

IF YOU HAVE SEEN ONE CIRCUIT, HAVE YOU SEEN THEM ALL? A COMPARISON OF THE ADVOCACY PREFERENCES OF THREE FEDERAL CIRCUIT COURTS OF APPEAL

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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 results of my survey in the federal First, Second, and Tenth Circuit Courts of Appeal. I mailed my survey, which consisted of eighty-six questions divided into seven sections, 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.<sup>1</sup> Overall, I received responses from 138 judges, which amounts to over forty-nine percent of those who received the survey. I received twenty-three responses from federal appellate judges, which equaled just over forty-two percent of the federal appellate judges who received the survey.

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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).

Some earlier results of the survey were presented last year in the *Journal of Appellate Practice and Process*.<sup>2</sup> But that article only reflected some of the responses, and it included none from the judges in the Mountain West. All of the survey's results, both federal and state and including the Mountain West courts, were presented this year in the *Journal of Appellate Practice and Process*.<sup>3</sup>

The responses from each of the three federal appellate courts, however, were combined into a single "federal" response in that article. The graphs shown here, in comparison, present the responses of each individual federal Circuit Court of Appeal to every question in the survey.

### I. METHODOLOGY

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

- A. The Structural Elements of Briefs;<sup>4</sup>
- B. Writing Style and Advocacy;<sup>5</sup>
- C. Use of Authority and the Record;<sup>6</sup>
- D. Typography of Briefs;<sup>7</sup>
- E. Physical Characteristics of Appellate Work Product;<sup>8</sup>
- F. Frequency of Certain Errors;<sup>9</sup> and
- G. Oral Argument<sup>10</sup>

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 court.

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2. David Lewis, *Common Knowledge about Appellate Briefs: True or False?* 6 J. APP. PRAC. & PROCESS 331 (2004).

3. David Lewis, *What's the Difference? Comparing the Advocacy Preferences of State and Federal Appellate Judges*, 7 J. APP. PRAC. & PROCESS (forthcoming 2005).

4. For results on this topic, *see infra* Part III.A (pages 896–903; questions #1–15).

5. For results on this topic, *see infra* Part III.B (pages 904–12; questions #16–32).

6. For results on this topic, *see infra* Part III.C (pages 913–16; questions #33–39).

7. For results on this topic, *see infra* Part III.D (pages 917–25; questions #40–56).

8. For results on this topic, *see infra* Part III.E (pages 926–30; questions #57–65).

9. For results on this topic, *see infra* Part III.F (pages 931–35; questions #66–74).

10. For results on this topic, *see infra* Part III.G (pages 936–41; questions #75–86).

The questions in the lone non-Likert scale part of the survey, however, sought a different type of information. In Section F (“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.

## II. 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 six (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 F of the survey<sup>11</sup> 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 not broken out to reflect any differences among the three Circuits; for this section—but only for this section—all of the judges’ responses are presented together.

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-three federal appellate judges. I believe that the graphs generally speak for themselves, so I do not provide any comments about individual graphs.

I recognize as well that some of the survey questions are not particularly germane to federal practice either because the issue is addressed in the federal rules of appellate procedure or the practice area is not litigated in federal court. In short, this was the by-product of conducting a multi-jurisdictional survey that was not tailored to any one jurisdiction.

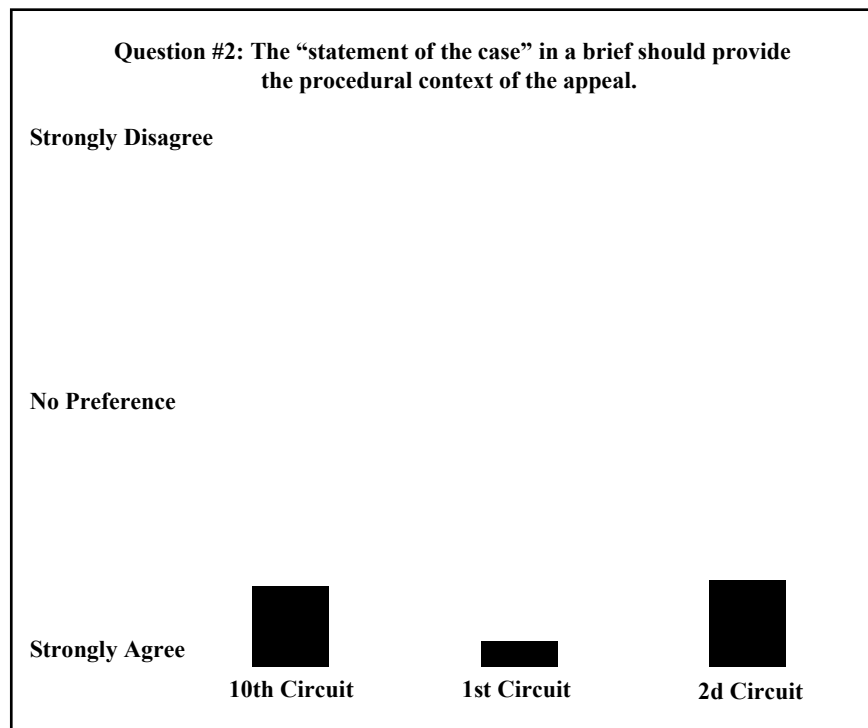
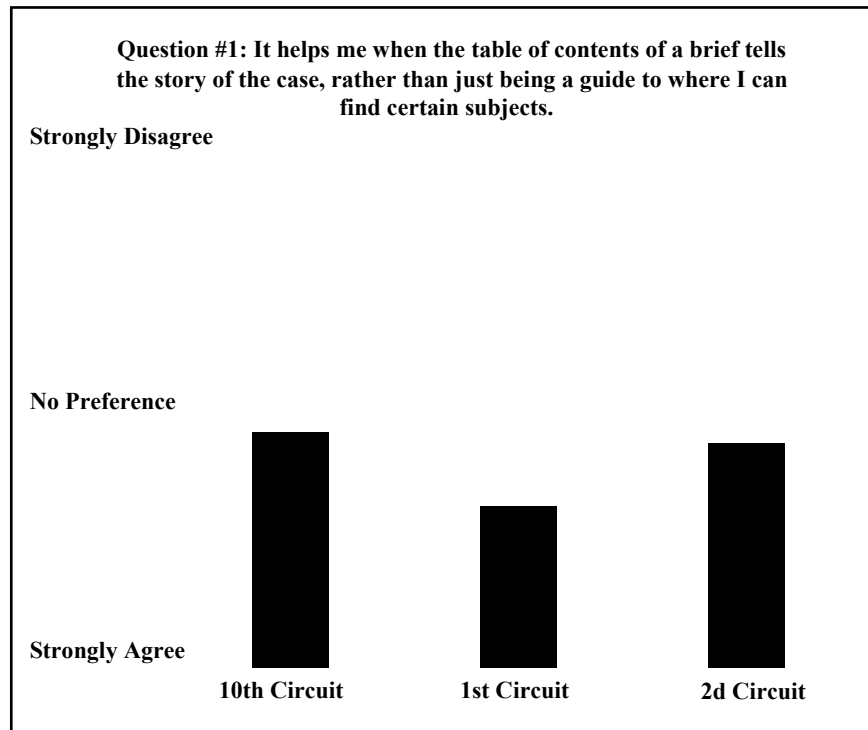
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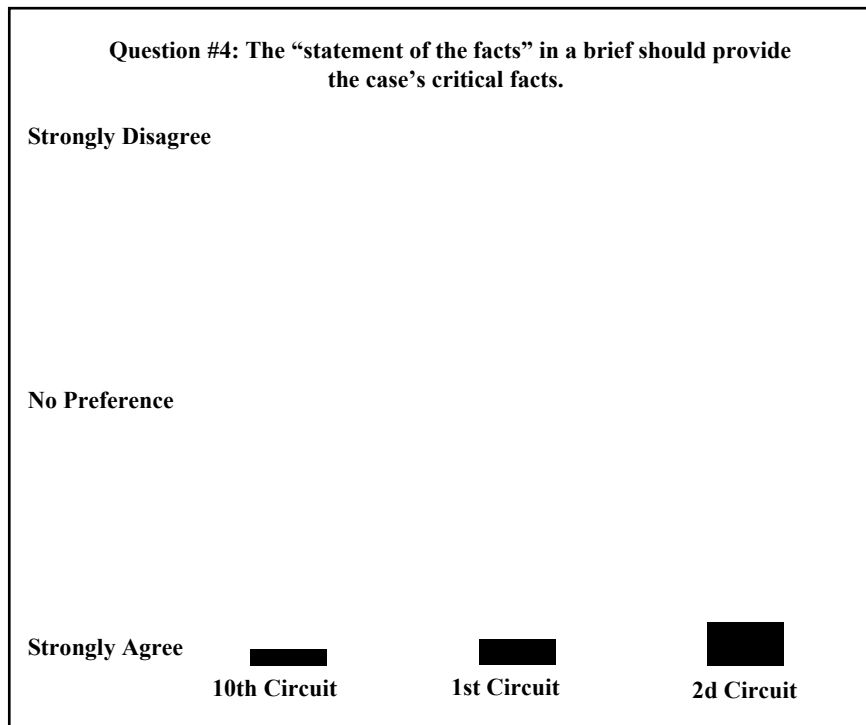
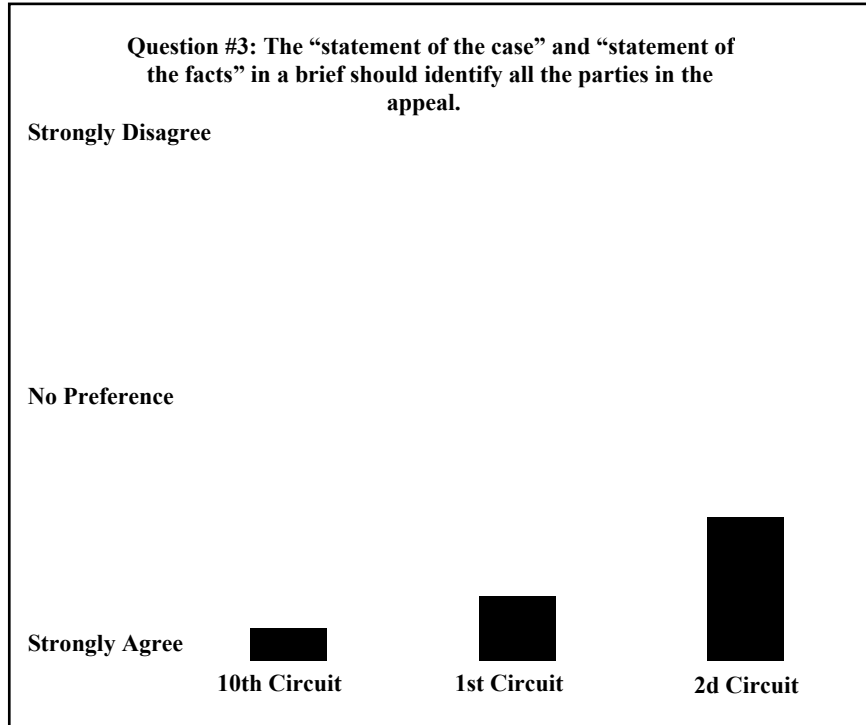
The survey results are summarized beginning on the following page.

