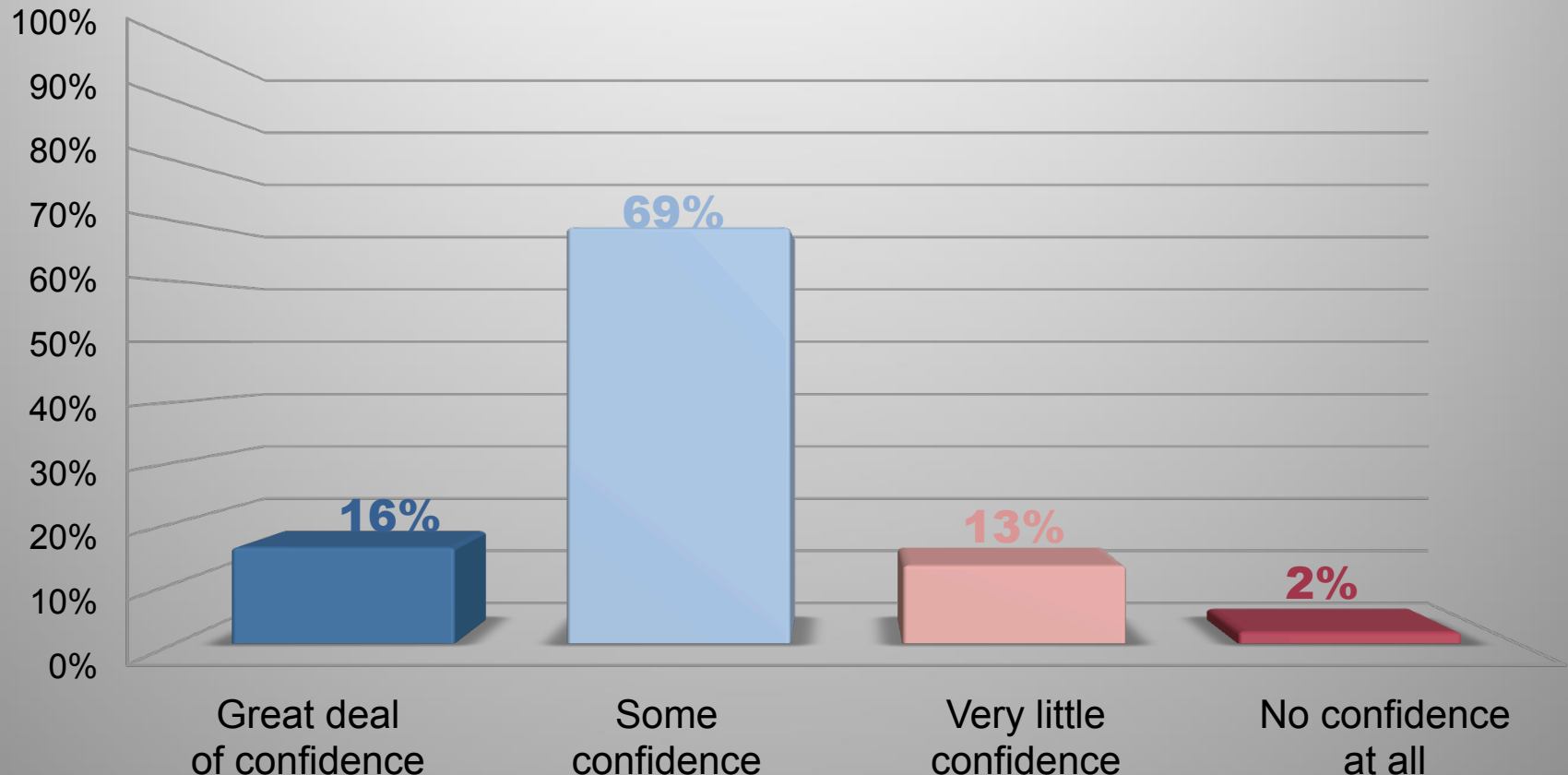


Trial Strategies for Overcoming Juror Bias

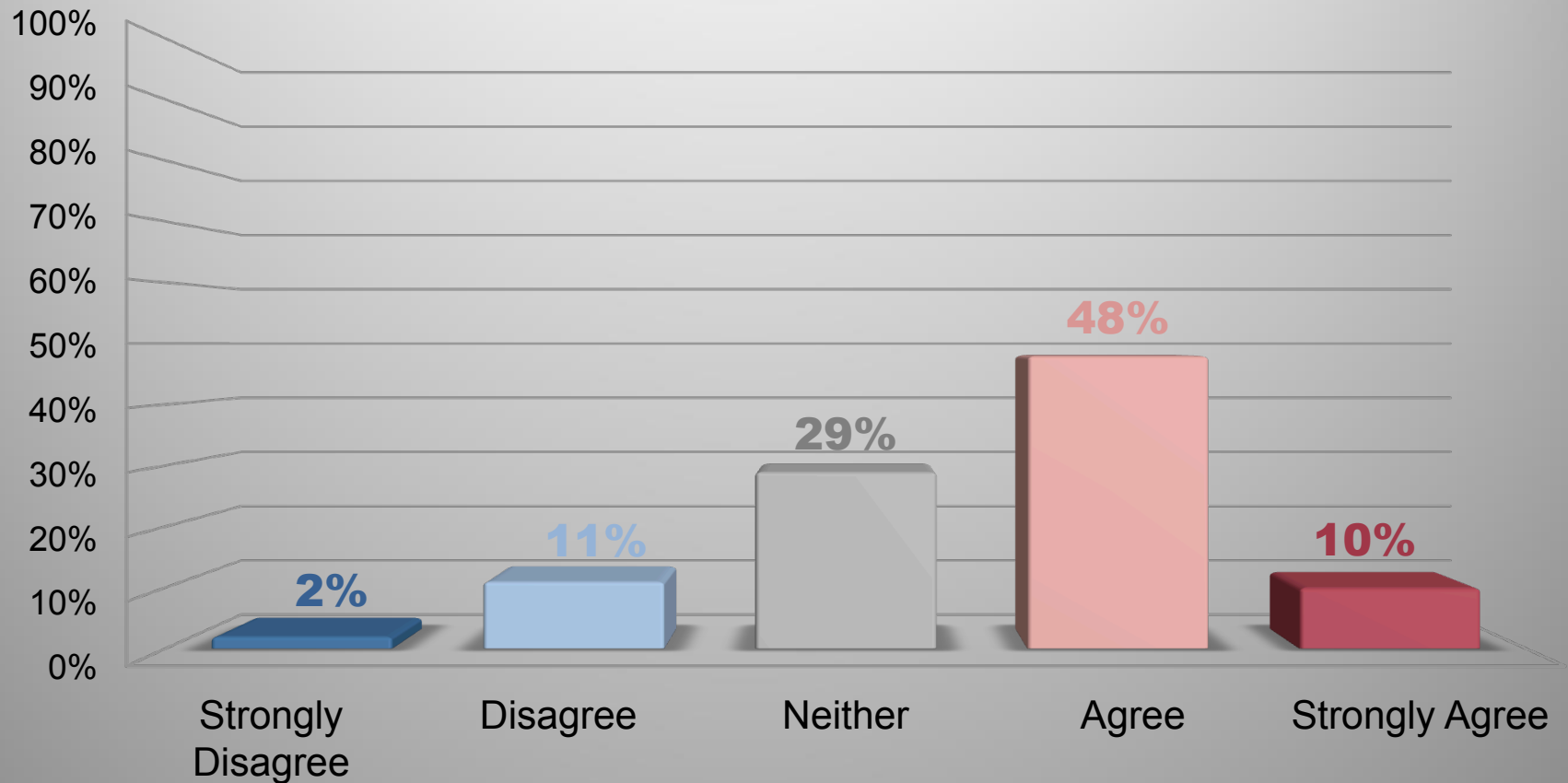
Federal Rules of Civil Procedure on Juror Selection

- Rule 47. Selecting Jurors
 - (a) EXAMINING JURORS. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.
 - (b) PEREMPTORY CHALLENGES. The court must allow the number of peremptory challenges provided by [28 U.S.C. §1870](#).
 - (c) EXCUSING A JUROR. During trial or deliberation, the court may excuse a juror for good cause.

