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Common Knowledge about Appellate Briefs: True or False?

David Lewis

COMMON KNOWLEDGE ABOUT APPELLATE BRIEFS: TRUE OR FALSE?

David Lewis*

I. INTRODUCTION

We receive advice on an endless number of topics from a wide-range of sources throughout our lives and our careers: our parents, siblings, and other relatives when we are young, professors and tutors in college, and associates, partners and other peers after we begin to practice law. And that does not even account for the innumerable articles, books and other media sources we read, see or hear over the years that tell us how others have solved problems and what is the "best" way to do just about anything.

Whether we acknowledge it or not, there is an obvious caveat included with any advice we receive. Is it any good? Is it reliable? And if we believe that it is, why is that so? Are we simply accepting it on faith, based in whole or in part on its source? Or are we simply trusting that the common wisdom on a particular topic is correct?

There is no shortage of advice and common knowledge when it comes to appellate brief writing, as anyone who practices appeals knows. Seemingly everyone has an opinion on how best to write a brief to persuade appellate judges to rule in your client's favor.

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The problem with appellate brief writing advice, however, is the same as with advice on any other topic: How do you know if it is any good? If it is not coming directly from appellate judges, why should we follow it? John W. Davis captured the essence of this problem in the oft-repeated passage from his famous article of some sixty-five years ago: "[W]ho would listen to a fisherman's weary discourse on fly-casting . . . if the fish himself could be induced to give his views on the most effective methods of approach."[1]

Because I agree with Davis, I surveyed appellate judges in New England and New York to determine whether the accepted wisdom was true for appeals in general and for appellate brief writing in particular.[2] I have set out some of my findings in this article in an attempt to help the appellate brief writer decide when the common knowledge about appellate brief writing is true, when it is false, and when the answer may lie somewhere in between.

II. METHODOLOGY

I mailed a survey that consisted of eighty-six questions divided into seven separate sections to all of the state and federal appellate judges in New England and New York. As this list demonstrates, each section covered a different topic relevant to appellate practice, with a focus on brief writing:

1. The Structural Elements of Briefs;

2. Writing Style and Advocacy;

3. Use of Authority and the Record;

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1. John W. Davis, *The Argument of an Appeal*, 3 J. App. Prac. & Process 745, 745 (2001), reprinting 26 A.B.A.J. 895 (Dec. 1940).

2. The appellate judicial survey was conducted under the auspices of the American Bar Association's Council of Appellate Lawyers, and was substantially based on an earlier survey conducted in California. *See* Charles A. Bird and Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. App. Prac. & Process 141 (2002).

4. Typography of Briefs;

5. Physical Characteristics of Appellate Work Product;

6. Frequency of Certain Errors; and

7. Oral Argument.[3]

The questions in each section sought to discover not only the advocacy preferences of the judges on those topics, but the strength of their convictions on these issues as well. To accomplish this goal, the questions in six of the sections provided the judges with Likert scales consisting of five answer choices ranging from strongly agreeing with a question asked (1) to strongly disagreeing with a question asked (5) with no preference in the middle (3). The remaining two choices (2 and 4) were intended to express essential, but not strong, agreement or disagreement with the question's premise.

The questions in the one non-Likert scale part of the survey, however, sought a different type of information from the judges. In the "Frequency of Certain Errors" section, the judges were given nine particular attributes of appellate briefs that judges, research attorneys, staff attorneys, and attorneys appearing before appellate courts would all be likely to regard as errors. The questions then provided three categories of cases—General Civil, Criminal, and Family—and asked the judges to estimate how often each error occurred in that category of case. In this section, the judges could choose from among six choices for each type of case: 0-10%, 11-20%, 21-30%, 31-40%, 41-50%, and 51%+.

To reach the results reported here, mean values as well as standard deviations were calculated for each individual federal and state court, for all the courts within the federal First and Second Circuits and for every court in New England and New York. The survey achieved a 55.7% overall response rate in New England and a 38.6% overall response rate in New York.

3. Because this article focuses only on appellate briefs, I do not report here on the judges' responses to the survey questions about oral argument.

III. UNDERSTANDING THE GRAPHS

The survey results presented here are clustered into four groups. Each group has two types of graphs: a single graph from the "Frequency of Errors" section and one or more graphs from the other six sections that indicate the strength of the judges' agreement or disagreement with a particular question.