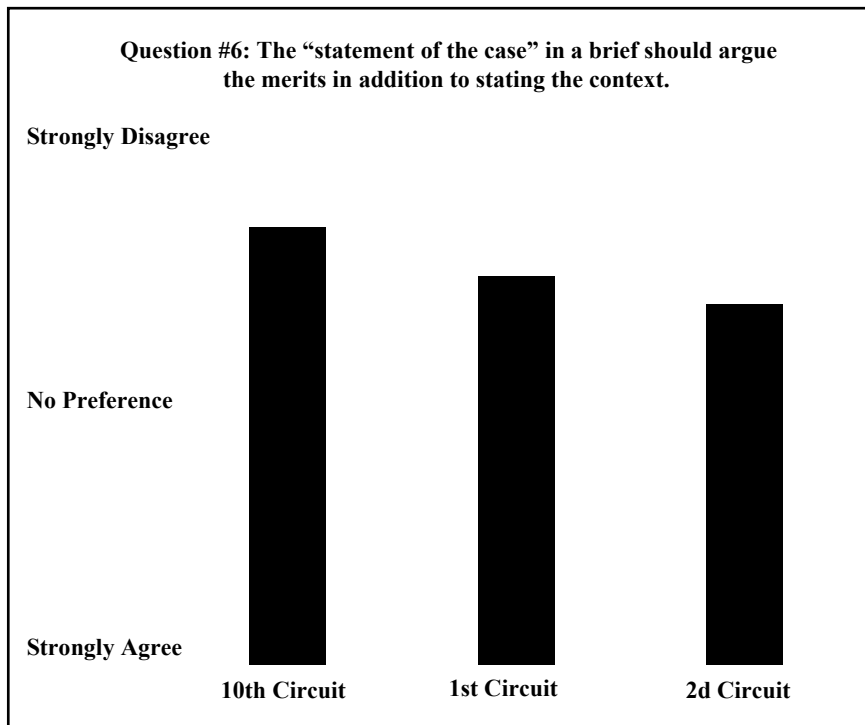
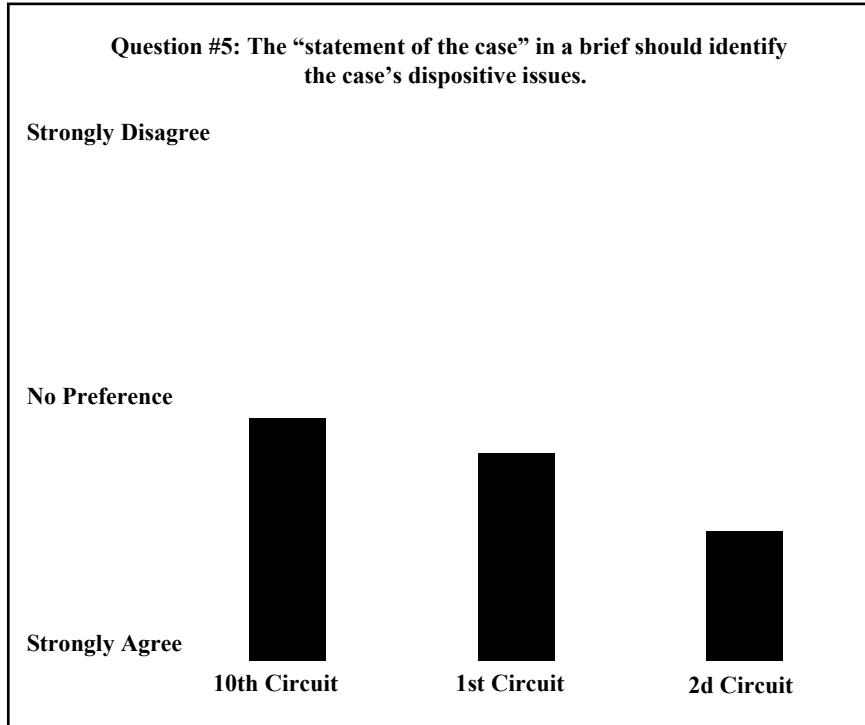
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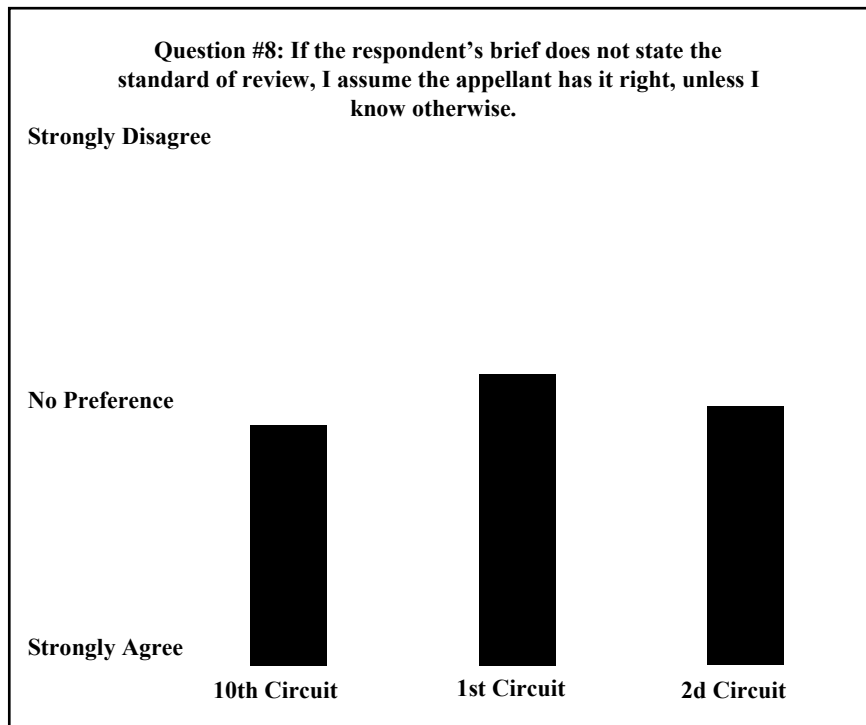
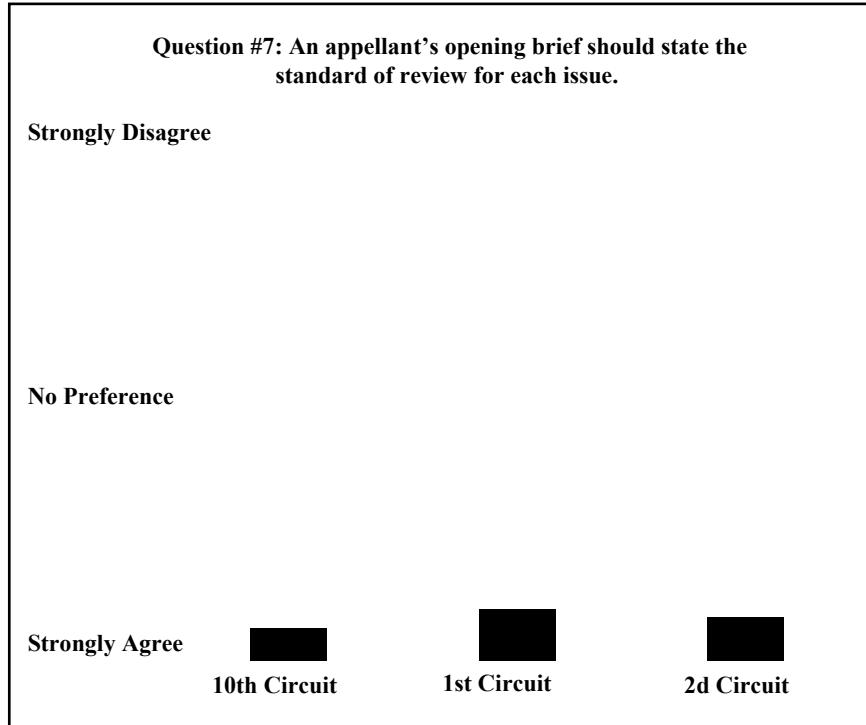
11. See *infra* Part III.F.