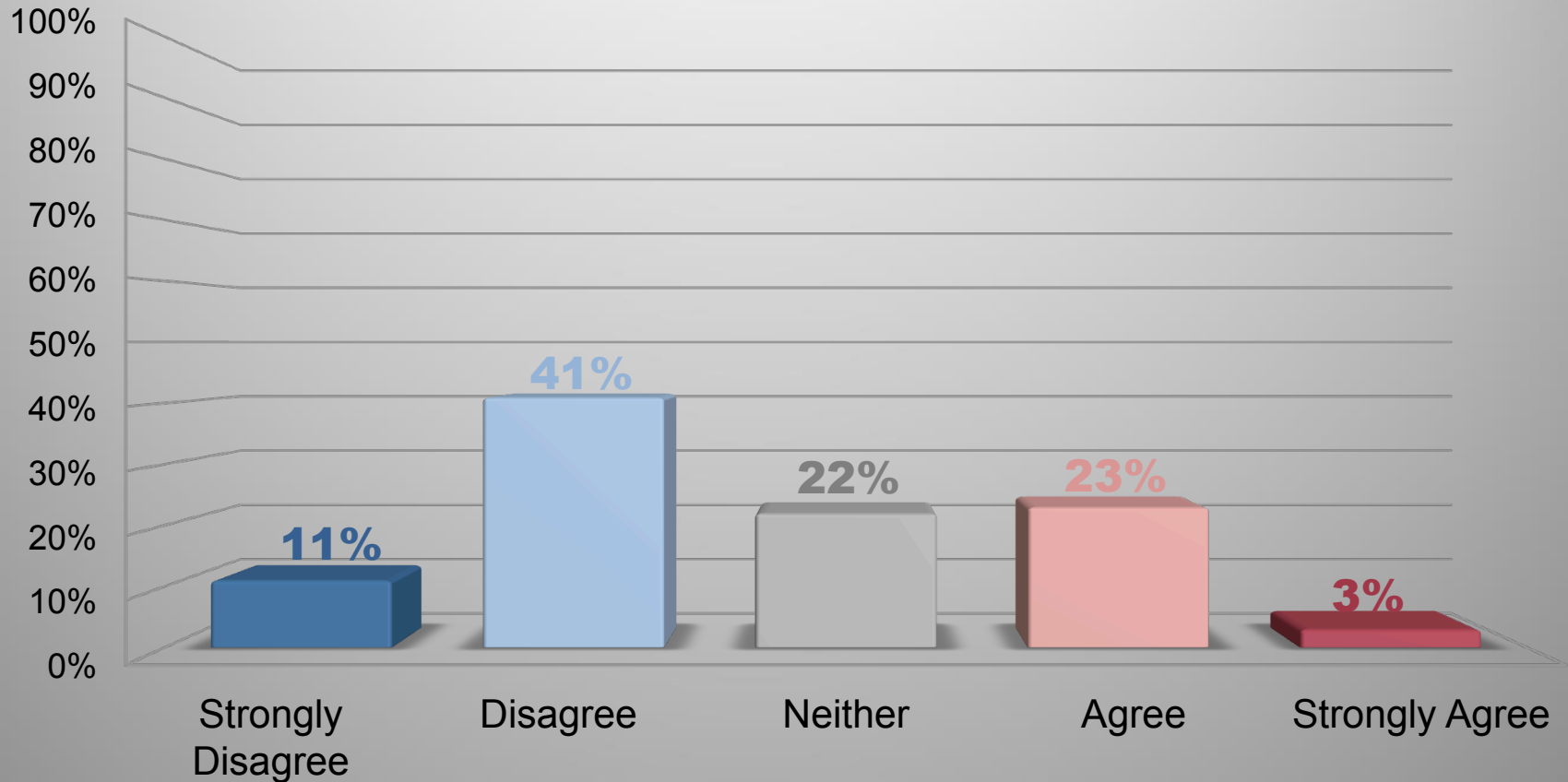
Jury Poll: How much confidence do you have in courts and the legal system?



