

Make Your Writing More Appealing

Part 1

BY DAVID LEWIS

This is the first in a series of articles exploring the results of a study I conducted on the advocacy preferences of state and federal appellate court judges. The lessons gleaned from the study are particularly timely given the increasing need for attorneys to prepare and file electronic briefs and other pleadings in a manner and format that will give their clients the best possible chance of success.

Several years ago, I began to investigate the attitudes of appellate judges by sending them surveys inquiring about their preferences regarding various aspects of appellate advocacy. My interest in their preferences was both professional and personal: I have been litigating civil and criminal appeals in state and federal court for over 20 years. I find the work extremely interesting and challenging, and I am always striving to make myself better at it. I also act as a consultant for lawyers who don't litigate appeals as often as I do, and I wanted to conduct research that would make my advice as helpful and informed as possible.

This article provides the data results for the study's key findings regarding brief writing. It begins by briefly describing the surveys and how to interpret a graph of the results so that you can better understand and apply the data when writing your next appellate (or trial) brief. It also summarizes some of the most important takeaways from the study. While much of what I learned was confirmatory, a few things surprised me.

But before we begin, I would like to express my thanks to all of the extremely busy judges who took a few minutes out of their day to read through and answer the questions. I hope their responses and these graphs will benefit the lawyers who study them and, with briefs that are clearer and better written, eventually the judges themselves.

Methodology of the Survey

Over the course of several years, I sent surveys to all federal and state appellate judges within the federal First, Second, Third, Seventh, and Tenth Circuits. The courts surveyed comprise 39 appellate courts in 18 states. (New Jersey did not give me approval to survey its judges, which is why the numbers are slightly "off.") I received responses from 192 judges, a response rate of slightly under 43%. This is a relatively high response rate for a survey that was submitted "cold" (i.e., I didn't prepare anyone ahead of time).

The survey contained 86 questions divided into seven sections:

1. The Structural Elements of Briefs
2. Use of Authority and the Record
3. Writing Style and Advocacy
4. Typography of Briefs
5. Physical Characteristics of Appellate Work Product
6. Frequency of Certain Errors
7. Oral Argument

The questions in each section sought not only to discover the advocacy preferences of the judges on those topics, but also to gauge the strength of their preferences. To accomplish this, the questions in six of the seven sections gave the judges a Likert scale consisting of five answer choices ranging from "Strongly Agree" (indicated by a "1") to "Strongly Disagree" (indicated by a "5"). (The other method will be explored in

a future article.) The Likert scale used in most of the sections of the survey looked like this:

Strongly Agree 1 2 3 4 5 Strongly Disagree

Mean (average) values and standard deviations were calculated for each individual court. I calculated standard deviations to have a quantity that indicated the extent of deviation for a group as a whole. This allowed me to gauge how much a group of judges disagreed with one another. The graphs in this article are focused on various aspects of legal writing and were selected from the first three sections of the survey:

