

Make Your Writing More Appealing

Part 2

BY DAVID LEWIS

This four-part article series summarizes the results of surveys sent to state and federal appellate court judges to evaluate their advocacy preferences. This part 2 discusses the types of errors commonly found in briefs so that attorneys can avoid them in their writing.

As discussed in part 1 of this series,¹ several years ago I began sending surveys to state and federal appellate court judges around the country to learn more about their attitudes regarding various aspects of appellate advocacy. My interest was both professional and personal: I have been litigating civil and criminal appeals in state and federal courts for over 20 years, love what I do, and 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 wanted to conduct research that would make my advice as helpful and informed as possible.

While the survey results received from the judges confirmed some generally accepted wisdom, the results also taught some surprising lessons. This article focuses on how often appellate judges believe advocates make certain mistakes in briefs, dividing those results into civil, criminal, and family law cases. It begins with a brief description of the survey, followed by an explanation of how to read the charts in this article.

Survey Methodology

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. 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.

This article presents the survey results for the "Frequency of Certain Errors" section. In this section, the judges were provided a list of common errors. Those errors ranged from substantive mistakes (e.g., misstating the record) to technical issues (e.g., improper punc-

tuation). Judges were asked what percentage of the time they believe the error appeared in briefs. To make the data more precise, judges were asked to rate the frequency of the errors in three types of briefs: general civil, criminal, and family law. The scale used in this section of the survey is shown below.

The charts in this article include the responses from all the appellate judges surveyed. The federal appellate judges did not respond to the "family" category because they do not see family law cases.

Reading the Charts

In the six charts that follow, blue bars represent briefs in general civil cases, dark grey bars represent briefs in criminal cases, and light grey bars represent briefs in family law cases. The y-axis (vertical axis) represents the raw number of judges who provided each answer. For example, a bar that reaches the 50 mark would mean that 50 judges provided a particular answer about criminal briefs. The x-axis (horizontal axis) shows the percentage of briefs the judges believed contained a particular error.

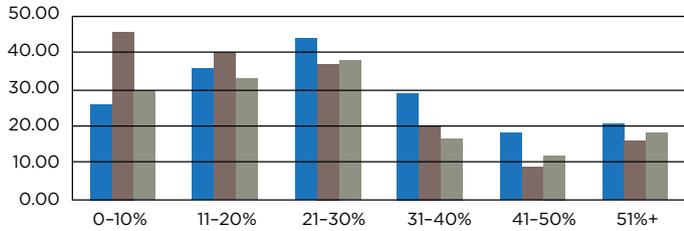
For example, in the first chart, 46 judges (or 24% of the 192 judges surveyed) believe that 0-10% of the time criminal briefs (the dark grey bar) are too long in relation to the issues presented. Note that if bars are generally high on the left side of the chart, it suggests most judges believe a specific issue occurs relatively infrequently. If there are some tall bars toward the right side of the chart, it suggests that a significant number of judges believe a problem is prevalent.

Because these charts present so much data, I've included a section that analyzes the data and provides general observations about what can be learned from the information.

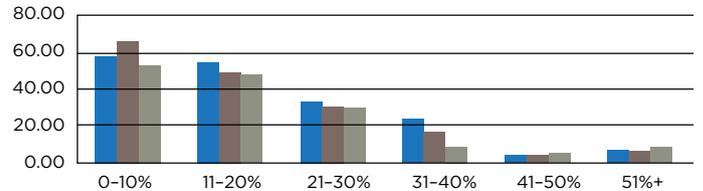
General Civil	0-10%	11-20%	21-30%	31-40%	41-50%	51+%
Criminal	0-10%	11-20%	21-30%	31-40%	41-50%	51+%
Family	0-10%	11-20%	21-30%	31-40%	41-50%	51+%

