



## 138 Appellate Judges Can't Be Wrong

### What I Learned When I Asked Appellate Judges About Their Advocacy Preferences

Several years ago, I began investigating the attitudes of appellate judges regarding various aspects of appellate advocacy. My interest in their responses was both professional and personal: I have been litigating civil and criminal appeals for a number of years, find them extremely interesting and challenging, and am always striving to make myself better at them. I also assist other lawyers who litigate appeals less often than I do and I try to make my advice as helpful and informed as possible.

I learned several interesting lessons from the survey data I collected. While much of what I learned was confirmatory, a few things I learned were more of a surprise. In this article, I will display a selection of the data concerning the things I learned that I would characterize as

**Author's Note:** Thanks to all of the judges who took the time to respond to my survey. I hope their responses will benefit both appellate lawyers and judges, and result in briefs that are both clearer and better written and advocacy that is conducted at a higher level overall.

the most important to remember as you are writing your next appellate brief. Before moving on to the data, however, I will briefly describe the survey so that you can better understand the data.

I sent surveys to all the federal and state appellate judges included within the federal First, Second, and Tenth Circuits, which works out to 28 appellate courts in 13 states. Overall, I received responses from 138 judges, which equals a response rate of slightly over 49 percent. The survey consists of 86 questions divided into the seven sections listed below.

- ❖ The Structural Elements of Briefs
- ❖ Writing Style and Advocacy
- ❖ Use of Authority and the Record
- ❖ Typography of Briefs
- ❖ Physical Characteristics of Appellate Work Product
- ❖ Frequency of Certain Errors
- ❖ Oral Argument

The questions in each section sought to discover not only the advocacy preferences of the judges on those topics, but also to gauge the strength of their responses. To accomplish this, the questions in six of the seven sections provided the judges with a Likert scale consisting of five answer choices ranging from strongly agreeing with a question asked (indicated by a "1") to strongly disagreeing with a question asked (indicated by a "5"), with no preference in the middle (indicated by a "3"). The remaining two choices were basic agreement or disagreement (indicated by a "2" and a "4," respectively). Mean values as well as standard deviations were calculated for each individual court. The data in this article are all from these sections. A Likert scale from the survey looks like this:

**Strongly Agree 1 2 3 4 5 Strongly Disagree**

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The questions in the lone non-Likert scale section of the survey sought a different type of information. In the “Frequency of Certain Errors” section, the judges were given nine particular attributes of appellate briefs that anyone experienced with appeals would generally agree are errors. The questions also provided the judges with three categories of cases: General Civil, Criminal, and Family. The judges were then asked to estimate how often a particular error occurred in a category of case by choosing a percentage for each category: from zero to 10 percent, 11 to 20 percent, and so forth up to a category including everything over 50 percent. None of the data from the “Frequency of Certain Errors” section is represented in this article. Mean values as well as standard deviations were calculated for each individual court for all sections of the survey except the “Frequency of Certain Errors” section.

The tables below show: (1) the question asked; (2) the number of judges who responded to that question (which sometimes totals less than 138 because not every judge answered every question); (3) the mean score for that particular group of judges; and (4) the standard deviation for the responses of those particular judges. For the purposes of the survey, I have presumed that a standard deviation of less than 1.00 represents general consensus among a group of judges. Each question is followed by a brief comment and analysis.

**Table 01**

I prefer the brief to be double-spaced, though greater spacing would be acceptable.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	1.60	0.55
	Second Circuit (8)	1.88	0.64
	Tenth Circuit (8)	1.63	0.52
	Overall Federal (21)	1.71	0.56
State	First Circuit (30)	2.00	1.14
	Second Circuit (34)	2.03	0.74
	Tenth Circuit (52)	1.87	0.91
	Overall State (116)	1.97	0.94

The federal judges agreed somewhat more strongly on this statement than the state court judges did, but not by much. The federal judges also were more in agreement with each other than the state judges, though their lower standard deviation could be the result of the smaller number of judges responding. The conclusion to draw here is not to manipulate a brief’s spacing to try and make a page limit; just stick to the double-spacing or whatever the rules in your jurisdiction require.