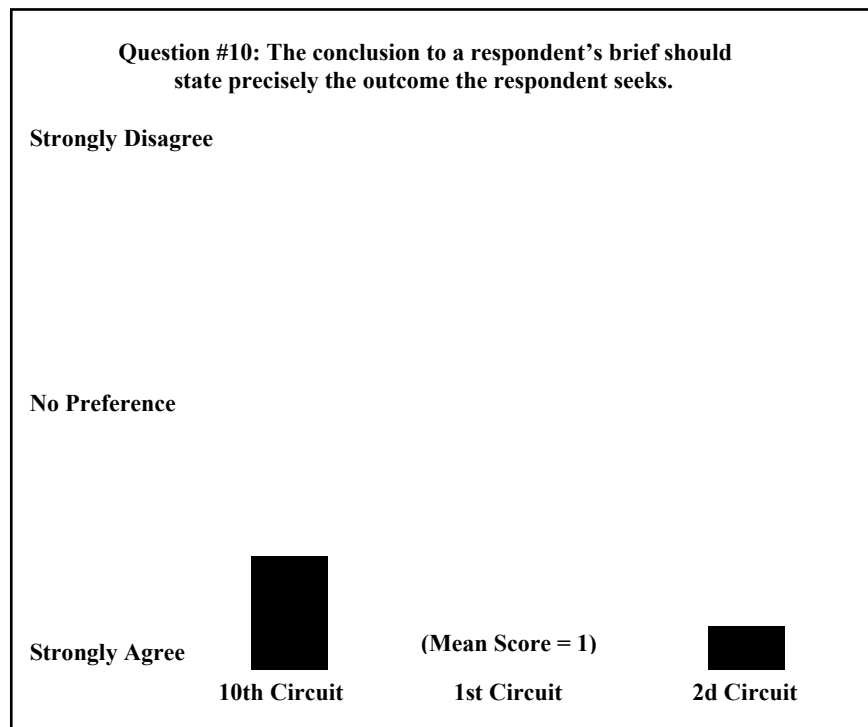
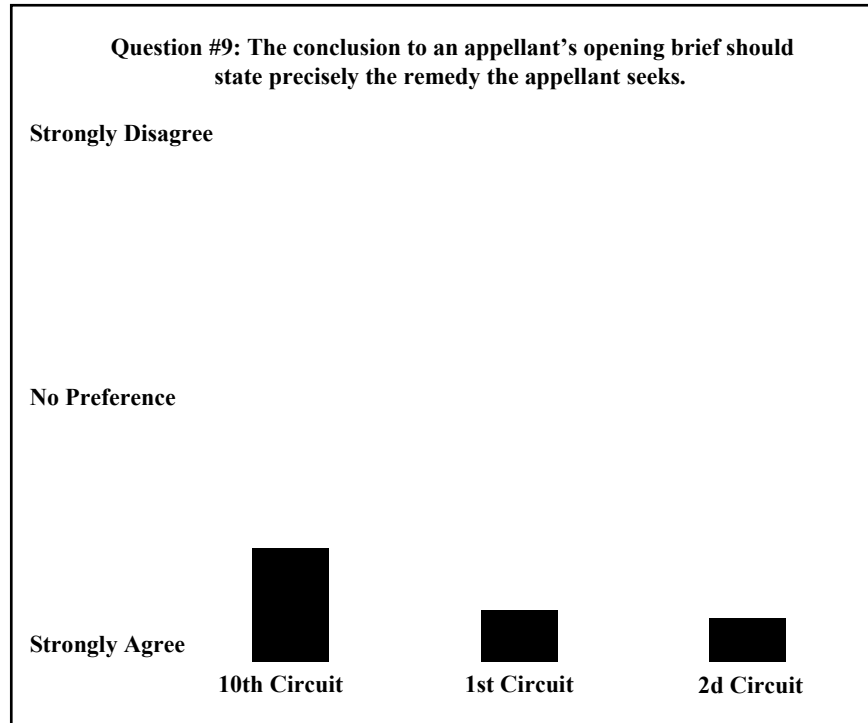
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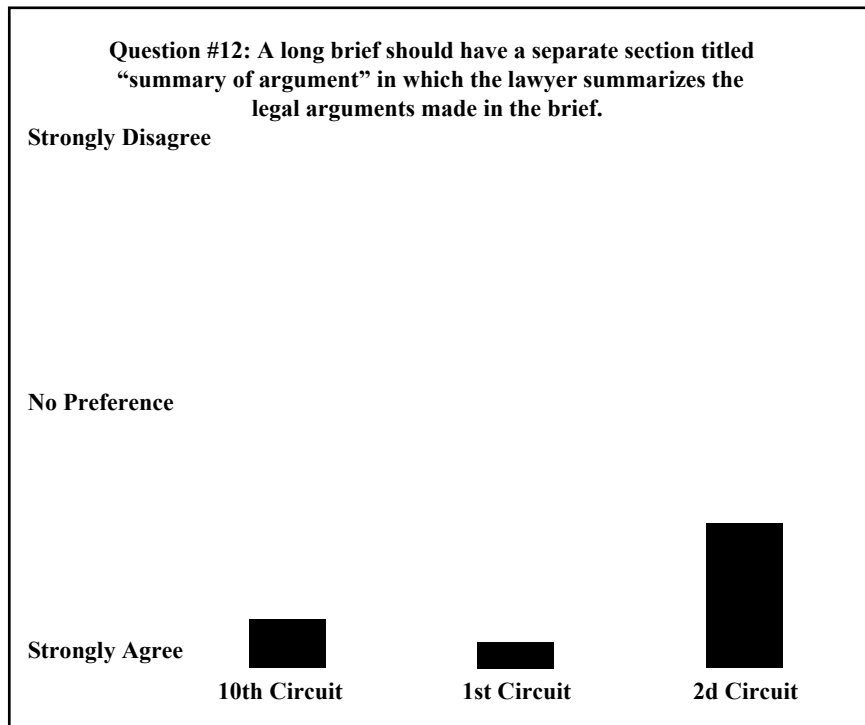
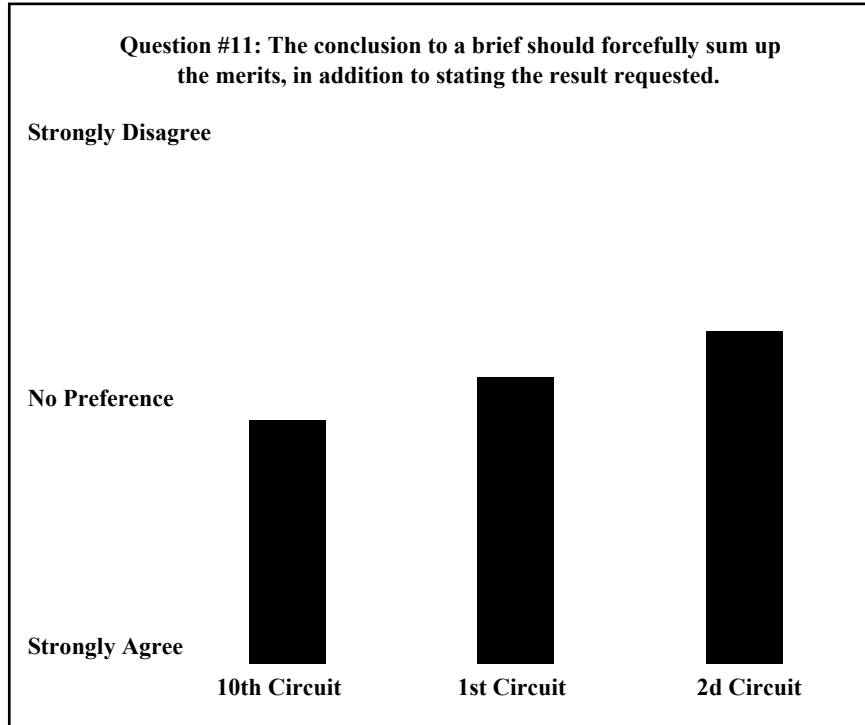