Frequency of Certain Errors

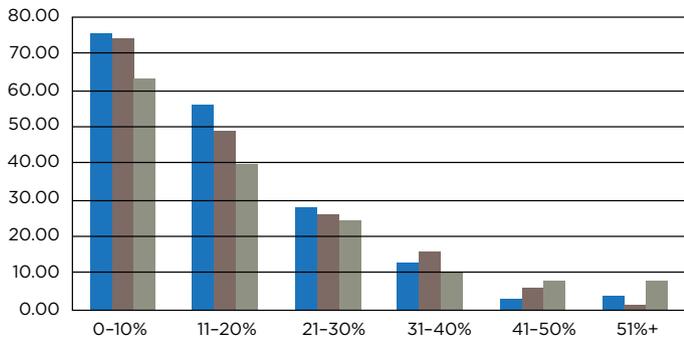
1. Briefs are too long in relation to complexity of issues



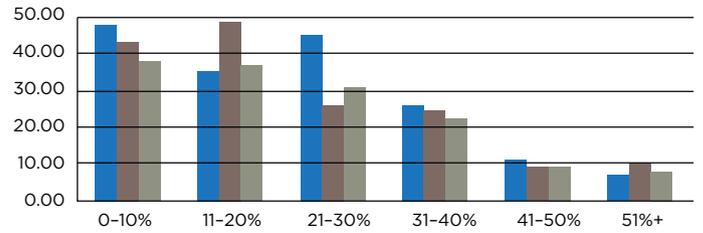
2. Case authority doesn't stand for proposition asserted



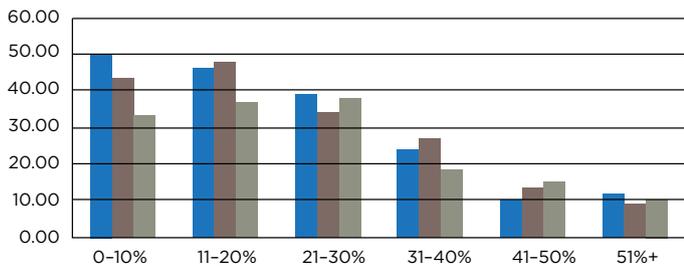
3. Briefs misstate the record



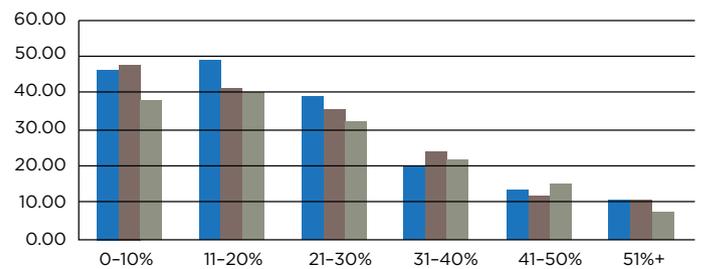
4. The statement of facts section violates the standard of review



5. Briefs are not sufficiently edited or proofread



6. Briefs contain improper grammar, punctuation, or use of apostrophes



- General Civil
- Criminal
- Family

Analysis and Observations

Chart 1. Overlong Briefs

In this chart, although the tallest bars are on the left, a quick look at the data reveals there are also some relatively tall bars on the right side, meaning that a good number of judges believe briefs are too long in a high percentage of total briefs.

Looking more specifically at the data, we see just how prevalent the judges believe the problem is. About 10% of the judges surveyed believe that civil briefs (21 judges), criminal briefs (16 judges), and family law briefs (18 judges) are too long in relation to the issues over 50% of the time. Put another way, about 10% of judges believe that over one-half of the briefs they read are too long in relation to the issues presented.

The data results present a concerning picture

for civil briefs—especially because these are largely written by attorneys receiving a fee from a private client. Approximately two-thirds of the judges (112 judges, or about 58% of the total) believe that civil briefs are too long in relation to the issues presented 21% of the time or more, with over 20 judges reporting that more than 51% of all civil briefs are too long.

