2005

What's the Difference? Comparing the Advocacy Preferences of State and Federal Appellate Judges

David Lewis
WHAT'S THE DIFFERENCE? COMPARING THE ADVOCACY PREFERENCES OF STATE AND FEDERAL APPELLATE JUDGES

David Lewis*

I. INTRODUCTION

Over the past several years, I have investigated the attitudes of appellate judges regarding various components of lawyers' advocacy on appeal. This article reports on the current results of my survey, which consisted of eighty-six questions divided into seven sections. I mailed this survey to all of the state and federal appellate judges in New England, New York, and the Mountain West in the hope of determining whether state and federal judges look at different aspects of appellate practice differently. I received responses from 138 judges, which amounts to over forty-nine percent of those who received the survey.

Some earlier results of the survey were presented last year in the Journal of Appellate Practice and Process. But that article only reflected some of the responses, and it included none from the judges in the Mountain West. The graphs shown in this article, in comparison, present the responses to every question in the survey from every judge who responded.

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1. This survey, substantially based on one conducted several years ago in California, was conducted under the auspices of the American Bar Association's Council of Appellate Lawyers. See Charles A. Bird & Webster Burke Kinnard, Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court, 4 J. App. Prac. & Process 141 (2002).

II. METHODOLOGY

Each of the seven sections of the survey covered a different topic relevant to appellate advocacy:

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

The questions in each section sought to discover not only the advocacy preferences of the judges on those topics, but also the strength of their feelings. To accomplish this, the questions in six of the sections provided the judges with a Likert scale consisting of five ranked answer choices ranging from strongly agreeing with a question asked (indicated by the judge’s choosing “1”) to strongly disagreeing with a question asked (indicated by the judge’s choosing “5”), with no preference in the middle (indicated by the judge’s choosing “3”). The remaining two choices were basic agreement or disagreement (indicated by the judge’s choosing “2” or “4,” respectively). Mean values as well as standard deviations were calculated for each individual federal and state court, and for all the courts, federal and state, within each of the First, Second, and Tenth Circuits.

The questions in the lone non-Likert scale part of the survey, however, sought a different type of information. In Section Six (“Frequency of Certain Errors”), the judges were given nine particular attributes of appellate briefs that appellate judges, research attorneys, staff attorneys, and advocates would all generally agree are errors. The questions then provided the judges with three categories of cases: General Civil, Criminal, and Family. The judges were then asked to estimate how often the particular error occurred in that category of case by choosing a percentage for each category of case: from zero to ten percent, eleven to twenty percent, twenty-one to thirty percent, thirty-one to forty percent, forty-one to fifty percent, or over fifty percent.
III. UNDERSTANDING THE GRAPHS

The survey results presented here remain in their original sections, and they are in order, so the article shows the results in the same context in which the judges saw the questions. The graphs in all of the sections other than Section VI (which was measured using a different scale), show how strongly the judges agreed or disagreed with the premise underlying a particular question. In each graph, the column height reflects the mean response of the judges.

The graphs generated from judges’ answers to Section Six of the Survey (shown in Section IX of this paper) are somewhat different. They indicate through percentages how often an error appeared to the judges to be occurring for each type of case. The graphs in this Section are also not broken out to reflect any state and federal differences; for this Section—but only for this Section—all of the judges’ responses are presented together.

I have not broken any of the graphs down by region, state, or individual court. The graphs reflect the combined data for all of the federal judges surveyed (from the United States Courts of Appeals for the First, Second, and Tenth Circuits) in one column, and the combined data for all of the state judges surveyed (from Colorado, Connecticut, Kansas, Maine, Massachusetts, New Hampshire, New Mexico, New York, Oklahoma, Rhode Island, Utah, Vermont, and Wyoming) in the other column. While the total number of responses to each question varies slightly because some judges did not answer every question, in general the graphs reflect the advocacy preferences of about twenty-two federal appellate judges and 116 state appellate judges. I believe that the graphs generally speak for themselves, so I do not provide any comments about individual graphs.