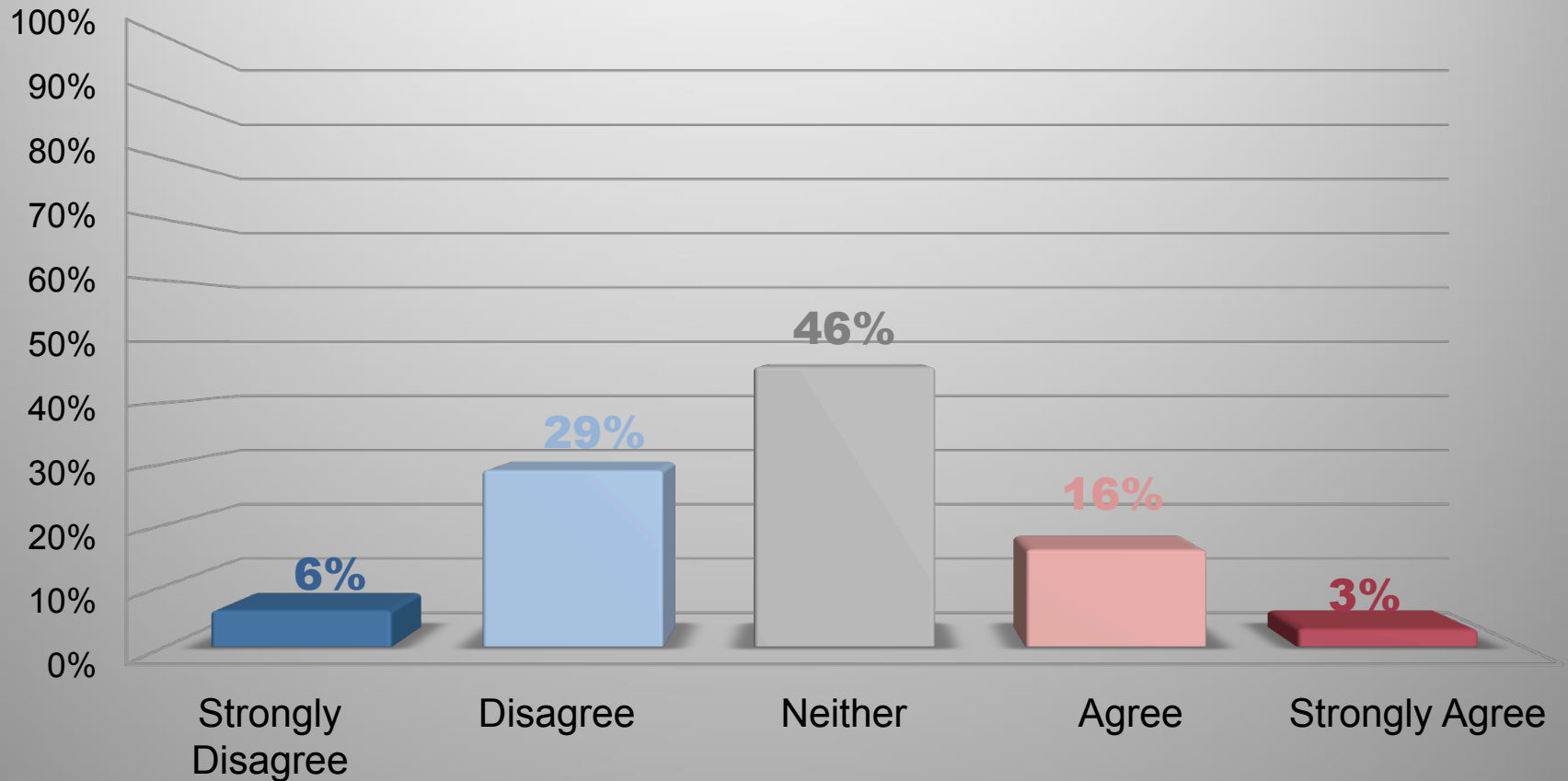
Jury Poll: A legal case must have some merit if it is not settled before trial.