Chart 2. Incorrect Case Authority

This chart delivers largely good news. The vast majority of judges believe that misusing case authority is rare, as evidenced by the left-skew of the bars. For example, the largest group of judges (far-left bars) believe that only 0–10% misstate or misuse case authority, meaning the largest group of judges believe at least 90% of briefs get this right.

And the trend continues: a full 60% of the 192 judges surveyed (114 for civil briefs, 116

for criminal briefs, and 103 for family briefs) believe that case authority is inaccurate in less than 20% of the briefs they read.

The other end of the spectrum, though, is concerning: about 5% of the judges believe that case authority is incorrect *somewhere between 41% and over 51% of the time.*

Chart 3. Misstatement of the Record

I find this chart the most surprising. Why? Because between staff attorneys, law clerks, and the judges themselves, appellate courts have a lot of people reviewing materials who will discover something as obvious as a misstatement of the record. In fact, it's a virtual certainty that a mistake like this will be discovered.

Despite this, 50% of the judges surveyed believe this error happens in civil briefs somewhere between 11–40% of the time. The numbers in criminal briefs are only slightly better: 51% of the judges surveyed believe it happens more than 10% of the time. Don't let this happen to you: be extremely careful when citing to the record.

Chart 4. Statement of Facts Violates Standard of Review

What I find most revealing in this chart is that almost 50 judges believe that the statement of facts violates the standard of review 11–20% of the time in criminal briefs (49 judges) and 21–30% of the time in civil briefs (45 judges).

About 23% of the judges surveyed believe that in civil and criminal briefs (44 judges for each) the statement of facts violates the standard of review somewhere from 31% of the time to over 51% of the time. Approximately the same number of judges believe that it happens 10% or less of the time.

Chart 5. Insufficient Proofreading

The judges' perceptions of civil, criminal, and family briefs are pretty much the same for each level of error:

- About 25% of the judges surveyed believe that 10% or less of the briefs they read have been insufficiently proofread.
- Another 25% of the judges surveyed believe that 11–20% of the briefs they read have been insufficiently proofread.
- The other 50% of the judges surveyed

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believe that briefs are insufficiently proofread 21% of the time or more, with a healthy number saying this occurs over 41% of the time.

Chart 6. Improper Grammar and Punctuation

The analysis for this chart is similar to the previous one:

- About 25% of the judges surveyed believe the error happens 0–10% of the time.
- Another 25% believe it happens 11–20% of the time.
- The remaining 50% of the judges believe it happens 21% or more of the time.

Note, however, that approximately 10% of the judges surveyed believe the error happens more than 40% of the time in each type of brief. 



David Lewis has been litigating appeals in state and federal court for over 20 years. He earned his law degree at the University of Denver Sturm College of Law and is licensed to practice law in Massachusetts and Colorado. His practice focuses on appellate litigation as well as helping lawyers, businesses, and organizations make their briefs and motions more readable and dynamic—www.appellateconsultant.com and facebook.com/appellateconsultant.

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KEY TAKEAWAYS

1 A fair number of briefs are too long given the complexity of issues presented. In a world where appellate judges are likely reading briefs in electronic format on a tablet, the overlong brief is asking to get skimmed.

2 For the most part, attorneys are doing a good job of using authority that stands for the proposition asserted and not misstating the record. But judges believe this continues to happen, if only in a minority of briefs. This is a particularly dangerous practice given the strong likelihood that someone at an appeals court will catch the error.

3 One of the rules in appellate law is to write to the standard of review. The survey results indicate that attorneys should be doing a better job of this.

4 The results indicate that while a solid percentage of attorneys proofread and comply with the rules of grammar, a high percentage of briefs still contain typos and grammatical errors. Although these types of mistakes are not central to legal arguments, we know they affect how the reader perceives the brief and the attorney who created it.

NEXT UP

Stay tuned for part 3 of the series, which will discuss the advocacy preferences of the judges—and the strength of those preferences—at oral argument.

NOTE

1. Lewis, “Make Your Writing More Appealing—Part 1,” 46 *Colorado Lawyer* 14 (Nov. 2017).



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