


SURVEYS *of the* COLORADO BENCH & BAR



ON COLORADO'S
SIMPLIFIED PRETRIAL
PROCEDURE FOR
CIVIL ACTIONS

INSTITUTE *for the*
ADVANCEMENT
of the AMERICAN
LEGAL SYSTEM



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PROCEDURE FOR CIVIL ACTIONS**

**AUTHOR:
Corina Gerety
Research Analyst**

INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

The Institute for the Advancement of the American Legal System (IAALS) is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Executive Director and former Colorado Supreme Court Justice Rebecca Love Kourlis leads a staff distinguished not only by their expertise but also by their diversity of ideas, backgrounds and beliefs.

IAALS provides principled leadership, conducts comprehensive and objective research, and develops innovative and practical solutions—all focused on serving the individuals and organizations who rely on the system to clarify rights and resolve disputes.

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Institute for the Advancement of the American Legal System

University of Denver

2044 E. Evans Avenue; HRTM Bldg., #307

Denver, CO 80208-2101

Phone: 303.871.6600

www.du.edu/legalinstitute

STAFF

Rebecca Love Kourlis, Executive Director

Pamela Gagel, Assistant Director

Stephen Daniels, Director of Research

Corina Gerety, Research Analyst

Natalie Knowlton, Research Analyst

Jenifer Ross-Amato, Senior Research Analyst

Dan Drayer, Director of Marketing & Communications

Theresa Spahn, Director of O'Connor Judicial Selection Initiative

Jennifer Moe, Legal Assistant

Abigail McLane, Budget and Office Manager

Stacey Davis, Executive Assistant

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This Report sets forth the results of the Institute for the Advancement of the American Legal System's surveys of Colorado judges and attorneys on Colorado Rule of Civil Procedure 16.1 ("Rule 16.1"), conducted in the summer of 2010.

EXECUTIVE SUMMARY

The Colorado Rule 16.1 surveys provided District Court judges, and attorneys belonging to the Colorado Bar Association's Litigation Section, an opportunity to express their views on Colorado's voluntary simplified pre-trial procedure for actions seeking \$100,000 or less from any one party. The surveys were developed to examine the experiences and observations of these legal professionals, and to contribute additional information to the dialogue on civil procedure reform.

Judge respondents represented a mix of newer and more experienced judges, with an average of 11 years on the bench. Exactly 90% of the judges have presided over at least one Rule 16.1 case. Attorney respondents tended to have high levels of experience, with an average of 20 years of legal practice in Colorado. Two-thirds of the attorneys have had at least one Rule 16.1 case. In terms of litigation role, 30% have primarily represented plaintiffs, 43% have primarily represented defendants, and 28% have represented both parties equally.

According to respondents, Rule 16.1 is used in straightforward cases with damages clearly below the \$100,000 limit. Use of the rule is relatively infrequent and is not widely promoted by responding attorneys and judges.

Judge and attorney respondents most commonly reported use of Rule 16.1 in contract, collections, and tort cases, particularly those with relatively low stakes and low complexity. Respondents also noted use of the simplified procedure when it can be expected that counsel will be cooperative. However, a majority of both groups – 85% of judges and 65% of attorneys – indicated that the Rule is employed only "occasionally" at most. Respondent judges reported, on average, that fewer than 10% of all civil cases on their docket proceed under the Rule.

Only a minority of responding judges (39%) and attorneys (25%) actively encourage use of the simplified procedure. Notably, the attorneys who have had a Rule 16.1 case are more likely to actively encourage its use.

According to respondents, Rule 16.1 has beneficial effects, in terms of time to disposition and cost to litigants, in comparison to the standard pre-trial procedure. In addition, the simplified procedure is not viewed as less fair.

Three-quarters of judge respondents and a majority of attorney respondents (53%) reported that application of Rule 16.1 shortens the time to resolve a case. Nearly 95% of judge respondents and over three-quarters of attorney respondents reported that application of the Rule decreases the parties' cost to litigate a case. Less than 5% of any group believes that the Rule has negative effects on cost and time, as compared to the standard pre-trial procedure.

A majority of responding judges (78%) and attorneys (55%) reported that there is no difference in procedural fairness between Rule 16.1 and the standard procedure. Notably, however, 43% of the attorneys and 13% of the judges indicated that the simplified procedure actually increases fairness, while less than 10% of any group believes that the Rule has a negative effect on fairness. For attorneys, responses on the issue of fairness were independent of party represented.

There is a strong consensus among judge respondents that Rule 16.1 provides adequate proof for asserting claims and defenses, while attorney respondents are split on the issue. In addition, the surveys provide some indication that the simplified procedure may increase access to trial.

Over 90% of respondent judges believe that Rule 16.1 provides “adequate discovery” to prove or disprove claims and defenses in cases to which it is applied. However, there is not a consensus among respondent attorneys, with 48% indicating that the Rule is adequate and 52% indicating that it is not.

The surveys asked all judges and the attorneys who have used Rule 16.1 to estimate the percentage of their Rule 16.1 cases that have proceeded to trial. The average reported trial rate among responding judges was 7.9% and the average among responding attorneys was 13.6%, with no statistically significant differences between those with five or fewer Rule 16.1 cases and those with more than five such cases. Although cases can be resolved satisfactorily short of trial, the fact that the reported Rule 16.1 trial rate averages are higher than state and national figures could be an indicator that the simplified procedure reduces pressure to settle based on the time and cost burdens of litigation. Certainly, further study of the issue is warranted.

According to respondents, economy and efficiency are the main reasons for employing Rule 16.1, while the fear of not being able to effectively litigate a case is the main reason for opting out of the Rule.

When asked to identify the three primary reasons for choosing to use Rule 16.1, the most common responses of attorneys who have used the Rule and of all judges related to the cost and/or time savings associated with the simplified procedure. Cost savings appear in the form of reduced discovery expenditures, reduced attorney fees, and reduced litigation expenses generally. Time savings appear in the form of reduced preparation time, an expedited trial setting, and an earlier resolution. It should be noted, however, that some attorney respondents are not convinced that these benefits always come to fruition in practice.

When asked to identify the three primary reasons for choosing *not* to use Rule 16.1, the most common response of attorneys who have used the Rule and of all judges related to the adequacy of the information provided under the simplified procedure and the necessity of discovery tools for effective case evaluation, settlement negotiation, litigation of dispositive motions, and preparation for trial.

With respect to possible changes to Rule 16.1, there is not a strong consensus on the amount in controversy limit, the use of other criteria for applicability, or the voluntary nature of the procedure.

Regarding the ideal limit on the amount in controversy, a plurality of respondent judges and a slim plurality of respondent attorneys indicated that the current \$100,000 limit is the appropriate level for application of the simplified procedure. Exactly 80% of the judges believe that the criteria for cases subject to Rule 16.1 should include criteria in addition to or in lieu of the amount in controversy, but only 44% of attorneys agreed. The most common other factor suggested by judge respondents for consideration was the complexity or simplicity of the case and the issues, and the most common other factor suggested by attorney respondents was the level of anticipated discovery and motions practice.

Exactly 75% of respondent attorneys disagree that Rule 16.1 should be mandated for “any cases.” However, 51% of the judges expressed support for requiring the simplified procedure. Of respondents in favor of obligatory application of the Rule, there was not a consensus concerning the criteria for mandating application. Some judges and attorneys suggested that the court should have the discretion to order use of Rule 16.1, or there should be presumptive mandatory application with exceptions granted only for good cause shown.

According to respondents, Rule 16.1 is not frequently used due to the existence of disincentives for both plaintiffs and defendants. Moreover, there is a certain degree of dissatisfaction with practice under and enforcement of the Rule, whether perceived or real.

Responding judges and attorneys commented on the risk of limiting a case at an early point, before the fact and issues are sufficiently understood. From the plaintiff’s perspective, it is difficult to limit recoverable damages at the outset, particularly when the limit includes attorney fees and punitive damages. From the defendant’s perspective, exposure to \$100,000 in liability is viewed as too high to consider defending the claims without discovery.

Commenting attorney respondents commonly complained that disclosures are not an adequate substitute for discovery tools, due to the fact that disclosures by the opposing side can be cursory or evasive. In addition, respondents believe that courts do little to enforce disclosure obligations and rarely exclude evidence that was not properly disclosed. It was also noted that the process may not actually be expedited, depending on the court’s docket.

Exactly 70% of judge respondents indicated not having received any training or training materials on Rule 16.1, and the remaining 30% indicated only sporadic or cursory judicial education on the Rule. Attorney respondents discussed their relative lack of familiarity with the simplified procedure, as well as reluctance to learn a new process. Some attorneys and judges offered praise for Rule 16.1 or provided suggestions for improving the procedure. One judge wrote that the experiment of “unlimited discovery has failed,” and one attorney described the simplified process as a “far superior way of resolving disputes.”

I. INTRODUCTION

The Institute for the Advancement of the American Legal System at the University of Denver (“IAALS”) is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Focusing on the needs of those who use the system, IAALS conducts research to identify problems and develop innovative, practical solutions.

In June and July of 2010, IAALS conducted two surveys of Colorado legal professionals to examine Colorado Rule of Civil Procedure 16.1 (“Rule 16.1”). Rule 16.1 sets forth a simplified pre-trial procedure for certain civil actions in Colorado District Court (“District Court”), the state trial court of general jurisdiction governed by the Colorado Rules of Civil Procedure (“CRCP”).¹

A. THE CONTOURS OF RULE 16.1

Rule 16.1 arose out of increasing concern over the lack of effective access to civil courts due to the slow, expensive, and often contentious nature of civil discovery, as well as a related concern over declining public confidence in the judicial system.² These issues led the Colorado Supreme Court to appoint, in November of 1998, a Civil Justice Committee (“Committee”) charged with thinking “creatively about possible solutions.”³ The Committee developed a simplified pre-trial procedure for civil cases, inspired by criminal procedure and based on the idea that even the most serious matters can be justly resolved by simply filing the pleadings, disclosing the evidence, and proceeding to trial.⁴ The effort received the support of the Governor’s Task Force on Civil Justice Reform, which recommended adoption and implementation by the judiciary.⁵ After a successful two-year pilot project,⁶ the simplified procedure was codified as Rule 16.1 for the purpose of enhancing the “just, speedy, and inexpensive determination of civil actions” by limiting discovery expense and providing the earliest practical trials.⁷ The Rule became effective on July 1, 2004.

The simplified procedure constitutes a separate “track,” and regular civil pre-trial procedures are used in cases to which Rule 16.1 is not applied. The Committee decided to differentiate cases according to the dollar amount at issue, with the goal of salvaging the ability “to obtain an affordable judicial determination of even the smaller dollar-volume controversies.”⁸ Accordingly, Rule 16.1 applies generally to civil actions in which the maximum monetary judgment sought against any party is \$100,000 or less, although a number of case types are exempted.⁹ The \$100,000 limit includes

¹ COLO. CONST. art. VI, §9.

² Richard P. Holme, *Back to the Future—New Rule 16.1: Simplified Procedure for Civil Cases Up to \$100,000*, 33 COLO. LAW. 11, 12 (May 2004) (describing the delay and cost hurdles that can prevent “pursuing even relatively small, but personally important, legal claims”).

³ *Id.* at 12. Governor Bill Owens, *Final Report of the Governor’s Task Force on Civil Justice Reform*, 20 (July 2000).

⁴ Holme, *supra* note 2, at 12.

⁵ Governor Bill Owens, *supra* note 3, at 19.

⁶ The official pilot study was conducted by one judge in each of two judicial districts from April 2000 to April 2002, and it was reported that the Rule was used in 75% of eligible cases in those courtrooms. Holme, *supra* note 2, at 12, 14, 26.

⁷ COLO. R. CIV. P. 16.1(a)(1).

⁸ Holme, *supra* note 2, at 12.

⁹ COLO. R. CIV. P. 16.1(a)(2), (b)(1), (b)(2). Unless stipulated by the parties, the Rule does not apply to the following: class actions, domestic relations cases, juvenile cases, mental health cases, probate cases, water law cases, forcible entry and detainer cases, actions in the nature of remedial writs, foreclosure sales, and “other similar expedited proceedings.”

attorney fees, penalties, and punitive damages (if any), but excludes interest and costs.¹⁰ In cases proceeding under the Rule, recovery from any one party is limited to that amount, and any verdict in excess is reduced to \$100,000.¹¹ Rule 16.1 applies to actions seeking purely equitable relief, such as injunctions and declaratory judgments,¹² and there are no restrictions on non-monetary awards.¹³

Rule 16.1 essentially replaces discovery mechanisms with extensive disclosures, signed by the disclosing party under oath.¹⁴ The text of the Rule summarizes the simplified procedure as follows:

This Rule requires early, full disclosure of persons, documents, damages, insurance and experts, and early, detailed disclosure of witnesses' testimony, whose direct trial testimony is then generally limited to that which has been disclosed. Normally, no depositions, interrogatories, document requests or requests for admission are allowed, although examination under C.R.C.P. 34(a)(2) [inspection of real or personal property] and 35 [physical and mental examination of persons] is permitted.¹⁵

Any party may designate specific information and documentation that the party believes ought to be disclosed.¹⁶ In addition, the Rule sets forth case type-specific initial disclosures of routinely expected documents for personal injury and employment actions.¹⁷ Depositions may be taken only in lieu of trial testimony¹⁸ or for the purpose of obtaining and authenticating documents from a non-party.¹⁹ However, voluntary additional discovery may be conducted if all parties agree, on condition that such discovery cannot be the subject of motions, form the basis for a trial continuance, or constitute recoverable costs.²⁰

Actions proceeding under Rule 16.1 are to be given "early trial settings, hearings on motions, and trials."²¹ Although the rule does not mandate assigning priority to simplified procedure cases

¹⁰ COLO. R. CIV. P. 16.1(b)(2), (c). Within the context of Rule 16.1, the term "interest" is intended to encompass pre-judgment and post-judgment interest *on* damages, but not interest sought *as* damages. Holme, *supra* note 2, at 16. Attorney fees count toward the limitation, even when a statute or contract designates recoverable attorney fees as "costs." *Id.* Paralegal charges are properly characterized as attorney fees. *Morris v. Belfor USA Group, Inc.*, 201 P.3d 1253, 1261-63 (Colo. App. 2008).

¹¹ COLO. R. CIV. P. 16.1(a)(2), (c).

¹² Holme, *supra* note 2, at 16.

¹³ COLO. R. CIV. P. 16.1(k)(4), (5).

¹⁴ Holme, *supra* note 2, at 21; COLO. R. CIV. P. 16.1(k)(1)(A). Disclosures are required to be signed under oath because they "serve as the principle means of identifying and producing evidence in the case in light of the absence of discovery." Sheila K. Hyatt & Stephen A. Hess, *Rule 16.1 Simplified Procedure for Civil Actions*, West's Colorado Practice Series, 16.1.1 (4th ed., current through the 2010 update).

¹⁵ COLO. R. CIV. P. 16.1(a)(2) (emphasis added); *see, e.g., Berry & Murphy, PC v. Carolina Cas. Ins. Co.*, 586 F.3d 803, 805-806 (10th Cir. 2009) (in diversity claim for insurance coverage of legal malpractice lawsuit, describing the state court's preclusion of witnesses and ultimate dismissal of the underlying action for failure to provide disclosures in accordance with CRCP 16.1).

¹⁶ COLO. R. CIV. P. 16.1(k)(1)(B)(iii).

¹⁷ COLO. R. CIV. P. 16.1(k)(1)(B)(i).

¹⁸ COLO. R. CIV. P. 16.1(k)(4). This provision was expected to, *inter alia*, allay the significant costs often incurred in connection with scheduling experts to testify at trial. Holme, *supra* note 2, at 23. The court has the discretion to disallow such depositions. *Thompson v. Thornton*, 198 P.3d 1281, 1284 (Colo. App. 2008).

¹⁹ COLO. R. CIV. P. 16.1(k)(3); *see also Thompson, supra* note 18, at 1284 ("depositions generally are not available under the simplified procedure for civil actions").

²⁰ COLO. R. CIV. P. 16.1(k)(9). Essentially, voluntary discovery "must not involve or require any participation by the court." Holme, *supra* note 2, at 23.