IV. SECTION ONE GRAPHS

The graphs in this Section were generated from the judges’ answers to the questions in Section One of the Survey, which addressed the structural elements of briefs:
Question #1: It helps me when the table of contents of a brief tells the story of the case, rather than just being a guide to where I can find certain subjects.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #2: The "statement of the case" in a brief should provide the procedural context of the appeal.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #3: The "statement of the case" and "statement of the facts" in a brief should identify all the parties in the appeal.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges
State Appellate Judges

Question #4: The "statement of the facts" in a brief should provide the case's critical facts.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges
State Appellate Judges
Question #5: The "statement of the case" in a brief should identify the case's dispositive issues.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #6: The "statement of the case" in a brief should argue the merits in addition to stating the context.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #7: An appellant's opening brief should state the standard of review for each issue.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges  State Appellate Judges

Question #8: If the respondent's brief does not state the standard of review, I assume the appellant has it right, unless I know otherwise.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges  State Appellate Judges
Question #9: The conclusion to an appellant’s opening brief should state precisely the remedy the appellant seeks.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #10: The conclusion to a respondent’s brief should state precisely the outcome the respondent seeks.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #11: The conclusion to a brief should forcefully sum up the merits, in addition to stating the result requested.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #12: A long brief should have a separate section titled "summary of argument" in which the lawyer summarizes the legal arguments made in the brief.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #13: A "summary of the argument" section provides an opportunity to persuade me, different and separate from a well-written table of contents or statement of the case and facts.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #14: A "summary of the argument" should not simply repeat the issue headings.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
This graph completes my display of material from Section One of the Judicial Survey, as question fifteen (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges’ answers to the questions asked in Section Two of the Judicial Survey, which focused on a different topic.

V. SECTION TWO GRAPHS

The graphs in this Section were generated from the judges’ answers to the questions in Section Two of the Survey, which addressed writing style and advocacy:
**Question #16:** While it depends on the specific case, in general I believe a brief should be organized with its most persuasive arguments first.

<table>
<thead>
<tr>
<th>Position</th>
<th>Federal Appellate Judges</th>
<th>State Appellate Judges</th>
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<tr>
<td>Strongly Disagree</td>
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<tr>
<td>No Preference</td>
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<tr>
<td>Strongly Agree</td>
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**Question #17:** While it depends on the specific case, in general I believe a brief should be organized with its arguments placed chronologically.

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<th>State Appellate Judges</th>
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<tr>
<td>No Preference</td>
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<tr>
<td>Strongly Agree</td>
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</table>
Question #18: I tend to skim blocked quotations longer than 6 or 7 lines when I read briefs.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #19: Long blocked quotations tend to lose the reader; I prefer short quotations or paraphrased text.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #20: It bothers me when a brief or writ petition uses legalese and old pleading language.

Strongly Disagree

No Preference

Strongly Agree
Federal Appellate Judges State Appellate Judges

Question #21: It bothers me when a brief uses the passive voice frequently.

Strongly Disagree

No Preference

Strongly Agree
Federal Appellate Judges State Appellate Judges
Question #22: It bothers me when a brief uses throat-clearing phrases (e.g., "it is important to note that", "it is respectfully submitted that").

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #23: It bothers me when a lawyer writes in first person plural (e.g., "First, we note that the Supreme Court reserved this issue").

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #24: It bothers me when a brief uses adverbs like “clearly” and “obviously” to support arguments.

- Strongly Disagree
- No Preference
- Strongly Agree

Federal Appellate Judges
State Appellate Judges

Question #25: Sometimes long sentences are distracting or confusing even if they are grammatically correct.

- Strongly Disagree
- No Preference
- Strongly Agree

Federal Appellate Judges
State Appellate Judges
Question #26: Lawyers should try to use shortened names rather than acronyms as abbreviations for corporate parties, statutes, and the like.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #27: I notice, and it bothers me, when arguments longer than six or seven pages lack subheadings.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #28: I'm bothered when statements of facts or of the case give me immaterial information, like dates of events and filings that don't matter.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #29: Substantive arguments should not be made in footnotes.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #30: Footnotes should be used sparingly.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #31: I prefer all case citations to be in footnotes.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
This graph completes my display of material from Section Two of the Judicial Survey, as question 32 (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges' answers to the questions asked in Section Three of the Judicial Survey, which focused on a different topic.

