARDS ACT

- Litigation continues – federal court FLSA filings:
  - 2015: 8917
  - 2016: 8830
  - 2017: 7858
  - Q1 2018: 1847
  - 2018: 7388 (projected)
  - http://trac.syr.edu/tracreports/civil/498/
- DOL recovered more than $270 million in back wages in 2017 for more than 240,000 workers.
  - https://www.dol.gov/whd/data/
- Common violations
  - Misclassification as exempt
  - Misclassification as independent contractors
  - Time shaving
  - Improper use of interns/volunteers
  - Failure to pay for breaks, travel time, or on-call time

FAIR LABOR STANDARDS ACT

- *Epic Systems Corp. v. Lewis*, pending decision from the U.S. Supreme Court. Argument heard Oct. 12, 2017.
- Technical writers brought class claim – Improperly classified as exempt.
- Issue: whether arbitration agreement requiring individual arbitration and waiving class claims is enforceable?
- Conflict of laws
  - Federal Arbitration Act
  - National Labor Relations Act
- 7th Circuit Court of Appeals affirmed W.D. Wis. decision that K unenforceable.
- Justices Ginsburg, Breyer, Sotomayor, and Kagan appeared to side with the argument that the class waiver was unenforceable while Chief Justice Roberts, Justice Kennedy, and Justice Alito seemed to believe the arbitration agreement was enforceable and not a violation of the NLRA.
- Neither Justice Thomas nor Justice Gorsuch asked any questions.

Demo of Juror Review of Electronic Evidence

Joshua Egstad
Director of IT for the Western District
and
Tim O'Shea
U.S. Department of Justice

May 17, 2018

STANDING ORDER GOVERNING ELECTRONIC EVIDENCE TO BE USED BY THE JURY DURING ITS DELIBERATIONS

IT IS ORDERED THAT:

1. Electronic evidence that a party intends to provide to the jury for the jury's use during deliberations must be in one of these formats: .pdf, .jpg, .bmp, .tif, .gif, .aiv, .wav, .mpg, .mp3, .mp4, .wma, .wav, .3gpp

2. The size of individual files shall not exceed 500 MB.

3. Electronic evidence file names must correspond unambiguously with the exhibit numbers used during trial.

4. All electronic evidence submitted at trial must be loaded to CDs, DVDs, or USB storage devices and submitted to the Deputy Clerk before jury deliberations unless the court permits later submission. The electronic storage media shall contain only admitted evidence and shall not include any other evidence or information.

5. Any request for relief from Paragraph (1) must be presented in a timely-filed motion in limine that details the alternate format or alternate evidence review equipment the party seeks to use, along with an explanation why this is necessary.

BY THE COURT:

/s/

JAMES D. PETERSON
Chief Judge

Report on Patent Summits and Local Civil Procedure Changes

A.J. Bianchi
Michael Best & Friedrich LLP

May 17, 2018

WDBA PATENT SUMMIT SUMMARY

On November 17, 2017, January 26, 2018 and March 2, 2018 numerous IP practitioners attended the three Patent Summits at the Western District Courthouse. Also in attendance were Chief Judge James Peterson, Judge William Conley and Magistrate Judge Stephen Crocker and their law clerks. The summit proceeded as an open forum at which practitioners and Chambers together discussed concerns, perceived problems and potential solutions related to patent litigation in the federal district court for the Western District of Wisconsin. Overall, the Summit was very well received by all who attended and resulted in great, open conversations about handling patent litigation in the Western District.

The discussions involved:

- The role and possible changes to the use of proposed findings of fact with summary judgment motions.
    - Some suggested doing away with proposed findings of fact all together,
    - Others suggested allowing parties to agree to a page limit or a limit on the number of proposed findings, in exchange for a hard deadline by which the parties will receive a ruling on summary judgment.
    - Chambers expressed that proposed findings of fact, if done correctly, assist Chambers in digging deeply into a case and resolve issues at summary judgment instead of pushing all issues to trial.
    - **Chambers also shared that the reply to the response to proposed findings of fact is one of the key documents they use in reaching summary judgment decisions**.
    - All practitioners in attendance agreed that additional time beyond the current 10 days in which a party is given to file reply materials would be extremely helpful to practitioners being able to produce good quality replies to the responses to proposed findings of fact.
- The topic of *Markman* hearings for early claims construction

- While some practitioners expressed a desire to have such hearings, others confirmed their preference for the Western District's procedure of tying claims construction to summary judgment.

- Chambers noted that it intended to stick with its current procedures for handling claims construction, but if parties believe that an early claims construction would be applicable in a case, the parties should file a motion requesting as much and Chambers would consider such a possibility, but the parties would need to persuade Chambers that such a hearing or early ruling would indeed be helpful and an effective use of resources.

- Chambers reiterated that it is very difficult to create a one-size-fits all approach to procedures governing all patent cases and thus, Chambers is always open to parties' filing motions that attempt to persuade Chambers that the case at hand requires or, at least, would be best served by an early claims construction or a tutorial on the technology at issue in the case or even an early, limited summary judgment motion.

- The use of tutorials in teaching Chambers about the technology at issue

- Adding two to three more months on patent case schedules.

  - Chambers suggested again that parties are free to file a motion persuading Chambers that a tutorial would be helpful.

  - Additionally, Chambers noted that cases are being scheduled for trial between 15 and 18 months out from the preliminary pretrial conference, but if parties believe more time is needed they should present their reasons to Chambers at the preliminary pretrial conference.

- Local Patent Rules

  - Practitioners and Chambers alike agreed that local patent rules were unnecessary and often create additional disputes.

  - Chambers noted that it will not be creating Local Patent Rules but that it would consider making changes to local procedures in the pretrial conference order.

- Discovery in patent lawsuits

  - Proportionality language

  - Standard Protective Order (which was created)

  - Expert Reply reports

- TC Heartland
- Trial procedures in patent lawsuits
    - Standard jury instructions
    - Handling deposition designations and exhibits
    - "Willfulness" determination
- Action Points
    - Change default summary judgment submissions schedule to 30 days for response materials and 15 days for reply materials.
    - Placing a date in the pretrial conference order by which parties can submit motions to persuade the Court that an in court hearing would be beneficial to provide a tutorial on the technology at issue in the case.
    - Placing a date in the pretrial conference order for rebuttal expert reports in which proponent experts can respond to respondent's expert's criticisms of proponent expert's initial opinions.
    - Inclusion of a specific list of documents to be disclosed and produced with infringement and invalidity contentions and set forth specific list in pretrial conference order.
    - Move deadline to file summary judgment up two weeks (so roughly 5 months from final pretrial conference)
    - Move final pretrial conference deadline so it occurs roughly three weeks before trial and then, require filing of deposition designation and exhibits the next week Monday and counter-designations and objections to exhibits and initial designations the following Monday, followed by an additional conference with the Court on the Thursday or Friday before trial to address deposition designation and exhibits.
    - Use of a standard form protective order that can be altered by stipulation.
    - Creation of a "how-to" document regarding Proposed Findings of Fact (still in process)

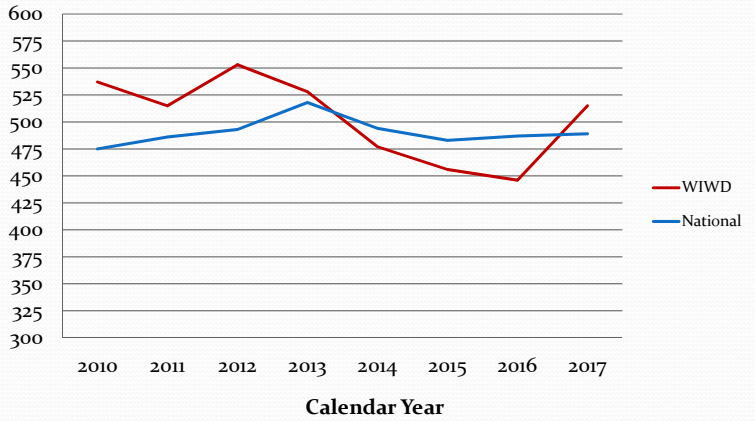
The State of the Western District of Wisconsin

Peter Oppeneer
Clerk of Court

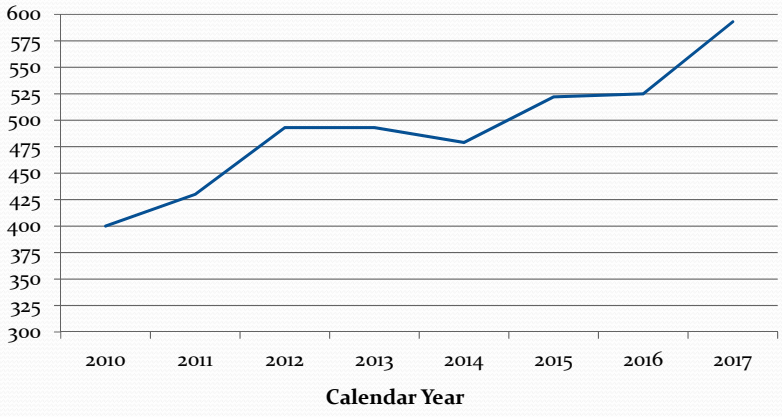
What's new in 2018?

- CLE credit for pro bono service
- Retirement of Probation Chief Paul Reed
- Clerk's Office will be under construction
- New evidence presentation in courtroom 250
- Electronic link to pretrial order attachments

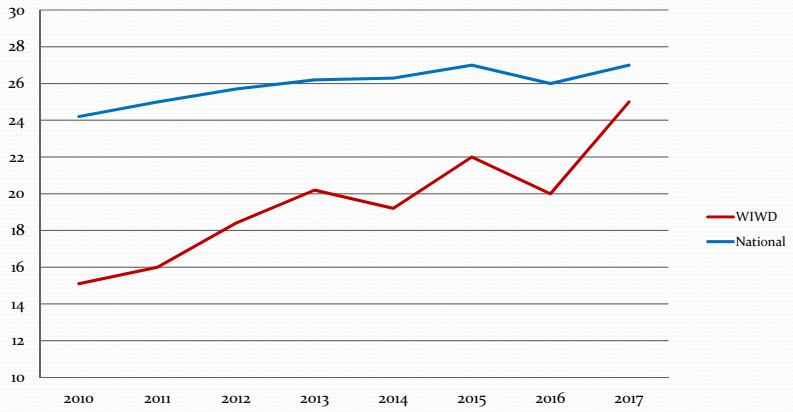
Weighted Filings Per Judgeship
2010 - 2017



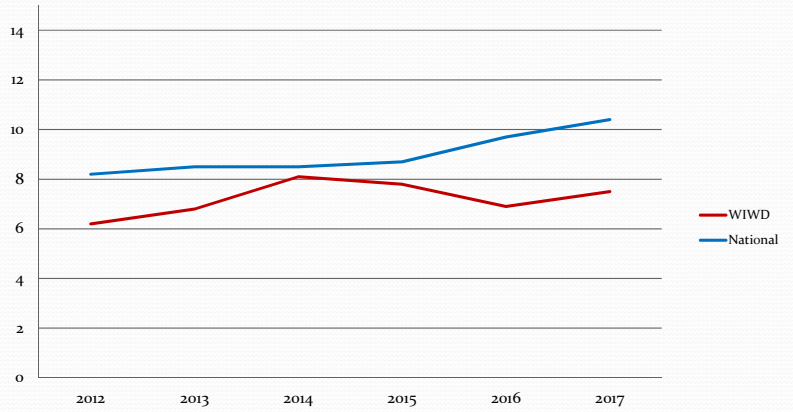
Pending Cases Per Judgeship
2010 - 2017



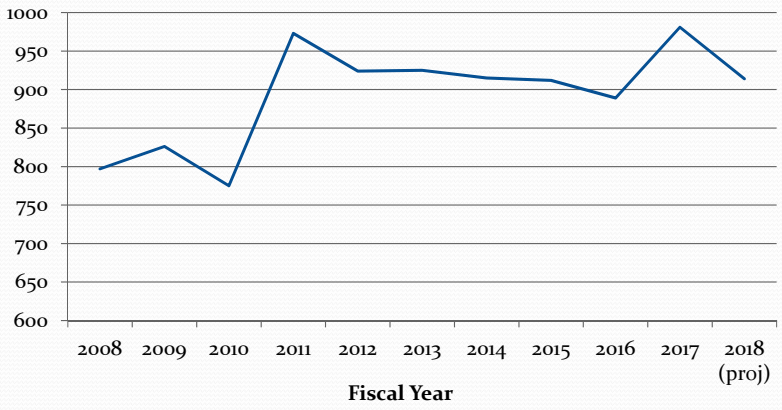
Median Time to Trial for Civil Cases (in months)
2010 - 2017



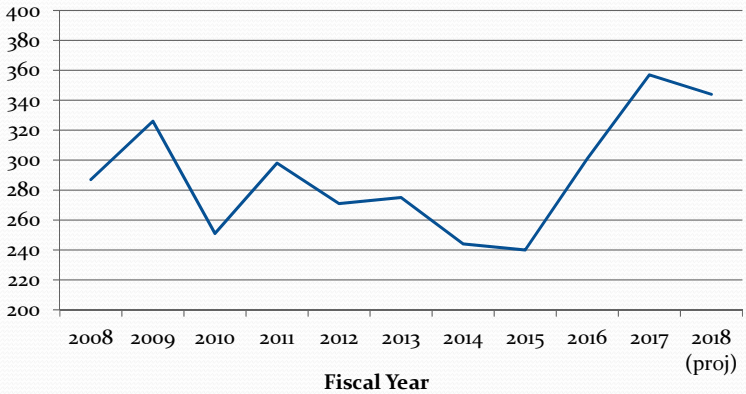
Median Time to Civil Disposition (in months)
2012 - 2017