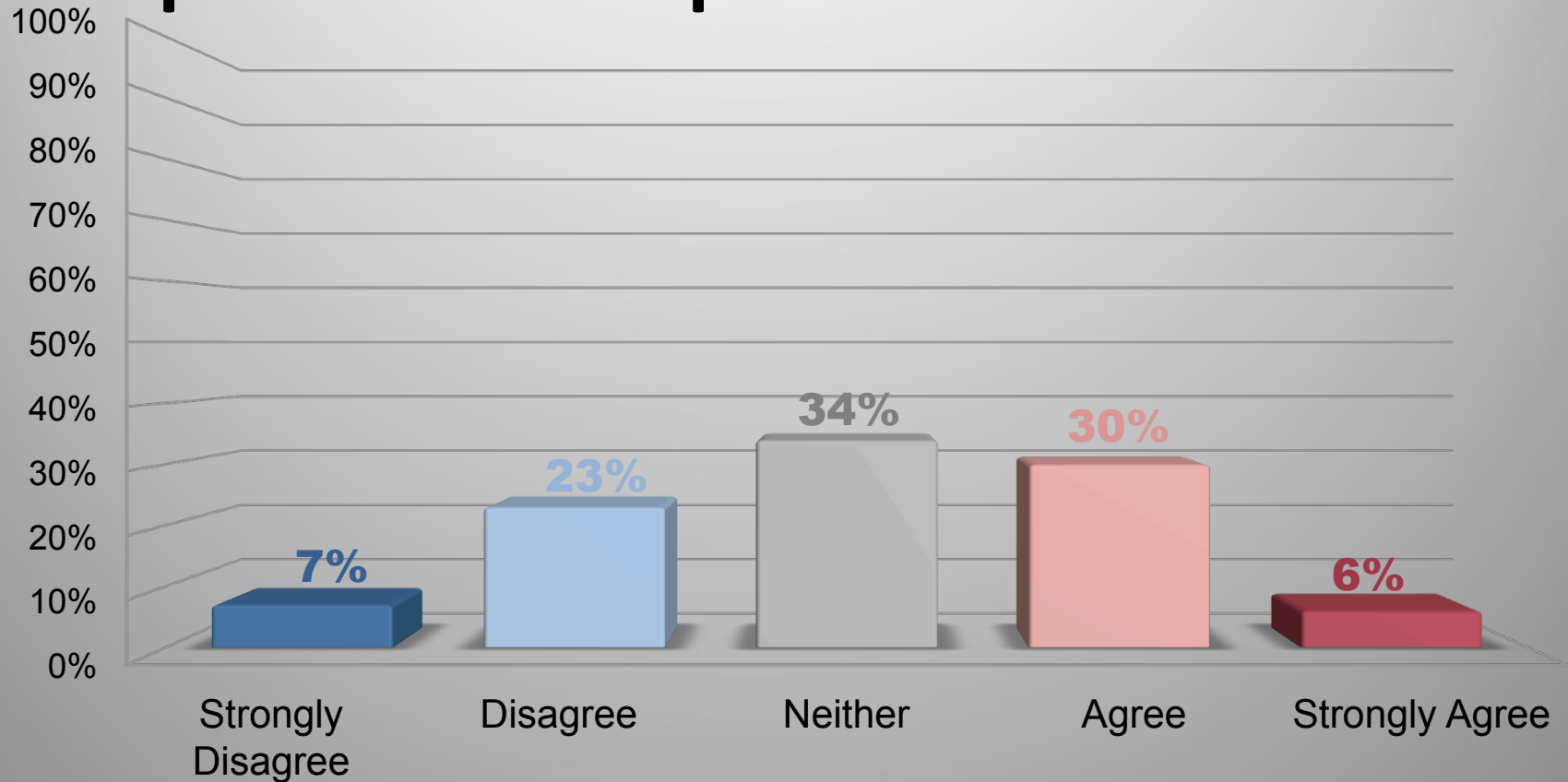
Jury Poll: A lawsuit would not be filed unless the party being sued had done something wrong.