VI. SECTION THREE GRAPHS

The graphs in this Section were generated from the judges' answers to the questions in Section Three of the Survey, which addressed the use of authority and the record:
Question #33: String citations with short bracketed quotations or summaries are a useful way to deal with multiple similar authorities that all support the author's point.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges State Appellate Judges

Question #34: Citations of more than three cases without intervening bracketed explanatory text are unhelpful.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges State Appellate Judges
Question #35: Case citations should almost always include a specific page reference.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #36: I am suspicious about whether the authority stands for the proposition asserted when a case citation lacks a specific page reference.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #37: I prefer that record references follow each sentence rather than come at the end of a paragraph.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #38: Even if a whole paragraph reports facts from only a page or two of the record, I still prefer that record references follow each sentence.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
This graph completes my display of material from Section Three of the Judicial Survey, as question 39 (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges’ answers to the questions asked in Section Four of the Judicial Survey, which focused on a different topic.

**VII. SECTION FOUR GRAPHS**

The graphs in this Section were generated from the judges’ answers to the questions in Section Four of the Survey, which addressed typography of briefs:
Question #40: Briefs can be produced with "ragged right" justification, which looks more like typing than printing, or "full justification," which makes every line except the last line of a paragraph run to the right margin. I prefer ragged right.

- Strongly Disagree
- No Preference
- Strongly Agree

Federal Appellate Judges  State Appellate Judges

Question #41: It affects the credibility of a brief when the lawyer has failed to apply any recognized style manual.

- Strongly Disagree
- No Preference
- Strongly Agree

Federal Appellate Judges  State Appellate Judges
Question #42: I do not have a preference for which style manual an attorney should use (e.g., Bluebook or ALWD Citation Manual) as long as the method used is consistent throughout the brief and allows me to quickly and accurately identify cited authority.

<table>
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<tr>
<th>Strongly Disagree</th>
<th>No Preference</th>
<th>Strongly Agree</th>
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<td>Federal Appellate Judges</td>
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Question #43: I prefer italics to underlining for case citations.

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<th>Strongly Disagree</th>
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<tr>
<td>Federal Appellate Judges</td>
<td>State Appellate Judges</td>
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</table>
Question #44: I prefer italics to underlining for emphasis, Latin words, and the like.

- Strongly Disagree
- No Preference
- Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #45: I prefer that, other than what a style manual or blue book requires, no words in the text of a brief be emphasized by italics, underlining, bold or CAPITALIZATION.

- Strongly Disagree
- No Preference
- Strongly Agree

Federal Appellate Judges

State Appellate Judges
### Question #46: I prefer titles of major parts of the brief (e.g. STATEMENT OF THE CASE) to be in all capitals.

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<tr>
<th>Strongly Disagree</th>
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<th>Strongly Agree</th>
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<td>Federal Appellate Judges</td>
<td>State Appellate Judges</td>
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### Question #47: I prefer main headings of the legal argument (e.g., THE JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE) to be in all capitals.

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<th>Strongly Disagree</th>
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<td>Federal Appellate Judges</td>
<td>State Appellate Judges</td>
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Question #48: I find that main headings of more than one line in all capitals are difficult to read.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges  
State Appellate Judges

Question #49: I prefer that the names of parties appear in all capitals throughout the brief.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges  
State Appellate Judges
Question #50: Some lawyers use a traditional outline structure, indenting each tier of headings an additional five spaces. Others use flush-left headings at all levels. I prefer flush-left.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #51: Briefs are easier to read when headings are boldface but not underlined.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #52: I prefer the brief to be in double spacing, though greater spacing would be acceptable.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #53: I prefer main headings of a legal argument in single line spacing.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #54: When a brief contains a list, I like bullet points or other creative typography to set it off from regular text.

Strongly Disagree

No Preference

Strongly Agree
Federal Appellate Judges
State Appellate Judges

Question #55: I like charts, diagrams, and other visual aids, especially when they can substitute for long textual explanations.

Strongly Disagree

No Preference

Strongly Agree
Federal Appellate Judges
State Appellate Judges
This graph completes my display of material from Section Four of the Judicial Survey, as Question 56 (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges’ answers to the questions asked in Section Five of the Judicial Survey, which focused on a different topic.

**VIII. SECTION FIVE GRAPHS**

The graphs in this Section were generated from the judges’ answers to the questions in Section Five of the Survey, which addressed the physical characteristics of appellate work product:
Question #57: I prefer comb binding.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #58: I prefer velo binding.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #59: I prefer staples and tape binding.

Strongly Disagree
No Preference
Strongly Agree

Federal Appellate Judges
State Appellate Judges

Question #60: I prefer spiral binding.