**Table 02**

Sometimes long sentences are distracting or confusing even if they are grammatically correct.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	1.60	0.55
	Second Circuit (9)	1.78	0.83
	Tenth Circuit (8)	1.50	0.53
	Overall Federal (22)	1.64	0.66
State	First Circuit (30)	1.85	0.96
	Second Circuit (34)	2.00	0.82
	Tenth Circuit (52)	1.83	0.96
	Overall State (116)	1.88	0.92

The federal judges again agreed slightly more strongly with the statement than the state judges, but as with #1 above, it was not by a great deal. The standard deviation for both groups

remained below 1.00, reflecting a general consensus among the judges. The point to remember here is to keep your sentences short and simple whenever possible.

**Table 03**

The “statement of the case” in a brief should argue the merits in addition to stating the context.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	4.00	1.22
	Second Circuit (9)	3.78	1.09
	Tenth Circuit (8)	4.38	0.92
	Overall Federal (22)	4.05	1.05
State	First Circuit (30)	4.57	0.68
	Second Circuit (32)	3.78	1.07
	Tenth Circuit (51)	4.17	0.99
	Overall State (113)	4.15	0.98

The responses to #3 are the first example of the judges expressing disagreement. The responses of most of the state and federal judges hover within a quarter point on either side of 4.0 (“disagree” on the Likert scale used here). For the most part, the standard deviations are close to or above 1.00, indicating a lack of consensus among most of the judges, though from the raw data their disagreement seems to be over how strongly they believed that the merits should not be argued in the statement of the case section and not whether it should ever be done at all. The one exception to this are the state judges in the First Circuit. Their responses showed solid consensus (0.68) and the strongest disagreement with the proposition of any of the other groups of judges.

**Table 04**

The “statement of the facts” in a brief should provide the case’s critical facts.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	1.20	0.45
	Second Circuit (9)	1.33	0.50
	Tenth Circuit (8)	1.13	0.35
	Overall Federal (22)	1.23	0.43
State	First Circuit (30)	1.03	0.18
	Second Circuit (31)	1.16	0.58
	Tenth Circuit (52)	1.15	0.36
	Overall State (113)	1.12	0.40

The responses to #4 are a nice contrast to the responses to #3. Here, the numbers for both the federal and state judges are mostly just above 1.00 (“strongly agree” on the Likert scale) with correspondingly low standard deviations. The message here is pretty straightforward — in the fact section you should stick to your case’s critical facts.

**Table 05**

An appellant’s opening brief should state the standard of review for each issue.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	1.40	0.55
	Second Circuit (9)	1.33	0.50
	Tenth Circuit (8)	1.25	0.46
	Overall Federal (22)	1.32	0.48
State	First Circuit (30)	1.40	0.67
	Second Circuit (29)	1.79	1.05
	Tenth Circuit (52)	1.35	0.65
	Overall State (111)	1.48	0.80

The responses here of both the state and federal judges all fall between “strongly agree” (1.00 on the Likert scale) and “agree” (2.00 on the Likert scale), shading slightly to the stronger response for the most part. The standard deviations, with one exception (the state judges in the Second Circuit), indicate general consensus in varying degrees among the various judges. The responses reflect the belief of the judges that an attorney should always be sure to include the standard of review for each issue in the brief.

**Table 06**

Substantive arguments should not be made in footnotes.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	2.60	1.52
	Second Circuit (9)	1.33	0.50
	Tenth Circuit (8)	1.38	0.74
	Overall Federal (22)	1.64	1.00
State	First Circuit (30)	1.73	1.11
	Second Circuit (34)	1.18	0.39
	Tenth Circuit (51)	1.24	0.55
	Overall State (115)	1.35	0.74

Putting substantive arguments in footnotes appears to be much less of a problem in New England than elsewhere. Both the federal and state judges within the First Circuit expressed less strong agreement with the statement than appellate judges elsewhere (the federal First Circuit judges, in fact, expressed almost no preference at all). Interestingly, the standard deviation of the scores for the state and federal judges in the First Circuit were both elevated, reflecting a lack of consensus among those judges on this question. The responses of the judges from the other circuits showed a stronger belief that substantive arguments should not be made in footnotes, and the response of those judges also reflected greater consensus. The overall responses are strong enough to conclude that substantive arguments should be made in the text of your brief and should not be made in footnotes.