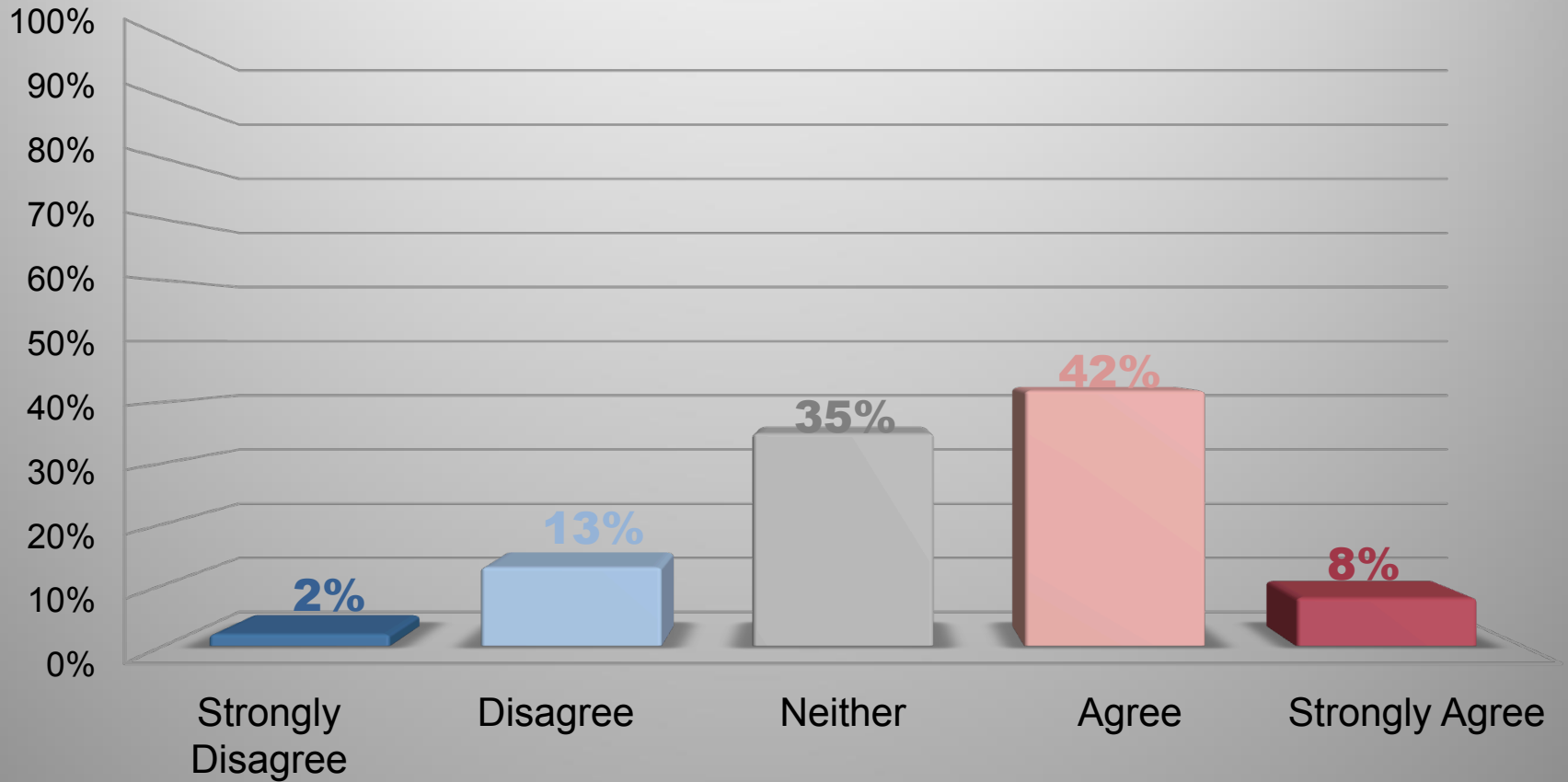
Jury Poll: The larger a company, the less I trust it.