²¹ COLO. R. CIV. P. 16.1(i).

over other cases, earlier and more certain trial dates are expected under Rule 16.1 due to the lack of time needed to conduct discovery and resolve any accompanying disputes.²²

Rule 16.1 is flexible in its application. The simplified procedure does not apply to a case if any party “timely and properly elects to be excluded from its provisions,”²³ and there is no mechanism to challenge or review that choice.²⁴ Moreover, at any time prior to trial, the court may terminate application of the rule upon “a specific showing of substantially changed circumstances sufficient to render the [simplified procedure] unfair and a showing of good cause for the timing of the motion to terminate.”²⁵ On the other hand, in actions with more than \$100,000 at issue, the parties may file a stipulation to proceed under the simplified procedure without any restriction on collectable damages.²⁶

Because CRCP 8(a) prohibits statement of the dollar amount of the judgment sought in the prayer for relief, each complaint, counterclaim, cross-claim, or third-party complaint must be accompanied by a case cover sheet, indicating whether Rule 16.1 applies to the case and, if not, the reason therefor.²⁷ Notably, the current standard cover sheet does not contain any reference to the opt-in provision of the Rule.²⁸

B. PRIOR ASSESSMENTS OF RULE 16.1

Within the Colorado legal community, initial reaction to Rule 16.1 varied. One commentator wrote:

Will [t]his [w]ork? Time will tell. There is reason to be skeptical, as innovations like the new Rule 16.1 have been tried in the past with mixed results. But there is more reason for hope. Finding a cost-effective way to resolve less complex yet important disputes in a timely fashion is a challenge that has eluded the civil justice system for some time. Rule 16.1 is a carefully conceived, serious effort to meet that challenge, and it may well be the answer.²⁹

The Colorado Judicial Branch conducted a two-phase study of Rule 16.1 in 2005 and 2006. To determine the frequency of use of Rule 16.1 soon after its enactment, Phase I examined a statistical “data sample of 1,074 civil cases filed in six metro region courts between July 2004 and

²² Holme, *supra* note 2, at 21.

²³ COLO. R. CIV. P. 16.1(a)(2), (d) (election for exclusion must be filed “no later than 35 days after the case is at issue”); see COLO. R. CIV. P. Appendix to Chapters 1 to 17A, Form 1.3. The written notice of exclusion must be signed by the party and its counsel (if any), to ensure that the decision is the “subject of careful discussion.” Edward A. Gleason, *Colorado Adopts New Litigation Procedures Designed to Save Time and Money* (Sept. 1, 2004) (<http://www.rothgerber.com/showarticle.aspx?Show=738>).

²⁴ Holme, *supra* note 2, at 18.

²⁵ COLO. R. CIV. P. 16.1(l). The Civil Rules Committee created this “escape hatch” provision to “avoid injustice in more extreme cases.” Holme, *supra* note 2, at 25.

²⁶ COLO. R. CIV. P. 16.1(e). A form stipulation is not contained within the CRCP.

²⁷ COLO. R. CIV. P. 8(a); COLO. R. CIV. P. Appendix to Chapters 1 to 17A, Form 1.2. A cover sheet is not required for domestic relations, probate, water, juvenile, and mental health cases. Moreover, the failure to file a cover sheet when required is not considered a jurisdictional defect.

²⁸ COLO. R. CIV. P. Appendix to Chapters 1 to 17A, Form 1.2.

²⁹ Gleason, *supra* note 23. Some opposition came from particular segments of the legal community. For example, attorneys outside of the metropolitan areas expressed concern that solutions designed for urban districts with heavy caseloads could have a detrimental effect on more rural areas, raising the cost of practice and upsetting longstanding relationships and methods of practice. Robert J. Truhlar, *Colorado Bar Association President’s Message to Members*, 33 COLO. LAW 23, 23-24 (Feb. 2004).

May 2005.”³⁰ Filed case cover sheets showed that the Rule was at least initially applied in 40.8% of cases in the study; the Rule did not apply to 27.9% of the cases; and the parties elected exclusion from the Rule in 2.4% of the cases. A cover sheet was lacking in 28.9% of the cases, and therefore it is unknown the extent to which those cases qualified for Rule 16.1 and, if so, whether the Rule was ultimately applied.³¹ The case files contained a cover sheet indicating definite use of Rule 16.1 in the majority of breach of contract (63.5%), “money” (76.7%), and “note” (71.8%) cases.³² In contrast, an affirmative indication of use of Rule 16.1 was found in only 25.3% of personal injury (including motor vehicle) cases, due in large part to the fact that the parties sought monetary awards in excess of \$100,000.³³

To measure Rule 16.1’s impact on case processing and court staff workload, Phase II examined – in the same six districts – nine case classes that were well-represented in Phase I.³⁴ The cases selected for analysis were opened during the five-year period between July 1, 2000 (Fiscal Year 2001) and June 30, 2005 (Fiscal Year 2005) and were closed as of March 9, 2006.³⁵ Ultimately, the study’s authors determined that the data was “not ‘mature’ enough to be evaluated properly,” and that more time would need to elapse before any such analysis would be credible.³⁶ Specifically, because the studied cases had to be closed by March 2006, the Fiscal Year 2005 data set contained fewer cases overall and fewer cases that proceeded to trial.³⁷ Moreover, the studied cases filed after the Rule’s effective date were likely to be less complex and easier to resolve than some of the studied cases filed in earlier years and closed by the same date.³⁸ The authors also noted that Rule 16.1 will likely be applied in cases “pre-disposed to speedier resolution than the general population of civil cases,” due to the opt-out provision and the damages cap.³⁹ Nevertheless, the study tentatively concluded that the data seemed to show a reduction in three court workload indicators: time to disposition; number of pre-trial hearings; and trial rates.⁴⁰

Six years after Rule 16.1 achieved statewide applicability, little information on its use and effectiveness exists. While the initial Judicial Branch study contains interesting figures, no subsequent data has been collected to demonstrate how Rule 16.1 has fared over time or its ultimate impact on civil disputes.⁴¹ The limited amount of caselaw is also illustrative. To date, only four

³⁰ Colorado Judicial Branch, Planning and Analysis Division, *A Preliminary Analysis of How Parties in Civil Cases are Using C.R.C.P. 16.1*, 2 (June 21, 2005). The six counties (Adams, Arapahoe, Boulder, Denver, Douglas, and Jefferson) adjudicate over half of all civil cases statewide. The sample cases were drawn from each district in approximately the same proportion as civil filings in Fiscal Year 2004.

³¹ *Id.* at 2, 8. Examples of reasons for the lack of a cover sheet include: the case was an expedited proceeding; the parties had not yet responded to the clerk’s office notice to file a cover sheet; a motion to dismiss had been filed; the matter had been dismissed or resolved prior to the filing of the cover sheet. The study authors surmise that about half of cases without cover sheets were expedited proceedings to which the Rule did not apply.

³² *Id.* at 2, 5-6. The word “definite” is used because the Rule may have ultimately been applied in some of the cases lacking a cover sheet at the time the study was conducted.

³³ *Id.* at 2, 6.

³⁴ Colorado Judicial Branch, Planning and Analysis Division, *Rule 16.1 Phase Two Report: Measuring the Impact on Case Processing and Judicial Officer/Court Staff Workload*, 1 (Apr. 21, 2006). The case classes were: personal injury motor vehicle, breach of contract, money, foreclosure, goods sold, negligence, note, replevin, and services rendered.

³⁵ *Id.*

³⁶ *Id.* at 7.

³⁷ *Id.* at 2-3.

³⁸ *Id.* at 3.

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 2, 7.

⁴¹ According to the Colorado State Court Administrator’s Office, no further Rule 16.1 studies have been conducted.

published state cases⁴² and four published federal decisions even cite to Rule 16.1.⁴³ If the proverbial phrase “time will tell” applies, additional evaluation is required before the results of the Rule 16.1 experiment will become clear.

C. THE IAALS STUDY

Given the desire within Colorado for further evaluation of Rule 16.1, as well as increasing interest in simplified civil procedures around the country, IAALS determined that Colorado judge and attorney surveys would make a valuable empirical contribution to the dialogue on civil procedure reform. Although such evaluative surveys are necessarily subjective, IAALS believes that judges and attorneys can speak to the successes and failures of procedural rules – and should have a stage on which to do so. In addition to their meaningful contact with litigants, they have a technical understanding of the civil justice system, possess intimate knowledge of its governing rules, and play a significant role in how it operates. Moreover, the survey data can inform the design of more objective Rule 16.1 studies.

IAALS administered one survey to judges on the bench in Colorado District Court and another survey to attorneys belonging to the Colorado Bar Association (“CBA”) Litigation Section. Both surveys were completed by those who have had civil cases in District Court after January 1, 2005, six months after Rule 16.1’s effective date.

The Rule 16.1 surveys explored the opinions of the Colorado bench and bar concerning the simplified civil procedure. The global research questions included:

- How often and under what circumstances is Rule 16.1 used?
- How does Rule 16.1 compare to the standard pre-trial process?
- Are any changes to the procedure warranted?

⁴² See *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710 (Colo. 2010) (noting that the case proceeded under Rule 16.1 in District Court); *Morris*, *supra* note 10 (noting that the case was tried pursuant to Rule 16.1 and holding that paralegal charges are not “costs” exempted from the damages limit); *Thompson*, *supra* note 18 (upholding trial court’s discretionary decision to disallow depositions in lieu of live testimony when plaintiff did not show that the depositions were necessary, most of the witnesses testified at trial, and there was ample time for live examination); *Anderson v. Hyland Hills Park & Recreation Dist.*, 119 P.3d 533 (Colo. App. 2004) (under the circumstances, plaintiff’s failure to endorse as a trial exhibit the incident report prepared by defendant’s employees pursuant to Rule 16.1(k)(6) did not render admission of the report an abuse of discretion).

⁴³ Three of the federal cases held that the state court civil cover sheet indicating over \$100,000 in controversy for exclusion from Rule 16.1 is not sufficient to establish the amount in controversy requirement for federal diversity jurisdiction. *Holladay v. Kone, Inc.*, 606 F.Supp.2d 1296 (D.Colo. 2009); *Baker v. Sears Holdings Corp.*, 557 F.Supp.2d 1208 (D.Colo. 2007); *Harding v. Sentinel Ins. Co., Ltd.*, 490 F.Supp.2d 1134, 1136 (D.Colo. 2007) (declining to construe the exclusion check-box as a factual representation or admission of a claim in excess of \$75,000). The other federal case was an appeal of the denial of an insurance claim on a legal malpractice action, which was premised on the failure to file notice to elect exclusion from Rule 16.1 and the failure to proceed in accordance with the Rule. *Berry & Murphy*, *supra* note 15.

II. METHODOLOGY

The Rule 16.1 surveys were created by IAALS in partnership with Judge Harlan Bockman (Chief Judge (ret.), 17th Judicial District) and Richard P. Holme (partner, Davis Graham & Stubbs LLP), both of whom were instrumental in the original development and implementation of the Rule. The CBA provided invaluable support to the effort.⁴⁴ The Butler Institute (“Butler”), an independent social science research organization at the University of Denver, assisted with survey administration.

A. SURVEY DEVELOPMENT

The survey development process began with a series of hypotheses and research questions concerning Rule 16.1. Two survey instruments – one tailored to judges and the other tailored to litigators – were then shaped over the course of several months in an iterative process of review and revisions. During this process, IAALS sought feedback on the presentation and substance of the survey questions from a number of Colorado practitioners, including the members of the CBA Litigation Section Council.

Once IAALS finalized the survey instruments, computerized versions were produced using Qualtrics online survey software. Thereafter, IAALS obtained approval for administration of the surveys from the University of Denver’s Institutional Review Board.

B. SURVEY DISTRIBUTION

The judge survey was designed for Colorado District Court judges who have handled civil cases in District Court at any time after January 1, 2005, regardless of experience with Rule 16.1. Accordingly, on June 29, 2010, Judge Bockman sent an e-mail to the 164 sitting District Court judges on the statewide judicial listserv, inviting participation in the study. On July 15, 2010, he sent a reminder e-mail to the same list. Each e-mail explained the importance of the study, encouraged participation, and provided a universal link to the online version of the survey as well as instructions for requesting a paper version.⁴⁵ The judge survey was officially in the field for three weeks, from June 29, 2010 until July 20, 2010. However, responses were accepted for four weeks, until July 27, 2010.

The attorney survey was designed for attorneys with civil litigation experience in Colorado District Court at any time after January 1, 2005, regardless of experience with Rule 16.1. Accordingly, on June 29, 2010, the CBA sent an e-mail invitation to participate, signed by Litigation Section Chair Peter Black and IAALS Executive Director Rebecca Love Kourlis, to the 1,530 attorney members of the CBA Litigation Section.⁴⁶ That same day, the request for participation was reprinted in a CBA CLE (Continuing Legal Education) online publication entitled the *Learned*

⁴⁴ This support was given under the leadership of Greg Martin, Deputy Executive Director of the Colorado and Denver Bar Associations, and Peter Black, Litigation Section Chair. Special thanks to Melissa Nicoletti, Director of Sections and Committees.

⁴⁵ It was not possible to provide a unique link to each potential participant due to distribution through the judicial listserv rather than the online survey software. No paper versions were ultimately requested.

⁴⁶ The survey email was not sent to Litigation Section members categorized as “associate” (non-attorney) or “student” members.

Lawyer.⁴⁷ On July 13, 2010, the CBA sent a reminder e-mail signed by Holme. On July 21, 2010, the CBA sent a final request for participation. As with the judge survey, each e-mail explained the importance of the study, encouraged participation, and provided a universal link to the online version of the survey as well as instructions for requesting a paper version.⁴⁸ The attorney survey was officially in the field for nearly four weeks, from June 29, 2010 until July 25, 2010. However, responses were accepted until July 28, 2010.

C. SURVEY ADMINISTRATION

Butler administered the surveys. In order to preserve the confidentiality of responses, a Butler researcher served as the point of contact for survey participants. While the surveys were in the field, Butler monitored their operation and collected the data in a password-protected environment. Upon conclusion of the survey period, Butler exported the data into an analytical software program in a password-protected file. Thereafter, Butler conducted a data verification process, eliminating respondents who did not provide an answer to any of the substantive questions and running descriptive statistics to detect and eliminate clear errors (such as answers outside the permissible ranges). Butler then provided the data to IAALS, removed of all identifiers.

D. SURVEY RESPONSES

Survey e-mails were sent to the judicial listserv of 164 sitting Colorado District Court judges, regardless of district, division, or years on the bench. Accordingly, the population to be studied – current judges who have handled general civil cases in District Court at any time after January 1, 2005 – has fewer than 164 individuals. More specifically, the listserv includes judges who have not handled a general civil docket during the relevant time period, due to assignment to a specialized court or division.⁴⁹ In addition to the information about the study conveyed in the e-mails, a threshold survey question asked whether the respondent had the requisite judicial experience. When the survey closed, 52 judges had given consent to participate in the study, while 50 answered “yes” to the threshold question and were permitted to complete the survey. Thus, using the highest possible population count (164) and the lowest response count (50), the most conservative estimate of the response rate is 31%. Using the same conservative figures, at a 90% confidence level, the maximum margin of error for the overall substantive results is +/- 9.73% of the reported percentages.

The CBA is a voluntary membership organization for legal professionals, with annual dues for attorneys ranging from \$94 to \$495.⁵⁰ Survey e-mails were sent to the list of 1,530 attorney members of the CBA Litigation Section, regardless of type of practice (*e.g.*, civil or criminal law, federal or state court) or dates of practice (if any). Accordingly, the population to be studied –

⁴⁷ Alli Gerkman, *IAALS Looking for Feedback on Colorado Rule of Civil Procedure 16.1*, Colorado Bar Association CLE, *The Learned Lawyer*, <http://thelearnedlawyer.com/2010/06/iaals-looking-for-feedback-on-colorado-rule-of-civil-procedure-16-1> (June 29, 2010).

⁴⁸ It was not possible to provide a unique link to each potential participant due to distribution through the CBA listserv rather than the online survey software. Again, no paper versions were ultimately requested.

⁴⁹ Specialized courts and divisions outside the purview of Rule 16.1 include criminal, domestic relations, juvenile, and probate.