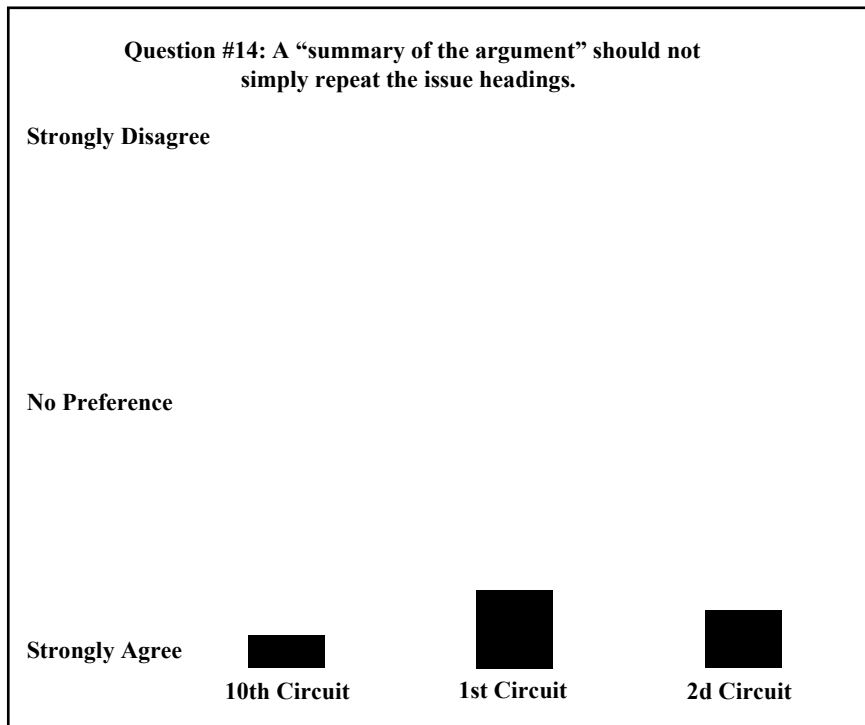
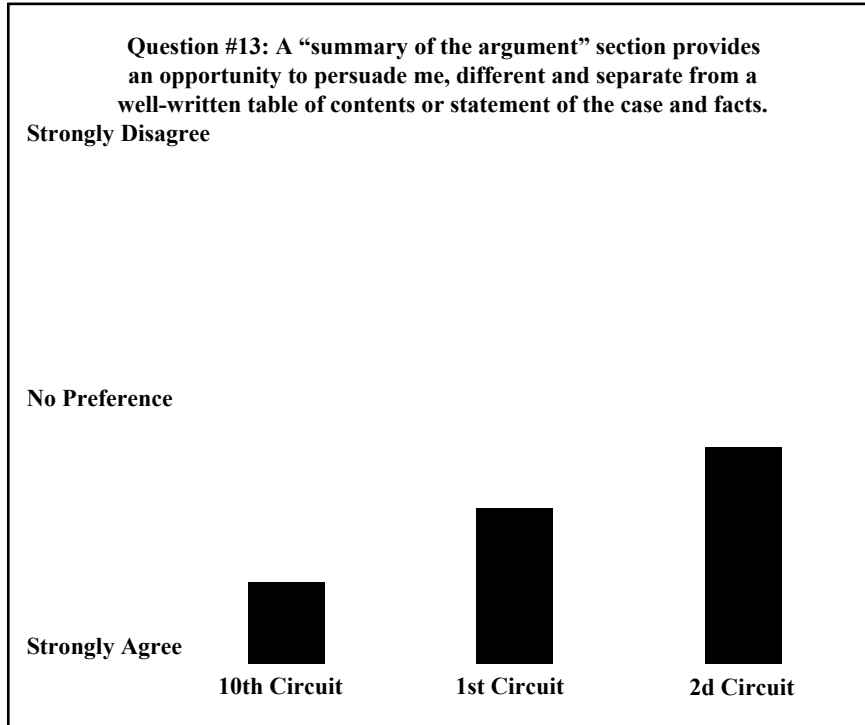