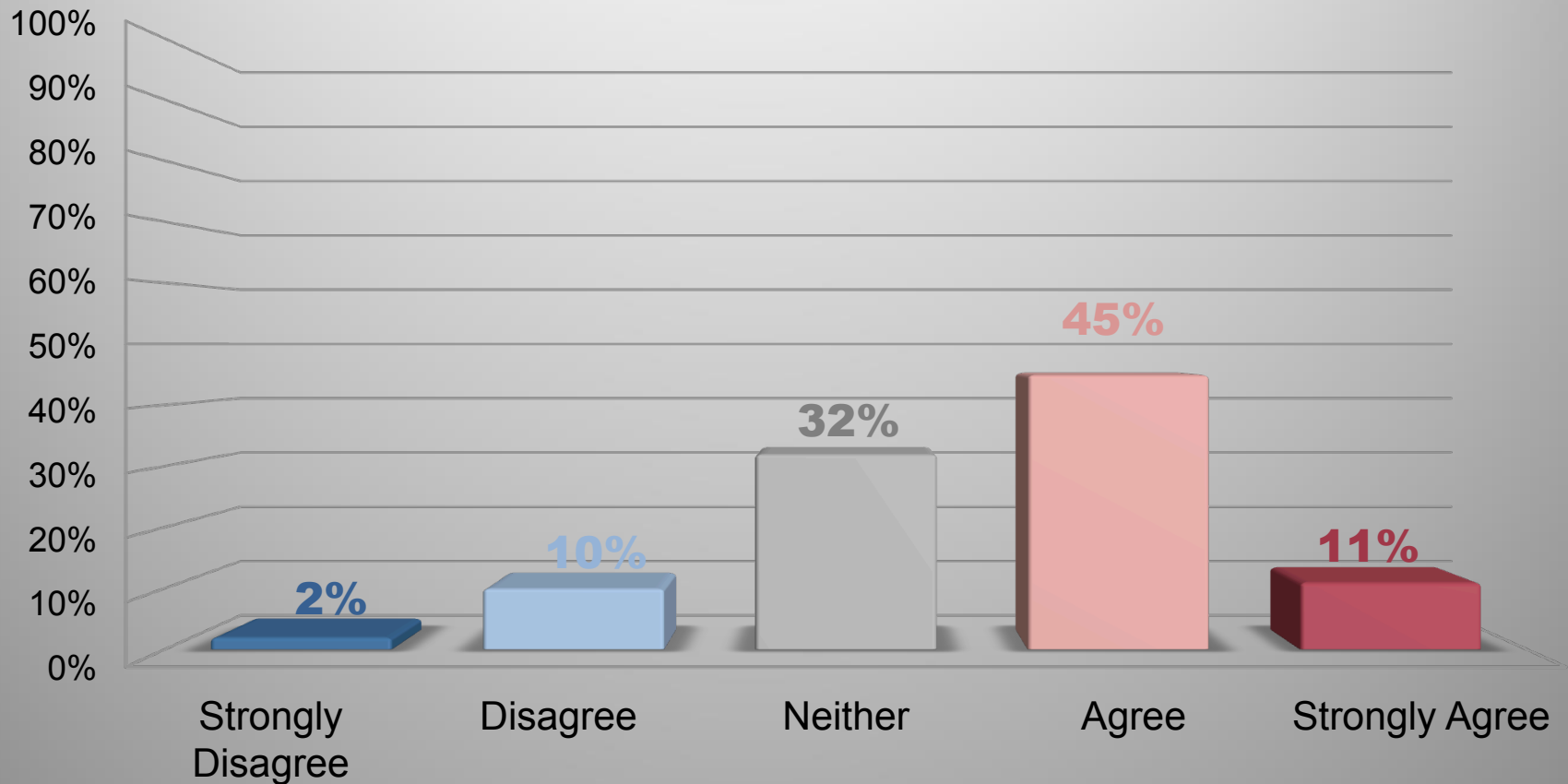
Jury Poll: An important function of juries in America is to send messages to corporation to improve their behavior.