The graphs in each group are related by topic. The first graph shows how often the judges believed an error was occurring for each type of case. The remaining graph or graphs in the group then show my attempt to determine both how strongly the judges felt about that error and to suggest possible solutions to the problem.

The mean values and standard deviations are also shown on these graphs. The standard deviation reflects the level of consensus among the judges. A higher standard deviation means that the judges expressed answers that varied more with each other on that question than they did on a question with a lower standard deviation. For the sake of this article, I have made the assumption that a standard deviation of less than 1.0 indicates consensus.

I have not broken the graphs down by region, state, or individual court for this article. The graphs instead reflect the combined data of all of the judges who responded. 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 eighty state and federal appellate judges.

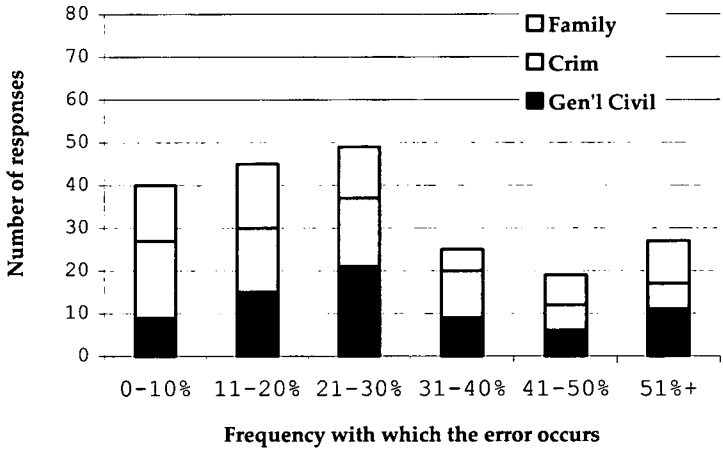
I provide brief comments with each group of graphs discussing and explaining the topic or issue that they address. I then include a short conclusion in each section intended to summarize what the information in that group means to the appellate brief writer. Because I believe that the graphs generally speak for themselves, however, I do not provide many comments about individual graphs.

IV. THE SURVEY RESULTS

A. Common Knowledge Point 1: Briefs Are Not Brief Enough.

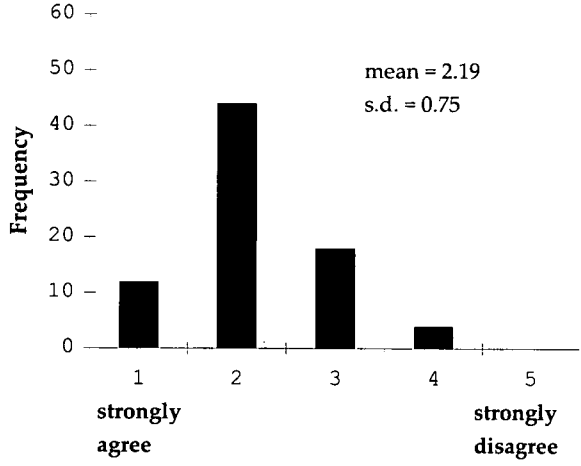
Persuasion, we are told in numerous different ways, is an art of quality, not quantity. Yet the long-standing complaint that appellate briefs are too long remains persistent despite increasingly strict page and word limits. The graphs in this group address the problem of the overlong brief and offer a couple of possible solutions.

Graph A-1: Briefs are unusually long in relation to the complexity of the issues



Graph A-1 indicates that the judges appear to believe that civil brief writers are the most frequent offenders of writing briefs that are too long and needlessly complex (NB the 21-30% category), with a particularly interesting upward tick in responses for both civil and family law cases in the 51%+ category. Criminal cases are not immune from the problem either, of course, but the bulk of the responses for criminal cases appear to be at the lower end of the spectrum.

Graph A-2: I like bullet points or other creative typography to set lists off from regular text



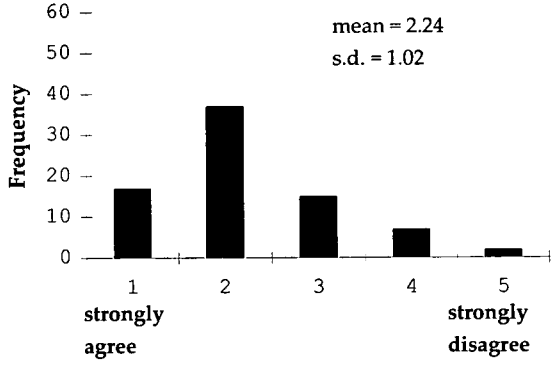
Two possible solutions to shorten and clarify a brief that may be too long are suggested by the Graphs A-2 and A-3. Every attorney writing a brief should consider placing more information in lists—bullet-pointed or otherwise—and replacing long explanations with charts or diagrams. This article itself offers examples of the efficacy of both solutions.