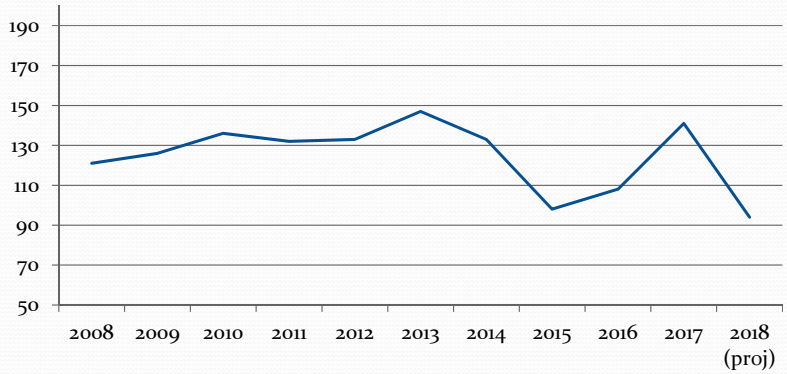
Total Civil Filings
2008 - 2018



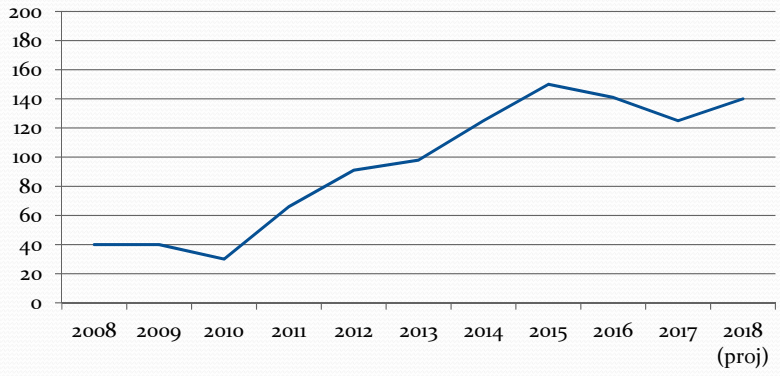
Prisoner Petition Cases
2008 - 2018



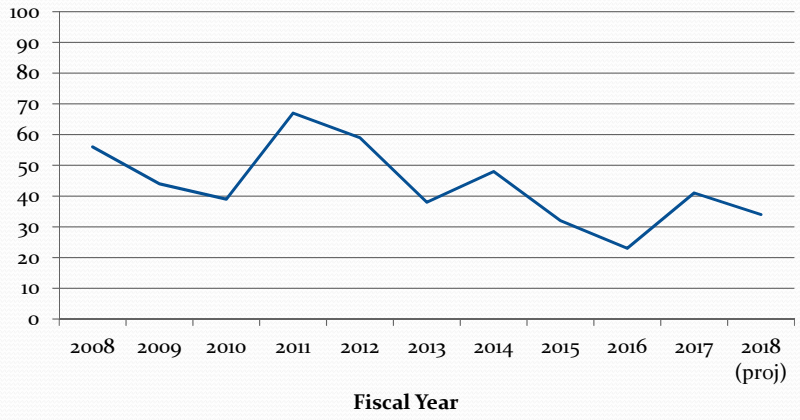
Non-Prisoner Civil Rights Cases
2008 - 2018



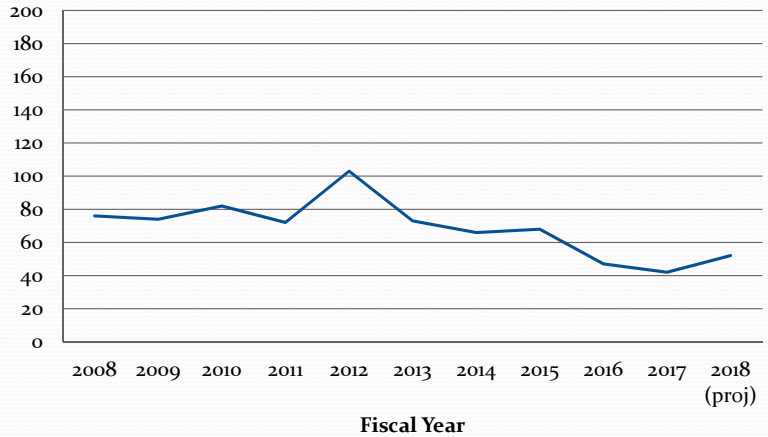
Social Security Cases
2008 - 2018



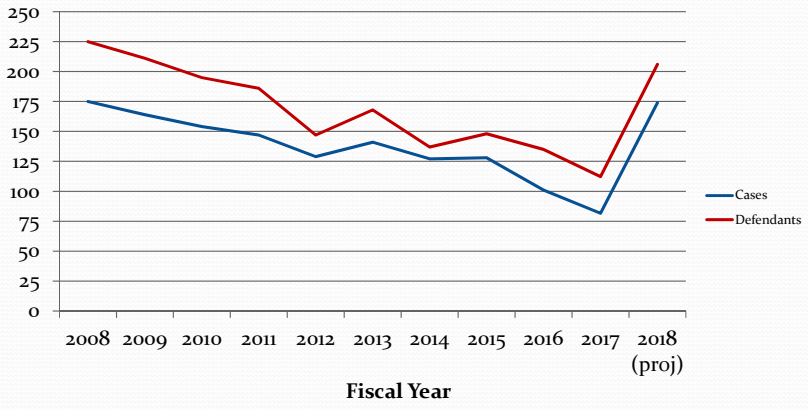
Patent & Trademark Cases
2008 - 2018



Contract Cases
2008 - 2018



Criminal Cases
2008 - 2018



U.S. District Court — Judicial Caseload Profile

			12-Month Periods Ending December 31							
			2012	2013	2014	2015	2016	2017	Numerical Standing Within	
Overall Caseload Statistics	Filings		1,196	1,153	1,132	1,082	1,068	1,185	U.S.	Circuit
	Terminations		1,074	1,152	1,156	1,003	1,065	1,054		
	Pending		986	985	958	1,043	1,050	1,185		
	Percent Change in Total Filings Current Year Over Earlier Year		-0.9	2.8	4.7	9.5	11.0		11	2
Number of Judgeships			2	2	2	2	2	2		
Vacant Judgeship Months			12.0	12.0	4.2	0.0	0.0	0.0		
Actions per Judgeship	Filings	Total	598	577	566	541	534	593	23	2
		Civil	490	463	474	436	445	491	17	2
		Criminal Felony	84	81	63	74	65	69	59	5
		Supervised Release Hearings	25	33	30	32	25	33	52	4
	Pending Cases		493	493	479	522	525	593	27	5
	Weighted Filings		553	528	477	456	446	515	30	2
	Terminations		537	576	578	502	533	527	37	4
	Trials Completed		12	14	18	27	16	22	22	2
Median Time (Months)	From Filing to Disposition	Criminal Felony	6.1	6.1	6.4	6.5	7.1	7.8	21	1
		Civil	6.2	6.8	8.1	7.8	6.9	7.5	22	2
	From Filing to Trial (Civil Only)		18.4	20.2	19.2	22.3	20.3	24.7	25	2
Other	Number (and %) of Civil Cases Over 3 Years Old		2 .3	5 .7	9 1.2	15 1.8	20 2.4	38 4.0	26	2
	Average Number of Felony Defendants Filed per Case		1.1	1.1	1.1	1.2	1.3	1.2		
	Jurors	Avg. Present for Jury Selection	21.7	26.0	24.8	25.2	23.0	29.1		
		Percent Not Selected or Challenged	14.8	20.4	20.2	17.5	12.2	10.5		

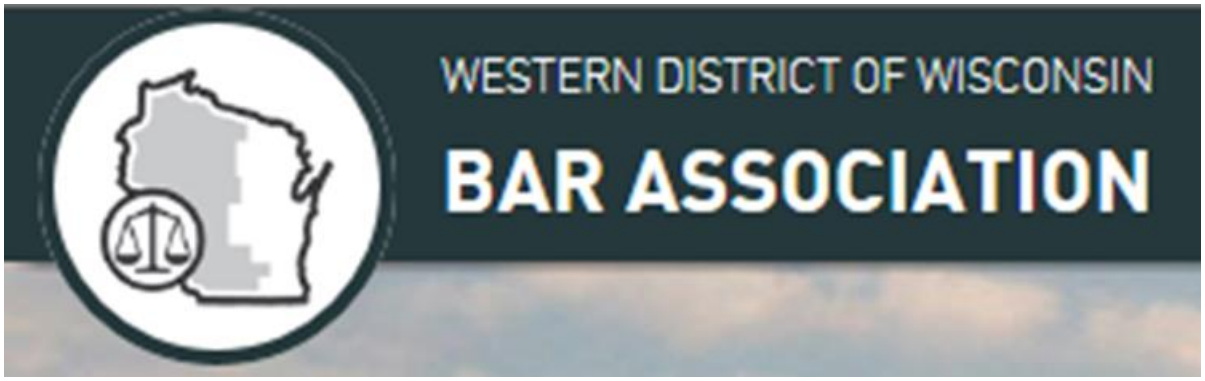
2016 Civil Case and Criminal Felony Defendant Filings by Nature of Suit and Offense

Type of	Total	A	B	C	D	E	F	G	H	I	J	K	L
Civil	981	125	14	380	5	9	72	47	40	40	132	5	112
Criminal	137	2	44	14	32	13	3	9	1	6	1	3	9

NOTE: Criminal data in this profile count defendants rather than cases and therefore will not match previously published numbers.
Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings by "Nature of Offense" do not.
See "Explanation of Selected Terms."

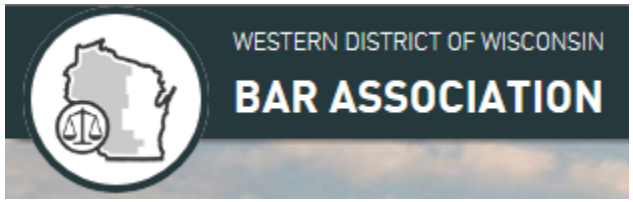
Nature of Suit and Offense Categories

Civil	A - Social Security B - Personal Injury/Product Liability C - Prisoner Petitions D - Forfeitures and Penalties	E - Real Property F - Labor Suits G - Contracts H - Torts (other than personal injury/product liability)	I - Copyright, Patent, and Trademark J - Civil Rights K - Antitrust L - All Other Civil Cases
Criminal Felony Cases (Excluding Transfers)	A - Marijuana B - All Other Drugs C - Immigration D - Firearms and Explosives	E - Fraud F - Violent Offenses G - Sex Offenses H - Forgery and Counterfeiting	I - Larceny and Theft J - Justice System Offenses K - Regulatory Offenses L - All Other Criminal



WDBA 2018 Court Survey

Prepared by:
Ann Peacock, Tim Edwards,
Danielle Schroder, Mark Hancock,
Tanya Salman, Rachel Graham



Survey Topics

Case Initiation
Mediation
Discovery
Expedited Motions
Dispositive Motions
Pretrial Filings
Trials
Suggestions for Improvement

Number of survey respondents = 315

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

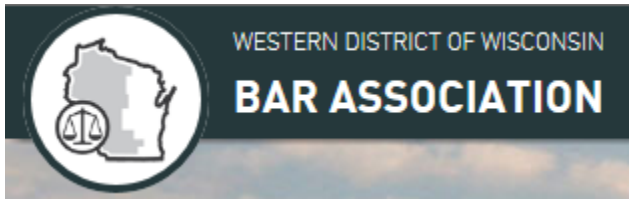
Survey Discussion Topics for Judges' Panel

- Early Case Mediation
- Discovery Deadline
- Non-Dispositive Expedited Motions
- Proposed Findings of Fact
- Dispositive Motions - Briefing and Decisions
- Timing for Motions in Limine

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

Early Case Mediation

- Approximately 50% favor and 40% oppose an early mediation requirement similar to 7th Circuit
- “Enthusiasm gap” — the most strident commenters do not find early mediation useful
- Commenters find mediation more helpful after some discovery
- Most — 75% — oppose mandatory mediation
- Support for current practice of voluntary mediation with Magistrate Oppeneer



Discovery Deadline

- Current practice – discovery closes one week before pretrial filings

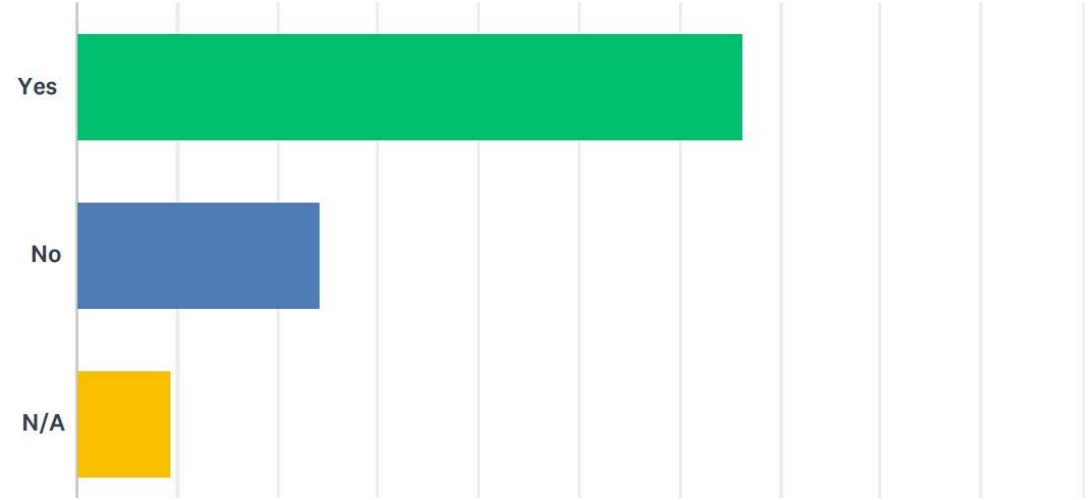
- Nearly even split, with a slight majority (52%) preferring earlier close of discovery and 48% favoring current deadlines

- Of those preferring earlier deadlines, vocal minority (25%) want discovery to close before summary judgment. Majority want discovery to close several weeks to months before pretrial filings.