⁵⁰ For attorney members, annual dues are between \$75 (for those on “inactive” status in Colorado) and \$185 (for those with eight or more years of experience). In addition, all attorney members on “active” status in Colorado who live in the state must belong to an affiliated local bar association, with annual dues ranging from \$20 to \$280. To join the Litigation Section, an additional charge of \$20 applies. See Colorado Bar Association, *CBA Attorney Membership Application Form*, www.cobar.org/memapp.cfm (last visited August 16, 2010).

attorneys who are members of the Litigation Section and have general civil litigation experience in Colorado District Court at any time after January 1, 2005 – is unknown in size but has fewer than 1,530 individuals. Specifically, every member of the CBA is eligible to join the Litigation Section without qualification,⁵¹ and any member with simply an “interest” in litigation is encouraged to do so.⁵² In addition to the information about the study conveyed in the e-mails, a threshold survey question asked whether the respondent had the requisite litigation experience. When the survey closed, 282 attorneys had given consent to participate in the study, while 272 answered “yes” to the threshold question and were permitted to complete the survey. Thus, assuming all attorney members of the Litigation Section constitute the study population (and it is clear that they do not), a very conservative estimate of the response rate is 18% (272/1,530). Using the same conservative figures, at a 90% confidence level, the maximum margin of error for the overall substantive results is +/- 4.52% of the reported percentages.

Due to the voluntary nature of the study, respondents were not required to answer all survey questions. Further, certain questions were inapplicable to some respondents, based on previous answers given. As a result of these permitted omissions and skip patterns, the precise number of respondents varies from question to question. Due to rounding, the sum of reported percentages may not equal exactly 100%.

⁵¹ Colorado Bar Association, Bylaws, art. 10, § 10.2, www.cobar.org/index.cfm/ID/451 (November 7, 2009).

⁵² See Colorado Bar Association, *CBA Section Membership*, <http://www.cobar.org/index.cfm/ID/20033/CONTENT/Sections/> (last visited August 16, 2010).

III. DEMOGRAPHICS

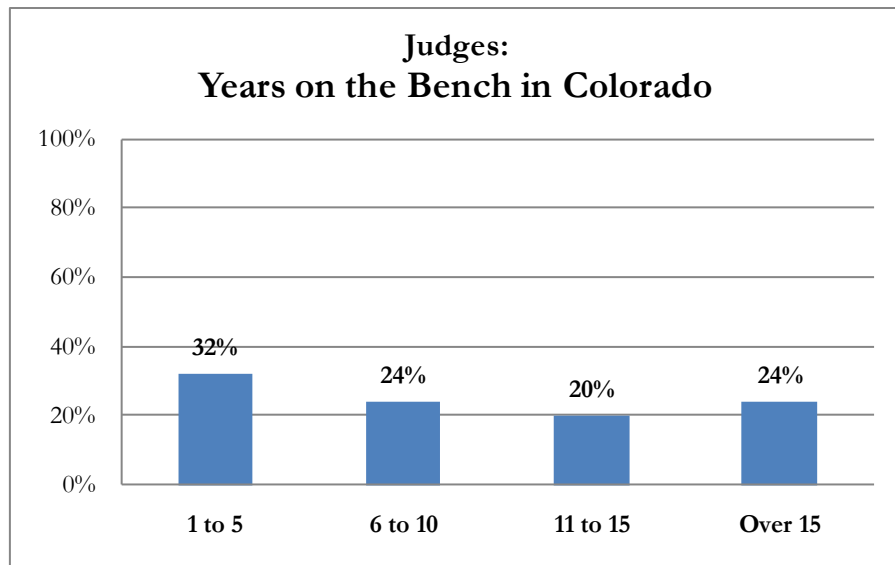
The surveys contained a number of background questions for the purpose of putting the responses into a context. Respondents were asked about their experience generally, as well as their level of experience with Rule 16.1.

A. JUDGE RESPONDENTS

1. JUDICIAL EXPERIENCE

Judge respondents have been on the bench in Colorado an average of 11 years. Figure 1 shows the relatively even distribution of respondents by years of judicial experience in the state. Approximately one-third have five or fewer years on the bench, and approximately one-quarter have 15 or more years on the bench. See Figure 1.

Figure 1 (Judge Q1)



2. EXPERIENCE WITH RULE 16.1

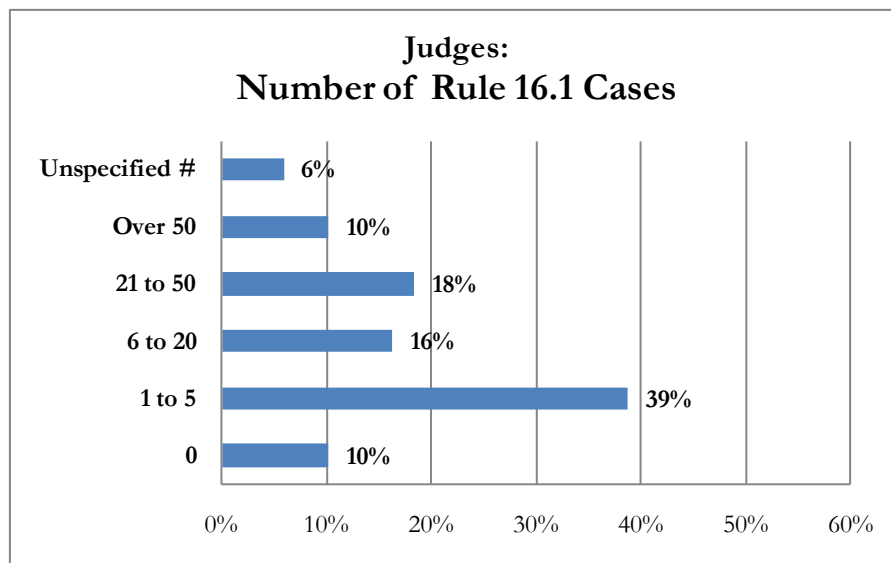
Regarding the extent of judicial education on Rule 16.1, exactly 70% of judge respondents (35) indicated not having received any training or training materials. Only 30% of respondents (15) have received some form of Rule 16.1 training. Of those who provided a description of their training, two-thirds referred to the Colorado State Judicial Conference, an event designed for the continuing education of judges.⁵³ One-quarter indicated having attended a CLE program generally, and over 15% cited the May 2004 Colorado Lawyer article authored by Holme (see footnote 2 of this report). Two respondents stated that they provided education to others. No other form of training was mentioned. These responses suggest that judicial education on Rule 16.1 has been sporadic, cursory, or informal.

⁵³ Of those, one-quarter specified that the Judicial Conference training occurred at the time of Rule 16.1's implementation. In the past, the Conference was held annually, but that is no longer the case.

Regarding the extent of judicial exposure to Rule 16.1, 10% of judge respondents (5) indicated that the parties have not used Rule 16.1 for any cases on their civil docket, while 90% (44) have presided over at least one Rule 16.1 case. Although all of those who received Rule 16.1 training or training materials indicated having a Rule 16.1 case, while only 85% of those who have not received training have had such a case, this difference is not statistically significant.⁵⁴ On this point, it should be noted that any comparison of judges who have received Rule 16.1 training or training materials with those who have not should be interpreted with caution, due to the relatively small number of judges in the sample, as well as the uneven distribution of respondents between the two groups. There may also be other unidentified differences that distinguish judges with training from those without, such as their levels of conscientiousness or their case management techniques. A larger and more equal sample might yield a different result. Moreover, significant differences are not expected, due to the limited nature of the “training” reported.

A plurality of all judge respondents (39%) indicated judicial experience with between one and five Rule 16.1 cases, while only one in ten indicated having more than 50 such cases. In addition, 6% indicated judicial experience with Rule 16.1, but did not specify the number of cases. See Figure 2.

Figure 2 (Judge Q3 and Q4)



A majority of judge respondents (60%) have presided over the trial of a Rule 16.1 case, while a minority (40%) have not. Over 90% of respondents who have received training have tried a Rule 16.1 case, while only about 40% of those without training have done so. This difference is statistically significant (with all of the caveats stated previously). Thus, it can be concluded that, for this population of respondent judges, having actually tried a Rule 16.1 case is dependent, to a certain degree, on whether the judge has received Rule 16.1 training.

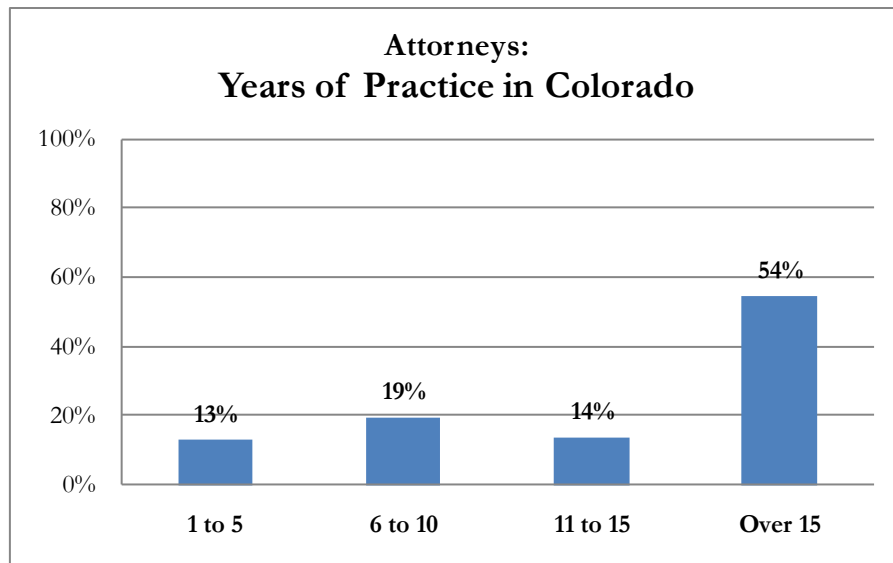
⁵⁴ All references to statistical significance are at the .001 level.

B. ATTORNEY RESPONDENTS

1. LEGAL EXPERIENCE

Attorney respondents have practiced law in Colorado an average of 20 years. Figure 3 shows the distribution of respondents by years of legal experience in the state. A majority of respondents have more than 15 years of practice.

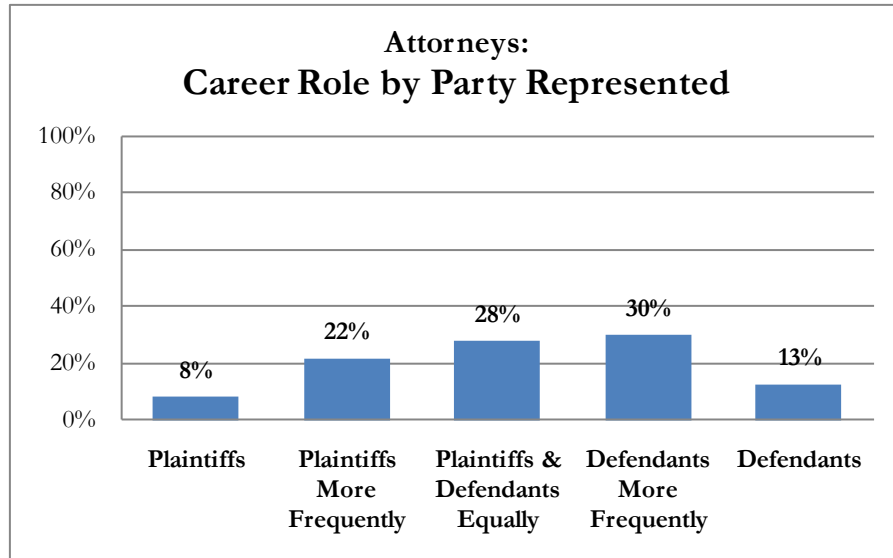
Figure 3 (Attorney Q1)



To obtain their overall perspective on civil litigation, respondents were asked to categorize their role over the course of their career, according to the type of party they have most frequently represented.⁵⁵ Figure 4 shows the distribution between plaintiffs' and defense attorneys, which is relatively balanced (30% have primarily represented plaintiffs and 43% have primarily represented defendants). Notably, 28% of respondents reported representing plaintiffs and defendants equally.

⁵⁵ The response options were: represent plaintiffs in all or nearly all cases; represent plaintiffs and defendants, but plaintiffs more frequently; represent plaintiffs and defendants equally; represent plaintiffs and defendants, but defendants more frequently; represent defendants in all or nearly all cases; neutral decision-maker.

Figure 4 (Attorney Q2)



Respondents could also indicate “neutral decision-maker,” a selection allowed in addition to any other response. In total, 11 respondents (4%) selected “neutral decision-maker,” all of whom also selected another career role (included in the percentages in Figure 4). Nearly 65% of neutral decision-maker respondents indicated representing plaintiffs and defendants equally.

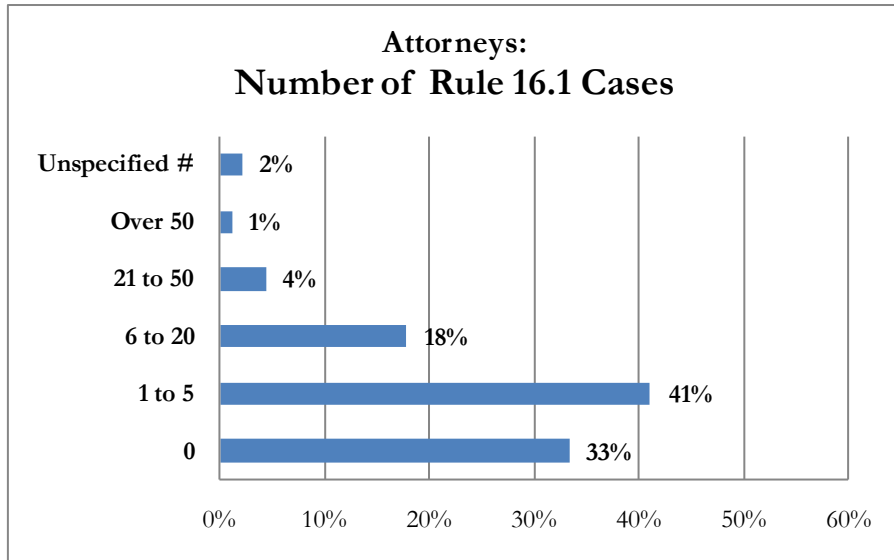
Of attorney respondents in private practice, exactly two-thirds (66%) reported belonging to a firm that will not refuse a case based on the amount in controversy, and 7% indicated not knowing their firm’s policy on the issue. However, over one-quarter (27%) stated that, as a general matter, their firm will not file or defend a case unless the amount in controversy exceeds a certain dollar amount. The dollar limits ranged from \$5,000 to \$3,000,000, with a median of \$75,000 and a mean of \$208,654.

2. EXPERIENCE WITH RULE 16.1

One-third of attorney respondents (90) indicated that they have not used Rule 16.1 for any cases, while two-thirds (180) have had at least one Rule 16.1 case.⁵⁶ As with the judge respondents, a plurality indicated experience with between one and five Rule 16.1 cases. In total, nearly 75% did not have more than five such cases, and over 90% did not have more than 20 such cases. In addition, 2% indicated experience with Rule 16.1 but did not specify the number of cases. See Figure 5.

⁵⁶ This information is presented to convey the experience level of respondents, and does not reflect overall rates of experience with Rule 16.1, as attorneys who have not used the Rule are probably less likely to voluntarily participate in a study on the topic.

Figure 5 (Attorney Q3 and Q4)
 $n = 270$



IV. THE SURVEY RESULTS

This survey asked questions about the use and effects of Colorado’s Rule 16.1, as well as ways in which the simplified pre-trial procedure could be improved. Unless otherwise indicated, percentages reported are the portion of total responses to the particular question, not the portion of total respondents to the survey. For each figure, the number of responses to the question is noted, labeled as “*n*”.

A. USE OF RULE 16.1

Since the initial Judicial Branch study,⁵⁷ information has not been gathered concerning how and under what circumstances the simplified procedure is utilized. First, this section will discuss the types of cases that tend to proceed under Rule 16.1. Second, this section will discuss the frequency of the Rule’s use. Finally, this section will discuss whether respondents encourage litigants to employ the simplified procedure. All of these questions refer to the respondent’s own experience.

1. CASE TYPE

It was originally expected that Rule 16.1 would be used by “parties with modest claims for known amounts,” such as “claims relating to collections, breach of contract, property damage, employment, and real estate.”⁵⁸ Given the flexibility in application of the simplified procedure, the survey sought to get a sense – from respondents with Rule 16.1 experience – of the cases to which it is actually applied. Judge respondents were asked to identify the types of cases that have proceeded under the Rule in their courtroom, and attorney respondents were asked to identify the types of cases that have proceeded under the Rule in their practice. The answer format was open-ended, so as not to restrict the nature or number of case characteristics considered and reported (*e.g.*, subject matter of the dispute, amount or type of damages, complexity of the case, etc.).