1. The Structural Elements of Briefs
2. Use of Authority and the Record
3. Writing Style and Advocacy

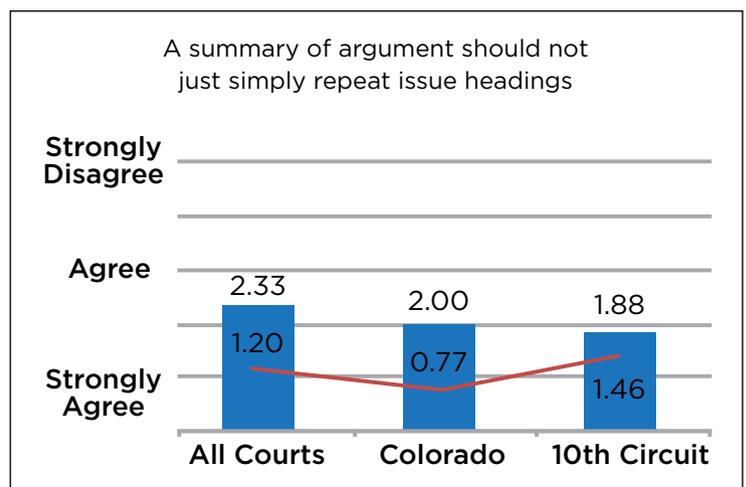
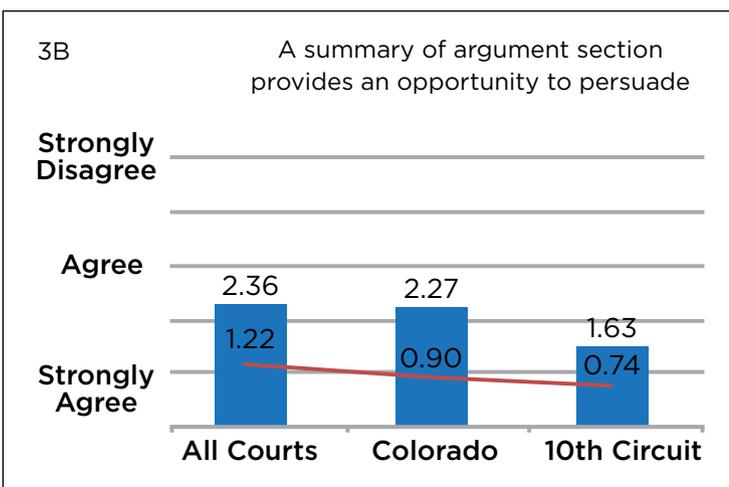
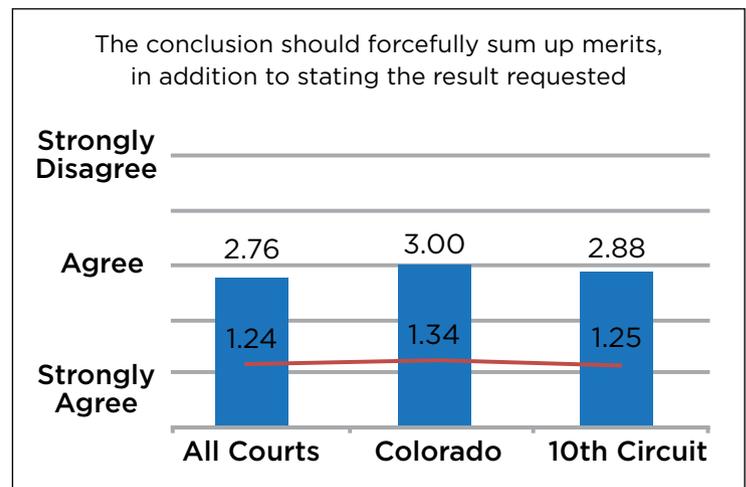
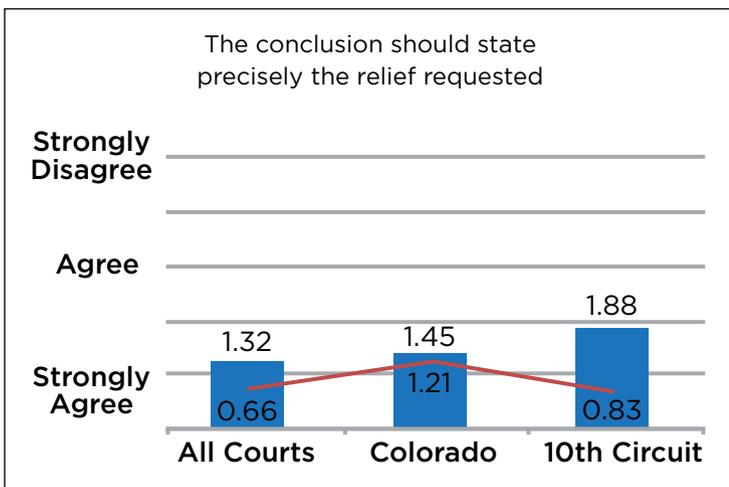
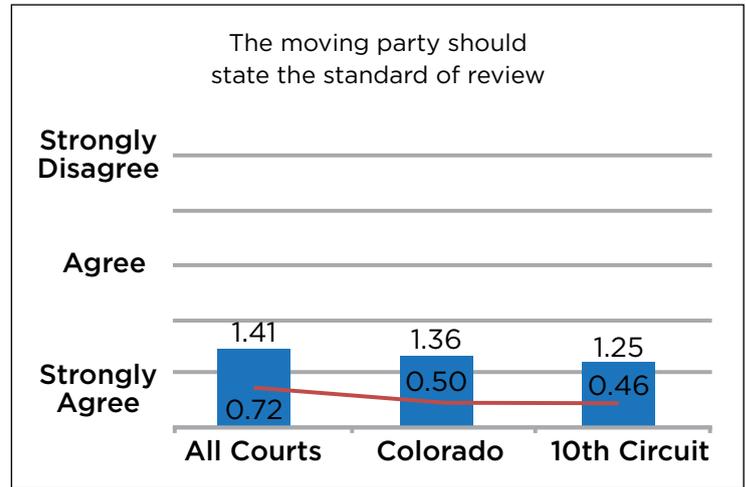
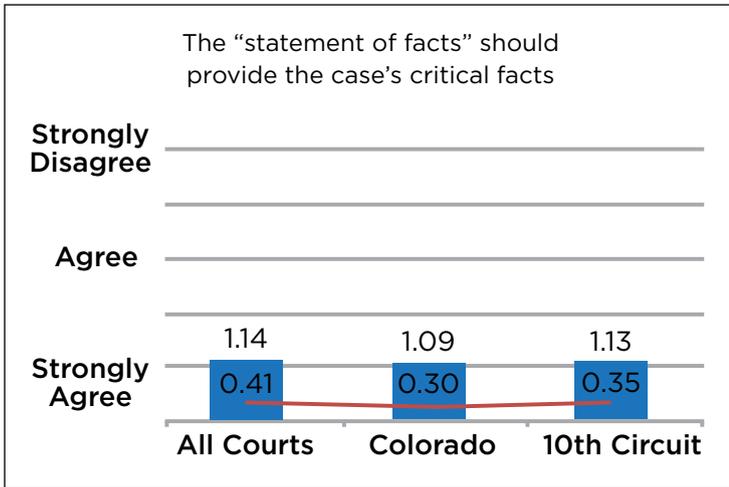
Understanding the Graphs