The numbered list at the beginning of the article describing the survey's different sections provides that information quickly and concisely in an easy-to-digest format. Writing them out in sequence in a paragraph of text would not have worked nearly as well.

Graphs A-2 and A-3 demonstrate another possible solution to the problem of the overlong brief. Using only text to describe all of the survey data used in this article would have taken page after page of sentences discussing lifeless, dry numbers. Turning the information into graphs, however, reduces the article's

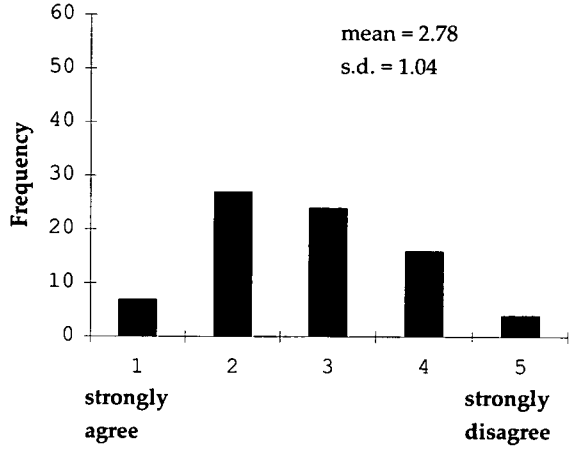
length—less for people to read—and conveys the information more clearly—easier for people to understand.

Graph A-3: I like charts and diagrams, especially when they can replace long explanations

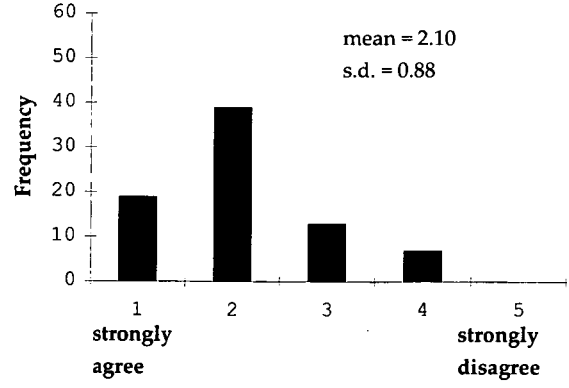


Graphs A-4 and A-5 address another problem that presents itself in many appeals: the long block quotation. The mean value in Graph A-4 indicates that the judges tended to have no preference on the question, but that they had a slight inclination to skim a long, block quote. The next graph supports the obvious solution. To avoid the possibility of a judge skimming and potentially missing something important to your case, replace the longer quote with a shorter or paraphrased quotation that highlights only the most important parts of your argument.

Graph A-4: I tend to skim blocked quotations longer than six or seven lines when I read briefs



Graph A-5: I prefer short quotations or paraphrased text to long blocked quotations



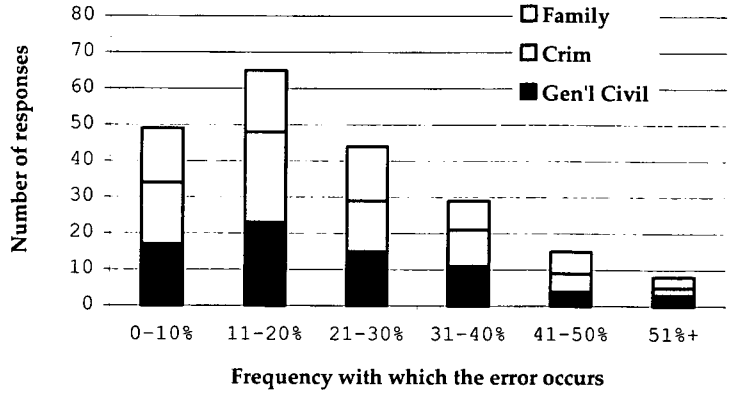
B. Common Knowledge Point 2: Briefs Are Not Proofread Carefully Enough.