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

Non-Dispositive Expedited Motions

Would it be useful for the court to have a procedure for expedited, non-dispositive motions similar to the Eastern District of Wisconsin?



ANSWER CHOICES	RESPONSES
Yes	66.24%
No	24.36%
N/A	9.40%

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

Non-Dispositive Expedited Motions

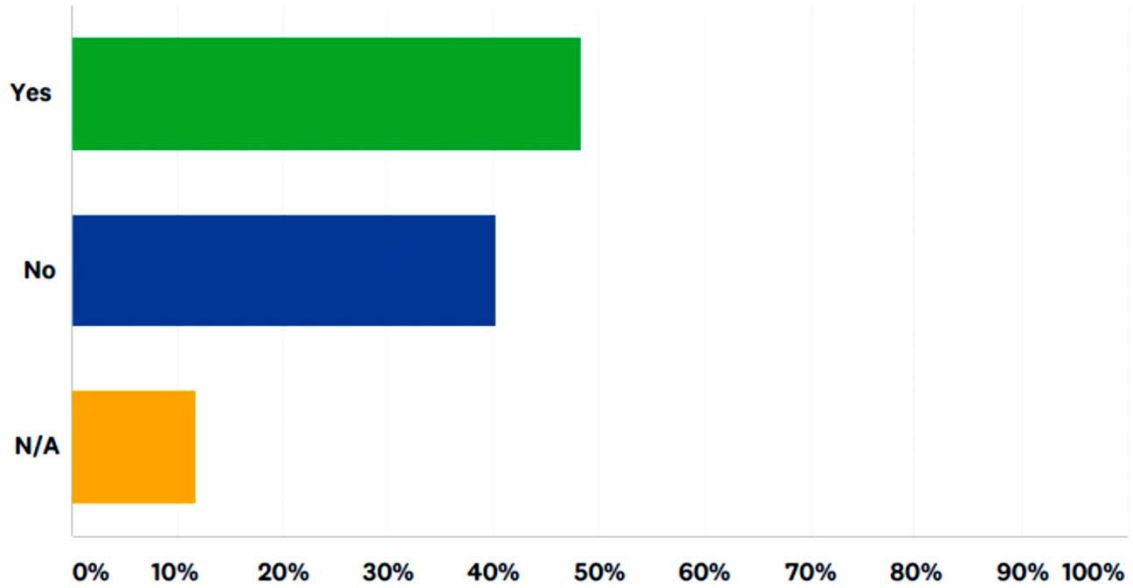
Suggestions for Non-Dispositive Expedited Motions:

- Generally viewed as positive and consistent with the Court's policy of resolving disputes promptly.
- Three-page limit might be too restrictive—some respondents thought five pages would be more workable, though others thought three pages was a good limiter.
- Suggestions that such motions should be limited to discovery disputes, or perhaps other specific categories of disputes.
- Concerns about the potential for abuse by pro se litigants.

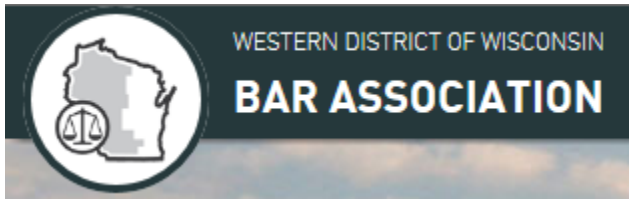
WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

Proposed Findings of Fact

Do you believe a limit on the number of PFOF's would be helpful?



ANSWER CHOICES	RESPONSES
Yes	48.28%
No	40.09%
N/A	11.64%



Proposed Findings of Fact

Feedback on reducing issues with PFOFs:

- Create joint undisputed facts and leave the rest (disputed facts) to briefing
- Only include PFOFs that are *material*
- Court should specifically strike facts for noncompliance (argumentative, no citation, compound, etc)
- Make a rule that legal conclusions are not proper PFOFs
- Limit the amount (page and/or paragraph #)
- Abandon replies
- Eliminate them for ERISA cases which rely only on the administrative record
- Eliminate them altogether
- They aren't a problem

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

Proposed Findings of Fact

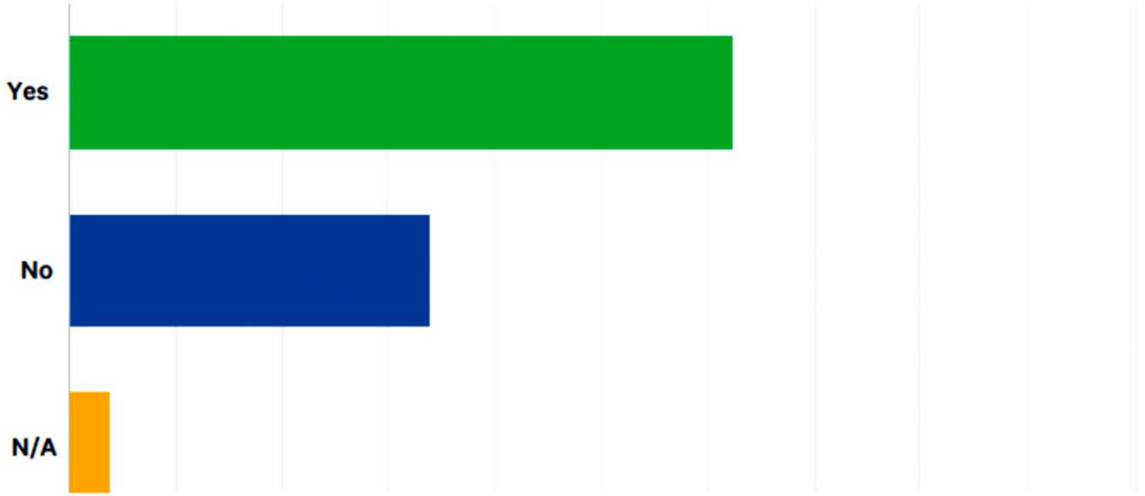
Questions on the Court's standard procedures

- As written, they seem to encourage parties to include more information than is necessary
- Can parties cite to facts in responses to PFOFs?
  (as opposed to having to file their own PFOFs and cite to those)
- Should citations in briefs be to the PFOFs or to the factual record?
- Clarification is needed on what information / evidence the movant can provide in the reply to the non-movant's response

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

Dispositive Motions – Brief Page Limits

Do you believe a limit on the number of pages for summary judgment briefs would be helpful?

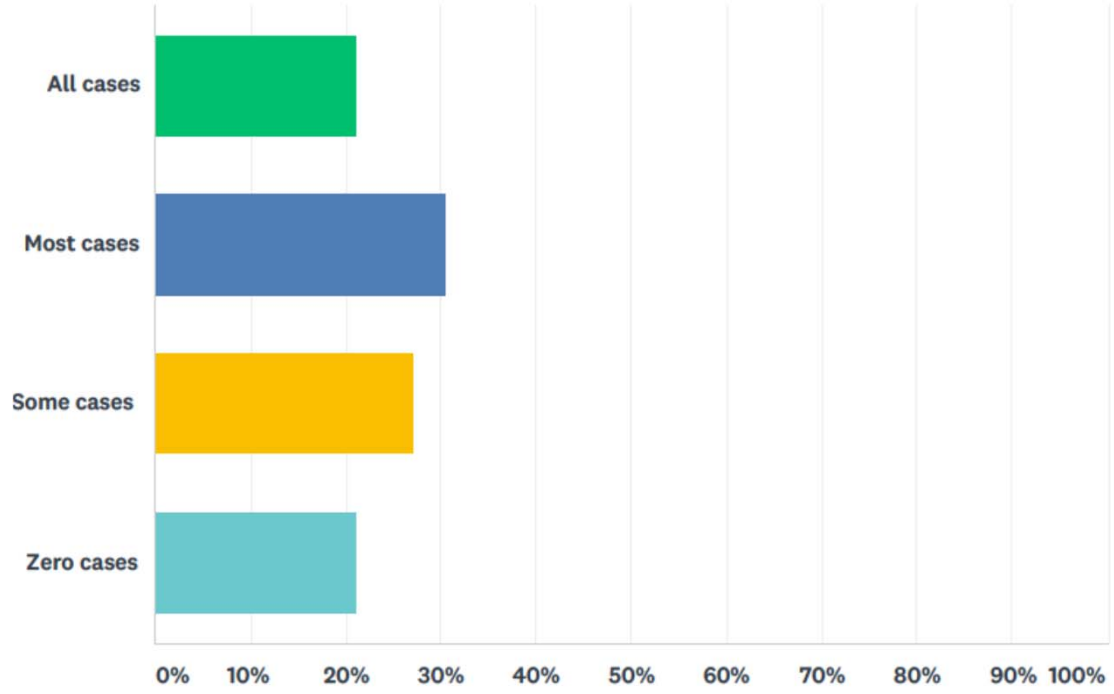


ANSWER CHOICES	RESPONSES
Yes	62.29%
No	33.90%
N/A	3.81%

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

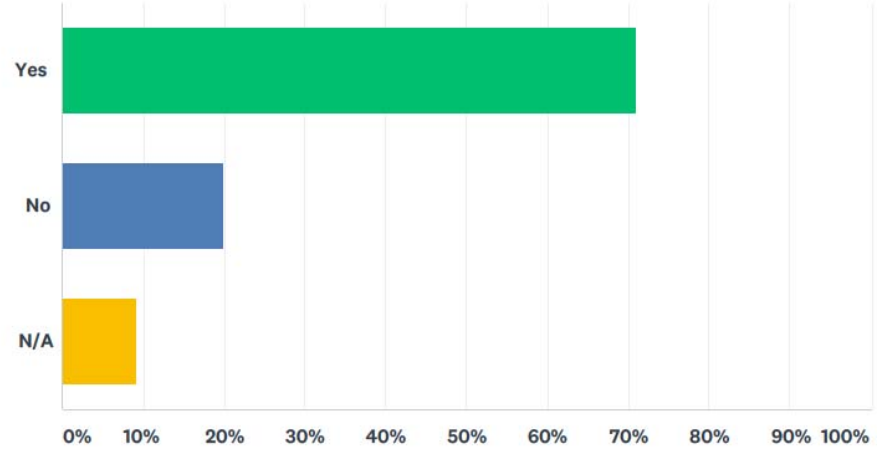
Dispositive Motions – Timing of Decisions

This question asks you to consider all of your cases that progressed to completion of summary judgment briefing. In how many of those cases did you expend resources unnecessarily because you did not have the summary judgment decision before you had to begin and/or finish preparing your pretrial filings?



Dispositive Motions – Timing of Decisions

- The Board of the Western District Bar Association proposes a specific solution: creation of a "summary judgment decision" deadline. The deadline would automatically strike the remainder of a case schedule if the Court has not issued a summary judgment decision by the set deadline. Are you in favor of this solution?

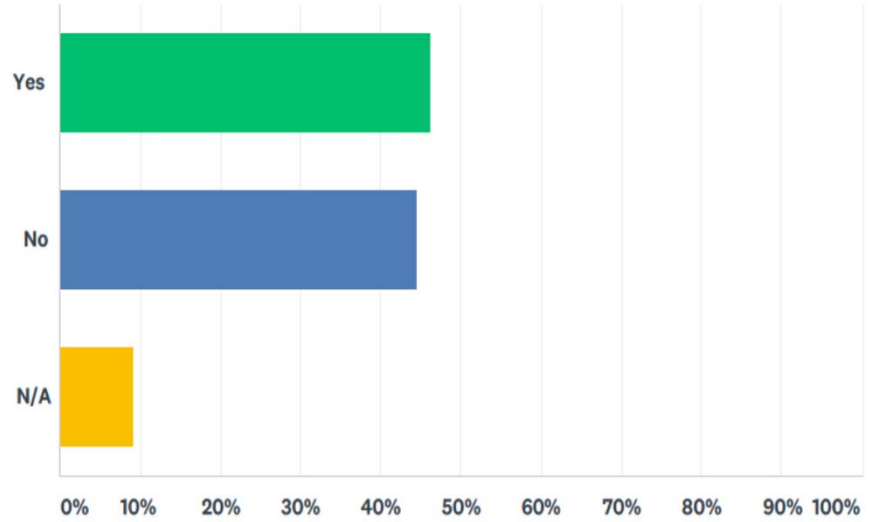


ANSWER CHOICES	RESPONSES
Yes	70.83%
No	19.91%
N/A	9.26%

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

Dispositive Motions – Timing of Decisions

Another potential solution for ameliorating any negative effects from the timing of summary judgment decisions would be entry of a text only order indicating whether the case is likely to proceed to trial on one or more issues. Are you in favor of this solution?

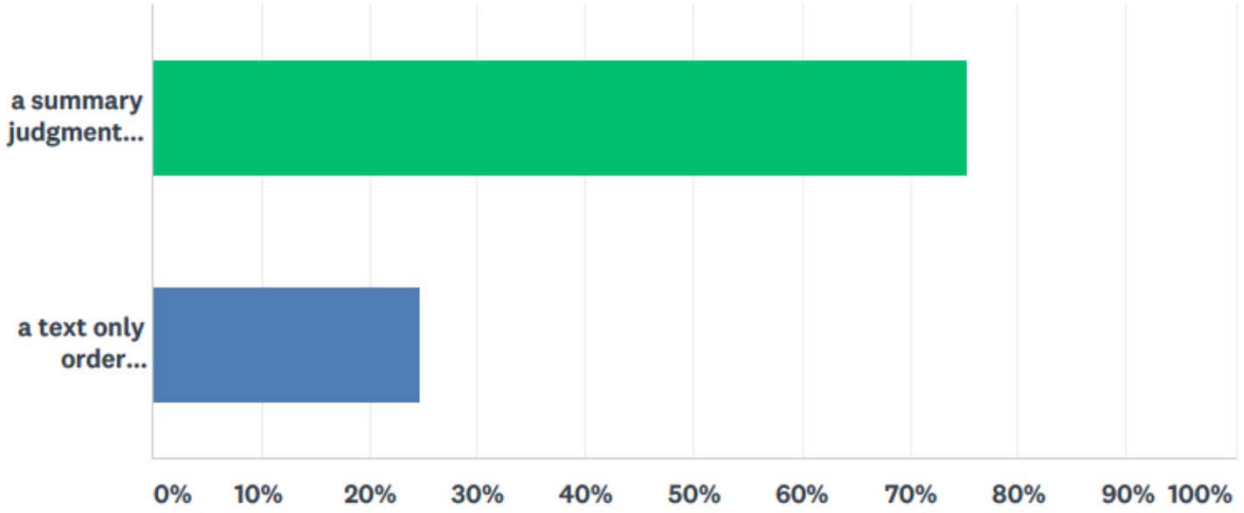


ANSWER CHOICES	RESPONSES
Yes	46.33%
No	44.50%
N/A	9.17%

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

Dispositive Motions – Timing of Decisions

Which of the above two potential solutions would work better for most of your cases?