**Table 07**

I prefer all case citations to be in footnotes.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	4.80	0.45
	Second Circuit (9)	4.22	0.83
	Tenth Circuit (7)	4.22	0.83
	Overall Federal (21)	4.43	0.75
State	First Circuit (29)	3.72	1.36
	Second Circuit (34)	4.12	0.95
	Tenth Circuit (51)	4.08	1.18
	Overall State (114)	4.00	1.17

These responses provide a good example of negative responses from the judges. All the responses, except the state judges in the First Circuit, are between “disagree” (4.00 on the Likert scale) and “strongly disagree” (5.00 on the Likert scale). The standard deviations also reflect general consensus with the exception of the state judges in the First Circuit (scoring 1.36) and the Tenth Circuit (scoring 1.18). Interestingly, these are also the two groups of judges with the lowest mean scores. The safest course to follow, according to the data, is not to put any of your citations in footnotes.

**Table 08**

Case citations should almost always include a specific page reference.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	1.80	0.84
	Second Circuit (9)	1.67	0.71
	Tenth Circuit (8)	1.50	0.93
	Overall Federal (22)	1.64	0.79
State	First Circuit (30)	1.23	0.50
	Second Circuit (34)	1.41	0.70
	Tenth Circuit (52)	1.65	0.88
	Overall State (116)	1.47	0.76

The responses here are pretty much what you would expect. They all range from “strongly agree” (1.00 on the Likert scale) to “agree” (2.00 on the Likert scale), and the standard deviations all reflect general consensus. In short: Include specific page references whenever possible.

**Table 09**

The conclusion to an appellant’s opening brief should state precisely the remedy the appellant seeks.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	1.40	0.89
	Second Circuit (9)	1.33	0.50
	Tenth Circuit (8)	1.88	0.83
	Overall Federal (22)	1.55	0.74
State	First Circuit (30)	1.10	0.31
	Second Circuit (30)	1.33	0.71
	Tenth Circuit (52)	1.38	0.77
	Overall State (112)	1.29	0.67

As with item #8, the responses are confirmatory with generally good consensus. It also serves as a reminder to be specific about the remedy that you seek on appeal. This is something that can be difficult to remember to do after you have been living with a case for a great deal of time and take so many things about the case for granted.

**Table 10**

A “summary of the argument” section should not simply repeat the issue headings.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	1.60	0.89
	Second Circuit (9)	1.44	0.73
	Tenth Circuit (8)	1.24	0.46
	Overall Federal (22)	1.41	0.67
State	First Circuit (30)	1.38	0.58
	Second Circuit (31)	1.68	0.75
	Tenth Circuit (52)	1.69	0.76
	Overall State (113)	1.61	0.72

The admonition not to simply repeat issue headings in a “summary of the argument” section appears in many appellate procedure rule books, and the responses of the judges reflect that they are in accord with this advice. The responses range from “strongly agree” (1.00 on the Likert scale) to “agree” (2.00 on the Likert scale). The standard deviations also reflect, to one degree or another, general consensus among the judges.