An IAALS research analyst classified the responses into discrete categories, as set forth in Figure 6. Responses that fit into two or more categories were classified in every applicable category.⁵⁹ For this reason, and because each respondent could provide multiple characteristics, the percentages do not total 100%. Most of the responses fit into two broad types: 1) a substantive area of the law and 2) a qualitative aspect of the case.

⁵⁷ Discussed *supra* in Section I.B.

⁵⁸ Holme, *supra* note 2, at 18.

⁵⁹ For example, “employment-related contract breach” was counted in both the “employment cases” and “contract cases” categories. “Low-damage tort cases” was counted in both the “relatively low stakes” and “tort cases” categories.

Figure 6 (Judge Q9; Attorney Q5)

$n = 38; n = 161$

| Case Types: Respondents' Rule 16.1 Cases | | |
|---|-------------------------------------|--|
| <i>Substantive Area of the Law</i> | <i>% of Judges Who Cited</i> | <i>% of Attorneys Who Cited</i> |
| Contract cases | 50% | 42% |
| Collections cases ⁶⁰ | 37% | 27% |
| Tort cases ⁶¹ | 39% | 22% |
| Property and real estate cases ⁶² | 16% | 17% |
| Business and commercial litigation | 8% | 16% |
| Lease and landlord-tenant cases ⁶³ | 8% | 10% |
| Construction cases ⁶⁴ | 5% | 6% |
| Employment cases | 3% | 3% |
| <i>Qualitative Aspect of the Case</i> | <i>% of Judges Who Cited</i> | <i>% of Attorneys Who Cited</i> |
| Relatively low stakes ⁶⁵ | 16% | 19% |
| Relatively low complexity ⁶⁶ | 11% | 9% |

With respect to the stakes, two attorney respondents gave an amount in controversy lower than that contained in the Rule: one stated a guideline of less than \$25,000 and the other stated a guideline of less than \$75,000. This may be an effort to ensure that the limitation on damages will not be implicated even if new information comes to light. Two attorneys mentioned using Rule 16.1 in cases with more than \$15,000 in dispute (*i.e.*, the amount exceeds County Court jurisdiction).

It was noted by both judges and attorneys that cooperation makes a difference in whether Rule 16.1 is utilized:

- “I have seen it used in simple cases involving experienced counsel with an established and good working relationship...”
- “Counsel for the opposing side was cooperative.”
- “Case included significant documents that were disclosed.”
- “Attorneys on both sides agree[d] to some expansion of the 16.1 discovery.”

Another case characteristic mentioned was the parties’ resources. One attorney noted use of the Rule in “cases with a plaintiff who does not have the funds to expend on more involved

⁶⁰ Account stated, check fraud, open account, and promissory note designations are included in the “collections cases” category. “Debt collection” was included in this category and not the contract cases category, even if the debt arose out of a contractual relationship.

⁶¹ Conversion, motor vehicle, negligence, personal injury, premises liability, product liability, and professional liability designations are included in the “tort cases” category.

⁶² Access, adverse possession, boundary, foreclosure, homeowner association and covenant, partition, property damage, quiet title, and zoning violation designations are included in the “property and real estate” category.

⁶³ Collection of unpaid rent, eviction, and security deposit designations are included in the “lease and landlord-tenant” category.

⁶⁴ Contractor payment, defect, and mechanic’s lien designations are included in the “construction cases” category.

⁶⁵ This quality was expressed with terms such as “small” or “minor” and “low damages” or “limited damages.”

⁶⁶ This quality was expressed with terms such as “simple,” “basic,” “straightforward,” “few disputed facts,” “limited set of documents,” “known witnesses,” “two parties,” and “liability clear.”

discovery.” Two judges remarked that the Rule is used with *pro se* defendants, or when there is no insurance carrier involved.

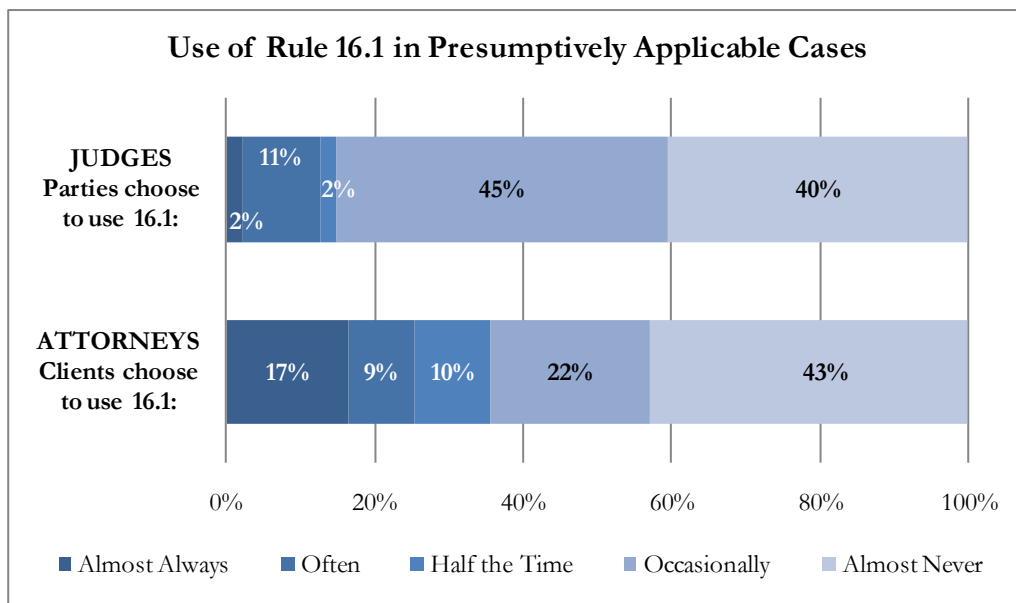
Finally, two attorneys mentioned applying Rule 16.1 to certain case types for strategic reasons. One attorney reported always trying to get cases involving punitive damages to proceed under the Rule for the purpose of limiting “exposure.” Another noted use of the Rule “[i]n one circumstance and one only: where the limit of available insurance for my insured client (defendant) is 100k or less.”

2. FREQUENCY

Given the voluntary nature of Rule 16.1, the survey sought to get a sense of the frequency of its use in qualifying cases. The distribution of responses for both judges and attorneys is shown in Figure 7. Importantly, one-quarter (25%) of attorney respondents indicated that they have not had a case eligible for Rule 16.1; those respondents are excluded from the percentage calculations below.⁶⁷

Attorneys reported a higher rate of use in presumptively applicable cases than judges. Over one-third (36%) of attorney respondents indicated use of Rule 16.1 at least half the time, while only 15% of judge respondents indicated the same. However, approximately 40% of both groups indicated that the rule is “almost never” used. Moreover, a majority of both groups – 85% of judges and 65% of attorneys – indicated that the rule is used at most only “occasionally.” See Figure 7.

Figure 7 (Judge and Attorney Q11)
n = 47; *n* = 194



Over 15% of respondent judges who actively encourage use of Rule 16.1⁶⁸ indicated that the parties “often” choose to use Rule 16.1, while less than 5% of the judges who do not encourage the procedure selected the “often” response option. However, the differences in responses between

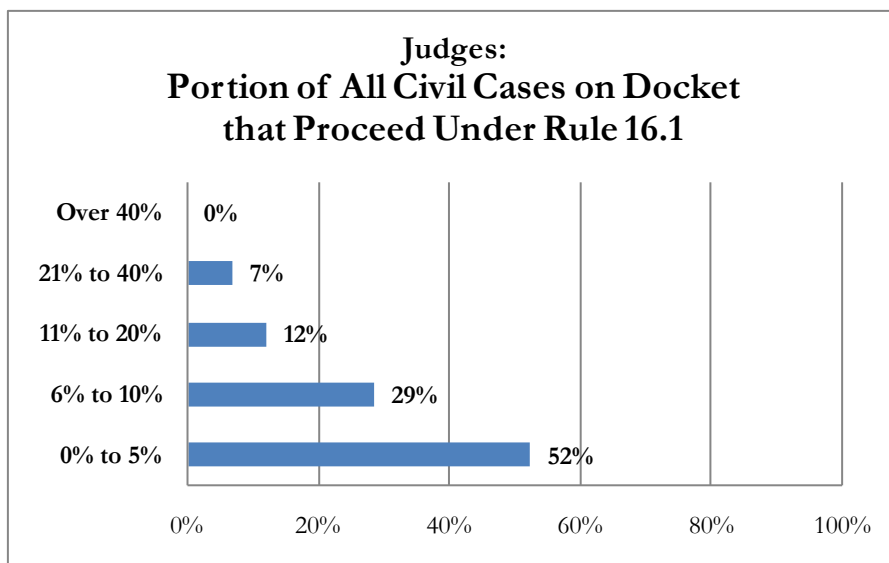
⁶⁷ One factor that may contribute to the lack of exposure to eligible cases could be the policy in some law firms, noted *supra* in Section III. B.1., of refusing cases that do not exceed a certain dollar value.

⁶⁸ The issue of encouraging use of the rule is discussed *infra* in Section IV.A.3.

these two groups are not statistically significant, and therefore the reported frequency with which the Rule is used appears to be independent of judicial encouragement.

The survey also sought to get a sense of the rate of use of Rule 16.1 in terms of civil litigation overall. Accordingly, respondent judges were asked for the percentage of all civil cases filed annually in their courtroom that have proceeded pursuant to Rule 16.1. The minimum reported value was 0% and the maximum reported value was 39%, with an average of 9%. A majority of judges indicated that 5% or fewer of their civil cases proceed under the simplified procedure, with nearly one-third (29%) indicating that only between 1% and 2% of their civil cases proceed under the procedure. See Figure 8.

Figure 8 (Judge Q5)
n = 42



These numbers appear to be low, particularly considering the fact that the latest report by the U.S. Department of Justice found the median civil trial damage award for plaintiffs who won monetary damages in general jurisdiction state courts nationwide to be \$28,000.⁶⁹ The same study determined that nearly two-thirds of “all plaintiff award winners were awarded \$50,000 or less.”⁷⁰ Understanding that there are differences in time, geography, law, and culture, this is still an indication that the majority of eligible cases are not proceeding under the simplified procedure. One attorney respondent made this point by writing:

Every cover sheet I see has the box checked that the plaintiff is seeking an award greater than \$100,000. I would say that perhaps two to three percent of those cases has settled for or resulted in a verdict of \$100,000 or more. Most, well over 50%, have settled for or resulted in a verdict for less than \$50,000. What does that tell you?

⁶⁹ Lynn Langton & Thomas H. Cohen, U.S. Department of Justice, *Bureau of Justice Statistics Special Report: Civil Bench and Jury Trials in State Courts, 2005*, <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=242>, 1, 5 (revised April 9, 2009).

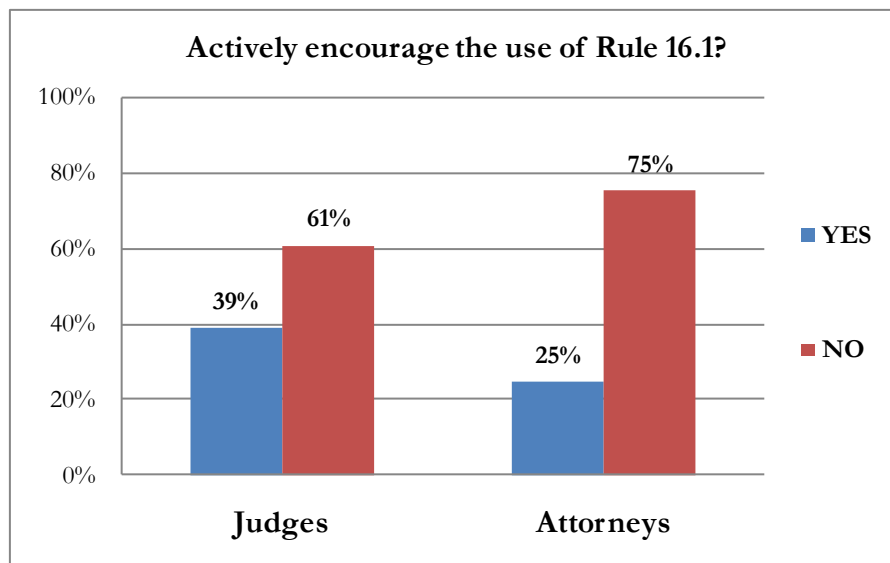
⁷⁰ *Id.* at 5.

3. PROMOTION BY LEGAL PROFESSIONALS

The survey sought to get a sense of the extent to which respondents educate litigants on Rule 16.1, as well as the extent to which they promote its use. Nearly three-quarters (73%) of all attorney respondents stated that they discuss the option of Rule 16.1 with their clients, while the remainder (27%) do not have such a discussion. Responses were independent of party represented, as there were no statistically significant differences between respondents who represent plaintiffs, defendants, or a combination thereof. Of attorney respondents who have had a presumptively applicable case, a strong majority (86%) discuss the procedure with their clients. Of those who have not had a presumptively applicable case, only about one-third (34%) discuss the procedure. This difference is statistically significant and indicates, not surprisingly, that those who have eligible cases are more likely to routinely inform their clients of the option.

Both attorneys and judges were asked whether they “actively encourage” use of Rule 16.1. As shown in Figure 9, nearly 40% of judges promote the simplified procedure, while only one-quarter of attorneys do so.

Figure 9 (Judge and Attorney Q10)
n = 46; *n* = 251



Two judge respondents pointed out that the determination regarding whether to proceed under the simplified procedure is made early in the case, often before the judge has any involvement or opportunity to influence its use. A majority (57%) of judges who have received Rule 16.1 training or training materials indicated actively encouraging its use, in comparison to a minority (39%) of those who have not received training; however, this difference is not statistically significant. Dividing respondent judges by those who have presided over a Rule 16.1 trial and those who have not, the level of encouragement is nearly the same.

Attorney responses were independent of party represented, as there were no statistically significant differences between those who represent plaintiffs, defendants, or a combination thereof. Of attorneys who have had a presumptively applicable case, approximately one-third (30%) encourage use of the procedure. Of those who have not had a presumptively applicable case, only one in ten (10%) encourage use of the procedure. This difference is statistically significant and

indicates, not surprisingly, that those who have eligible cases are more likely to actively encourage use of the Rule.

Of attorneys who have actually employed Rule 16.1 in one of their cases, one-third encourage its use, while only about 10% of those who have not used the Rule do so. This is a statistically significant difference. Thus, within this population of respondents, experience with the Rule makes encouragement of its use more likely.

B. EVALUATION OF RULE 16.1

The surveys provided Colorado judges and attorneys with the opportunity to evaluate Rule 16.1. First, this section will discuss the effects of the simplified procedure as compared to the standard pretrial procedure. Second, this section will discuss the adequacy of information afforded under Rule 16.1. Third, this section will discuss reported trial rates for Rule 16.1 cases. Finally, this section will discuss respondents' rationales for proceeding under or opting out of the Rule.

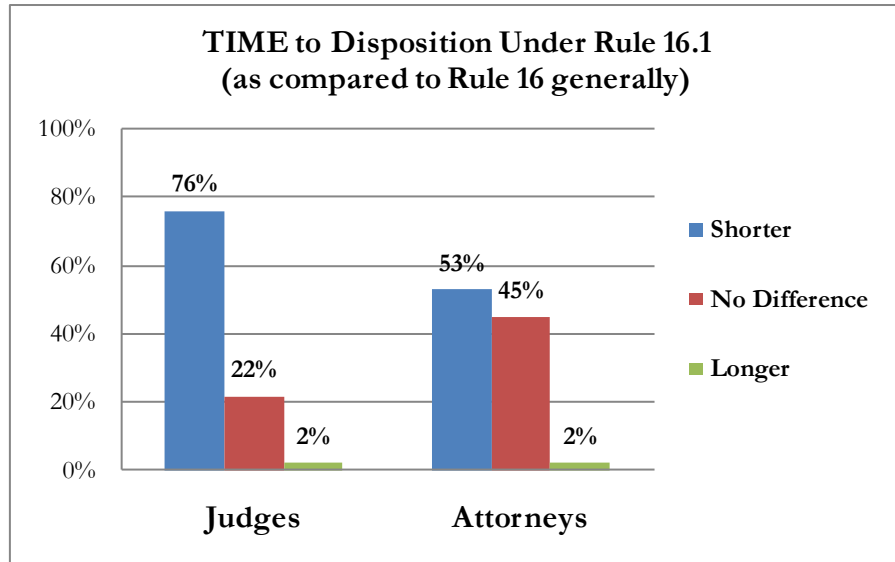
1. TIME, COST AND FAIRNESS

The surveys asked respondents to assess litigation under Rule 16.1 – as compared to litigation under the standard procedure contained in CRCP 16⁷¹ – using three measures: time to disposition, cost to litigants, and fairness of the process.