Jury Poll: Companies will lie to win a lawsuit.



Jury Poll: Executives of companies will lie to help their company.



Jury Bias Sample Decisions

- *Thompson v. Altheimer & Gray*, 248 F.3d 621, 622 (7th Cir. 2001)
 - In employment race-discrimination case, failure to exclude juror/business owner for cause where juror admitted her status as a business owner and her experience of dealing with employees raising a wide variety of issues “just to get something” precluded her from being impartial was reversible error. (Posner, J.)

Jury Bias Sample Decisions

- *Skilling v. United States*, 561 U.S. 358, 398, 130 S. Ct. 2896, 2925, 177 L. Ed. 2d 619 (2010)
 - Appeal from the criminal trial of former Enron CEO Jeff Skilling, who claimed his conviction was tainted by a biased jury after extensive media coverage of the Enron collapse.
 - Supreme Court upheld conviction despite jurors writing things such as “Skilling probably knew he was breaking the law” and “greed on Enron’s part triggered the company’s bankruptcy and that corporate executives, driven by avarice, walk a line that stretches sometimes the legality of something.”
 - “Jurors, the trial court correctly comprehended, need not enter the box with empty heads in order to determine the facts impartially.”

Jury Bias Sample Decisions

- *Caterpillar Inc. v. Sturman Indus., Inc.*, 387 F. 3d 1358, 1373 (Fed. Cir. 2004)
 - In patent litigation, reversing district court's decision to empanel a juror who was married to an employee of the Plaintiff-corporation, because her husband's financial stake in the litigation made her biased as a matter of law.

Potential Bias Against Big Employer

- Big business =
 - Big money
 - Unlimited resources
 - Bureaucracy, but perfect communications
 - *Something* or *Someone* probably did something bad
 - Insurance for any major event
 - Unlimited legal resources (high expectation of attorneys at trial)
 - All businesses probably do some type of philanthropy (only tell me about if it is related to the facts of the case)

Strategies for Learning About Your Jury Pool

- Pre-selection considerations:
 - What is the unemployment rate in your venue – is this going to be a sympathetic jury?
 - Major employment cases in the recent past or well publicized cases; any significant industry lay-offs?
 - Is there a strong union presence?
 - Your company name in the local news

Strategies for Learning About Your Jury Pool

- Ask open-ended, single-topic questions
- Listen, listen, listen and watch
- Watch for:
 - Personal/professional experience in business
 - Punitive jurors:
 - Occupational trauma (underemployment or recent job loss)
 - Life trauma (divorce, separation, death, severe illness, financial burden)
 - General hostility
 - Control over one's destiny – external locus of control
 - High empathy

Pro-Business Trial Strategy

- Dealing with the local presence: for better, for worse
- Who is going to be the face of the company?
- Why should the jury care about this case?
 - Do those attending trial show the company also cares?
- What are the pre-litigation processes and procedures?
 - ... And then who can back this up outside the company?
- Responding to the claims, not relying on the burden of proof
- Small points with big optics:
 - Watch for overuse of acronyms or legal and business terms
 - Don't look like a big business in the courtroom (no army of lawyers/staff)

Ten Tips Learned the Hard Way

1. Tackle the Elephant in the Room-
2. Voir Dire About Litmus Test issues
3. Don't Attack too Soon-Attacking the plaintiff in voir dire generally backfires
4. Why Jury Bias is More Important than Facts
5. Making your case the exception to the rule
6. The Real Burden of Proof
7. Deal directly at trial with Plaintiff "Reptile Theory" presentations
8. Benefit of conducting mock trial or juror focus groups.
9. Make sure the company storyteller is well-prepared
10. Humanize the defendant for the jury