Strongly Disagree
No Preference
Strongly Agree

Federal Appellate Judges
State Appellate Judges
Question #61: Attorneys do not sufficiently proofread briefs before filing them with the court.

- Strongly Disagree
- No Preference
- Strongly Agree

Strongly Agree: Federal Appellate Judges

Strongly Agree: State Appellate Judges

Question #62: Attorneys often provide illegible copies in the appendix.

- Strongly Disagree
- No Preference
- Strongly Agree

Strongly Agree: Federal Appellate Judges

Strongly Agree: State Appellate Judges
Question #63: It negatively affects the credibility of an appeal when I believe that the appellant failed to make a good faith effort to include all appropriate documents in the appellant's appendix or addendum.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #64: I prefer a party to include all exhibits in an appendix, not just those cited in the briefs.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #65: 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).

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

This graph completes my display of material from Section Five of the Judicial Survey, as Question 65 (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges’ answers to the questions asked in Section Six of the Judicial Survey, which focused on a different topic.

IX. Section Six Graphs

The graphs in this Section were generated from the judges’ answers to the questions in Section Six of the Survey, which addressed the frequency of certain errors:
Question #66: Briefs are unusually long in relation to the complexity of the issues.

Question #67: Case authority does not stand for the proposition asserted.

Question #68: Briefs misstate the record.
Question #69: Statements of facts violate the standard of review (e.g., in a substantial evidence appeal, appellant presents the side of conflicting evidence favorable to appellant).

Question #70: Briefs make personal attacks on opposing counsel.

Question #71: Briefs make personal attacks on the trial court.
Question #72: Briefs are not sufficiently edited or proofread.

Question #73: Briefs contain improper grammar, punctuation, or use of apostrophes.

Question #74: Volumes of the record do not stay bound.
This graph completes my display of material from Section Six of the Judicial Survey, as Question 74 (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges’ answers to the questions asked in Section Seven of the Judicial Survey, which focused on a different topic.

X. SECTION SEVEN GRAPHS

The graphs in this Section were generated from the judges’ answers to the questions in Section Seven of the Survey, which addressed oral argument:

![Graph showing responses to Question #75: I often make up my mind on important points during oral argument.](image)
Question #76: I often find oral argument helpful in shaping a good decision, even if it doesn’t affect the disposition.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #77: I expect counsel to strictly abide by their time estimates unless the court indicates counsel may exceed that time.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #78: I appreciate it when counsel ceases argument upon making all planned and responsive necessary points even though his or her available time has not yet expired.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #79: 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.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #80: I believe argument is more effective when it is narrowly focused as opposed to attempting to address all issues raised in the briefs.

[Options: Strongly Disagree, No Preference, Strongly Agree]

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<th>State Appellate Judges</th>
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<td>Strongly Agree</td>
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Question #81: It bothers me when counsel uses oral argument simply to reiterate those points raised in the briefs.

[Options: Strongly Disagree, No Preference, Strongly Agree]

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<th>State Appellate Judges</th>
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<td>Strongly Agree</td>
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Question #82: The traditional opening is a good way to start when I'm on the panel.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #83: An informal opening is a good way to start when I'm on the panel.

Strongly Disagree

No Preference

Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #84: A direct launch into your argument is a good way to start when I'm on the panel.

- Strongly Disagree
- No Preference
- Strongly Agree

Federal Appellate Judges

State Appellate Judges

Question #85: The phrase "your honors" grates on my ears.

- Strongly Disagree
- No Preference
- Strongly Agree

Federal Appellate Judges

State Appellate Judges
Question #86: When responding to my questions, I prefer counsel to refer to me by name (e.g., "Justice Doe").

<table>
<thead>
<tr>
<th>Strongly Disagree</th>
<th>No Preference</th>
<th>Strongly Agree</th>
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<td>Federal Appellate Judges</td>
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This graph completes my display of material from Section Seven of the Judicial Survey, as question 86 (answers to which are graphed immediately above) was the final question in that Section. Because there were no further questions in the Survey, this graph also completes the display portion of this article.

XI. CONCLUSION

I conclude by expressing my thanks to all of the judges who took the time to respond to the survey. They are all extremely busy people who took a few minutes out of their day to read through and answer these questions. I hope their responses and these graphs will benefit appellate lawyers in some way, and that the time spent by those judges will provide them with the benefit of briefs that are both more clear and better written, and advocacy that is conducted at a higher level overall.