Figure 10 shows the perceptions of Colorado judges and attorneys concerning the effects of the simplified procedure on the speed at which cases are resolved. Three-quarters of judge respondents find that Rule 16.1 shortens time to disposition. The majority of attorney respondents agree, although a significant portion find that the Rule does not make a difference with respect to time. Notably, exactly 98% of both groups indicated that Rule 16.1 has either a positive or neutral effect on the length of a case, while only 2% indicated that the Rule has a negative effect.

⁷¹ CRCP 16 provides the standard procedure governing case and trial management, in particular as related to disclosures and discovery under CRCP 26. Generally, Rules 16, 26-34, and 36 do not apply to cases that proceed under Rule 16.1, except as specifically provided in Rule 16.1. COLO. R. CIV. P. 16(a); COLO. R. CIV. P. 16.1(k).

Figure 10 (Judge Q19a; Attorney Q18a)
n = 46; n = 225



For judge respondents, the assessment of the speed of a case under the simplified procedure was not associated with years on the bench⁷² or with having presided over the trial of a Rule 16.1 case.

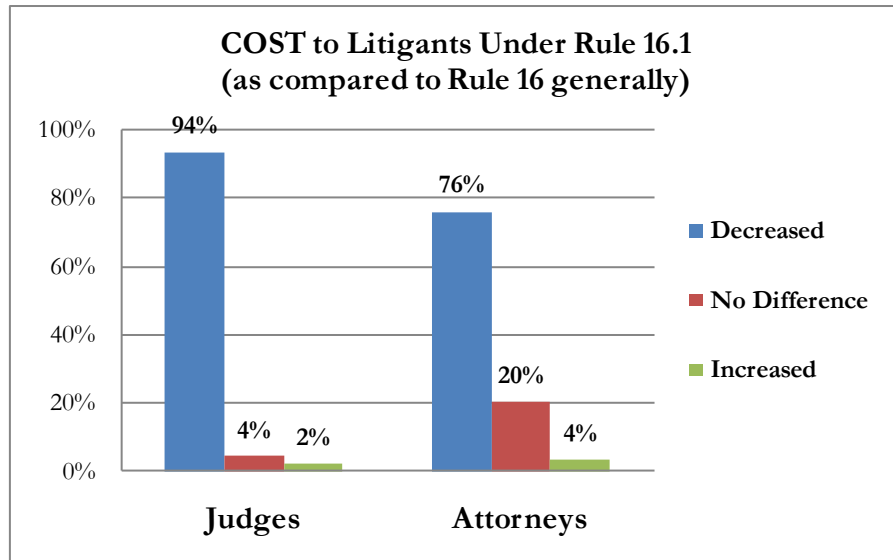
For attorney respondents, the assessment of the speed of a case under the simplified procedure was dependent, to a certain extent, upon years of legal practice.⁷³ A majority (64%) of those who have practiced law for 18 or fewer years indicated a shorter time to disposition, while only a minority (40%) of those with 19 or more years of experience indicated the same (the majority of that group indicated no difference in time). However, answers were independent of party represented and, interestingly, there was not a statistically significant difference in responses between those who have actually used Rule 16.1 and those who have not.

⁷² In testing for statistically significant differences based on years on the bench, judge respondents were divided in two different ways. First, they were divided into two groups, one containing respondents who have been on the bench both before and after Rule 16.1 took effect (7 or more years), and one containing respondents who have only been on the bench since Rule 16.1 was enacted (1-6 years). Second, they were divided into quartiles for even distribution between groups (1-4 years; 5-9 years; 10-15 years; and 16 or more years).

⁷³ As with the judge respondents, attorney respondents were divided in two different ways for testing statistically significant differences based on years of experience. First, they were divided into two groups, one containing respondents who have practiced law before and after Rule 16.1 took effect (7 or more years), and one containing respondents who have only practiced law since Rule 16.1 (1-6 years). Second, they were divided into quartiles for even distribution between groups (1-8 years; 9-18 years; 19-30 years; and 31 or more years).

Figure 11 shows the perceptions of Colorado judges and attorneys concerning the effects of the simplified procedure on the costs that litigants must incur. There is a strong consensus among both judge and attorney respondents that Rule 16.1 decreases litigation costs. Notably, over 95% of both groups indicated that Rule 16.1 has either a positive or neutral effect on the cost of a case, while less than 5% indicated that the Rule has a negative effect.

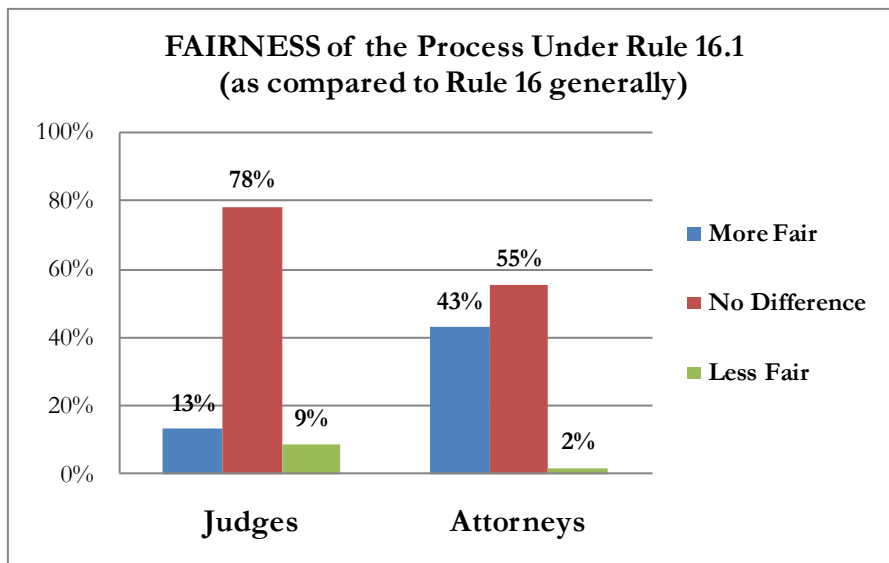
Figure 11 (Judge Q19b; Attorney Q18b)
n = 46; *n* = 226



For judge respondents, the assessment of the cost of a case under the simplified procedure was not associated with years on the bench or with having presided over the trial of a Rule 16.1 case. For attorney respondents, the assessment of the cost of a case under the simplified procedure was not associated with years of legal practice, party represented, or having experience with a Rule 16.1 case.

Figure 12 shows the perceptions of Colorado judges and attorneys concerning the effects of the simplified procedure on the fairness of the litigation process. A majority of both judge and attorney respondents indicated that there is no difference in procedural fairness between Rule 16.1 and Rule 16. Notably, over 40% of attorneys believe that the simplified procedure actually increases fairness. Fewer than one in 10 judges and fewer than one in 20 attorneys hold the opinion that the Rule is less fair.

Figure 12 (Judge Q19c; Attorney Q18c)
n = 46; *n* = 226



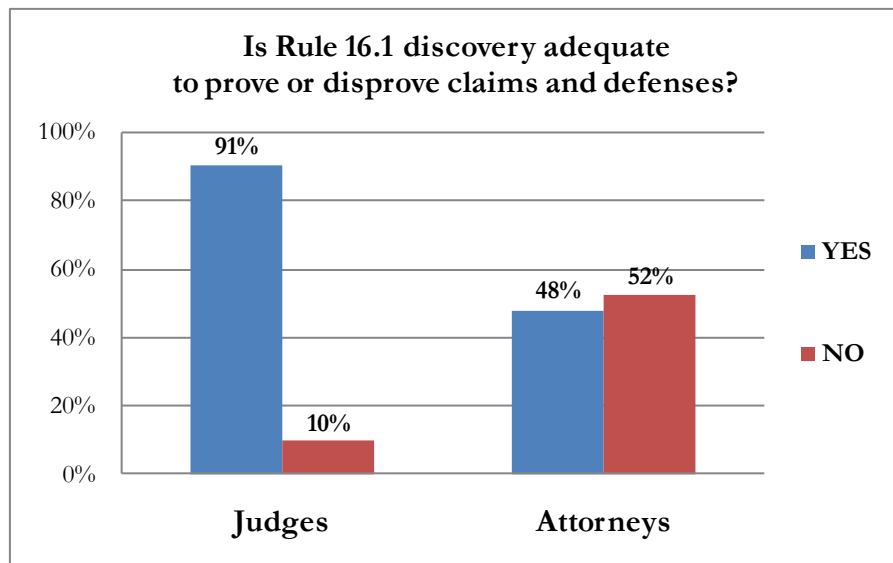
For judge respondents, the assessment of the fairness of the simplified procedure was dependent, to a certain extent, upon years on the bench. Those who were appointed to the bench before Rule 16.1 took effect were more likely to indicate no difference in fairness than those who were appointed after Rule 16.1 took effect. The responses for those who have one to six years of judicial experience were: 21% more fair; 57% no difference; 21% less fair. The responses for those with seven or more years of judicial experience were: 9% more fair; 88% no difference; 3% less fair. While these differences are statistically significant, they do not provide an indication that the opinions of either group lean one way or another with respect to fairness. In addition, answers regarding procedural fairness were independent of whether the judge has had a Rule 16.1 case proceed all the way to trial.

For attorney respondents, the assessment of the fairness of the simplified procedure was not associated with years of legal practice or party represented. While a smaller proportion of attorney respondents who have used Rule 16.1 indicated that the Rule decreases fairness than attorney respondents who have not used the Rule, the difference is not statistically significant.

2. ADEQUACY OF PROOF

The surveys asked all judges, as well as attorneys who have actually used Rule 16.1, whether the rule provides “adequate discovery” to prove or disprove claims and defenses in cases to which it is applied.⁷⁴ As shown in Figure 13, judge respondents overwhelmingly believe that the Rule is adequate, while attorney respondents are split on the issue.

Figure 13 (Judge and Attorney Q8)
 $n = 42; n = 170$



One judge respondent remarked that this question “should be a percentage rather than [a] binary choice. The rule is adequate in some cases.” Specifically, the judge mentioned simple business contract disputes and cases involving experienced and cooperative counsel.

For judge respondents, there were no statistically significant differences between the responses of judges who have presided over the trial of a Rule 16.1 case and those who have not done so, with over 85% of both groups indicating that the simplified procedure is adequate. Moreover, 100% of judge respondents who have had some level of Rule 16.1 training believe the procedure is adequate, although there is not a statistically significant difference between that group and the judges without any training, 86% of whom also believe the procedure is adequate.

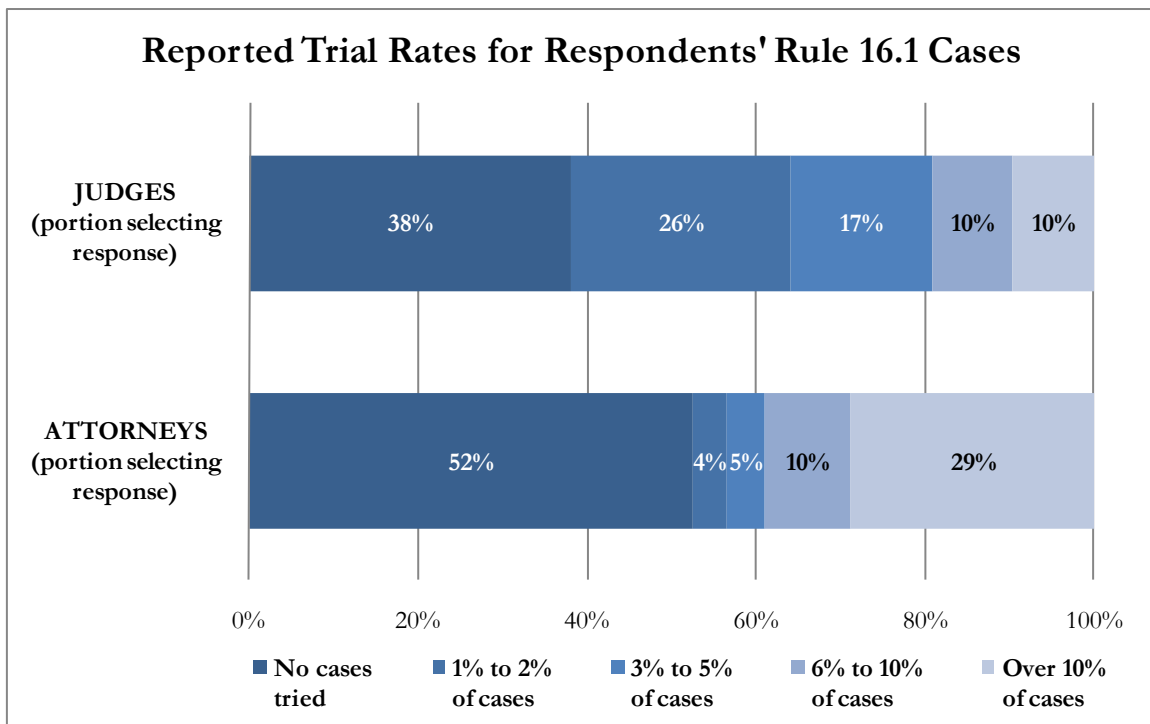
For attorney respondents, assessment of the adequacy of the Rule was independent of party represented.

⁷⁴ Use of the term “discovery” here was imprecise, as Rule 16.1 significantly reduces or eliminates the discovery process. The intent of the question was to assess whether Rule 16.1 nevertheless provides adequate information to effectively litigate cases.

3. TRIALS

The surveys sought to get a sense of trial rates for Rule 16.1 cases, in order to begin to explore the theory that the simplified procedure reduces pressure to settle due to the cost and time burden of expansive discovery. Accordingly, judges and attorneys who have had a Rule 16.1 case were asked to estimate the percentage of all of their Rule 16.1 cases that have proceeded to trial. See Figure 14 for the distribution of responses. While a plurality of both groups indicated no experience trying a Rule 16.1 case, it is notable that exactly 10% of judge respondents and nearly 30% of attorney respondents reported that over 10% of their Rule 16.1 cases have gone to trial.

Figure 14 (Judge and Attorney Q7)
n = 174; *n* = 42



For their Rule 16.1 cases, the average reported trial rate among judge respondents was 7.9% and the average among attorney respondents was 13.6%. Within each group, there was not a statistically significant difference in mean reported trial rates between those with five or fewer Rule 16.1 cases and those with more than five such cases.⁷⁵

The averages of respondents' reported percentages do not provide definitive trial rates or properly address the issue of whether the simplified procedure increases litigants' access to trial. That information can only be gathered through a controlled docket study and by comparing similar cases in similar courts proceeding under both the simplified and standard procedures. However, it may be useful to note that, in Colorado District Court, 65,909 civil cases were terminated in Fiscal

⁷⁵ Judge respondents with 1-5 cases (*n* = 19) averaged 13.2%, and those with 5 or more cases (*n* = 22) averaged 3.7%. While this difference may seem large, it is not statistically significant. The averages for attorney respondents were much closer, as those with 1-5 cases (*n* = 110) averaged 14.1%, and those with 5 or more cases (*n* = 63) averaged 12.9%.

Year 2009, but only 663 civil trials took place during that period.⁷⁶ Using those numbers, an estimated trial rate would be about 1%. In addition, according to the latest available data from the U.S. Department of Justice, trials “accounted for only about 3% of all tort, contract, and real property dispositions in [state] general jurisdiction courts” in 2005.⁷⁷ Again, there are many variables to consider in any comparison. Nevertheless, the fact that survey respondents’ average reported trial percentages for simplified procedure cases are higher than estimated state and national trial rates may be an indicator of higher trial rates under Rule 16.1 and certainly supports further study of the issue.