Most attorneys proofread briefs repeatedly as they are being written in an attempt to catch every typo and eliminate every misspelling. A fast-approaching filing deadline, however, exerts great pressure to complete a brief. While most, if not all, attorneys would like to proofread a brief a few more times before it gets filed, a deadline is, after all, a deadline: There comes a time when the attorney just has to let go. As someone told me years ago, you cannot let the perfect be the enemy of the finished.

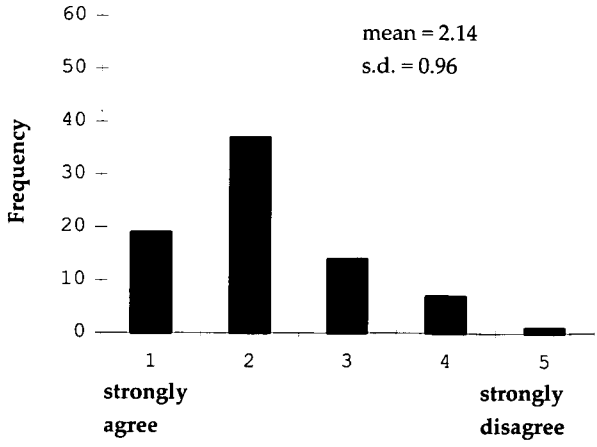
The graphs in this group are straightforward and show results that most appellate judges and attorneys would probably expect. As is evident from Graph B-1, many judges believe that an appreciable number of briefs are insufficiently proofread before they are filed with their courts. I found it interesting that there seems to be no distinction between the three different types of cases when it comes to proofreading: The judges appear to believe that the attorneys preparing all three types do it equally poorly (or equally well, depending on how you look at it).

How strong are the judges' beliefs on this point? Again, no real surprises. Graph B-2 shows solid agreement with the question throughout the group of judges, and indicates that many judges strongly agreed. The mean value reinforces the general, overall agreement among appellate judges that too many attorneys file briefs without sufficiently proofreading them. The only solution seems to be to budget more time up front to allow for extra proofing and to try to get a colleague to read the brief over with fresh eyes before it gets copied, bound, and filed.

Graph B-1: Briefs are not sufficiently edited or proofread



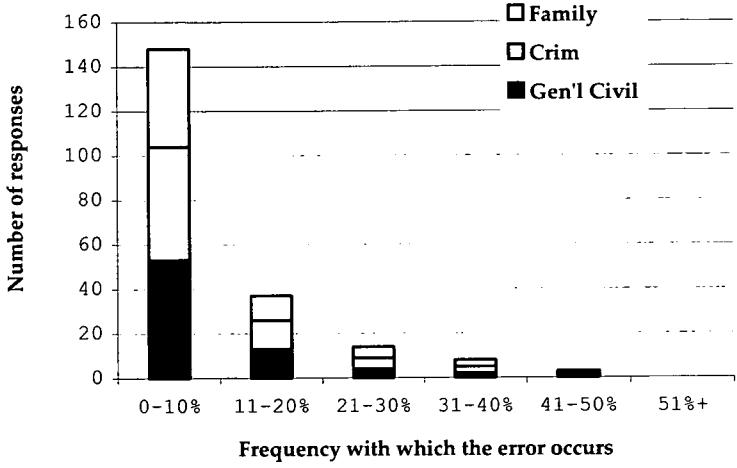
Graph B-2: Attorneys do not sufficiently proofread briefs before filing them with the court



C. Common Knowledge Point 3: Briefs Exhibit Proper Style.

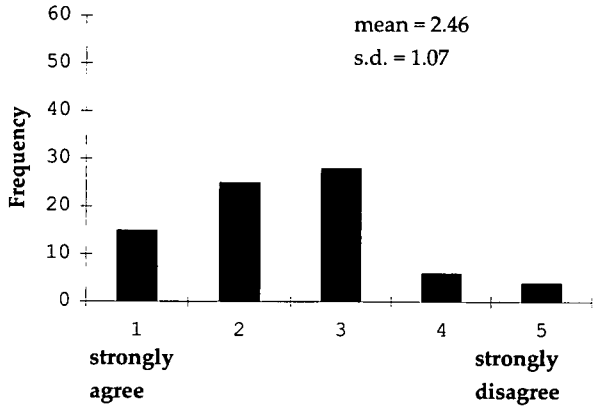
As Graph C-1 shows, the judges emphatically confirmed the common wisdom on this topic: that brief writers do in fact use correct grammar and punctuation. The overwhelming number of responses for all three types of cases is in the lowest category of frequency of occurrences (0-10%).