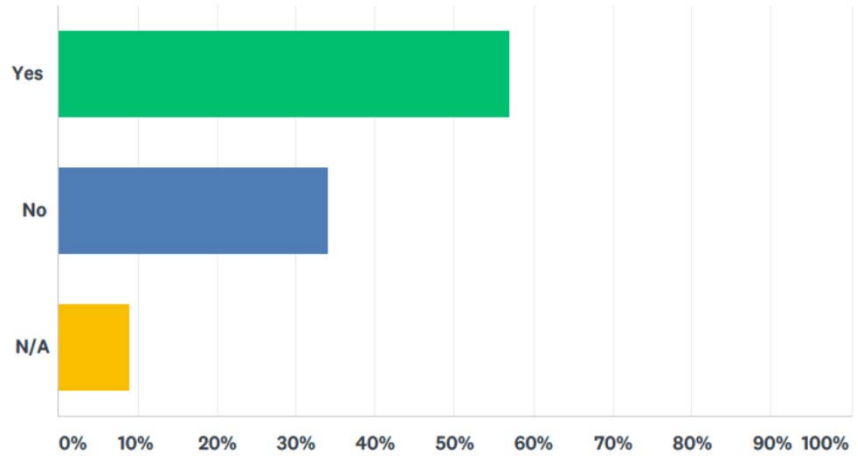


ANSWER CHOICES	RESPONSES
a summary judgment dec s on dead ne	75.36%
a text on y order nd cat ng whether the case s ke y to proceed to tr a on one or more ssues	24.64%

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

Timing for Motions in Limine

To better target your motions in limine, would you prefer a deadline for motions in limine to be after the other standard pretrial filings (Rule 26(a)(3) disclosures, proposed voir dire, jury instructions, special verdict)?

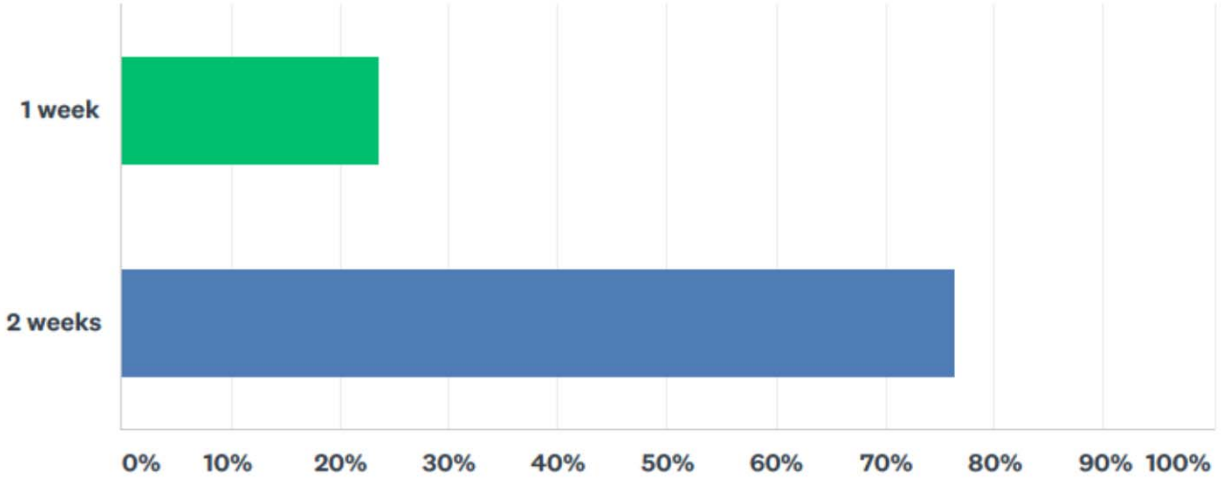


ANSWER CHOICES	RESPONSES
Yes	56.82%
No	34.09%
N/A	9.09%

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

Timing for Motions in Limine

If you answered “Yes” to the preceding question, how many weeks do you prefer between motions in limine and other pretrial materials?



ANSWER CHOICES	RESPONSES
1 week	23.70%
2 weeks	76.30%

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

Timing for Motions in Limine

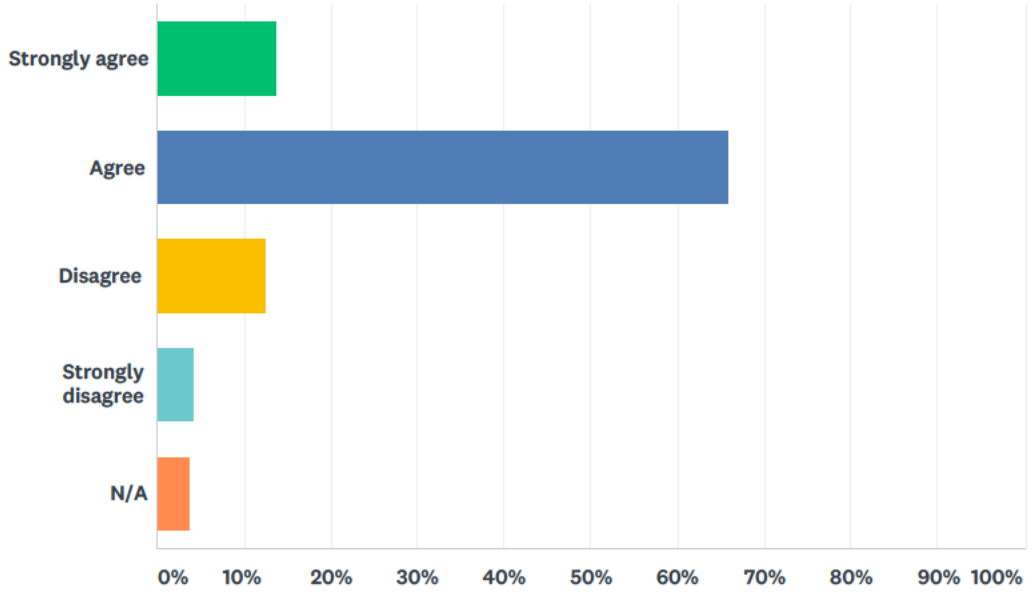
Suggestions for Motions in Limine:

- Generally, respondents agreed motions in limine should be filed ***after*** the other pretrial filings.

- But some respondents suggested the need for a separate deadline for motions to exclude experts/Daubert motions.

Q1 The general timeline of the Court's calendaring appropriately reflects the needs of the case.

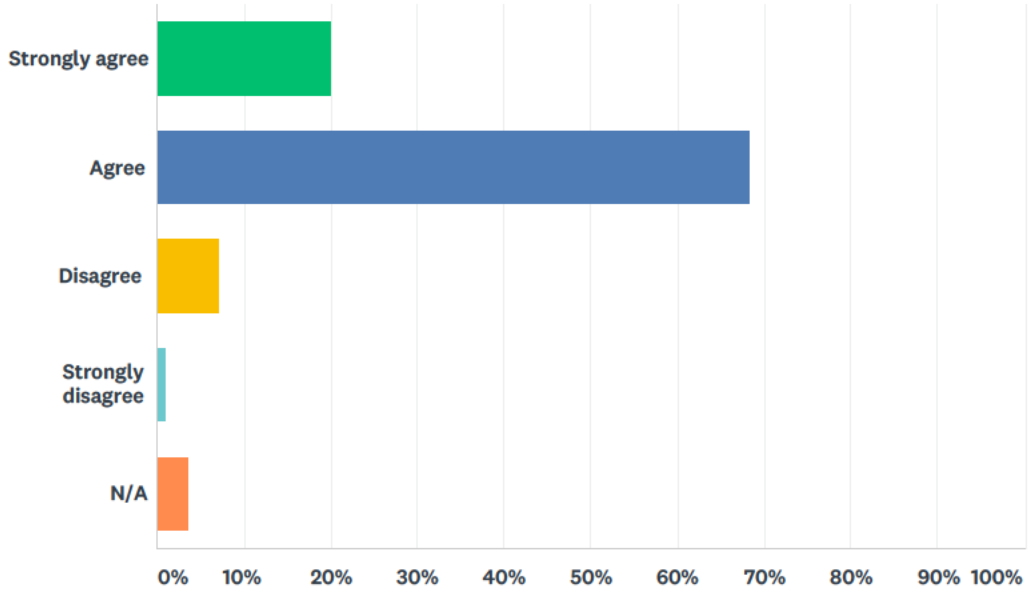
Answered: 313 Sk pped: 2



ANSWER CHOICES	RESPONSES	
Strong y agree	13.74%	43
Agree	65.81%	206
D sagree	12.46%	39
Strong y d sagree	4.15%	13
N/A	3.83%	12
TOTAL		313

Q2 The Court's pretrial orders, including its standard attachments, are easy to understand.

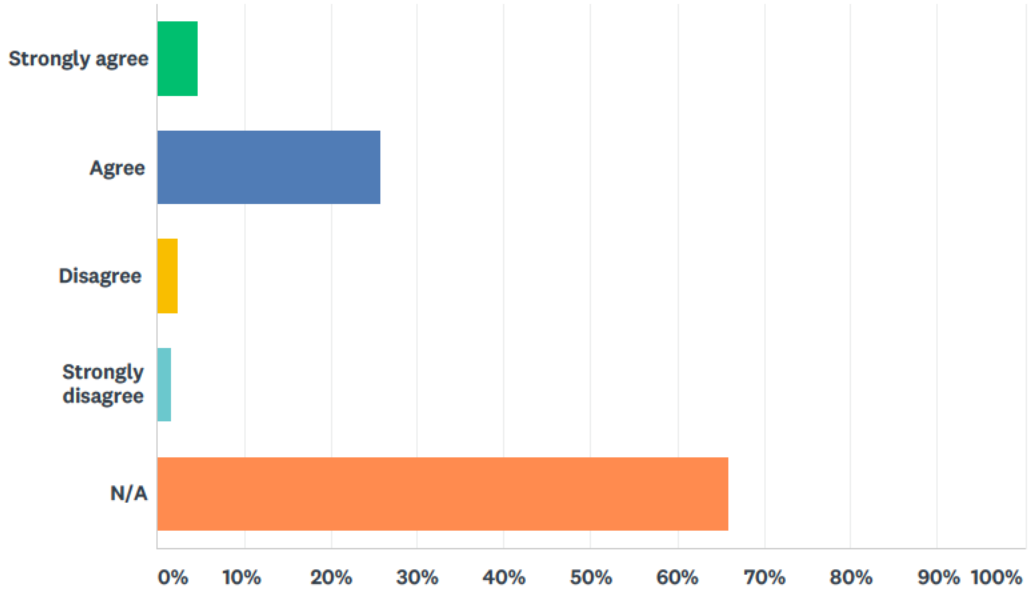
Answered: 313 Sk pped: 2



ANSWER CHOICES	RESPONSES	
Strong y agree	20.13%	63
Agree	68.37%	214
D sagree	7.03%	22
Strong y d sagree	0.96%	3
N/A	3.51%	11
TOTAL		313

Q3 The Court's procedures for preliminary injunctions are reasonable and efficient.

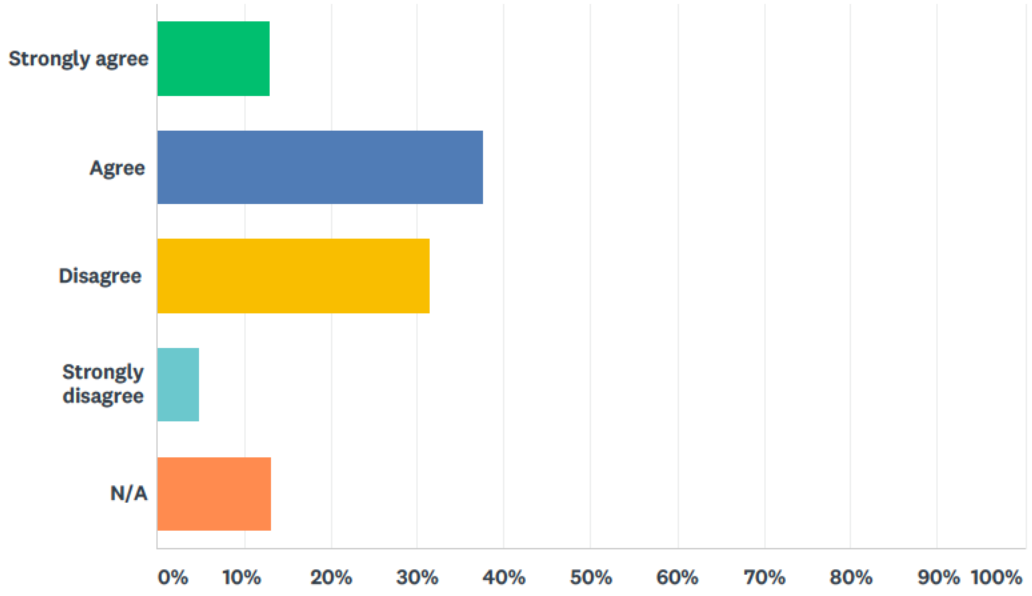
Answered: 310 Sk pped: 5



ANSWER CHOICES	RESPONSES	
Strong y agree	4.52%	14
Agree	25.81%	80
D sagree	2.26%	7
Strong y d sagree	1.61%	5
N/A	65.81%	204
TOTAL		310

Q5 It would be useful if the Court conducted early stage mediation (similar to the 7th Circuit).