4. RATIONALES FOR APPLYING OR OPTING OUT OF THE RULE

The surveys sought to get a sense of the real reasons behind the decision to apply or opt-out of Rule 16.1 in respondents’ cases. These questions were open-ended to avoid placing any restrictions on the responses provided.

a. Primary Reasons for Using Rule 16.1

The attorney survey asked respondents who indicated having used Rule 16.1 to identify the three primary reasons for doing so. The judge survey asked all respondents – if they knew – the three primary reasons the parties and/or counsel choose to use Rule 16.1.

i. Attorney Respondents

The most common response, given by approximately two-thirds of commenting attorneys, related to the cost savings associated with proceeding under the Rule. In addition, nearly half of respondents answered to the effect that Rule 16.1 provides a simple and streamlined litigation process that limits unnecessary discovery and attorney hours, and is particularly suited for straightforward cases in which the facts are known, liability is clear, or disputes are not anticipated. Respondents commonly indicated that the simplified procedure provides a more immediate resolution, both in terms of a faster pretrial process and expedited trial settings. A good portion of respondents also noted use of Rule 16.1 in cases having damages below the threshold, rendering the pretrial process more proportionate to the dispute. One attorney remarked that it “[f]ocuses the case on essential issues.” Another stated that it provides “maximum access to district court in civil cases.” It should be noted, however, that several respondents qualified their descriptions of the cost and time benefits with words such as “potential,” “purported,” “ostensibl[e],” and “theoretical.” One attorney stated that the expected benefits have not come to fruition in practice, but did not give further detail on the reasons for this assessment.

A portion of attorney respondents linked use of Rule 16.1 to the wishes of the other party or their client. One attorney wrote: “less stress for the client.” Others indicated an obligation to proceed under the Rule – by order of the court, by the requirements of the rule, or due to the lack of a good reason to opt out. Several attorneys cited the desire to limit liability under the cap on damages. A number also cited the benefits of expanded mandatory disclosures, particularly with

⁷⁶ Colorado Judicial Branch, *Annual Statistical Report Fiscal Year 2009*, http://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2009/FY09ARFINALREVkvpdf.pdf, 26, 29. The “civil” category does not include domestic relations, juvenile, mental health, or probate actions. Of the civil trials, 366 were bench trials and 297 were jury trials. There were a total of 67,480 civil cases filed during the same period.

⁷⁷ U.S. Department of Justice, *supra* note 69, at 1. The figure includes jurisdictions nationwide “that provided totals for both trial and non-trial general civil dispositions.”

respect to witness testimony. One attorney explained that when representing a plaintiff, the Rule is used if settlement, rather than trial and appeal, is anticipated; on the other side, the Rule is used when representing a defendant who wishes to go to trial without discovery. A few attorneys indicated using Rule 16.1 to prevent discovery abuse by the other side, and a few indicated using the Rule to avoid depositions or e-discovery. Two attorneys indicated using the Rule simply to test how it worked.

ii. Judge Respondents

According to judge respondents, parties and counsel choose to use Rule 16.1 mainly for reasons of economy and efficiency. Judges most commonly cited the cost savings associated with use of the Rule, followed by the time savings. Cost savings were described in terms of discovery expenses, attorney fees, and overall litigation expenditures. Time savings were described in terms of a reduction in the time required to prepare and try the case, an expedited setting on the court's docket, and an earlier resolution. A number of judges mentioned the reduced complexity of the pretrial process, which results in less work and prevents the "other party from loading up [the] case with paper." Two judges noted that some cases fall under the Rule by default due to inadvertence or lack of understanding; for example, more sophisticated plaintiffs in loan or credit card cases will prefer the rule for "reasons of economy," and *pro se* defendants do not have sufficient awareness of the opt-out provision. One judge wrote that the Rule "provides [an] early opportunity for effective mediation without waiting for completion of burdensome discovery." Another judge stated that taking advantage of the streamlined process generally requires "confident counsel and a very simple dispute."

b. Primary Reasons for Not Using Rule 16.1

It was originally anticipated that the opt-out provision would involve "a legitimate analysis of a case" showing that application of the simplified procedure would be "inappropriate."⁷⁸ The attorney survey asked all respondents to identify the three primary reasons for not using Rule 16.1. The judge survey asked all respondents – if they knew – the three primary reasons the parties and/or counsel choose not to use Rule 16.1.

i. Attorney Respondents

By far, the most common reason articulated for not using Rule 16.1 was that the simplified procedure provides inadequate information to effectively evaluate the case, negotiate a settlement, prepare or defend dispositive motions, and conduct trial. Essentially, the majority of commenting respondents believe that the flexibility to use various discovery tools plays an important role in bringing to light the facts and issues necessary for a just resolution, and both plaintiffs and defendants are concerned that the lack of discovery may detrimentally affect their ability to succeed. For example, respondents noted that depositions are valuable for obtaining "facts unfiltered by opposing counsel" and can yield "nuggets of information." One attorney wrote that, under notice pleading, complaints are often so "thin" that claims cannot be appropriately defended without discovery.

Many respondents consider the disclosure requirement to be a poor substitute for discovery, describing extensive disclosures as burdensome and costly. Moreover, they commented that the lack of information early in the case makes it difficult to provide sufficiently detailed disclosures, which

⁷⁸ Holme, *supra* note 2, at 14.

creates a fear that important evidence will be precluded. On the other side of the coin, there is little trust that the opposing party's disclosures are adequate and little faith that the court will address such abuses by enforcing the Rule. A few respondents remarked that Rule 16.1 creates satellite disputes over the sufficiency of information disclosed because the level of detail required by the Rule is unclear. One attorney expressed dissatisfaction with the requirement that employment plaintiffs provide access to the files of prior employers even when not relevant, as it "leads to misuse of the information."⁷⁹

A significant portion of attorneys cited the cap on damages. Those respondents do not want to restrict recovery or lose settlement leverage, particularly when the client places a particular value on the case. Moreover, there is often uncertainty concerning valuation at the outset of a case, accompanied by a fear that more damages will come to light during the litigation or be allocated by the decision-maker. A few respondents noted that inclusion of attorney fees in the limit can render proceeding under Rule 16.1 financially unviable for cases involving recoverable fees, particularly if there is an appeal. In addition, one respondent wrote that "[t]he culture of over-discovery is hard to change, especially when you show your hand on case value, regardless of complexity, too early." Another commented that it is useless to struggle at guessing the level of damages in personal injury cases when it can be expected that defendants and their insurers will opt out of the rule.

Contrary to the survey data on the effects of Rule 16.1, some commenting attorneys do not perceive any advantages over Rule 16. According to these attorneys, disclosure obligations and disputes leave the cost benefits unrealized, while the work required to negotiate voluntary discovery may outweigh simply proceeding with regular discovery. Moreover, several respondents remarked that expedited trial settings are not a reality in many courts.

Several attorneys stated that even when they wish to litigate under Rule 16.1, the other party will opt out because the Rule contains opt-out incentives for both plaintiffs and defendants. Several attorneys admitted to simply being more comfortable with the regular procedure due to limited understanding of and familiarity with Rule 16.1. A handful of attorneys admitted that discovery provides a tool to leverage settlement and extract fees from the client. A few commented that the Rule is perceived as a malpractice risk, as there is a fear that the court will second-guess the decision and apply an ethical duty of exhaustive preparation. One attorney stated: "Simplified procedure frightens clients, who feel like they are getting the system's 'cheap seats' – I have had several clients opine that if they are not to have full discovery, then they ought to have a reduced filing fee, etc."

ii. Judge Respondents

In describing why parties and/or counsel choose *not* to use Rule 16.1, commenting judges most frequently cited the fact that some cases are genuinely not suitable for Rule 16.1 due to the complexity of the case or the expected level of damages. One respondent wrote of "the need for discovery tools to get testimony 'on the table' and facilitate resolution of the case," but with the qualification that "[t]his reason is not as applicable as the parties likely think, though." The next most common response was fear on the part of the attorney, including the fear of missing information, the fear of being surprised at trial, and the fear of a malpractice claim.

Respondent judges often linked resistance to Rule 16.1 to problems with the legal culture. Many identified a desire to adhere to old habits and routines, along with a lack of experience with

⁷⁹ Rule 16.1(k)(1)(B)(ii) provides that the claimant may move for a protective order concerning this information under CRCP 26(c).

and distrust of “something different.” A portion indicated a belief that lawyers want to conduct more discovery, with a range of reasons given, including the view that more process “equates to better lawyering,” discomfort with the streamlined procedure because today’s litigators are essentially “discovery lawyers,” and the fact that more discovery generates income and impresses clients. A number of judges cited tactical reasons for opting out of the Rule, such as the desire to slow the progress of the case or use discovery costs as a “club to force settlement.” Two judges remarked that the timing of the Rule 16.1 decision must be made early, before the attorneys have a good understanding of the case and feel comfortable limiting discovery options. One judge stated: “I’m not sure if all attorneys are advising their clients of the option.” Another stated that even when the case falls under Rule 16.1, “the attorneys seem to forget that the rule applies and proceed under Rule 16.”

C. POSSIBLE CHANGES TO RULE 16.1

The surveys explored judges’ and attorneys’ opinions regarding whether any changes to the Rule 16.1 simplified procedure should be made. This section discusses responses concerning the amount in controversy limit, the criteria for applicability, and whether the rule should be mandated.

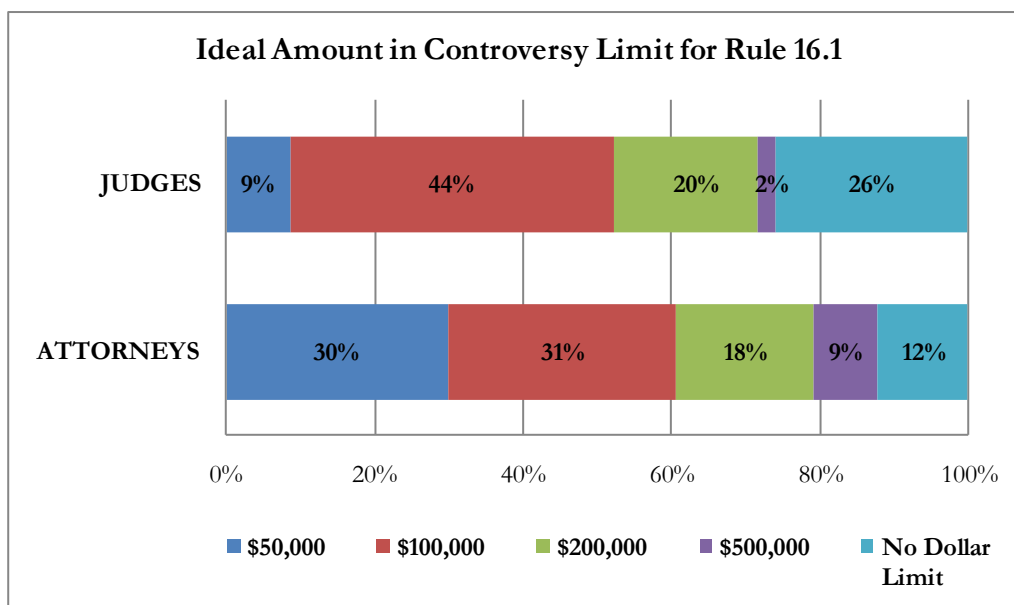
1. AMOUNT IN CONTROVERSY LIMIT

The surveys asked what the “amount in controversy” limit for Rule 16.1 should be. See Figure 15 for the distribution of responses. A plurality of judges and a slim plurality of attorneys indicated that the \$100,000 current limit is the appropriate level for the simplified procedure. However, 30% of attorneys would like to see the limit lowered to \$50,000, reducing the number of qualifying cases, while only about one in ten judges indicated likewise.

Approximately one in five respondents from both groups believe the limit should be raised to encompass cases involving up to \$200,000, and approximately 10% of judges believe the limit should be \$500,000. Although \$1 million was a response option, it was not selected by even 1% of any group. Nevertheless, one-quarter of judges and over 10% of attorneys indicated that there should be “no dollar limit.” It should be noted that it is unclear whether this response option was interpreted to mean that all cases should qualify or whether one or more criteria other than a dollar amount should be used (see Section IV.C.2., below).

Figure 15 (Judge Q14; Attorney Q13)

$n = 46$; $n = 245$



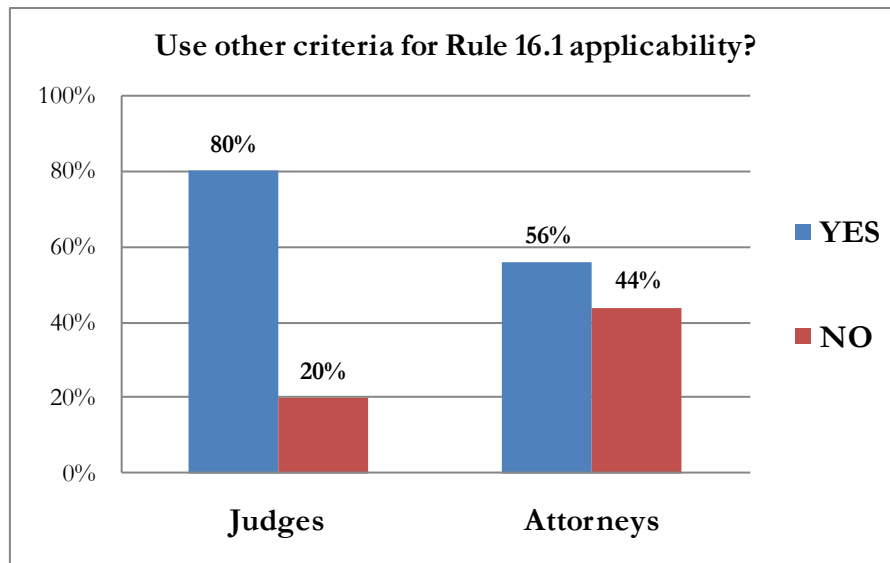
For the attorney respondents, there were no statistically significant differences in responses based on party represented.

2. OTHER CRITERIA FOR APPLICABILITY

The surveys asked whether the parameters for cases subject to Rule 16.1 should include criteria in addition to or in lieu of the amount in controversy. For illustration purposes, the question contained the following non-exclusive list of examples: case type, number of parties, number of claims, anticipated discovery requirements, anticipated motions practice, anticipated number of lay and expert witnesses, and expected number of trial days.

Four out of five respondent judges indicated that the criteria for Rule 16.1 applicability should be expanded or changed. A majority of respondent attorneys indicated the same, although a significant portion would maintain the amount in controversy as the sole standard. See Figure 16.

Figure 16 (Judge Q15; Attorney Q14)
n = 45; n = 252



The surveys then asked those respondents in favor of additional or different criteria to identify which factor(s) should be employed for application of Rule 16.1.

The most common factor provided by judge respondents was the complexity or simplicity of the case and the issues, including the number of claims, cross-claims, and counterclaims. One judge described the concept in terms of the “novelty or routineness” of the action. The number of parties and the number of witnesses (expert and lay) were also common factors specified. Several judges stated that Rule 16.1 should be (at least presumptively) applicable for certain case types and not for others.⁸⁰ A number of judges pointed to anticipated discovery requirements, while a number of judges indicated that all of the criteria listed for illustration purposes should be employed. Two judges suggested that the Rule should apply to cases with *pro se* parties.

Two judges indicated that the court should have the discretion to order use of Rule 16.1 after a status conference or a hearing on the amount in controversy. Another wrote: “I’m just not sure the criteria drive the use of the rule. Attorneys don’t like the restrictions and limitations going into the case and not really knowing what they will confront.” The solution suggested by one judge: apply the simplified procedure to all civil cases.

The most common factor for Rule 16.1 applicability provided by attorney respondents was anticipated discovery and motions practice. One attorney emphasized that this factor is particularly important when electronically stored information is involved. The number of parties (*e.g.*, two-party actions), the number of lay and expert witnesses (*e.g.*, only one expert per side), and the simplicity of the case (*i.e.*, the quantity and complexity of the facts and issues) were also common factors specified. As with the judge respondents, a good portion of attorneys stated that Rule 16.1 should

⁸⁰ The case types specifically mentioned by judge respondents for use of Rule 16.1 were: collections cases (*i.e.*, credit card collections); election disputes; evictions; judicial foreclosures; personal injury actions; quiet title cases; and “other statutory-based” matters. The case types listed to be excluded were: complex commercial matters; product liability cases; and medical malpractice claims.

be applicable to certain case types and not others.⁸¹ In addition, a number of attorneys pointed to the anticipated length of trial (*e.g.*, one or two days).