The data presented in this article is organized into three sets of responses: "All courts," "Colorado," and "10th Circuit." "All courts" contains the results from every judge in the survey. "Colorado" contains responses from only Colorado Supreme Court justices and Colorado Court of Appeals' judges. And "10th Circuit" includes responses from only Tenth Circuit judges.

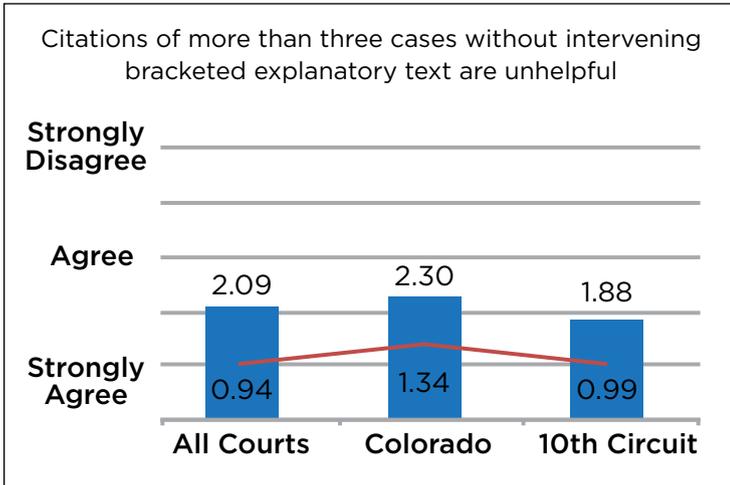
The number at the top of each column is the mean value of all data within that set of responses. In the first graph, for example, the mean value for "All courts" is 1.14. The important thing to remember with the mean value columns in the graphs is that the closer the number is to 5 (i.e., the bigger the bars), the more a group of judges did *not* agree with the proposition in the question. A lawyer once told me to think of them as "anger" bars—a column grows the more a judge disagrees with the question and their blood pressure rises.

The number next to the red line is the standard deviation for the set of responses. The standard deviations are connected by a red line so that the varying levels of agreement within a set of responses can be more easily compared. 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.