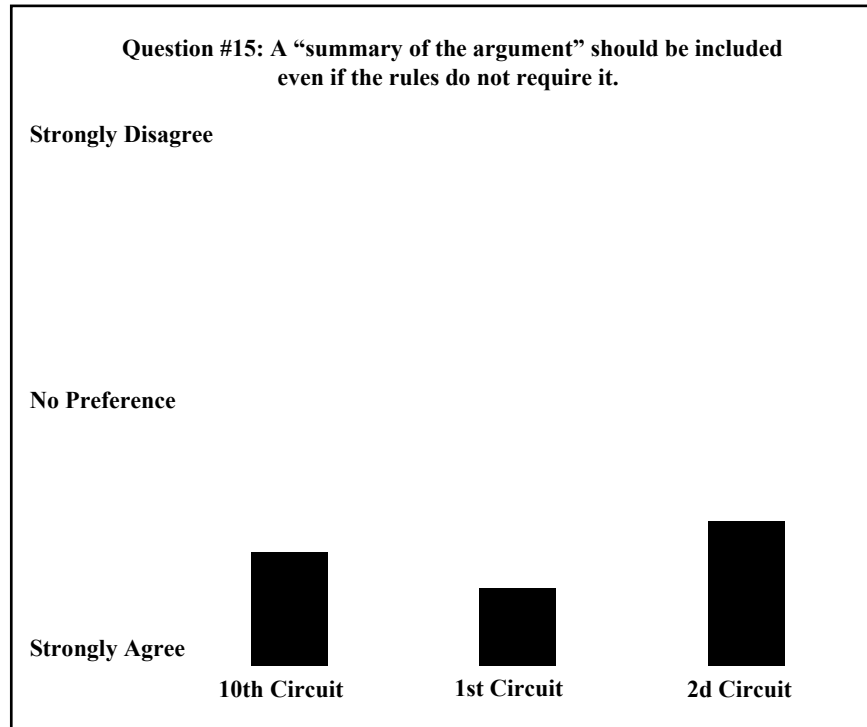




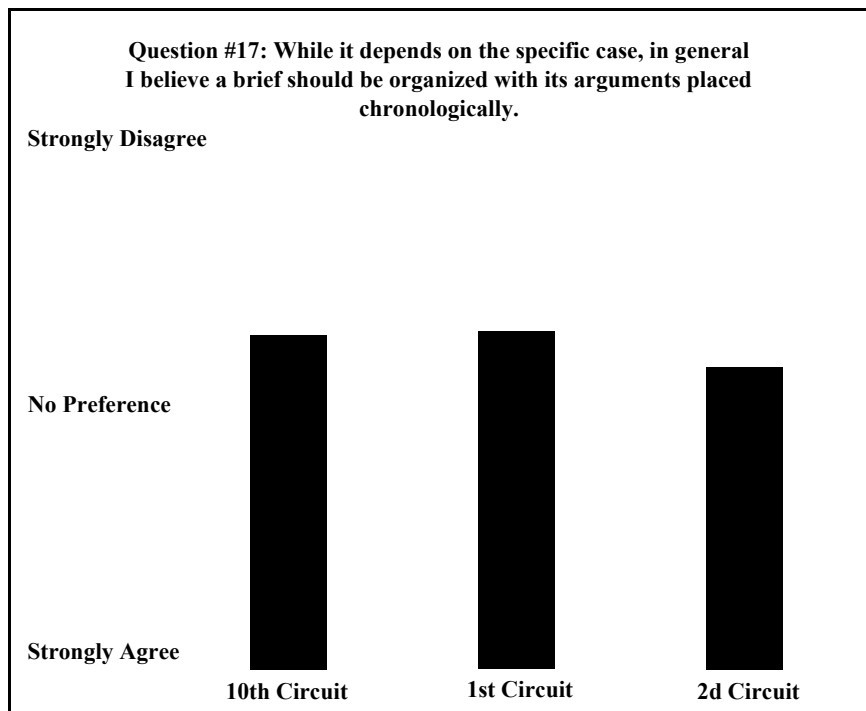
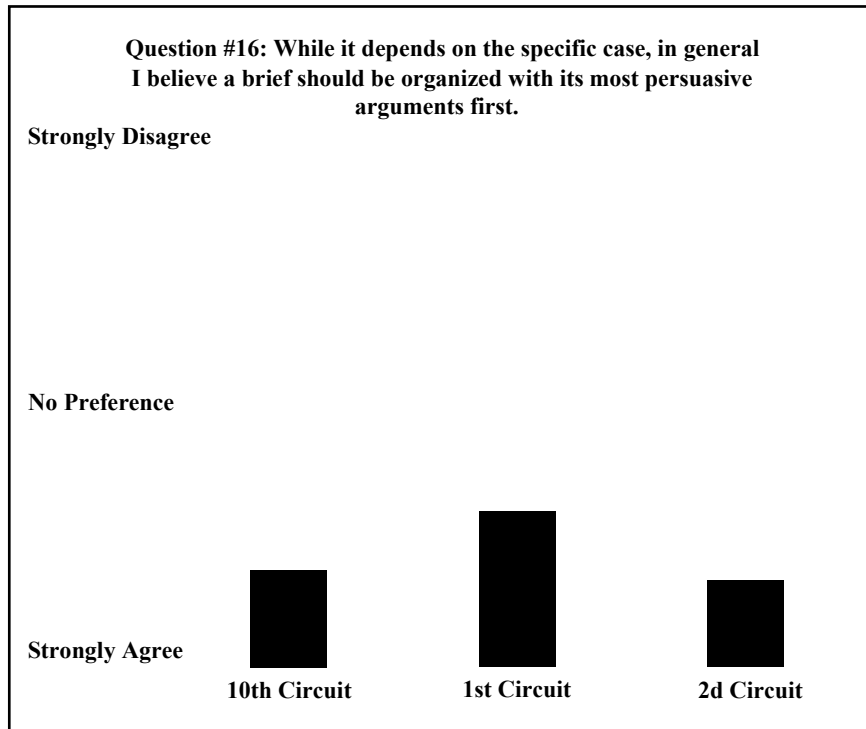