In emphasizing that Rule 16.1 works best for simple cases, however defined, one attorney stated: “It is more appropriate for a \$500,000 breach of contract case with limited issues and defenses than for a \$25,000 construction defects claim.” However, some attorneys indicated that the amount in controversy should remain a factor. Amounts specified ranged from \$30,000 to \$500,000.⁸² A handful of attorneys stated that all of the criteria listed for illustration purposes should be employed. Several attorneys proposed that application of Rule 16.1 should be flexible, and determined by the judge after a discussion of the claims, the needs and resources of the parties, and whether the costs of proceeding under the standard procedure would be disproportionate to the amount in controversy or the gravity of the issues. According to one attorney, “leaving it to counsel to discuss the claims and defenses and issues relating to discovery is largely ineffectual.”

One attorney expressed a desire for Rule 16.1 to be used in probate litigation, where cases are intended to be quick and simple, but the lack of rules can cause them to flounder: “Perhaps Rule 16.1 could be the best of both worlds; simple procedure but sufficient to properly manage litigation.” In contrast, a few attorneys expressed a desire to pull back application of the Rule in quiet title and partition actions, where property values often exceed \$100,000 and the issues can be complex and fact-intensive. It was also suggested that separate criteria for non-monetary damages cases could be established.

Other attorney comments were less specific and more reflections on the general concept of a simplified procedure:

- Employ “[w]hatever [criteria] would encourage/require the use of the simplified rule. Litigation has become ridiculously and prohibitively expensive. Only the very poor and the rich can afford to really litigate a case anymore.”
- “I don’t really think adding additional criteria solves the problem with the complexity of the ‘simplified’ procedure. If mandatory initial disclosure requirements were honored by attorneys and enforced by courts, all civil litigation would be less expensive, more just, and less complicated.”

Finally, a range of comments reflected a lack of knowledge about Rule 16.1. For example, some attorneys indicated that the procedure should apply upon agreement of the parties. Other comments included:

- “The amount in controversy should be analyzed per party, not per entirety of the claim.”
- “Counsel should be able to opt in at any level of damages, not just opt out.”
- “The option should be provided in quiet title, injunctive, and declaratory judgment actions.”

⁸¹ The case types specifically mentioned by attorney respondents for use of Rule 16.1 were: collections claims; contract disputes; personal injury cases; promissory note claims; property actions (simple or property damage only); vehicle collision cases; and wage act claims. The case types listed to be excluded were cases with commercial litigants and personal injury actions involving death.

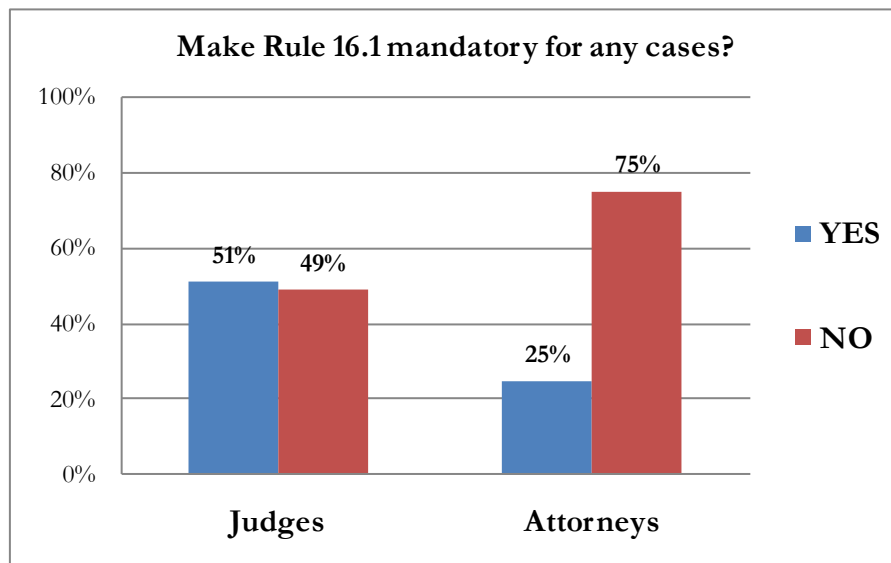
⁸² With one attorney suggesting that this should be a jurisdictional requirement (akin to County Court limits).

- “Expedited proceedings should be exempt...”
- “I have no other criteria other than discovery may be obtained by agreement or motion.”

3. MANDATORY APPLICATION

The surveys asked whether the simplified procedure in Rule 16.1 should be mandated for “any cases.” As shown in Figure 17, respondent judges are fairly evenly divided on the issue. In contrast, three-quarters of respondent attorneys indicated that Rule 16.1 should not be mandated. This question was worded so as not to provide respondents with information concerning the circumstances under which application of the procedure would be mandatory. Considering possible reluctance to express support for a change with unknown dimensions, a slim majority of judge respondents and one-quarter of attorney respondents nevertheless did.

Figure 17 (Judge Q17; Attorney Q16)
n = 47; *n* = 249



For judge respondents, the desire (or lack of desire) to make the procedure mandatory for “any cases” was independent of Rule 16.1 training. One attorney respondent commented that the simplified procedure should be either made mandatory or abandoned, for it has become “simply another step to be taken that is generally a waste of time.”

The surveys asked those respondents in favor of mandatory application of the Rule to describe the case types or circumstances under which the simplified procedure should be required. As is apparent from the information presented below, many criteria were named but a consensus did not form around one specific factor or set of factors.

Of respondents who set forth recommended parameters for a mandatory simplified procedure, nearly 30% of judges and over 35% of attorneys provided solely an amount in controversy. The amounts ranged from \$15,000 to \$500,000. One attorney proposed mandating the simplified procedure for actions under \$100,000, but raising the cap for applicability to \$500,000.

A few attorneys advocated for strict rules regarding the amount in controversy assertion, such as applying CRCP 11 or sanctions for improperly stating an amount in excess of the limit.

Approximately 20% of judges and approximately 15% of attorneys who answered the question proposed simply that certain substantive case types should involve mandatory application of Rule 16.1. None of the case type suggestions received substantially more support than any of the others, and included: collections; landlord-tenant; lien foreclosure; money judgment (absent negligence); motor vehicle (*e.g.*, rear end collision); personal injury (simple or minor); premises liability (absent serious injury); and promissory note.

However, nearly half of judges and about one-quarter of attorneys who answered the question provided another single factor or a combination of factors for mandatory application of Rule 16.1. Those factors included: actions with a low number of parties, lay witnesses, expert witnesses, or issues; actions that are routine or simple as opposed to novel or complex; actions that involve *pro se* litigants; actions tried to the court rather than a jury; and actions that do not involve constitutional rights. Some examples of combinations of factors submitted are listed below.

- Under \$50,000, with fewer than four parties and five witnesses;
- “Routine” breach of contract cases with one party on each side and only one or two claims;
- Minor, non-complex motor vehicle, bad faith, construction, and mechanic’s lien cases under \$150,000 with a small number of parties;
- Collection matters (*e.g.*, promissory note, credit card) with easily ascertainable damages and routine defenses;
- Non-complex, minor motor vehicle accidents and “slip and falls” in which multiple parties are not involved and only alternative theories of relief are pled.

Of the attorneys who responded to the question, nearly one in five stated that Rule 16.1 should have presumptive mandatory application for certain cases, but that the judge should be able to grant an exception for good cause shown. A majority of those respondents accompanied the answer with a reference to the amount in controversy, and a few respondents accompanied the answer with a reference to routine personal injury auto cases or promissory note cases.

Approximately 5% of judges and over 5% of attorneys stated that the court should have the discretion to make the simplified procedure mandatory on a case-by-case basis. One judge expressed the opinion that Rule 16.1 should be mandatory for all cases.

D. OTHER COMMENTS ON RULE 16.1

The surveys gave respondents the opportunity to provide additional clarification or comments about Rule 16.1.

1. JUDGE RESPONDENTS

Judge respondents most commonly remarked on the ease with which cases can opt out of the simplified procedure, by noting the frequency of exclusion, suggesting reasons therefor, and proposing mechanisms for greater inclusion. According to commenting judges, lawyers generally will seek to opt out of Rule 16.1 due to a perceived increased risk of malpractice claims in the absence of full discovery. One judge wrote:

[T]he risk . . . of tying [one's] hands at an early stage of the case is so significant that I believe that the attorneys – and even their clients – are willing to accept the greater expense and delay of avoiding 16.1 to achieve what is perceived to be a more predictable, and a fairer, outcome.

However, as one judge noted: “Murder trials are conducted on disclosure so therefore it does not make any sense that a civil matter cannot be handled the same way.” Short of making the Rule mandatory, respondents suggested raising the bar for opting out, which might include requiring a specific showing of necessity or requiring a written certification containing a good faith estimate of the additional expense and delay to be expected.

In contrast to the overall survey results, commenting judges were fairly split on the time and cost effects of Rule 16.1. On one side, it was noted that the “experiment” in “unlimited discovery has failed.” On the other side, it was noted that the simplified procedure has minimal benefits and discovery is more efficient than disclosure for cases that proceed to trial. Commenting judges were also split on the fairness of Rule 16.1. For example, one judge remarked that the procedure “equalizes the playing field” for parties with disparate resources, while another remarked that the procedure can be less fair as “a direct result of the types of cases” to which it is applied, *i.e.*, contract loan and credit card cases, and “the *pro se* representation” of defendants in those cases.

One judge suggested that counsel ought to be required to file a certification that they have advised their client of Rule 16.1. Another judge acknowledged that the elimination of “unnecessary steps and procedures” results in a better process, but supports “a much more bespoke approach” to case management over a dictate by rule (*i.e.*, the development of an individualized discovery plan for each case).

2. ATTORNEY RESPONDENTS

The majority of commenting attorneys expressed some level of dissatisfaction with Rule 16.1. The most common complaint was that heightened disclosure obligations are not a sufficient substitute for discovery in obtaining necessary relevant information prior to trial. As one respondent wrote: “The question is whether [the Rule] allows a party...a full and fair opportunity to present their case. Cost is a secondary factor.”

Commenting attorneys attributed unfairness under Rule 16.1 to inadequate or “cursory” disclosures by the opposing party, combined with a lack of enforcement by the court. One attorney

noted that the disclosure process has become “an art in evasion,” another likened the task of continually having to request disclosure of relevant information to “pulling teeth,” and a third noted the inability to “test the completeness and accuracy” of disclosures. On the other side of the equation, respondents noted that courts are disinclined to enforce disclosure obligations by excluding undisclosed evidence, leading to “ambush” at trial. One respondent stated: “I think 16.1 is more of an aspirational ideal than a practical alternative [because it] assumes full and complete initial disclosures,” without a mechanism to test completeness or accuracy. This is an issue further complicated by uncertainty regarding the level of detail in disclosures that will ultimately be deemed sufficient.

A good portion of commenting attorneys noted that Rule 16.1 does not actually simplify the process or provide time and cost benefits that would “justify waiving discovery.” Those respondents claimed that Rule 16.1 cases move at the same speed as “regular” cases, as delay is often a function of the court’s docket. In addition, the expense of complying with and litigating disclosure requirements, negotiating voluntary discovery, and “trying to anticipate the opposition’s case” diminishes expected cost savings. One attorney wrote: “Any procedure or rule can be ‘gamed’ to delay resolution, increase cost and negatively affect the fairness of the proceedings.” Further, several attorneys commented that discovery can produce early settlements, which can be more efficient and economical than moving forward under the simplified procedure.

It appears that the Rule contains disincentives for both plaintiffs and defendants. Commenting plaintiffs’ attorneys pointed to the cap on recoverable damages. They also noted that the amount includes attorney fees, penalties, and punitive damages, early predictions of which are difficult. One attorney noted that the damages cap comes into play only after the stated procedural purposes of the Rule have been accomplished, and moreover, it does not appear to influence defendants’ use of the rule, as they consistently opt out anyway. This is confirmed by commenting defense attorneys. One attorney stated that “an exposure of \$100,000 is too high to make defendants seriously consider litigating a case without discovery.” Interestingly, more of those respondents identifying themselves as defense attorneys objected to the lack of discovery than those identifying themselves as plaintiffs’ attorneys. For example, in explaining the need for information to build a defense and the inability to trust plaintiffs to provide it, one attorney noted: “In my experience, the ‘smoking gun’ that would defeat the plaintiff’s claim is not going to be voluntarily produced.”

An additional concern expressed by commenting attorneys: lack of familiarity with Rule 16.1. One attorney mentioned having a fear of the process due to information obtained from colleagues and asked, “[W]hy subject a client to an unknown process given warnings in the marketplace[?]” Another noted that lawyers and judges are resistant to learning a new way to prepare a case. A few attorneys suggested that making the Rule mandatory – forcing practitioners to learn the process and eliminating the temptation to conduct discovery for revenue purposes – will allow the benefits to materialize, especially for smaller cases exceeding the jurisdiction of County Court. Another cautioned that the success of the procedure depends on attorneys skilled in preparing Rule 16.1 cases and “judges who are really invested in making the rule work.”

Indeed, a portion of commenting attorneys applauded the Rule and its effects. Those respondents described the simplified procedure as a “good idea” with “laudable goals” and “definite utility.” According to one attorney:

Our judicial system is horribly complex, and most cases under several hundred thousand end up costing more in legal fees than [is] at issue. Rule 16.1 is a far

superior way of resolving disputes than the civil rules for everything other than the most complex cases.

One respondent observed: “I see the value of this process as an interim one between county court and district court matters.” However, others suggested simply raising County Court jurisdiction to \$50,000 or \$75,000.

In fact, many commenting attorneys offered suggestions for ways in which Rule 16.1 could be improved. These suggestions included:

- Clarify whether the requirement of a detailed description of testimony applies to parties or only non-party witnesses;
- Clarify whether a trial management order is required;
- Provide a mechanism to ensure faster disposition;
- Create incentives to use the procedure, such as fee/cost shifting against plaintiffs who opt out and do not prove damages over \$100,000 or against defendants who opt out and do not conduct meaningful discovery;
- Change the terminology from “simplified” to “expedited” or “accelerated” to encourage more usage in commercial cases not qualifying as complex.

Several attorneys confessed having too little experience with the Rule to comment appropriately, which is telling. Notably, none of the attorney respondents mentioned the malpractice risk in this portion of the survey.

E. RESPONDENT SUGGESTIONS FOR A MORE TIMELY AND COST-EFFECTIVE PROCESS

As a final matter, the surveys asked respondents to name one rule or procedure in District Court they would change to achieve a more timely and cost-effective process for litigants. These suggestions could be unrelated to Rule 16.1.

1. JUDGE RESPONDENTS

The suggestions provided by judge respondents varied, as there was not one idea that constituted a significant portion of responses. A number of judges expressed a desire to limit discovery and associated motions practice, in favor of more effective disclosures. A number advocated for early and substantive case management conferences to set the parameters of the pretrial process, as the present management orders tend to be ignored or “continually modif[ied].” One judge noted:

I resisted [case management conferences] for some time because, given my heavy docket, I did not believe I had time to do them. I have found that to be a false belief and I find that they are a net time saver. However, material training of judicial officers would be required to make these genuinely effective.

Several judges suggested tightening time limits; for example, by requiring returns of service within a reasonable period of time, limiting the time to join parties and amend pleadings, requiring court approval for extensions for answers, setting firm time limits for disclosures, and shortening the time for motions, responses, and replies. However, another judge suggested that the parties should drive the time frames, on the basis that “[f]orcing parties to meet various milestones encourages more litigation” in the form of sanctions motions.

A number of judges expressed a desire to change summary judgment practice, including shortening both the length of the motions and the timeframe for their filing. One judge remarked that motions are “often frivolously filed when the parties know there are questions of fact,” which costs the litigants money and costs the court time.

Several judges would like to see a more robust and meaningful duty to confer with opposing counsel, which is too often met by simply sending an e-mail or leaving a voicemail. A few would also like to see an enhanced ability to impose meaningful sanctions on an offending party, whether the attorney or the client. A few suggested mandatory alternative dispute resolution after disclosures, to provide an objective assessment of the case, leading to settlement or a narrowing of the litigation.

Other suggested changes include:

- A “speedy trial” requirement for civil cases;
- Mandatory training for *pro se* litigants;
- The expression of CRCP 16 and CRCP 26 “in more user-friendly language,” perhaps with examples in the comments.