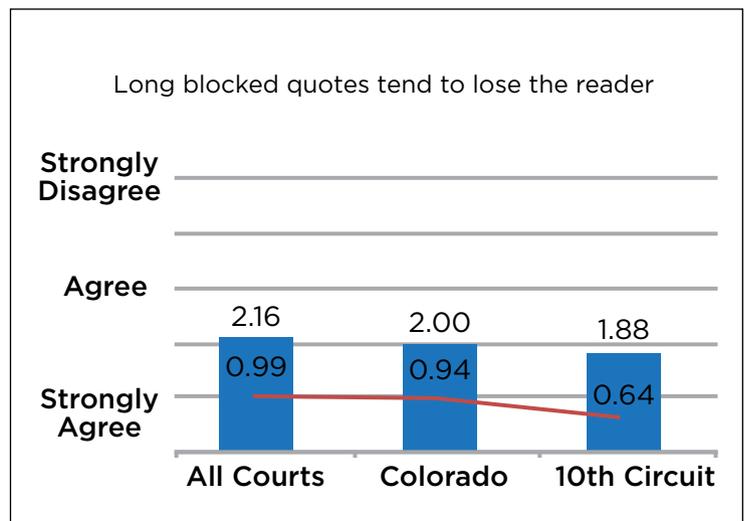
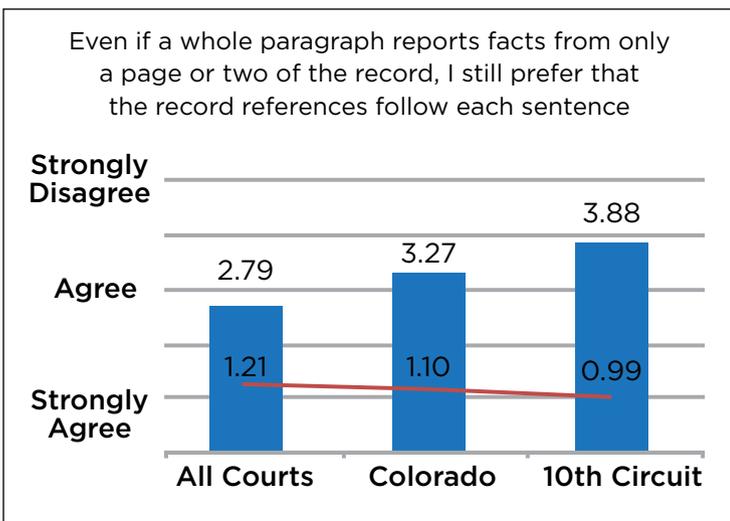
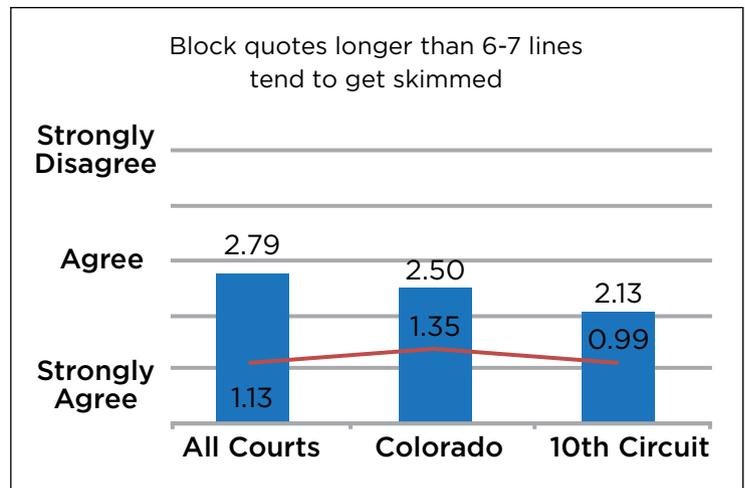
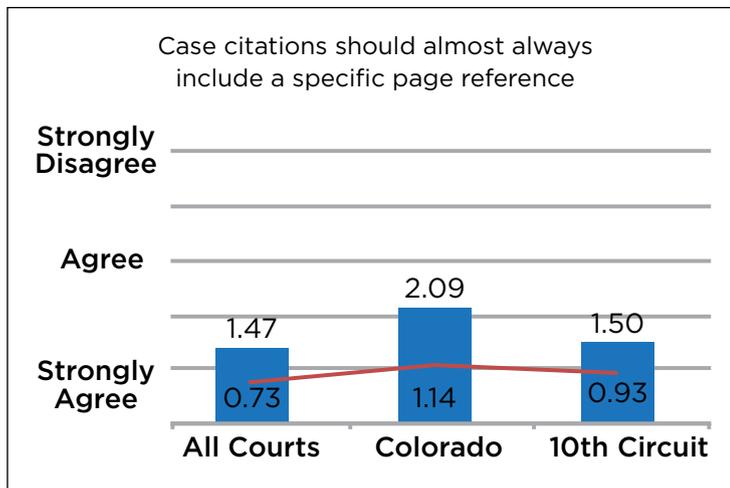
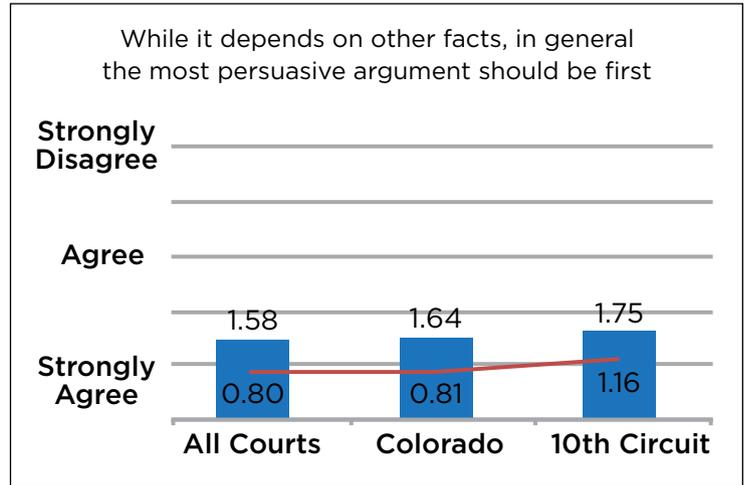
1. The Structural Elements of Briefs