**Table 11**

Whenever a set of exhibits, appendix, clerk's transcript, or reporter's transcript includes multiple volumes, I prefer the record reference in briefs to include volume numbers as well as page numbers.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	1.00	0.00
	Second Circuit (9)	2.22	0.97
	Tenth Circuit (8)	1.63	0.52
	Overall Federal (22)	1.73	0.83
State	First Circuit (30)	1.37	0.56
	Second Circuit (34)	2.03	0.90
	Tenth Circuit (52)	1.52	0.70
	Overall State (116)	1.63	0.77

The responses of the federal judges in the First Circuit reflect complete consensus; the standard deviation is 0.00. All the federal judges in the First Circuit "strongly agree" with the proposition. In contrast, the Second Circuit judges, both state and federal, responded less strongly, although both groups of judges from the Second Circuit agreed with the proposition. The federal and state judges from the Tenth Circuit landed somewhere between the judges from the First and Second Circuits. The standard deviations followed this pattern as well; the First Circuit judges showed greater consensus than the Second Circuit, and the Tenth Circuit judges fell somewhere in between. The lesson to take away here? Use volume numbers.

**Table 12**

When a brief contains a list, I like bullet points or other creative typography to set it off from regular text.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	2.00	0.71
	Second Circuit (9)	2.44	0.88
	Tenth Circuit (8)	2.13	0.83
	Overall Federal (22)	2.23	0.81
State	First Circuit (30)	2.07	0.74
	Second Circuit (34)	2.27	0.76
	Tenth Circuit (52)	2.31	0.76
	Overall State (116)	2.23	0.75

I was a bit surprised that the responses of the judges were as consistent in their agreement and showed as much consensus as they did. The responses give a green light to presenting any list in your brief as a series of bullet points or other typography as a way to make your argument easier to read and understand.

**Table 13**

I like charts, diagrams, and other visual aids, especially when they can substitute for long textual explanations.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	2.60	0.89
	Second Circuit (9)	2.44	1.13
	Tenth Circuit (8)	2.25	1.04
	Overall Federal (22)	2.41	1.01
State	First Circuit (30)	2.17	0.95
	Second Circuit (33)	2.31	1.03
	Tenth Circuit (52)	2.10	0.75
	Overall State (115)	2.16	0.88

Using charts, diagrams, or other visual aids did not

receive as strong a response or as much consensus as using bullet points or creative typography for lists. I believe, however, there is still sufficient agreement to give this a try when the appropriate situation presents itself. The somewhat variable responses could be a result of the fact that doing a chart that is genuinely helpful can be difficult (and doing one poorly that is unhelpful is very easy). A well-done and well-thought-out chart, however, can be a powerful tool in conveying your message. Anyone interested in learning more should take a look at any of the books by Prof. Edward Tufte.

**Table 14**

I prefer a party to include all exhibits in an appendix, not just those cited in the briefs.

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	3.40	1.67
	Second Circuit (8)	3.63	1.06
	Tenth Circuit (8)	3.88	0.64
	Overall Federal (21)	3.67	1.06
State	First Circuit (30)	3.47	1.33
	Second Circuit (34)	3.15	1.08
	Tenth Circuit (51)	3.90	0.98
	Overall State (115)	3.57	1.15

I was a bit surprised that the responses were not more strongly in disagreement here. But they are strong enough in the direction of "disagree" (4.00 on the Likert scale) with enough lack of consensus that it seems to me that including every exhibit in an appendix is probably not what you want to do.

**When you have finished making your points and answering questions at oral argument, sit down even if you have time remaining to speak.**

**Table 15**

I appreciate it when a party attaches documents with the brief that are important to the resolution of the appeal (e.g., statutes or the relevant portion of a contract or transcript).

Court (# of judges)		Mean Score	Std Dev
Fed	First Circuit (5)	1.60	0.89
	Second Circuit (9)	2.11	1.27
	Tenth Circuit (8)	1.25	0.46
	Overall Federal (22)	1.68	0.99
State	First Circuit (29)	1.86	1.16
	Second Circuit (34)	2.09	0.90
	Tenth Circuit (52)	2.13	0.97
	Overall State (115)	2.05	1.00

The contrast with item #14 is clear enough. Other than the elevated standard deviations by the federal Second Circuit judges and state First Circuit judges, there was good agreement and consensus that it is helpful to include the documents that truly bear on the resolution of your appeal with your brief. One note of caution would be to avoid being over-inclusive in



designating and attaching documents to a brief since adding too many documents will dilute the impact of the genuinely important ones. Also, adding too many documents will likely annoy the judges by giving them more paper to sort through.