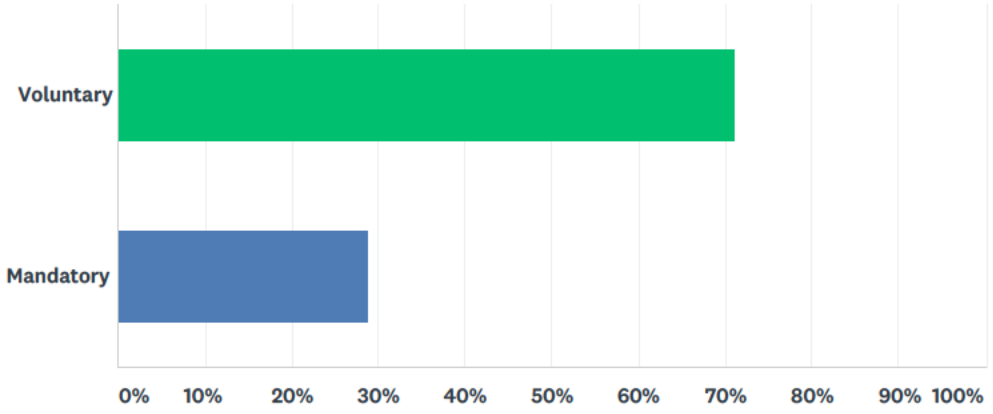
Answered: 294 Sk pped: 21



ANSWER CHOICES	RESPONSES	
Strong y agree	12.93%	38
Agree	37.76%	111
D sagree	31.29%	92
Strong y d sagree	4.76%	14
N/A	13.27%	39
TOTAL		294

Q6 If early-stage mediation would be useful, should it be voluntary or mandatory?

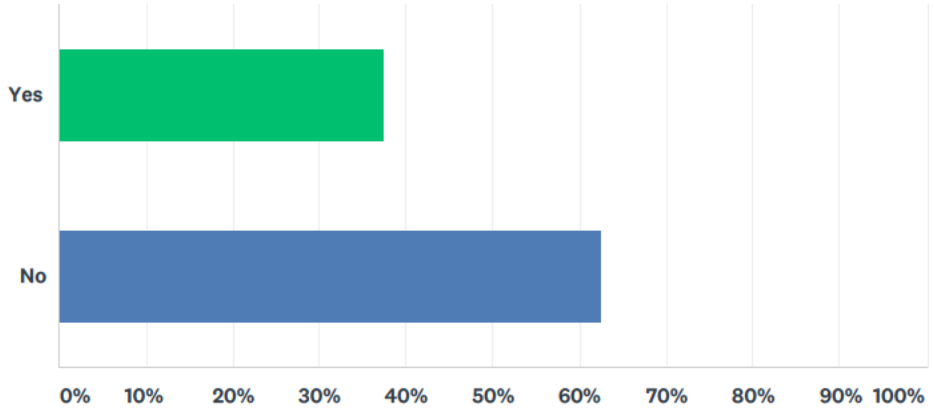
Answered: 280 Sk pped: 35



ANSWER CHOICES	RESPONSES	
Vo untary	71.07%	199
Mandatory	28.93%	81
TOTAL		280

Q7 The Court now issues one deadline for settlement letters. Would it be useful to add a deadline for an early settlement letter?

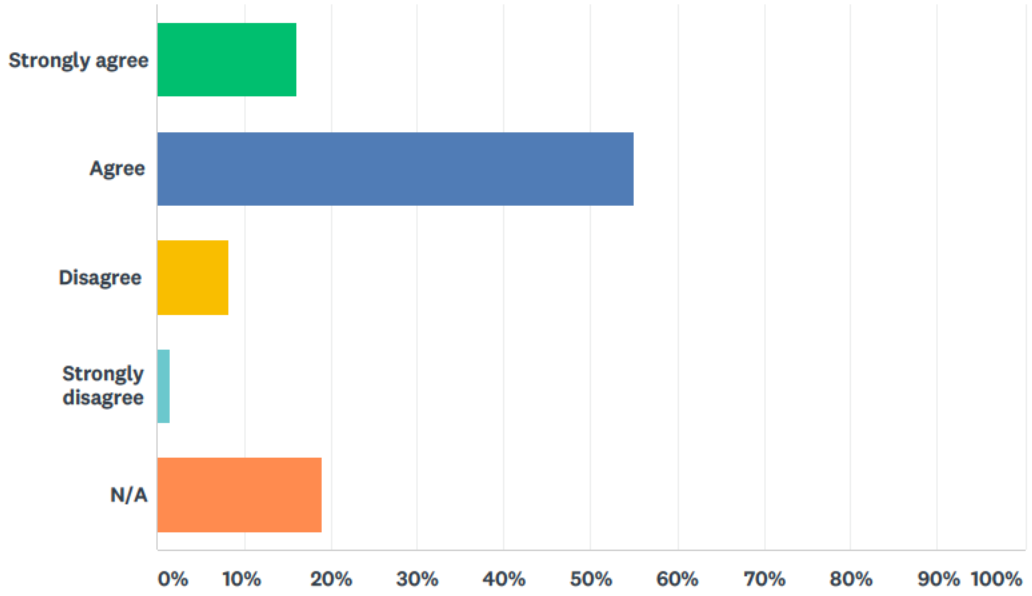
Answered: 272 Sk pped: 43



ANSWER CHOICES	RESPONSES	
Yes	37.50%	102
No	62.50%	170
TOTAL		272

Q9 Discovery motions are resolved in an appropriate amount of time.

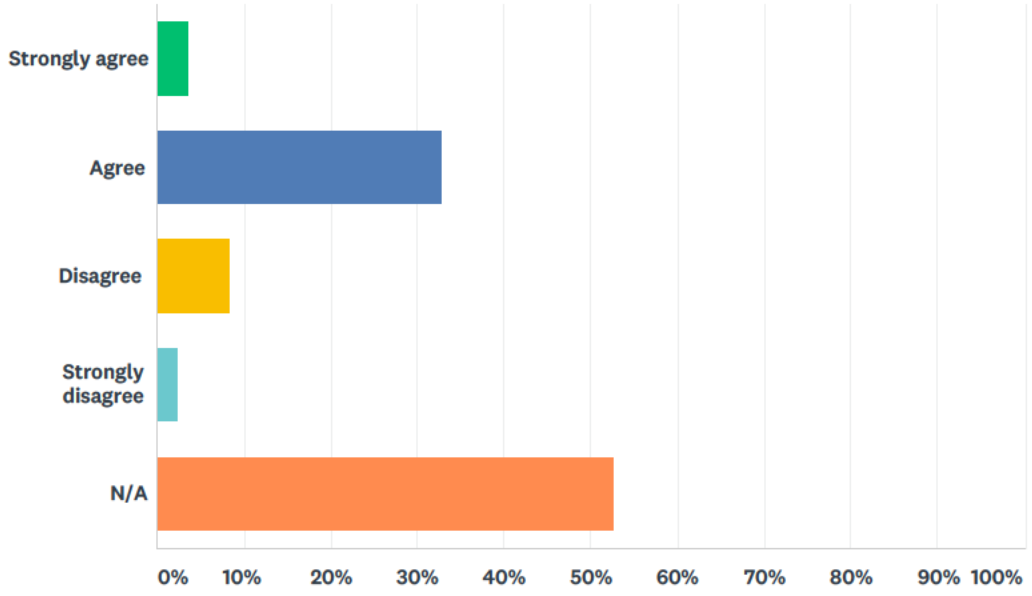
Answered: 256 Sk pped: 59



ANSWER CHOICES	RESPONSES	
Strong y agree	16.02%	41
Agree	55.08%	141
D sagree	8.20%	21
Strong y d sagree	1.56%	4
N/A	19.14%	49
TOTAL		256

Q10 Discovery sanctions are relatively consistent with those handed down in other courts.

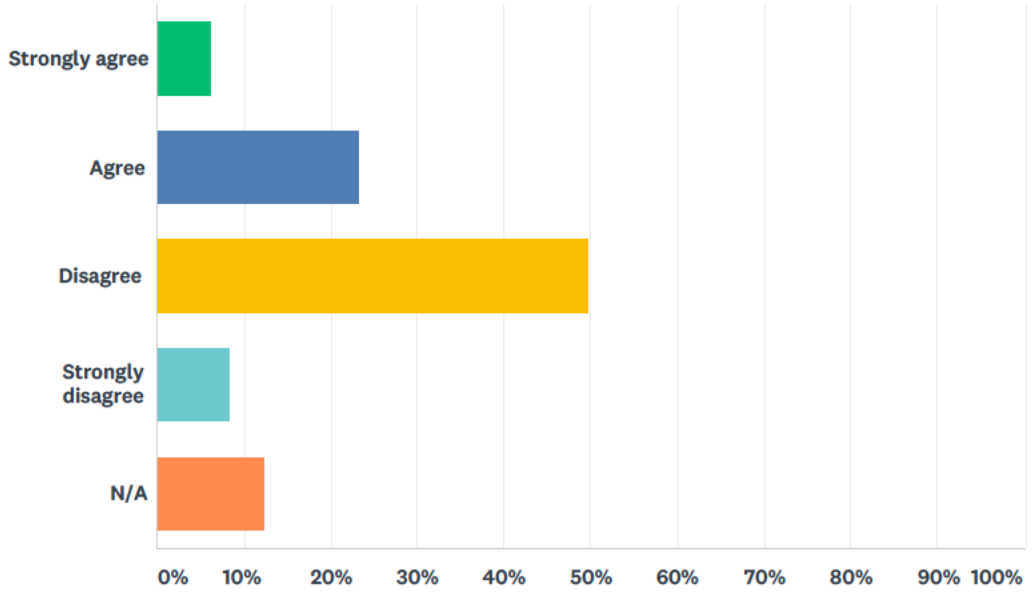
Answered: 250 Sk pped: 65



ANSWER CHOICES	RESPONSES	
Strong y agree	3.60%	9
Agree	32.80%	82
D sagree	8.40%	21
Strong y d sagree	2.40%	6
N/A	52.80%	132
TOTAL		250

Q11 The Court should implement more local rules to facilitate the discovery process.

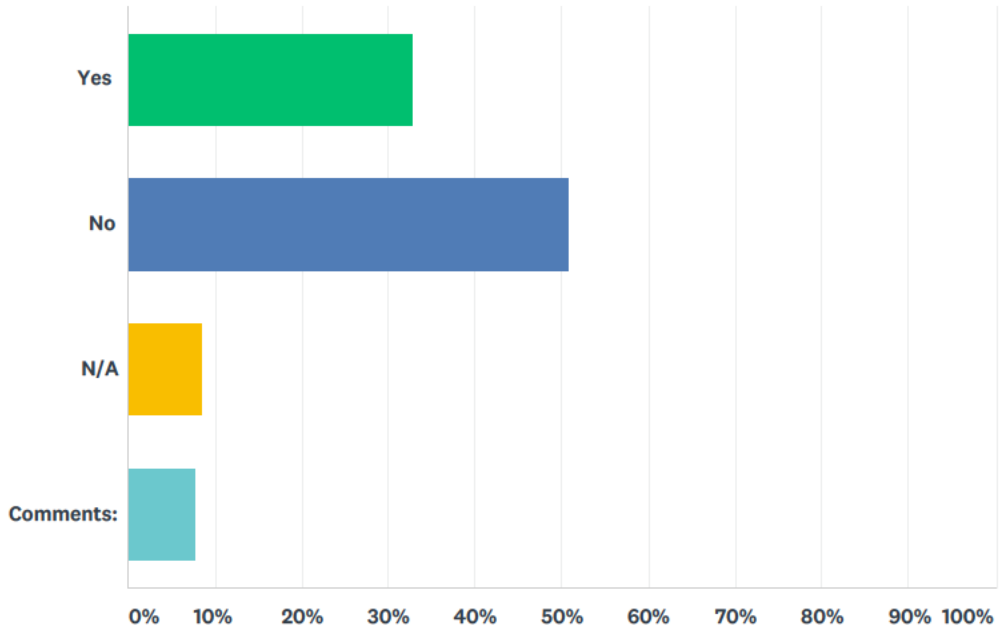
Answered: 253 Sk pped: 62



ANSWER CHOICES	RESPONSES	
Strong y agree	6.32%	16
Agree	23.32%	59
D sagree	49.80%	126
Strong y d sagree	8.30%	21
N/A	12.25%	31
TOTAL		253

Q12 The Eastern District of Wisconsin limits one party from asking more than 25 total interrogatories for opposing parties represented by the same counsel. The Western District allows 25 interrogatories for each individual opposing party. Do you think the Eastern District limit would be useful in the Western District?