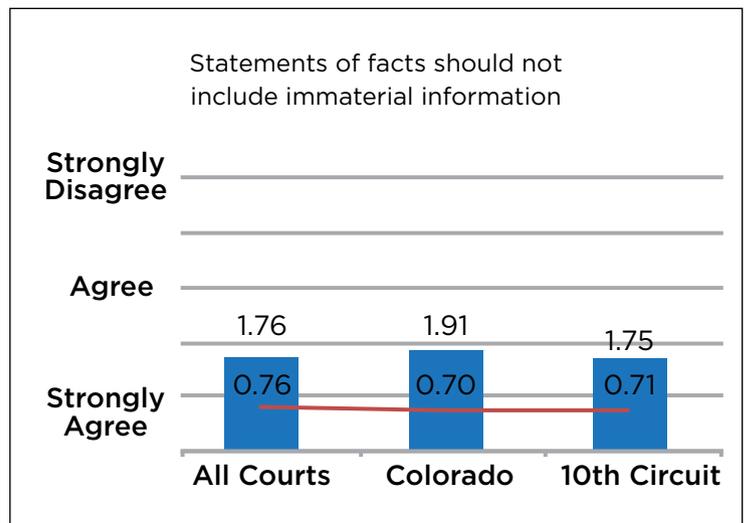
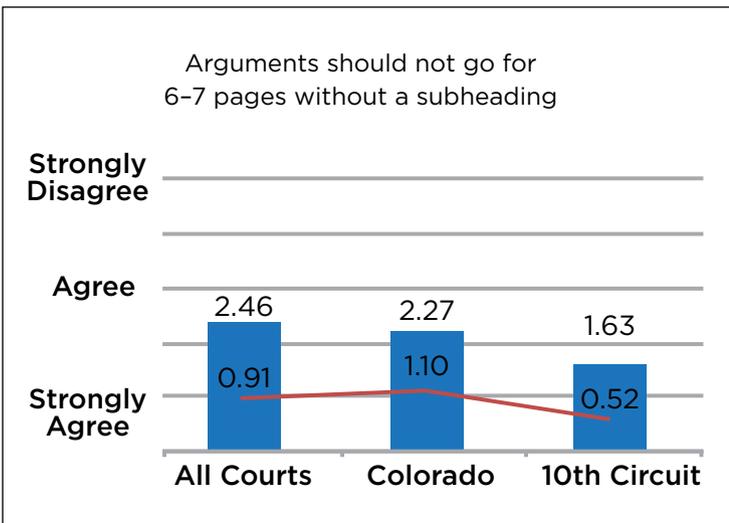
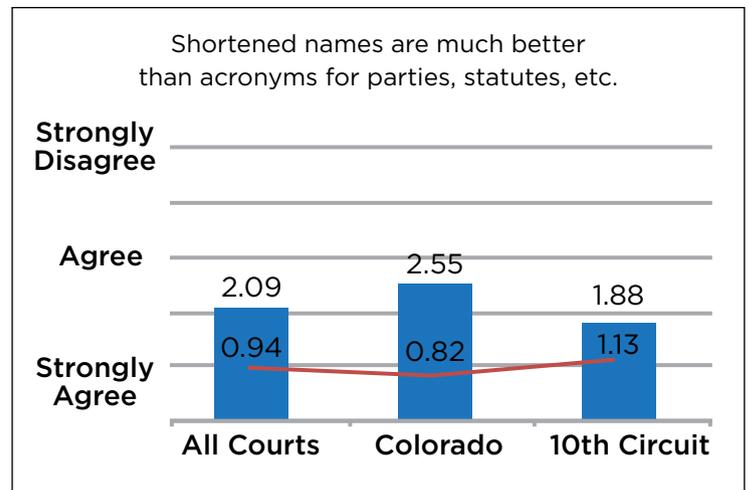
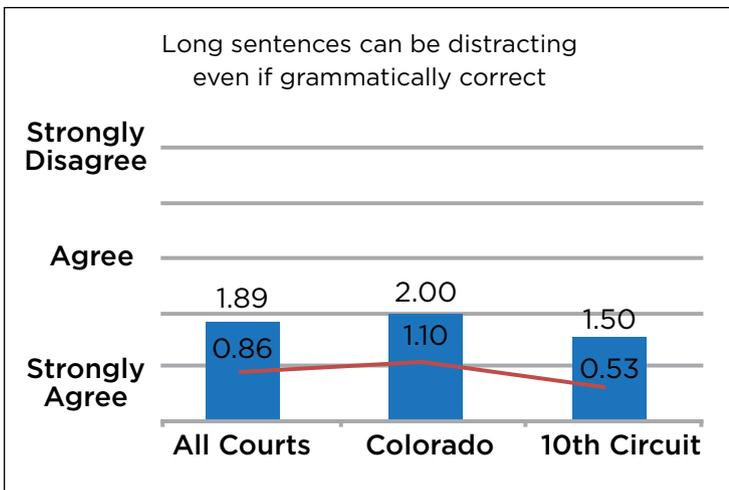
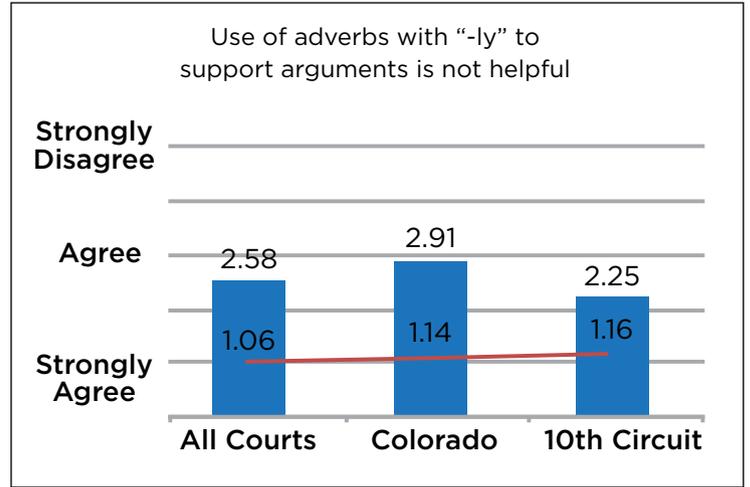
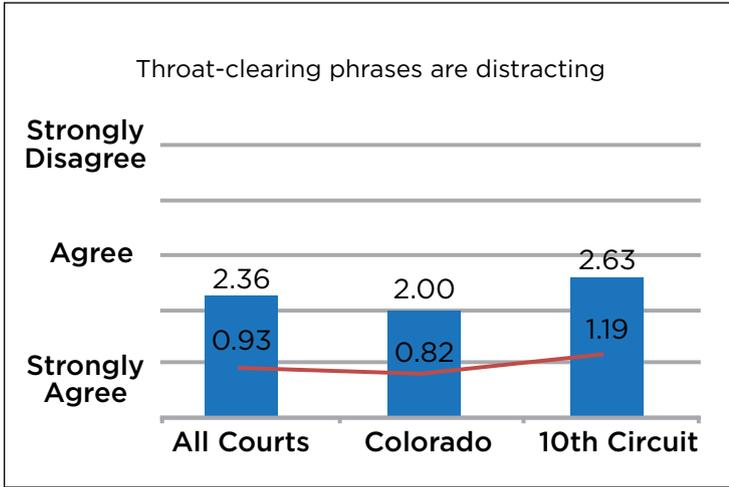
2. Use of Authority and the Record