Graph C-1: Briefs contain improper grammar, punctuation, or use of apostrophes

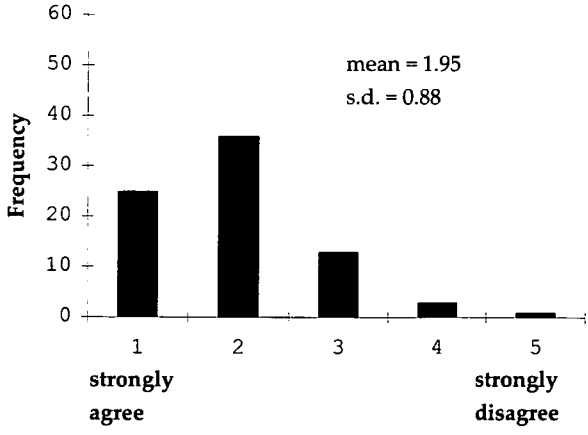


The remaining two graphs in this section illustrate an interesting finding. As Graph C-2 shows, the judges' responses indicate that they express only mild agreement—and come close to expressing no preference at all with a mean value of 2.46—with the question of whether it affects the brief writer's credibility if the writer does not follow a recognized style manual. It is impossible to ignore, however, that almost no judges disagreed with the question, strongly or otherwise, and that many judges agreed or even strongly agreed that a failure to use a recognized style manual does affect the credibility of the brief writer.

Graph C-2: It affects credibility when the lawyer has failed to apply any recognized style manual



Graph C-3: I do not have a preference for a style manual as long as the method used is consistent



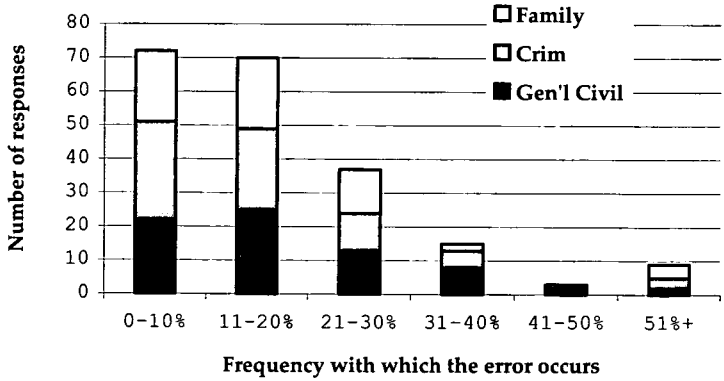
Graph C-3 provides a slight twist on the answers shown in Graph C-2. The judges strongly indicated that what they really want, more than to see that a recognized style manual was used, is a consistent style throughout a brief. In a bit of good news for appellate lawyers, their responses indicate that, in general, that is what they are seeing the majority of the time.

D. Common Knowledge Point 4: Specific Page Citations Should Always Be Used.

Common wisdom says that maintaining credibility on appeal requires (among many other things) including specific page citations to the record and the case law to support your argument. Failing to include specific page references would seem to be hurting your cause and damaging your credibility by making the judge question the accuracy of what you are saying in your brief.

It also goes without saying that the case citations used in the brief should support the argument being made in the brief. The judges' responses reveal that many attorneys either do not know this rule or do not follow it as closely as they should.

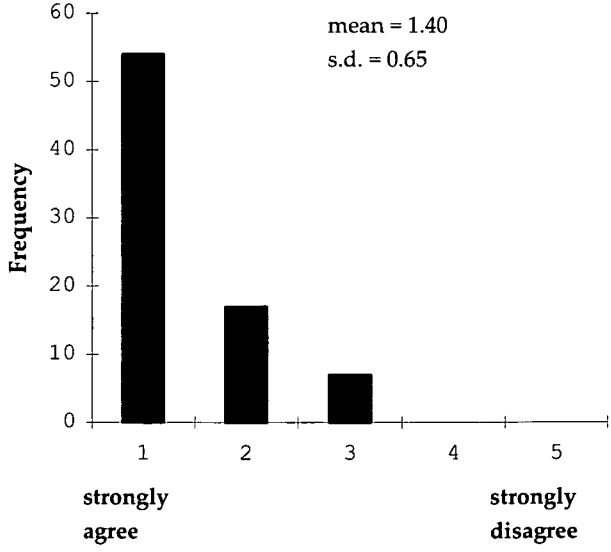
Graph D-1: Case authority does not stand for the proposition asserted



As Graph D-1 demonstrates, the judges' responses indicate that at least a fair amount of the time the case authority cited in a brief does not stand for the propositions asserted. Of interest is the way in which criminal and civil cases appear to flip-flop in frequency between the 0-10% category and the 11-20% category, with the judges' perceptions being that the error occurs in criminal briefs slightly less frequently than it does in civil cases.