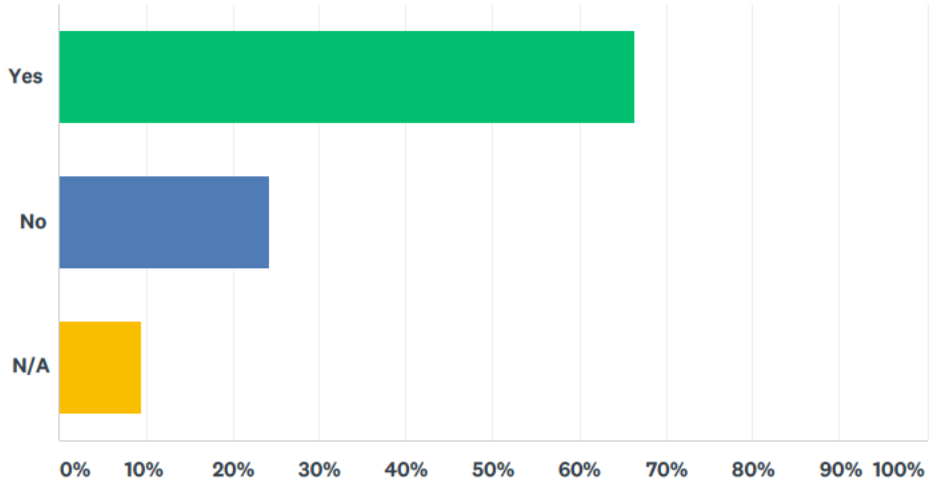
Answered: 258 Sk pped: 57



ANSWER CHOICES	RESPONSES	
Yes	32.95%	85
No	50.78%	131
N/A	8.53%	22
Comments:	7.75%	20
TOTAL		258

Q14 Please state whether you believe it would be useful for the Court to incorporate an expedited, non-dispositive motion practice into its local rules. For reference, please see below for the Eastern District of Wisconsin Civil Local Rule 7(h).(7)(h) Expedited Non-Dispositive Motion Practice. (1) Parties in civil actions may seek non-dispositive relief by expedited motion. The motion must be designated as a “Civil L. R. 7(h) Expedited Non-Dispositive Motion.” The Court may schedule the motion for hearing or may decide the motion without hearing. The Court may designate that the hearing be conducted by telephone conference call. The Court may order an expedited briefing schedule(2) The motion must contain the material facts, argument, and, if necessary, counsel’s certification pursuant to Civil L. R. 37. The motion must not exceed 3 pages excluding any caption and signature block. The movant may not file a separate memorandum with the motion. The movant may file with the motion an affidavit or declaration for purposes of (1) attesting to facts pertinent to the motion and/or (2) authenticating documents relevant to the issue(s) raised in the motion. The movant’s affidavit or declaration may not exceed 2 pages. The respondent must file a memorandum in opposition to the motion within 7 days of service of the motion, unless otherwise ordered by the Court. The respondent’s memorandum must not exceed 3 pages. The respondent may file with its memorandum an affidavit or declaration for purposes of (1) attesting to facts pertinent to the respondent’s memorandum and/or (2) authenticating documents relevant to the issue(s) raised in the motion. The respondent’s affidavit or declaration may not exceed 2 pages. No reply brief is permitted absent leave of Court.(3) The provisions of subsection (h) do not apply to 42 U.S.C. § 1983 actions brought by incarcerated persons proceeding pro se.

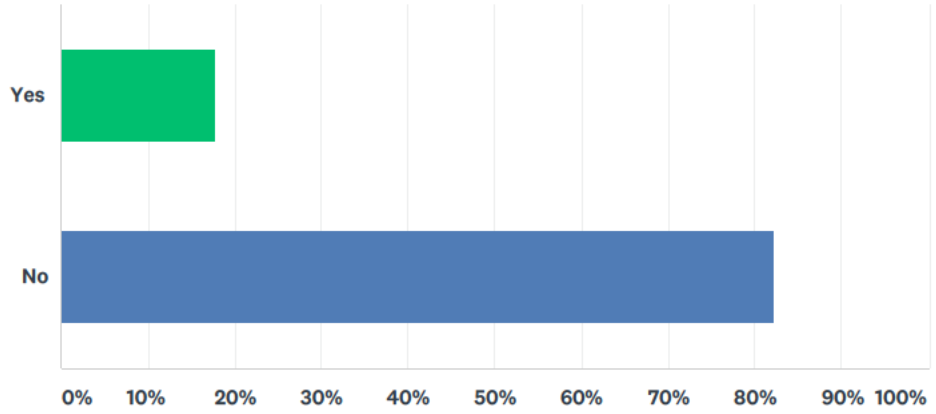
Answered: 234 Sk pped: 81



ANSWER CHOICES	RESPONSES	
Yes	66.24%	155
No	24.36%	57
N/A	9.40%	22
TOTAL		234

Q15 If you answered “Yes” to the preceding question, is there anything about this rule which would benefit from modification for use in the Western District of Wisconsin?

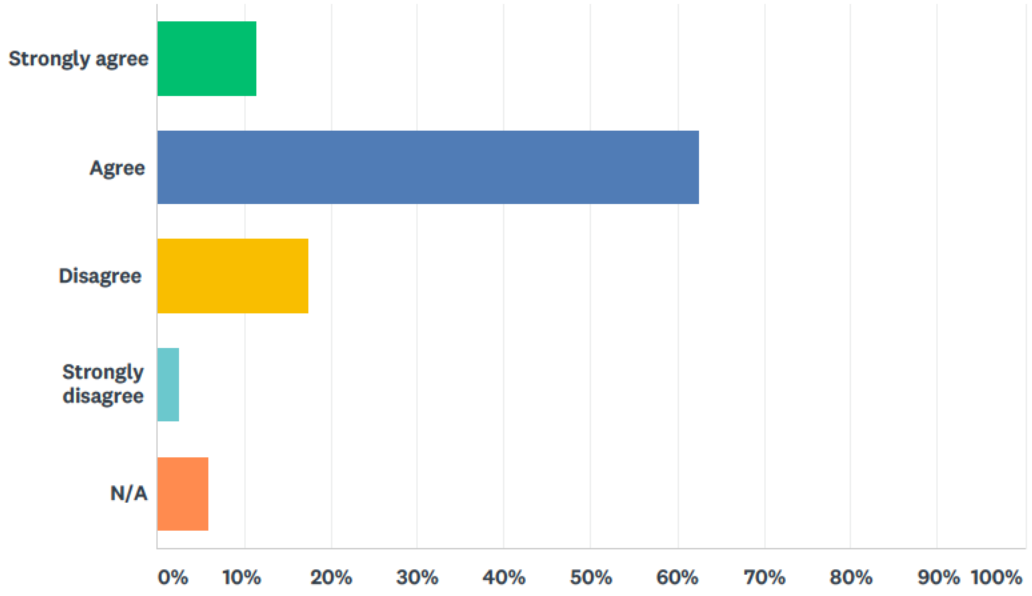
Answered: 157 Sk pped: 158



ANSWER CHOICES	RESPONSES	
Yes	17.83%	28
No	82.17%	129
TOTAL		157

Q16 The briefing schedules on summary judgment give the parties an adequate amount of time to file response materials and reply materials.

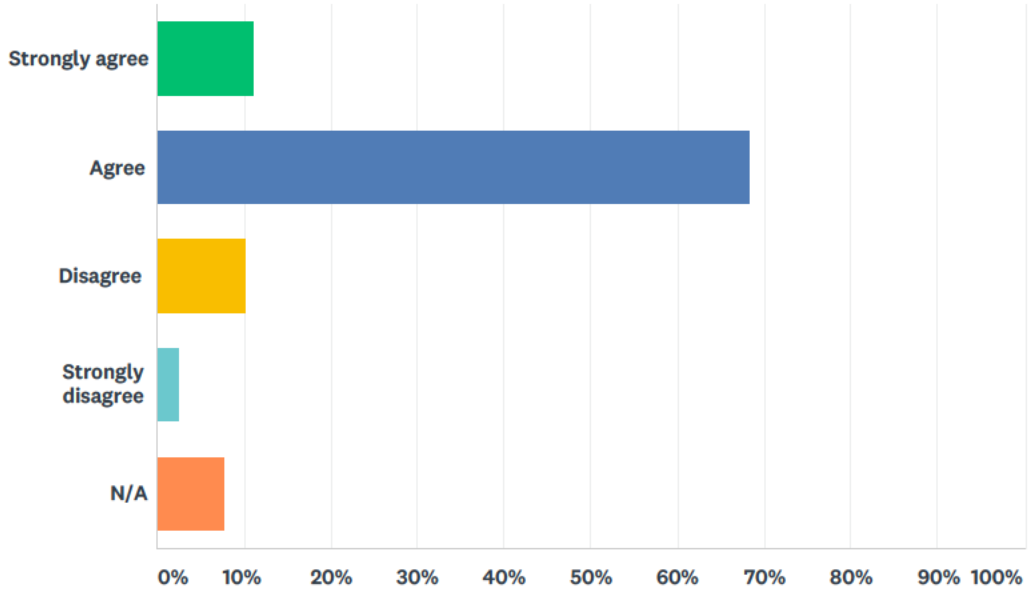
Answered: 235 Sk pped: 80



ANSWER CHOICES	RESPONSES	
Strong y agree	11.49%	27
Agree	62.55%	147
D sagree	17.45%	41
Strong y d sagree	2.55%	6
N/A	5.96%	14
TOTAL		235

Q17 The Court's standard procedures provide adequate guidance on drafting and responding to proposed findings of fact.

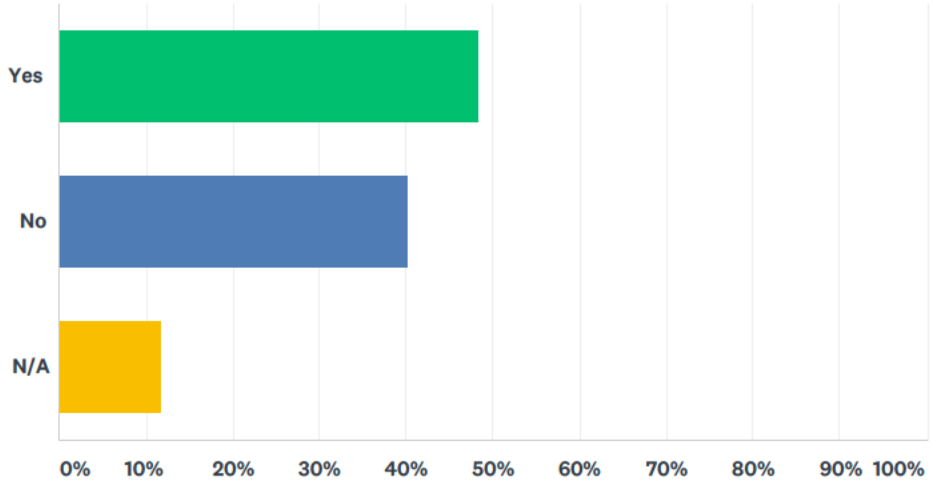
Answered: 235 Sk pped: 80



ANSWER CHOICES	RESPONSES	
Strong y agree	11.06%	26
Agree	68.51%	161
D sagree	10.21%	24
Strong y d sagree	2.55%	6
N/A	7.66%	18
TOTAL		235

Q19 The Eastern District of Wisconsin has a local rule limiting the number of Proposed Findings of fact to 150 for the moving party and 100 for the non-moving party. Do you believe a limit on the number of Proposed Findings of Fact would be helpful in the Western District?

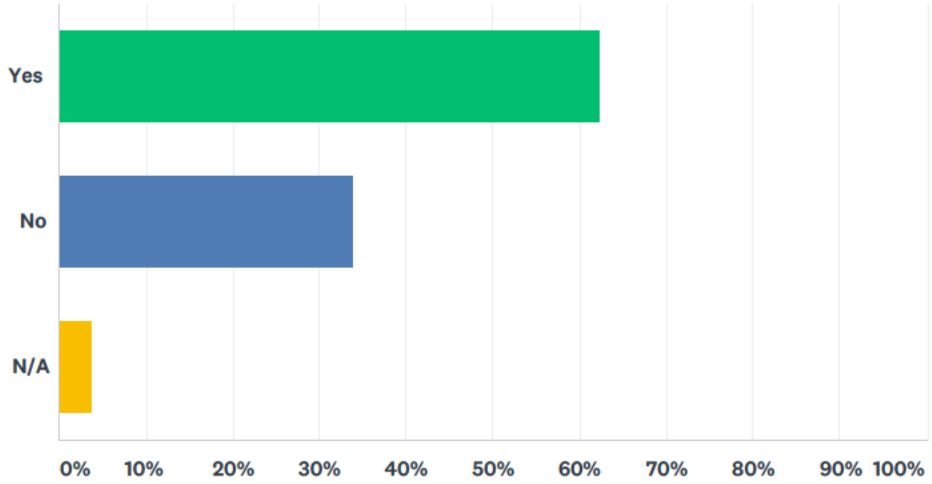
Answered: 232 Sk pped: 83



ANSWER CHOICES	RESPONSES	
Yes	48.28%	112
No	40.09%	93
N/A	11.64%	27
TOTAL		232

Q21 The Eastern District of Wisconsin has a local rule setting a limit on the number of pages for summary judgment briefs (30 for the brief-in-cheief, 30 for the response brief and 15 for the reply brief). Do you believe a limit on the number of pages would be helpful in the Western District?

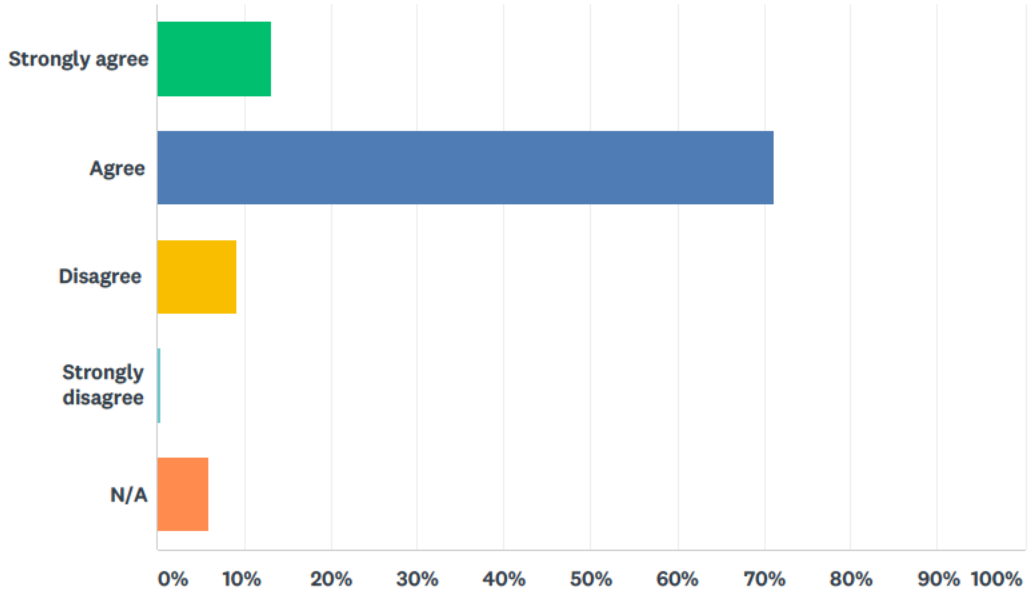
Answered: 236 Sk pped: 79



ANSWER CHOICES	RESPONSES	
Yes	62.29%	147
No	33.90%	80
N/A	3.81%	9
TOTAL		236

Q23 The Court's instructions regarding its pretrial submissions, as stated in its standard Preliminary Pretrial Conference Order, are easy to understand.