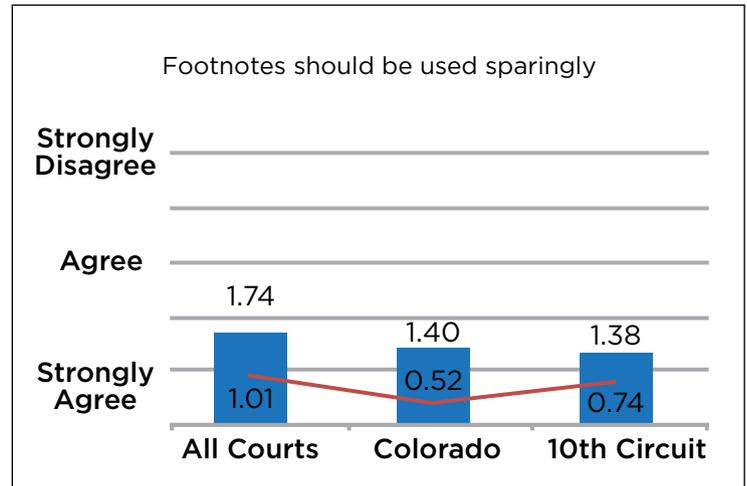
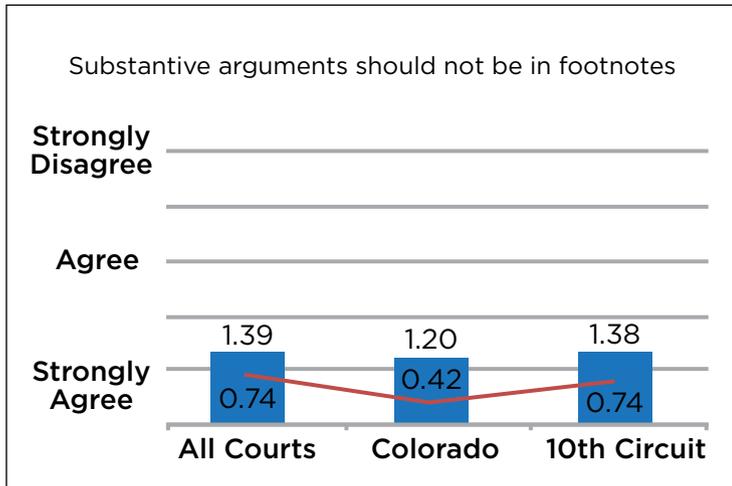
3. Writing Style and Advocacy