Although I did not of course survey any lawyers on this point, my own experience certainly conforms with the judges' responses. When I represent an appellant and the decision is made to file a reply brief, I always try and use cases from the appellee's brief in my reply. In my experience, it is usually not too difficult to find at least a couple of cases in the appellee's brief that support my position better than they do the appellee's.

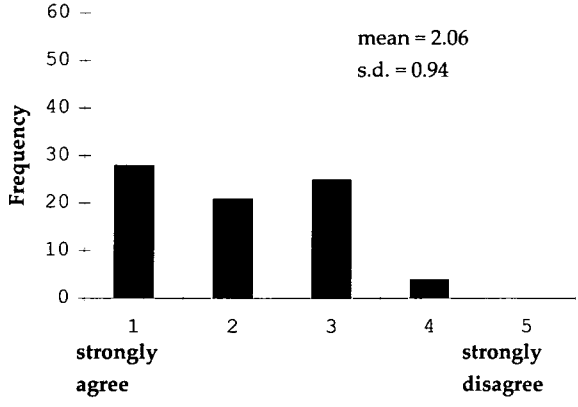
Graph D-2: Case citations should almost always include a specific page reference



As everyone knows, the quickest way for a court or opposing counsel to confirm if a case citation supports a claim in a brief is to look up and read the specific page cited. Despite the generally lower frequency of lawyers' failing to use pinpoint citations, Graph D-2 reflects the judges' strong feelings in favor of using specific page citations. The low standard deviation of 0.65 indicates solid consensus behind that opinion.

The practical result of using specific page references makes the judges' answers understandable. Given the tremendous caseloads of most appellate courts, using a specific page reference enables the judges to avoid undertaking—or having their clerks or the staff attorneys undertake—a time-consuming search through a record appendix for a proposition with a nonexistent or even ambiguous reference.

Graph D-3: I am suspicious when a case citation lacks a specific page reference



Oddly enough, however, the judges were not as unified in their responses as to whether the lack of a specific citation made them suspicious about whether the citation actually supported the proposition asserted in the brief. While the mean value of 2.06 shown in Graph D-3 indicated general agreement with the question, almost as many judges had no preference or strongly agreed with the question.

The important point, however, is that despite not being as strong as expected, the responses remain clustered around general agreement with the belief that the lack of specific page references may cause an appellate judge to question the authority that you cite. And why take that chance with something as important as your brief? The greater detail allows judges to focus on the substance of your argument instead of spending their time and energy questioning whether the information in your brief is reliable. The savvy and conscientious appellate lawyer will make sure that clear and specific directions to the appropriate portions of each cited case are given to the court so that the authority best supporting his or her client's position—and that are most likely to persuade the court to rule in the client's favor—are quickly and easily accessible to the court.

V. CONCLUSION

The judicial preferences discussed in this article all reflect the reality that appellate courts, wherever they may be, are extremely busy institutions whose members have to make efficient use of their time. Recognizing this reality, appellate brief writers must provide appellate courts with clear, concise directions to the results that favor their clients.

The brief writer's goal, in some ways, is analogous to giving an important potential client directions to your office. The potential client wants to hear what you have to say and may even be persuaded—after hearing your presentation—to hire you and give you a large retainer. But the potential client has to get to your office for the meeting without getting lost. How careful are you to make sure the directions you give are clear, concise, and accurate?

Think of appellate judges as potential clients and your brief as the directions you are giving. The judges want to hear what you have to say and may even be persuaded to rule in your client's favor. But as the responses to this survey show, you have to give appellate judges precise, accurate directions to both the parts of the record that favor your client and to the supporting case law that you have found. In addition, you have to do the necessary proofreading and editing to make sure that

your directions are clear, understandable, and do not include any mistakes.