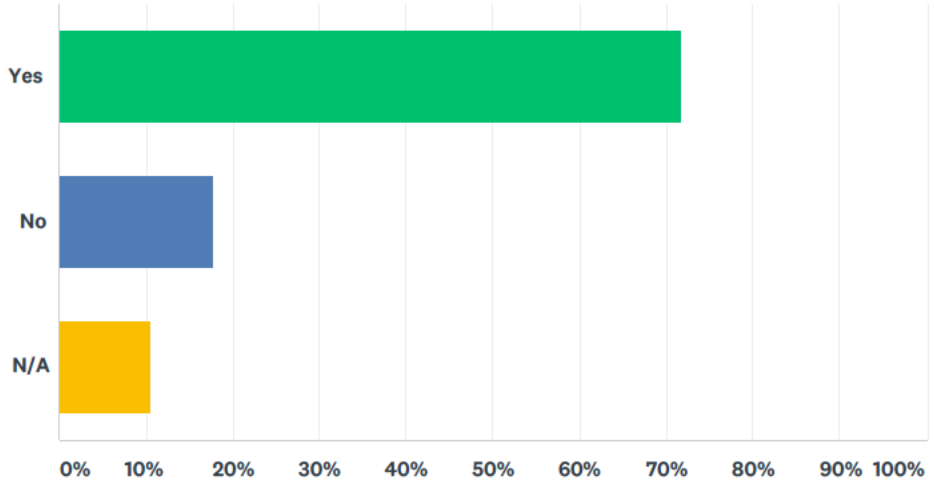
Answered: 219 Sk pped: 96



ANSWER CHOICES	RESPONSES	
Strong y agree	13.24%	29
Agree	71.23%	156
D sagree	9.13%	20
Strong y d sagree	0.46%	1
N/A	5.94%	13
TOTAL		219

Q24 The standard timing of pretrial submissions appropriately reflects the needs of a case.

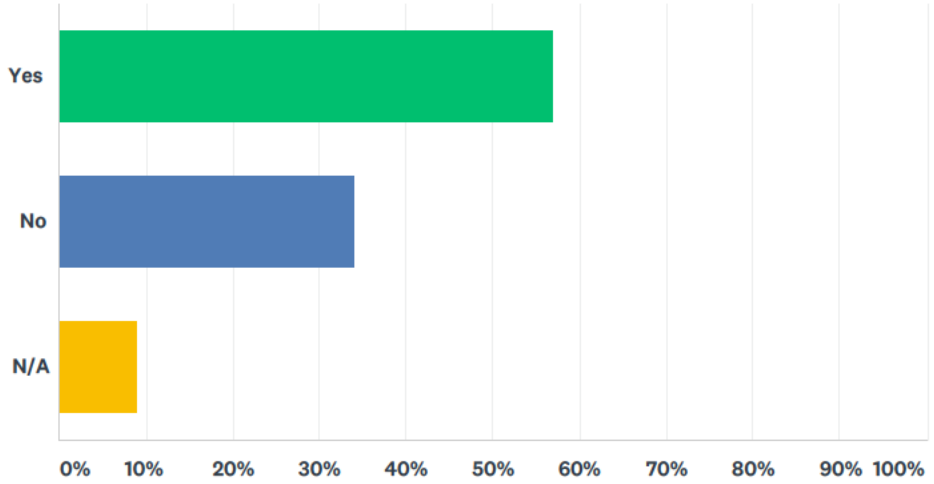
Answered: 220 Sk pped: 95



ANSWER CHOICES	RESPONSES	
Yes	71.82%	158
No	17.73%	39
N/A	10.45%	23
TOTAL		220

Q25 In order to better target your motions in limine, would you prefer a deadline for motions in limine to be after the other standard pretrial filings (Rule 26(a)(3) disclosures, proposed voir dire questions, proposed jury instructions, and proposed verdict forms)?

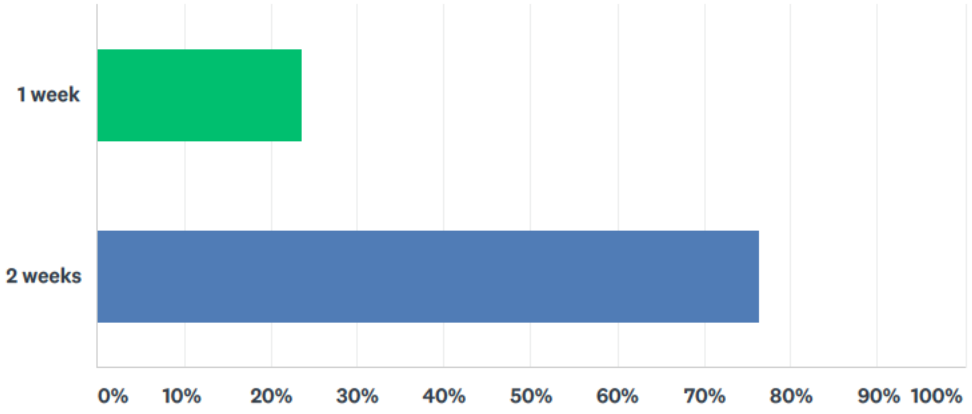
Answered: 220 Sk pped: 95



ANSWER CHOICES	RESPONSES	
Yes	56.82%	125
No	34.09%	75
N/A	9.09%	20
TOTAL		220

Q26 If you answered “Yes” to the preceding question, how many weeks do you prefer between motions in limine and other pretrial materials?

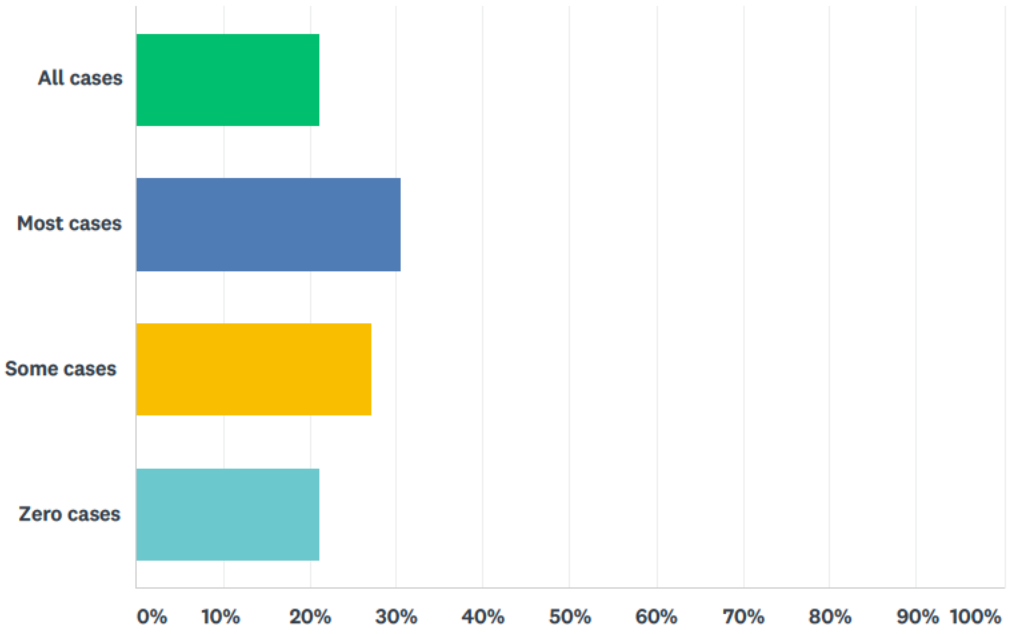
Answered: 135 Sk pped: 180



ANSWER CHOICES	RESPONSES	
1 week	23.70%	32
2 weeks	76.30%	103
TOTAL		135

Q27 This question asks you to consider all of your cases that progressed to completion of summary judgment briefing. In how many of those cases did you expend resources unnecessarily because you did not have the summary judgment decision before you had to begin and/or finish preparing your pretrial filings?

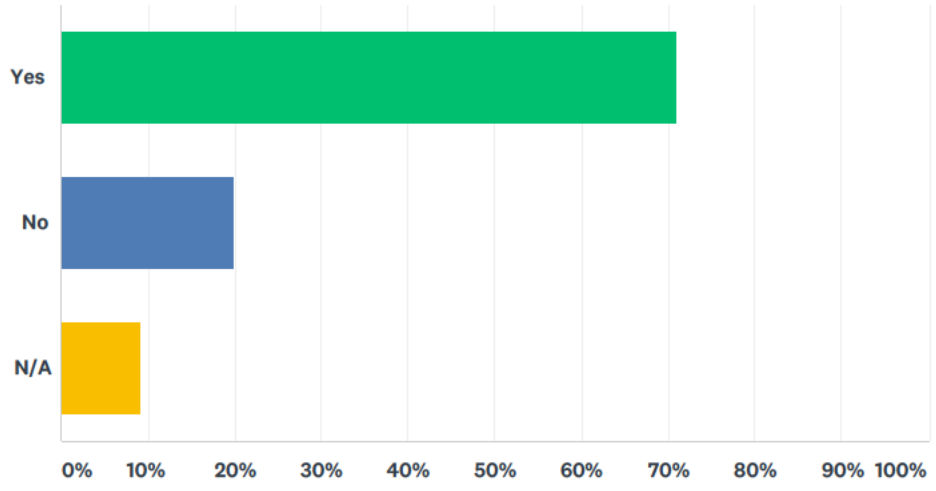
Answered: 209 Sk pped: 106



ANSWER CHOICES	RESPONSES	
A cases	21.05%	44
Most cases	30.62%	64
Some cases	27.27%	57
Zero cases	21.05%	44
TOTAL		209

Q28 The Court has acknowledged that its timing of summary judgment decisions may have a negative effect on parties' trial preparation and expenditure of resources. The Board of the Western District Bar Association proposes a specific solution: creation of a "summary judgment decision" deadline. The deadline would automatically strike the remainder of a case schedule if the Court has not issued a summary judgment decision by the set deadline. Are you in favor of this solution?

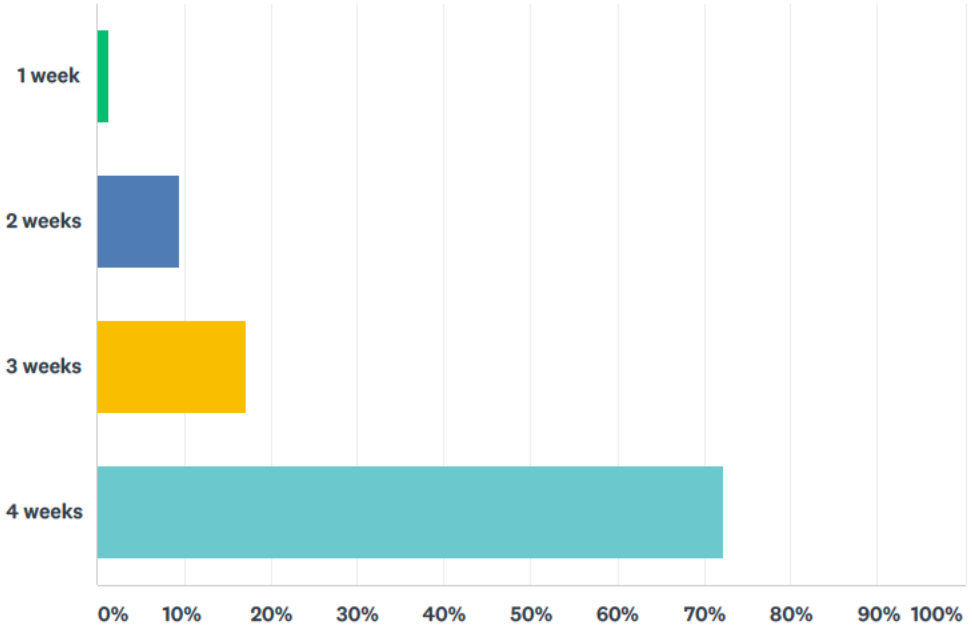
Answered: 216 Sk pped: 99



ANSWER CHOICES	RESPONSES	
Yes	70.83%	153
No	19.91%	43
N/A	9.26%	20
TOTAL		216

Q29 If you answered “Yes” to the preceding question, how many weeks—between the summary judgment decision deadline and the pretrial filings deadline—would largely avoid any negative effect on parties’ trial preparation and expenditure of resources?