3. Writing Style and Advocacy (cont.)



3. Writing Style and Advocacy (cont.)



KEY TAKEAWAYS

In general, it's a good idea to do the following:

- Sum up the merits of your case in your conclusion.
- Don't waste the summary of argument section by just repeating the issue headings. This section provides a separate opportunity to persuade the court.
- Include parentheticals with case citations. Three or more case citations without some explanation isn't helpful.
- Include a citation to the record for each sentence in the statement of facts.
- Consider shortening block quotes that are longer than 6 or 7 lines because these tend to lose the reader.
- Avoid "throat-clearing" phrases such as "it is important to note that" or "it is respectfully submitted that."
- Avoid words that end in "-ly."
- Include subheadings if an argument is longer than 6 or 7 pages.

In addition, you should *definitely* do the following:

- Include all critical facts in the statement of facts, and omit facts that don't matter to your case.
- Be up front with the standard of review, and include it in your brief.
- Be clear about what you are asking the court to do in your conclusion.
- Include a specific page reference with case citations.
- Put your strongest argument first.
- Keep sentences short.
- Use shortened names for parties rather than acronyms in most cases.
- Use footnotes sparingly—and don't put arguments in them.

Stay tuned for Part 2 of the series, which will discuss the type and frequency of certain errors that attorneys make on appeal. The survey results provide an overview of the things you should avoid doing in your next appeal. ^{CL}



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Correction Notice: "Tips for Meeting Page and Word Limits" by Ben Cohen (Oct. 2017)

Between the time this article was written and the time it went to press, the Colorado Court of Appeals changed its record citation format policies. The Court's new record citation format is available at [www.courts.state.co.us/userfiles/file/Court_Probation/01st_Judicial_District/Record%20Citation%20Policy%208-4-17%20\(2\).pdf](http://www.courts.state.co.us/userfiles/file/Court_Probation/01st_Judicial_District/Record%20Citation%20Policy%208-4-17%20(2).pdf).