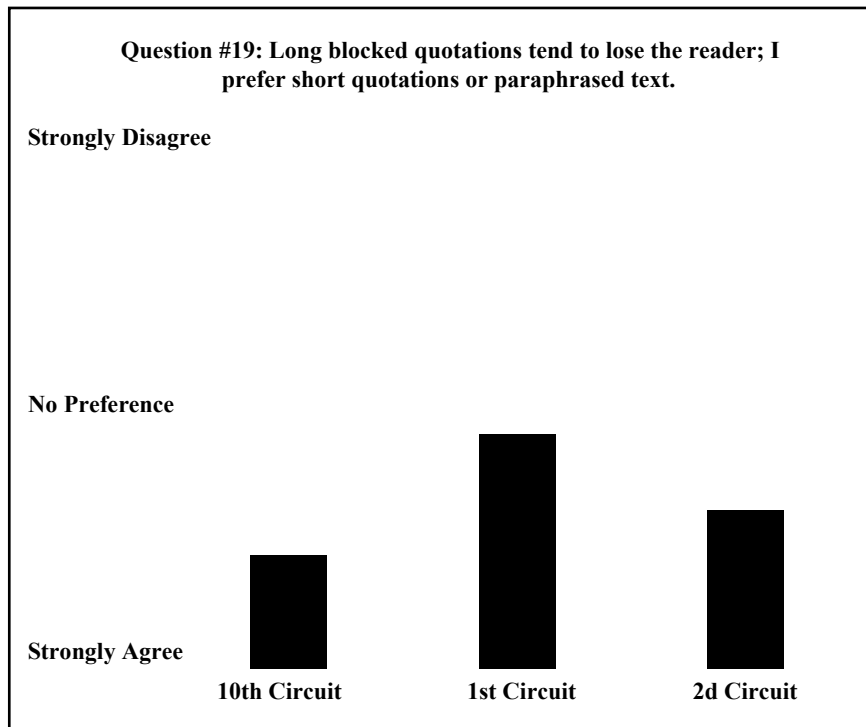
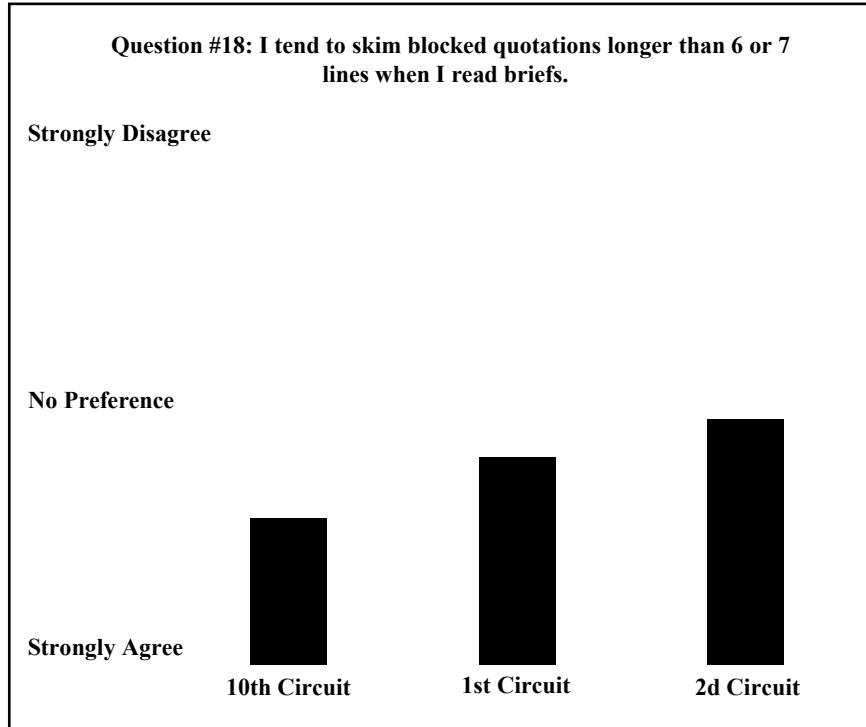


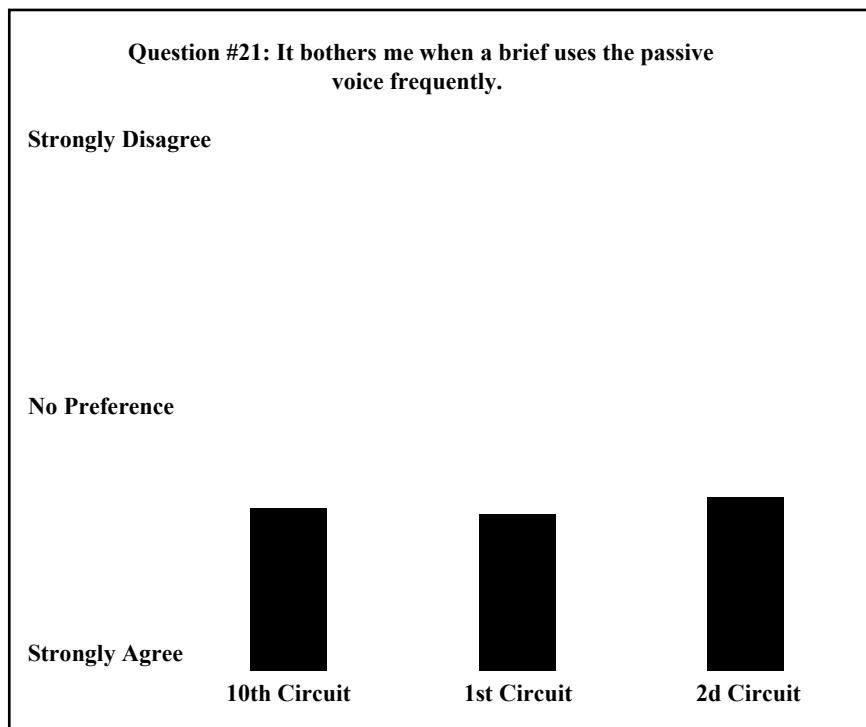
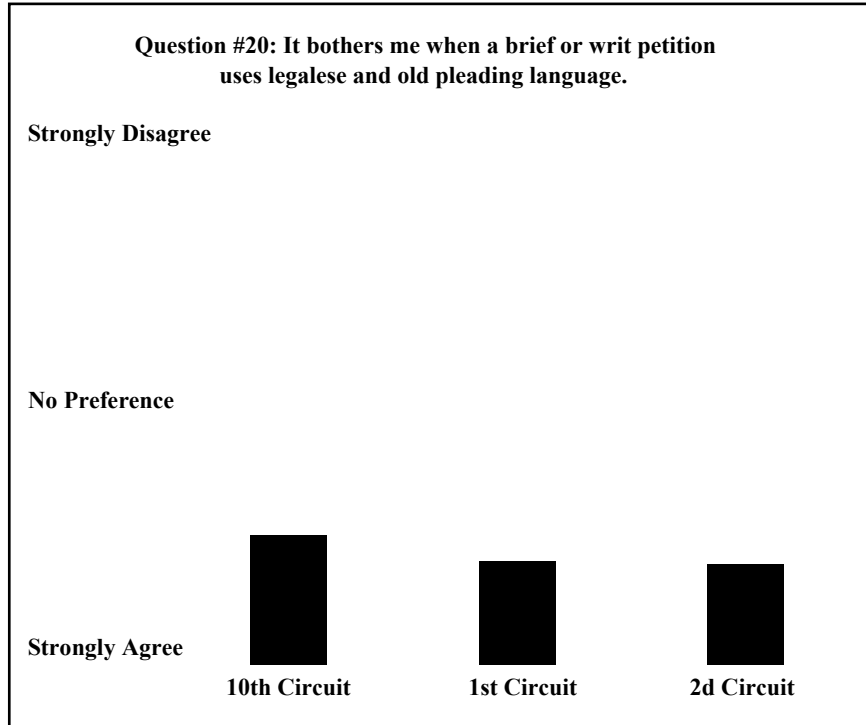