One judge noted the role of legal fees:

I don’t think the rules really fundamentally change the cost of hiring very good counsel to handle these cases. Most of the best firms won’t handle a case less than \$100,000. That is just cost driven and most of the attorneys in those firms have told me they could not afford to hire themselves!

Finally, a number of judges reemphasized that application of Rule 16.1 should be either mandatory or at the court’s discretion, rather than at the option of the parties.

2. ATTORNEY RESPONDENTS

Attorney respondents’ suggestions most commonly related to the level of discovery permitted under the rules. Of the attorneys who remarked on discovery, all but one proposed limiting discovery in some fashion. Specific proposals included limiting depositions (*e.g.*, only depositions of parties, no depositions of experts, depositions last less than half a day, etc.). Attorneys also suggested eliminating or substantially limiting interrogatories, due to the significant time and resources required for very little benefit. A number of attorneys recommended altering the use of experts, including limiting the quantity or using neutral panels, to avoid the “battle of the experts” phenomenon. It was also suggested that there should be a cap on hourly expert witness fees, which can be exorbitant. A number of attorneys advocated for the use of special discovery

masters to expedite the resolution of “discovery disputes and squelch the delay tactics that have become the ultimate goal in and of [themselves].” Such a master could also be used for Rule 16.1 disclosure disputes.

Other suggestions regarding the discovery regime were less specific. Some attorneys discussed narrowing discovery in ways consistent with the proportionality principle. Some attorneys stated that the rules should address or streamline electronic discovery, with one noting that the lack of standardized and detailed guidance means litigating in a costly and time-consuming manner “with the paranoia that a judge could use his/her discretion to adopt oppressive, unrealistic, Scheindlin-like requirements.”⁸³ One attorney went so far as to propose the elimination of all formal discovery.

The second-most common suggestion was a call for closer and more active judicial management of cases. This included both oversight of the pretrial process, as well as stronger and more consistent enforcement of the rules through the imposition of meaningful sanctions when violations occur. The attorneys requested early and frequent pretrial conferences, to set appropriate time frames, raise and resolve discovery disputes, and advance the case to resolution. According to these attorneys, the close involvement of a judicial officer – preferably the one who will ultimately try the case – “tempers the ambitions of counsel and their clients.” In addition, court appearances not only eliminate wasteful and expensive paper process, but also enhance oral advocacy skills. One attorney noted: “More face time with judges and opposing counsel would probably increase professionalism and lessen expense.” Another wrote: “We often litigate cases and never appear before the judge until trial.” One attorney, however, cautioned that numerous unnecessary mandatory meetings have the potential to complicate the process and increase costs.

A good portion of attorney respondents provided suggestions relating to disclosures. The majority of respondents who commented on disclosures expressed a desire to make disclosure requirements more clear, more robust, and more strictly enforced, while a minority expressed a desire to eliminate disclosures completely. Both groups seemed to agree that the present requirements are unfocused and unhelpful, and they encourage disputes.

A good portion of attorney respondents suggested implementing a time limit for the court to rule on dispositive and other critical motions, as well as better communication regarding when a ruling can be expected. While there was acknowledgement of stressed court loads, these respondents believe that timely rulings on motions will help to clear dockets. One attorney proposed that any motion not ruled upon within the time limit could be automatically deemed denied. The following are other comments related to this suggestion:

- “The delay in court rulings is the cause of much overall delay, expense and uncertainty in the litigation process.”
- “The fact that several district courts fail to rule on critical, dispositive motions until just before trial is very costly to our clients.”
- “I have had motions linger for over a year in some cases.”

⁸³ This is a reference to federal e-discovery orders issued by Judge Shira Scheindlin, United States District Court Judge for the Southern District of New York, such as the landmark *Zubulake v. UBS Warburg, LLC* series (02 Civ. 1243), as well as the more recent order in *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* (05 Civ. 9016), entitled “*Zubulake* Revisited: Six Years Later.”

A good portion of attorney respondents provided suggestions related to scheduling. Some expressed a belief that the trial date is decided too early in the process, resulting in a “myriad” of strictly-held and unrealistic deadlines unrelated to the specific needs of the case. These attorneys advocated setting a case for trial only after discovery is complete, good faith settlement efforts have been undertaken, and trial needs are known. Nevertheless, once set, trial dates should be firm. One attorney noted that “[w]hen cases get bumped (sometimes repeatedly), costs dramatically increase because the attorney must prepare and re-prepare.” Also, real deadlines prevent “inertia from tak[ing] over.” A handful of attorneys also commented on the timing of expert disclosures (currently “at least 120 days before the trial date” for claiming parties and 30 days thereafter for defending parties⁸⁴). However, there was no consensus about whether they occur too early or too late. Half of these respondents believe that disclosures should be made earlier because the party’s theory of the case is often unknown until expert disclosures are made. Half of these respondents believe that disclosures should be made later because the current deadline pushes trial too far out and the parties do not have a good handle on the case until closer to trial.

A good portion of attorney respondents provided suggestions related to alternative dispute resolution (“ADR”). A majority of these respondents believe that mandatory ADR should be promoted and enforced, but there were a couple who believe that the court should order ADR only on a case-by-case basis, describing a “blanket policy” as a “waste of time and money in many instances.” One attorney suggested removing the requirement for settlement discussions within 35 days of the at-issue date, for at that point, the “parties do not have a realistic estimate on the value of their cases.”

Several attorney respondents suggested some form of differentiated case management. These suggestions included: separating the civil and criminal dockets into separate divisions, including on appeal; a specialized division for business/commercial matters; specific disclosure requirements for specific case types (*e.g.*, construction defect cases); and increased presumptive discovery limits in complex commercial cases (over \$1 million and more than 2 parties). One attorney hinted at a more case-specific approach: “Some rules are unnecessarily onerous in a given case but necessary in others.”

A number of attorneys proposed some type of “loser pays” attorney fee-shifting scheme, but one attorney proposed the elimination of cost shifting. A number of attorneys suggested encouraging summary judgment as a means of narrowing the issues, while a number suggested that summary judgment should be eliminated or streamlined. According to one attorney, “[t]he increased burden...far outweighs the benefit of those few cases where summary judgment is actually granted and, more rarely, sustained on appeal.”

A number of attorney respondents recommended increasing the jurisdictional limits for small claims and county courts. One attorney promoted use of filing fees to encourage or discourage certain levels of discovery (*i.e.*, \$50 for small claims court, \$100 or \$150 for county court, and \$1500 or \$2000 in district court).

Other interesting proposals included:

- At all status conferences and mediations, require counsel to certify costs to that point and the estimated cost through discovery and trial. This suggestion specifically referred to defense counsel and the tendency to prolong the case to increase fees.

⁸⁴ COLO. R. CIV. P. 26(a)(2)(C)(I), (II).

- Require the requesting party to advance discovery compliance costs at a statutory rate, to promote prioritization and avoid marginally necessary discovery.
- Eliminate answers to the complaint, except to the extent that they contain jurisdictional issues and affirmative defenses.
- Provide work product protection for correspondence with and draft reports of expert witnesses, to alleviate the need to hire multiple experts for consultation and testimony.
- Allow requests for production to be served on third parties.

Finally, one attorney pointed to a more cultural issue: “It is not the rules that are the issue, it is the litigants’ mindless fighting about discovery, even though the scope of discovery is supposed to be broad. It is time consuming, expensive and silly.”

V. CONCLUSION

IAALS sincerely thanks all of the individuals and organizations who dedicated precious time, effort, and energy to make the Colorado Rule 16.1 Surveys possible. It is our hope that this study will make a valuable contribution to the understanding of simplified civil procedures. We look forward to processing this information in conjunction with other efforts to understand and improve the American civil justice system.

APPENDIX A: JUDGE SURVEY INSTRUMENT

Are you a judge who handles or has handled civil cases in COLORADO DISTRICT COURT at any time after January 1, 2005? For this survey, civil cases do not include domestic relations or family cases.

Yes

No

If you answered "Yes," please proceed to Question 1.

If you answered "No," you may stop here. The Institute for the Advancement of the American Legal System thanks you for your time. We encourage you to learn more about our work by visiting www.du.edu/legalinstitute.

1. How many years have you been on the bench in Colorado?

2. Colorado Rule of Civil Procedure 16.1 provides a simplified procedure for certain civil actions in which the monetary judgment sought against any one party does not exceed \$100,000, exclusive of interest and costs. Have you received any training or training materials regarding Rule 16.1?

Yes

No

If Yes, please describe: _____

3. Have parties used Rule 16.1 for any cases on your docket?

Yes

No

If you answered "Yes" to Question 3, proceed to Question 4.

If you answered "No" to Question 3, proceed to Question 10.

4. Estimate the number of cases in which parties have used Rule 16.1 in your courtroom:

1 to 5

6 to 20

21 to 50

51 to 100

Over 100

5. Estimate the percentage of all civil cases filed annually in your courtroom that have proceeded pursuant to Rule 16.1:

_____ %

6. Have any Rule 16.1 cases gone to trial before you?

Yes

No

7. Estimate the percentage of Rule 16.1 cases (as a percentage of total 16.1 cases on your docket) that have gone to trial in your courtroom:

_____ %

8. In your experience, does Rule 16.1 provide for adequate discovery to prove or disprove claims and defenses in cases to which it is applied?

Yes

No

9. Please identify the case types where Rule 16.1 has been utilized in your courtroom:

10. Do you actively encourage the use of Rule 16.1?

- Yes
- No

11. In cases to which Rule 16.1 presumptively applies, how often do the parties choose to use the simplified procedure?

- Almost never
- Occasionally
- About half the time
- Often
- Almost always

12. If you know, please identify the three primary reasons the parties and/or counsel choose to use Rule 16.1:

13. If you know, please identify the three primary reasons the parties and/or counsel choose NOT to use Rule 16.1:

14. The amount in controversy limit for Rule 16.1 should be:

- \$50,000
- \$100,000
- \$200,000
- \$500,000
- \$1,000,000
- No dollar limit

15. Should the criteria for actions subject to Rule 16.1 include criteria in addition to or in lieu of the amount in controversy? (Other criteria could include case type, number of parties, number of claims, anticipated discovery requirements, anticipated motions practice, anticipated number of lay and expert witnesses, expected number of trial days, etc.)

- Yes
- No

If you responded "Yes" to Question 15, proceed to Question 16.

If you answered "No", proceed to Question 17.

16. Please identify the criteria that you think should be employed for application of Rule 16.1, not limiting your response to the examples listed in Question 15:

17. Should Rule 16.1 be mandated for any cases?

- Yes
- No

If you responded "Yes" to Question 17, proceed to Question 18.

If you answered "No", proceed to Question 19.

18. Please describe the case types or circumstances under which Rule 16.1 should be mandatory:

19. Litigation under Rule 16.1, as compared to litigation under Rule 16 (generally):

| a. Time | b. Cost to Litigants | c. Fairness of the Process |
|--|--|--|
| <input type="checkbox"/> Shortens time to disposition | <input type="checkbox"/> Decreases cost | <input type="checkbox"/> Less fair |
| <input type="checkbox"/> No difference in time | <input type="checkbox"/> No difference in cost | <input type="checkbox"/> No difference in fairness |
| <input type="checkbox"/> Lengthens time to disposition | <input type="checkbox"/> Increases cost | <input type="checkbox"/> More fair |

20. Please provide any clarification or comments about Rule 16.1 that you would like to add:

General Questions:

21. If you could change any one rule or procedure in Colorado District Court to achieve a more timely and cost-effective process for litigants, what would it be and why?

Are you willing to be contacted to participate in further studies concerning Rule 16.1? By selecting "yes," your contact information will not be associated with your responses to this survey, which will remain confidential. Contact information will be collected in a separate database, will be used only for the purpose indicated above, and will not be shared or distributed.

Yes

First name: _____

Last name: _____

Email: _____

Phone: _____

How would you prefer to be contacted? By email

By phone

No

APPENDIX B: ATTORNEY SURVEY INSTRUMENT

Are you an attorney with CIVIL LITIGATION experience in COLORADO DISTRICT COURT at any time after January 1, 2005? For this survey, civil litigation does not include domestic relations or family cases.

- Yes
- No

If you answered "Yes," please proceed to Question 1.

If you answered "No," you may stop here. The Institute for the Advancement of the American Legal System thanks you for your time. We encourage you to learn more about our work by visiting www.du.edu/legalinstitute.

1. How many years have you practiced law in Colorado?

2. Please describe your civil litigation role over the course of your career:

If applicable, you may check "neutral decision-maker" in addition to any other box.

- Represent plaintiffs in all or nearly all cases
- Represent defendants in all or nearly all cases
- Represent plaintiffs and defendants, but plaintiffs more frequently
- Represent plaintiffs and defendants, but defendants more frequently
- Represent plaintiffs and defendants equally
- Neutral decision-maker

3. Colorado Rule of Civil Procedure 16.1 provides a simplified procedure for certain civil actions in which the monetary judgment sought against any one party does not exceed \$100,000, exclusive of interest and costs. Have you used Rule 16.1 for any cases?

- Yes
- No

If you answered "Yes" to Question 3, proceed to Question 4.

If you answered "No" to Question 3, proceed to Question 9.

4. Estimate the number of cases in which you have used Rule 16.1:

- 1 to 5
- 6 to 20
- 21 to 50
- 51 to 100
- Over 100

5. Please identify the case types where you proceeded under Rule 16.1:

6. Please identify the three primary reasons for using Rule 16.1:

7. Estimate the percentage of your Rule 16.1 cases (as a percentage of your total 16.1 cases) that have gone to trial:

_____ %

8. In your experience, does Rule 16.1 provide for adequate discovery to prove or disprove claims and defenses in cases to which it is applied?

- Yes
- No

9. Do you discuss the option of Rule 16.1 with your clients?

- Yes
- No

10. Do you actively encourage the use of Rule 16.1?

- Yes
- No

11. In cases to which Rule 16.1 presumptively applies, how often does your client choose to use the simplified procedure?

- Almost never
- Occasionally
- About half the time
- Often
- Almost always
- I have not had a case to which Rule 16.1 presumptively applies

12. Please identify the three primary reasons for NOT using Rule 16.1:

13. The amount in controversy limit for Rule 16.1 should be:

- \$50,000
- \$100,000
- \$200,000
- \$500,000
- \$1,000,000
- No dollar limit

14. Should the criteria for actions subject to Rule 16.1 include criteria in addition to or in lieu of the amount in controversy? (Other criteria could include case type, number of parties, number of claims, anticipated discovery requirements, anticipated motions practice, anticipated number of lay and expert witnesses, expected number of trial days, etc.)

- Yes
- No

If you responded "Yes" to Question 14, proceed to Question 15.

If you answered "No", proceed to Question 16.

15. Please identify the criteria that you think should be employed for application of Rule 16.1, not limiting your response to the examples listed in Question 14:

16. Should Rule 16.1 be mandated for any cases?

- Yes
- No

If you responded "Yes" to Question 16, proceed to Question 17.

If you answered "No", proceed to Question 18.

17. Please describe the case types or circumstances under which Rule 16.1 should be mandatory:

18. Litigation under Rule 16.1, as compared to litigation under Rule 16 (generally):

| a. Time | b. Cost to Litigants | c. Fairness of the Process |
|--|--|--|
| <input type="checkbox"/> Shortens time to disposition | <input type="checkbox"/> Decreases cost | <input type="checkbox"/> Less fair |
| <input type="checkbox"/> No difference in time | <input type="checkbox"/> No difference in cost | <input type="checkbox"/> No difference in fairness |
| <input type="checkbox"/> Lengthens time to disposition | <input type="checkbox"/> Increases cost | <input type="checkbox"/> More fair |

19. Please provide any clarification or comments about Rule 16.1 that you would like to add:

General Questions:

20. As a general matter, your firm does not file or defend a case unless the amount in controversy exceeds:

\$ _____

- Firm does not decline cases based on the amount in controversy
- Don't know
- I am not in private practice

21. If you could change any one rule or procedure in Colorado District Court to achieve a more timely and cost-effective process for litigants, what would it be and why?

Are you willing to be contacted to participate in further studies concerning Rule 16.1? By selecting "yes," your contact information will not be associated with your responses to this survey, which will remain confidential. Contact information will be collected in a separate database, will be used only for the purpose indicated above, and will not be shared or distributed.

Yes

First name: _____

Last name: _____

Email: _____

Phone: _____

How would you prefer to be contacted? By email

By phone

No