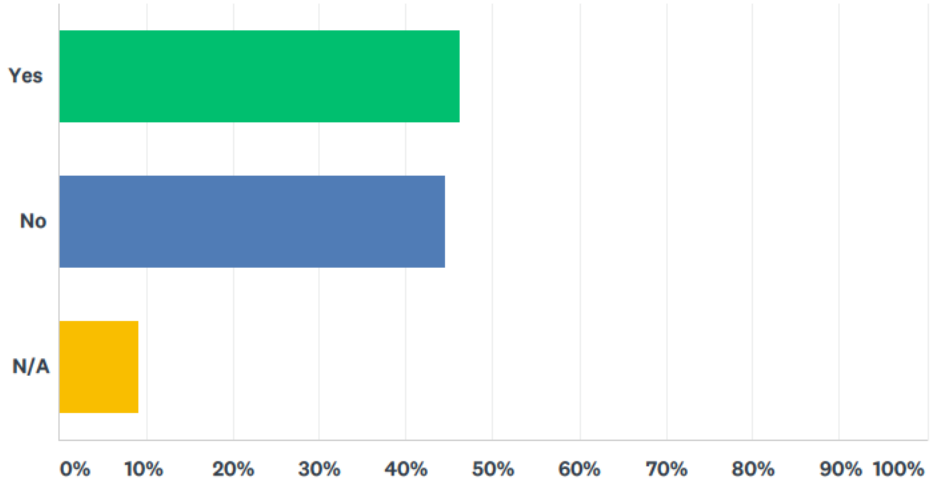
Answered: 169 Sk pped: 146



ANSWER CHOICES	RESPONSES	
1 week	1.18%	2
2 weeks	9.47%	16
3 weeks	17.16%	29
4 weeks	72.19%	122
TOTAL		169

Q30 Another potential solution for ameliorating any negative effects from the timing of summary judgment decisions would be entry of a text only order indicating whether the case is likely to proceed to trial on one or more issues. Are you in favor of this solution?

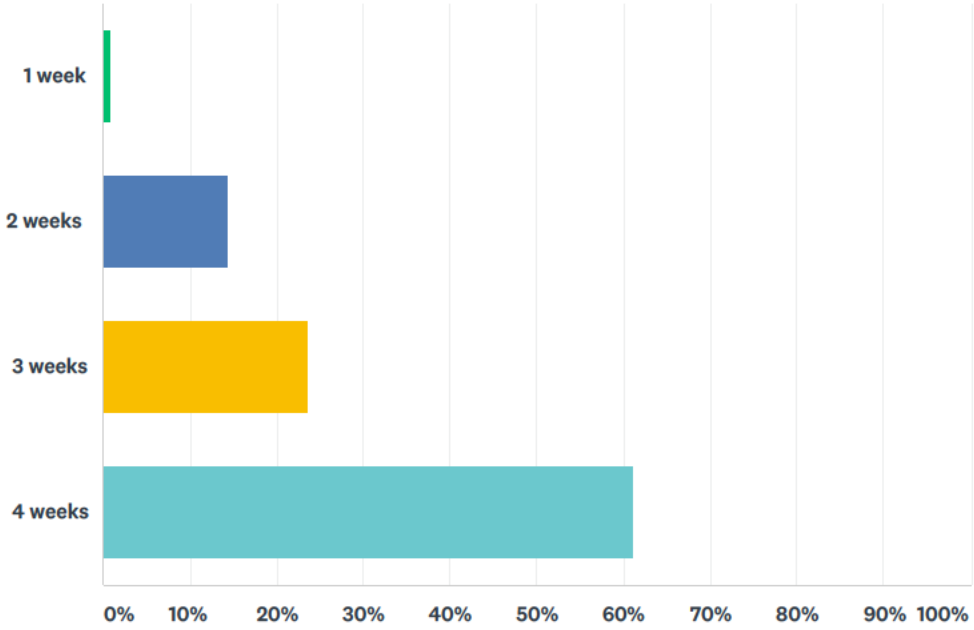
Answered: 218 Sk pped: 97



ANSWER CHOICES	RESPONSES	
Yes	46.33%	101
No	44.50%	97
N/A	9.17%	20
TOTAL		218

Q31 If you answered “Yes” to the preceding question, how many weeks—between the text order and the pretrial filings deadline—would largely avoid any negative effect on parties’ trial preparation and expenditure of resources?

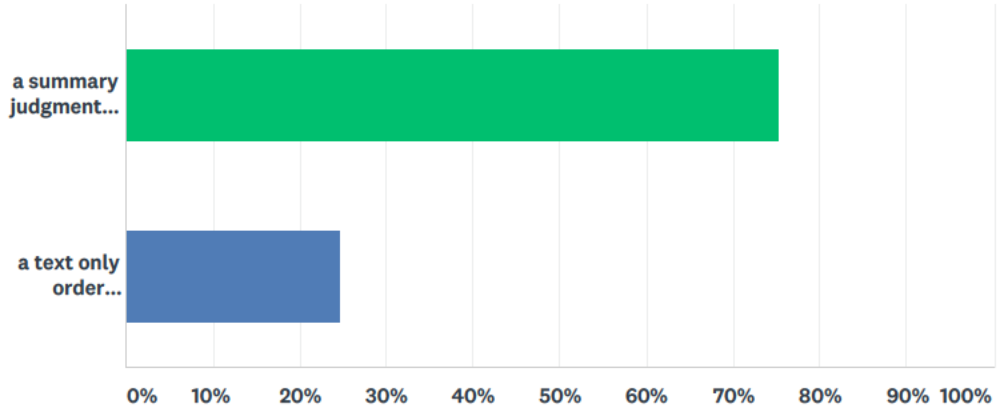
Answered: 118 Sk pped: 197



ANSWER CHOICES	RESPONSES	
1 week	0.85%	1
2 weeks	14.41%	17
3 weeks	23.73%	28
4 weeks	61.02%	72
TOTAL		118

Q32 Which of the above two potential solutions would work better for most of your cases?

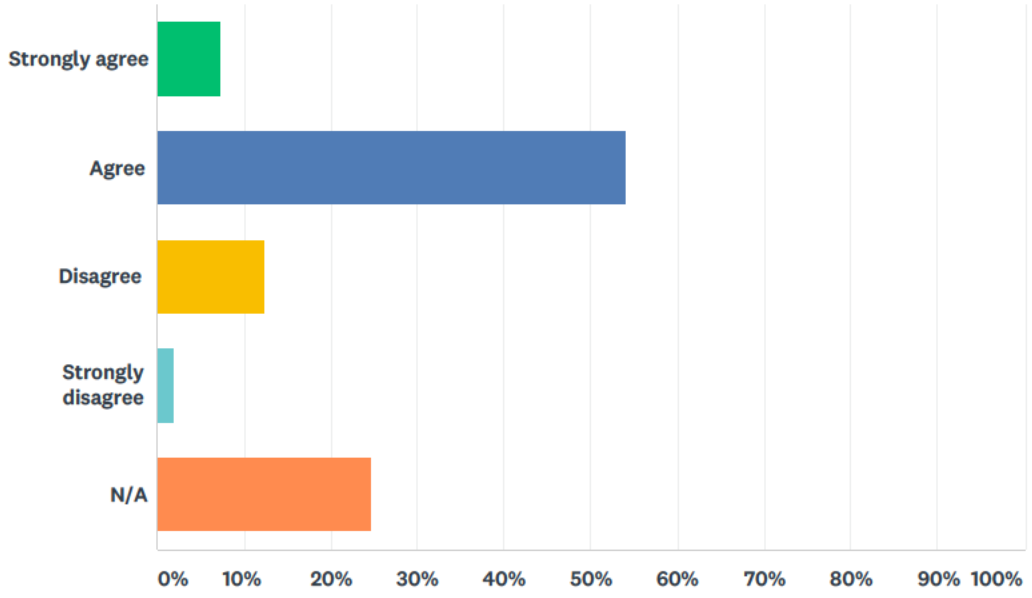
Answered: 207 Sk pped: 108



ANSWER CHOICES	RESPONSES	
a summary judgment dec s on dead ne	75.36%	156
a text on y order nd cat ng whether the case s ke y to proceed to tr a on one or more ssues	24.64%	51
TOTAL		207

Q33 In my experience, the Court is able to address all outstanding issues at the final pretrial conference such that trial proceeds as efficiently as possible.

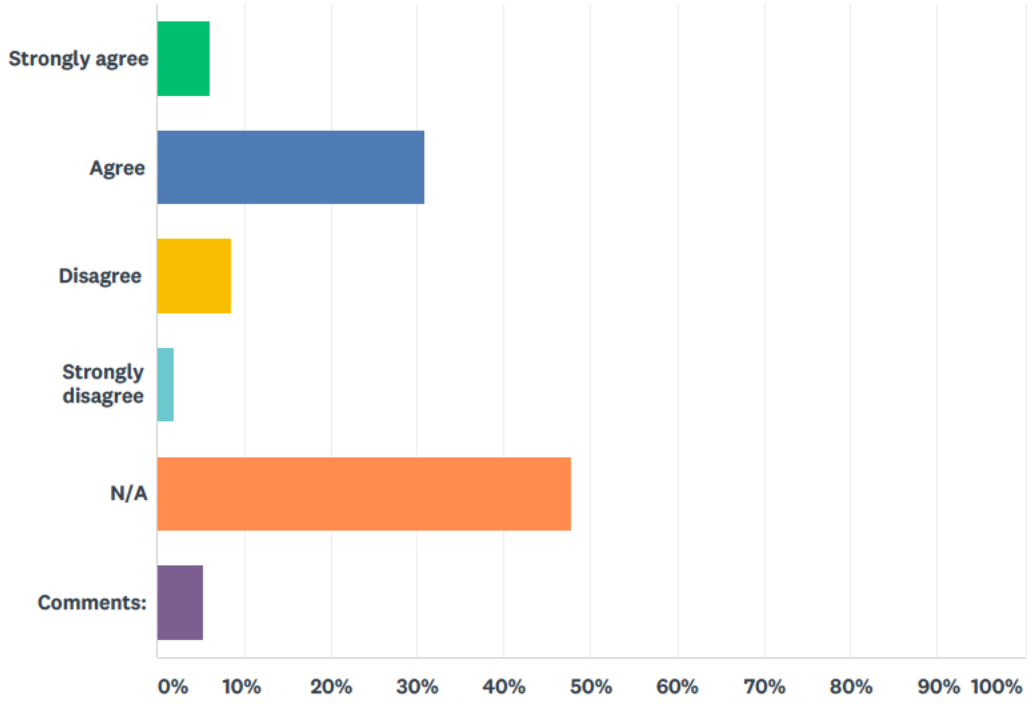
Answered: 219 Sk pped: 96



ANSWER CHOICES	RESPONSES	
Strong y agree	7.31%	16
Agree	53.88%	118
D sagree	12.33%	27
Strong y d sagree	1.83%	4
N/A	24.66%	54
TOTAL		219

Q35 During a jury trial, any Court questions to witnesses are asked in an impartial manner.

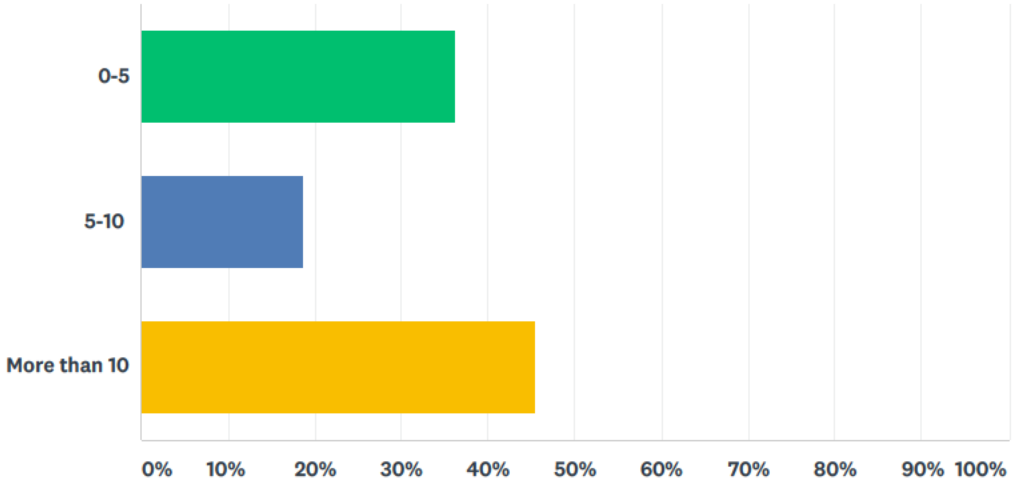
Answered: 212 Sk pped: 103



ANSWER CHOICES	RESPONSES	
Strong y agree	6.13%	13
Agree	30.66%	65
D sagree	8.49%	18
Strong y d sagree	1.89%	4
N/A	47.64%	101
Comments:	5.19%	11
TOTAL		212

Q42 How many cases have you litigated in the Western District of Wisconsin?

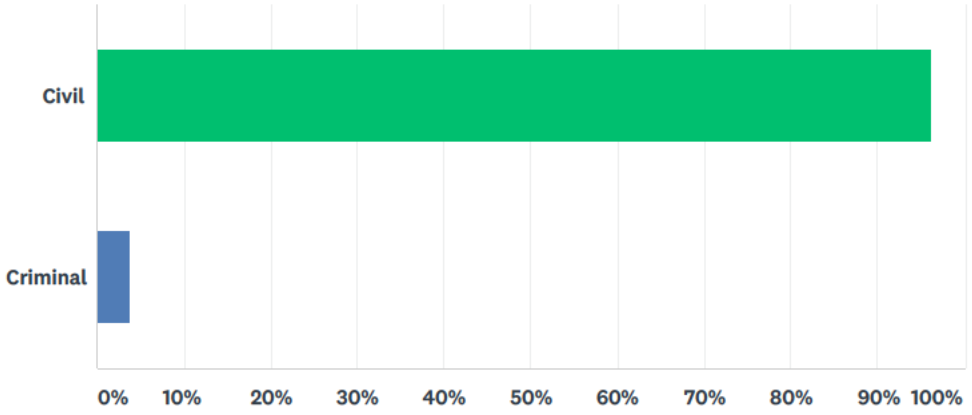
Answered: 216 Sk pped: 99



ANSWER CHOICES	RESPONSES	
0-5	36.11%	78
5-10	18.52%	40
More than 10	45.37%	98
TOTAL		216

Q43 What type of cases do you primarily litigate?

Answered: 218 Sk pped: 97



ANSWER CHOICES	RESPONSES	
C v	96.33%	210
Cr m na	3.67%	8
TOTAL		218