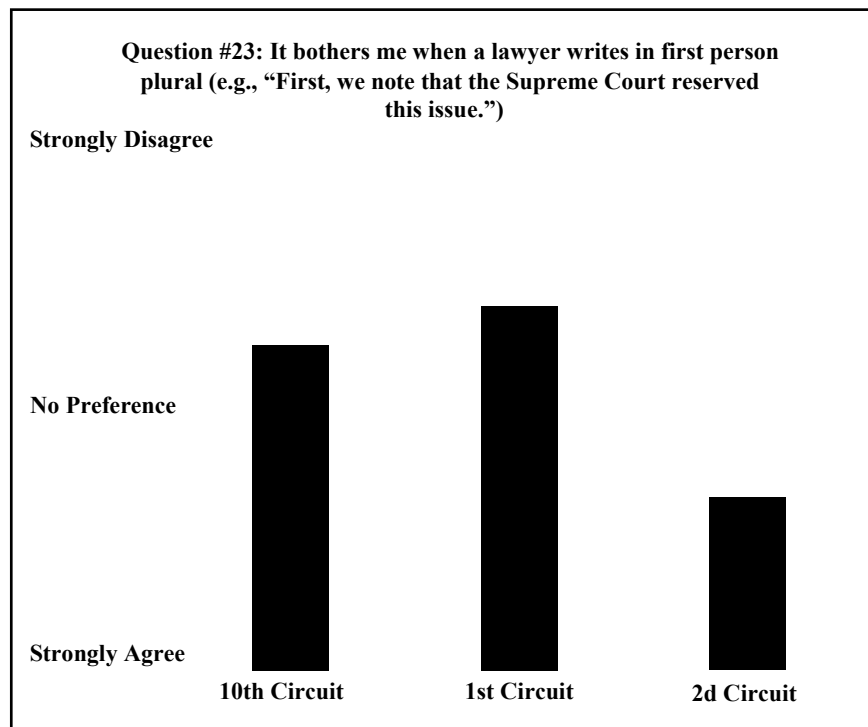
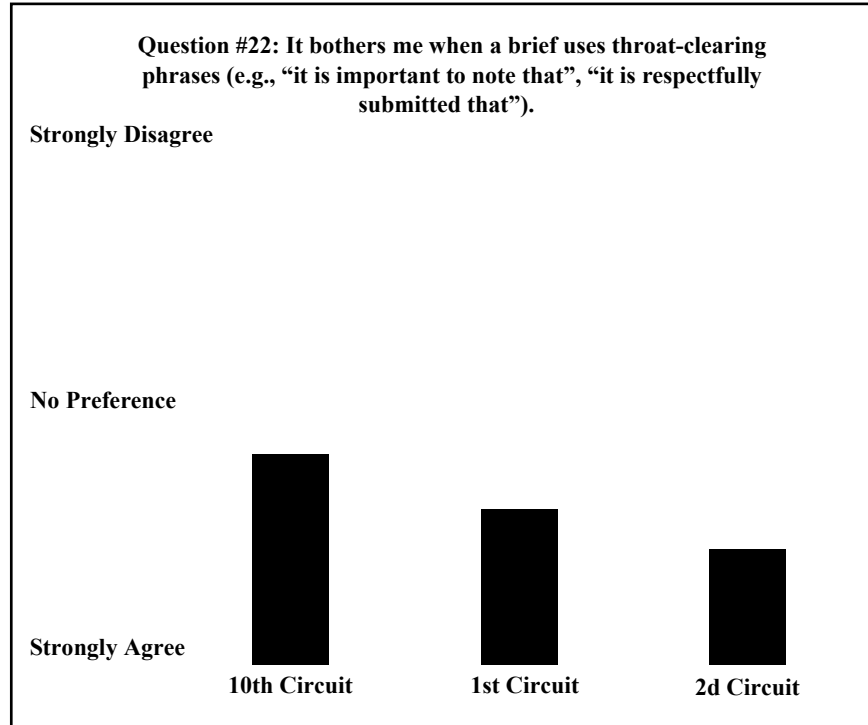