**Table 16**

It negatively affects the credibility of an appeal when I believe the appellant failed to make a good faith effort to include all appropriate documents in the appellant's appendix or addendum.

Court (# of judges)	Mean Score	Std Dev
Fed		
First Circuit (5)	1.80	1.30
Second Circuit (9)	2.11	0.78
Tenth Circuit (8)	1.75	0.46
Overall Federal (22)	1.91	0.81
State		
First Circuit (30)	1.70	0.88
Second Circuit (34)	2.00	0.74
Tenth Circuit (51)	2.45	1.08
Overall State (115)	2.12	0.98

Although the federal First Circuit and the state Tenth Circuit judges displayed less consensus than the other groups, the mean scores all hover around "agree" (2.00 on the Likert scale). In short, do not play games with designating documents in the appendix; one way or another the court will get the document you have not included and your failure to include it will reflect poorly on you and your client.

**Table 17**

Attorneys do not sufficiently proofread briefs before filing them with the court.

Court (# of judges)	Mean Score	Std Dev
Fed		
First Circuit (5)	2.00	1.00
Second Circuit (8)	2.38	1.06
Tenth Circuit (8)	1.88	0.83
Overall Federal (21)	2.10	0.94
State		
First Circuit (30)	1.87	0.90
Second Circuit (34)	2.41	0.89
Tenth Circuit (52)	2.00	0.95
Overall State (116)	2.09	0.94

The judges generally agreed with each other that lawyers should proofread more before they file briefs with the court. The responses did not reflect a great deal of strength in the belief indicating that it is not too great a problem, but nevertheless the message is clear.

**Table 18**

I appreciate a candid response (e.g., "I don't know") when counsel does not know the answer to a question, rather than avoiding the question or answering non-responsively.

Court (# of judges)	Mean Score	Std Dev
Fed		
First Circuit (5)	1.00	0.00
Second Circuit (9)	1.11	0.33
Tenth Circuit (8)	1.00	0.00
Overall Federal (22)	1.05	0.21
State		
First Circuit (29)	1.03	0.19
Second Circuit (34)	1.24	0.43
Tenth Circuit (50)	1.12	0.33
Overall State (113)	1.13	0.34

All the mean scores reflect that the judges "strongly agree"

(1.00 on the Likert scale) and the standard deviations are all near or at zero indicating strong consensus. The message could not be much clearer from the data. If you do not know an answer at oral argument, say you do not know, offer to send the court a post-argument letter with an accurate answer, and move on to other points.

**Table 19**

I appreciate it when counsel ceases argument upon making all planned and responsive points even though his or her available time has not yet expired.

Court (# of judges)	Mean Score	Std Dev
Fed		
First Circuit (5)	1.00	0.00
Second Circuit (9)	1.22	0.44
Tenth Circuit (8)	1.13	0.35
Overall Federal (22)	1.14	0.35
State		
First Circuit (29)	1.05	0.20
Second Circuit (34)	1.21	0.41
Tenth Circuit (50)	1.30	0.54
Overall State (113)	1.21	0.45

The answers are similar to those in #18 and the message is similarly clear. When you have finished making your points and answering questions at oral argument, sit down even if you have time remaining to speak.

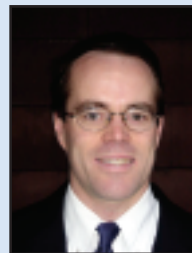
For anyone interested in seeing more results from my survey, take a look at these law review articles:

❖ *If You Have Seen One Circuit, Have You Seen Them All?: A Comparison of the Advocacy Preferences in Three Federal Circuit Courts of Appeal*, 83 Denv. U. L. Rev. 893 (2006).

❖ *What's the Difference? A Comparison of the Advocacy Preferences of State and Federal Appellate Judges*, 7 J. App. Prac. & Process 335 (2005). ■

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