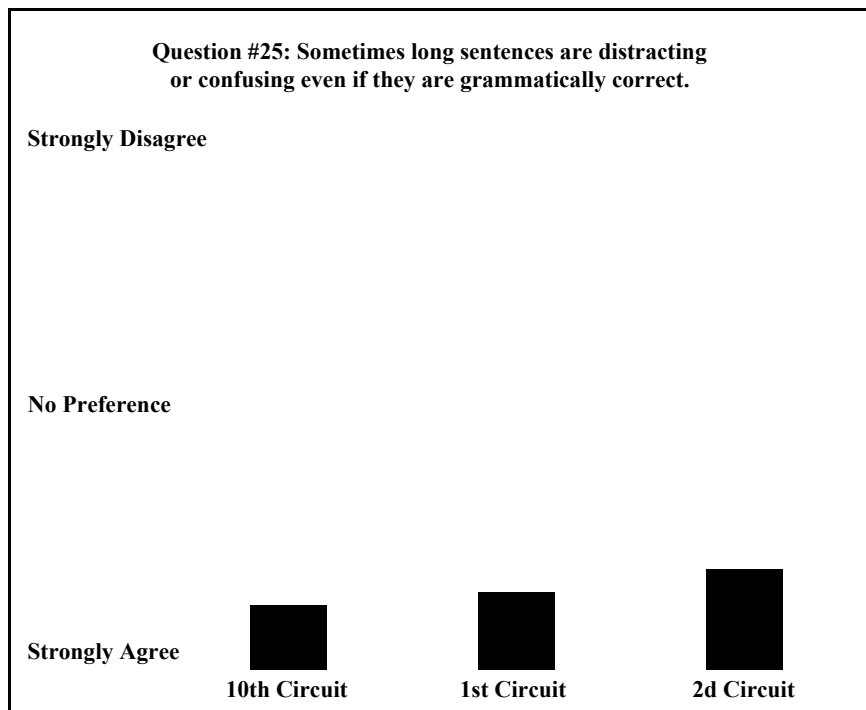
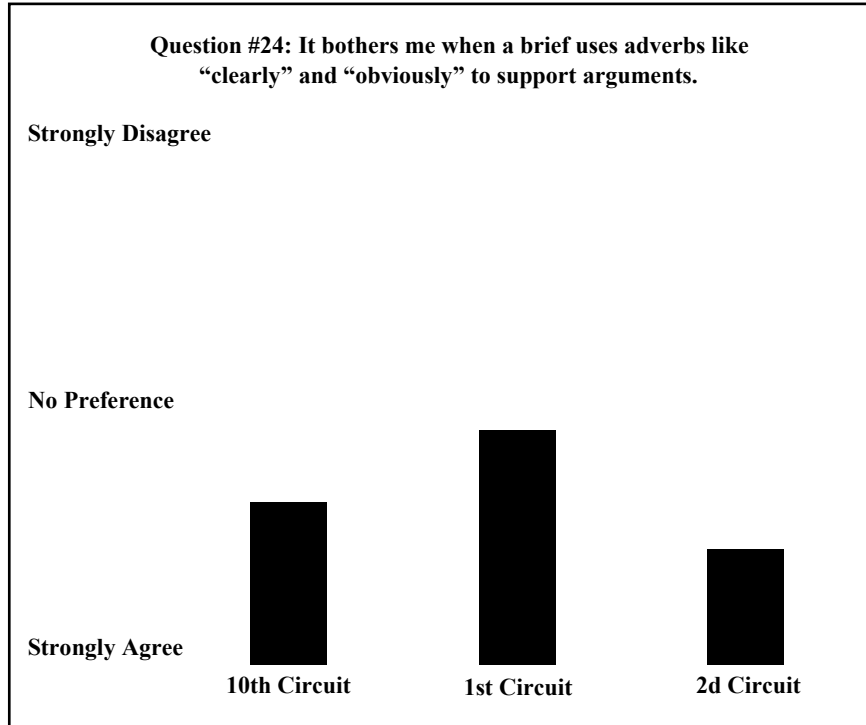
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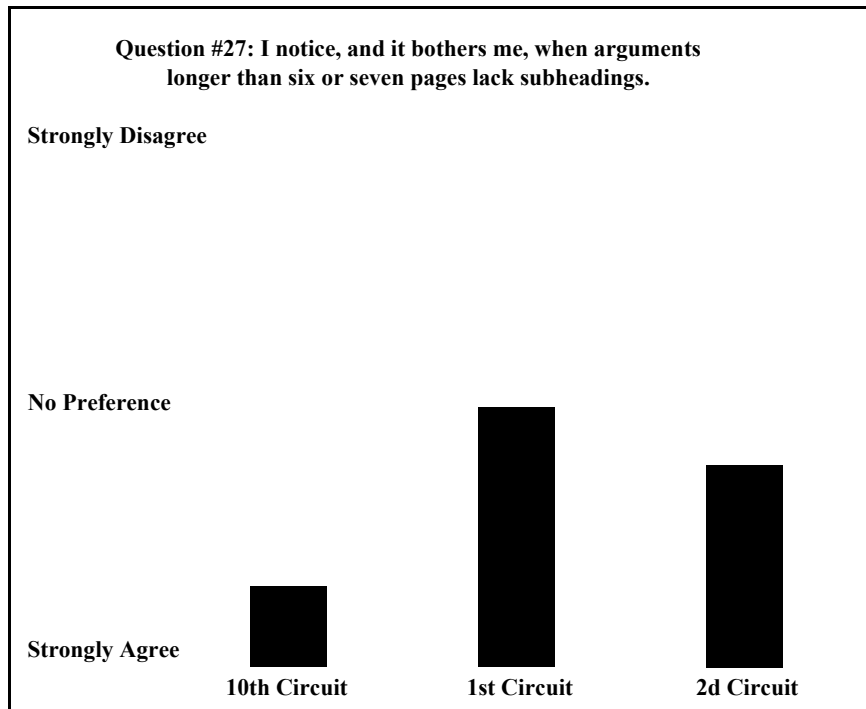
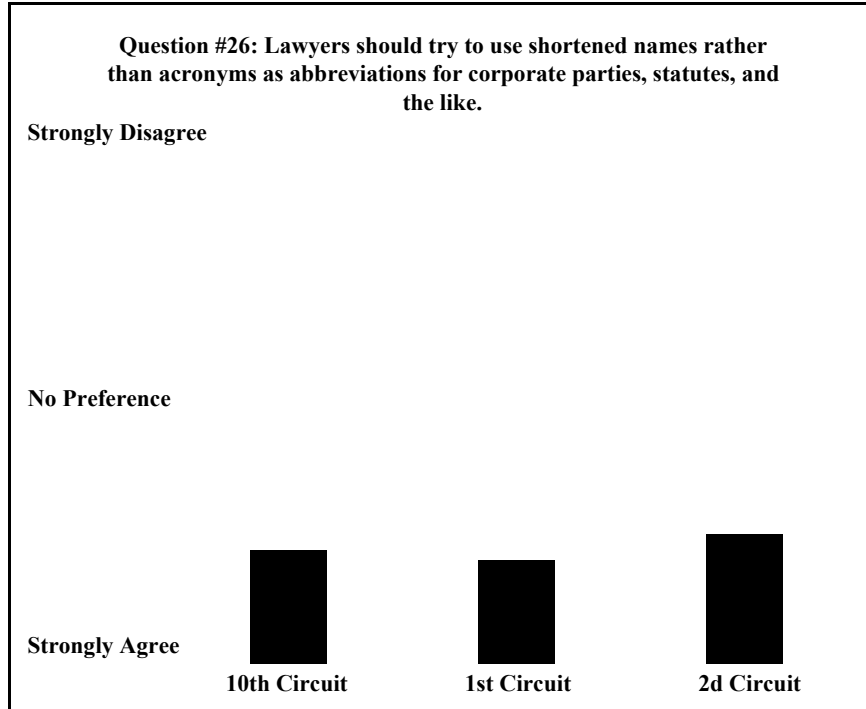


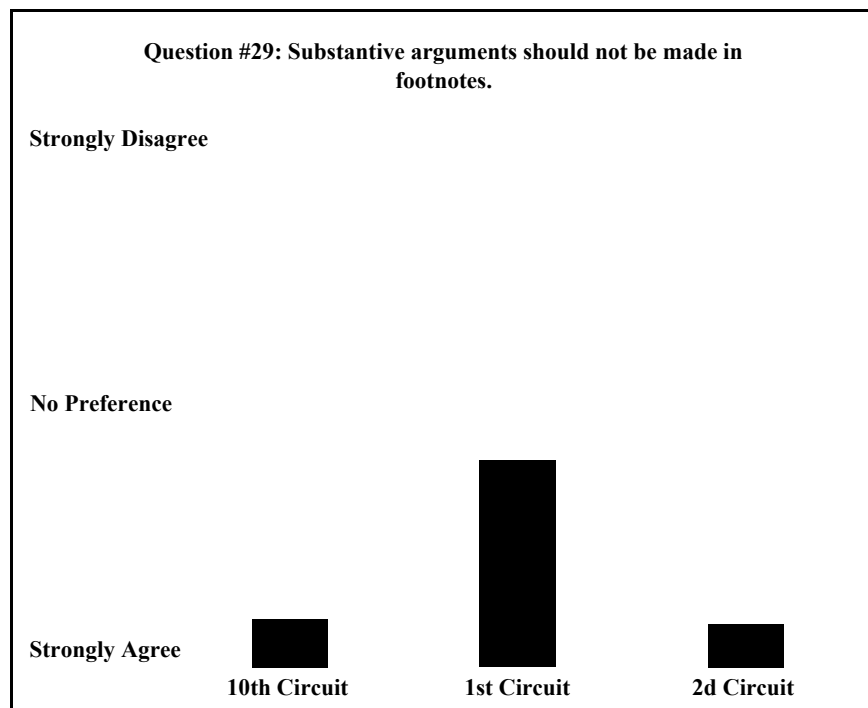
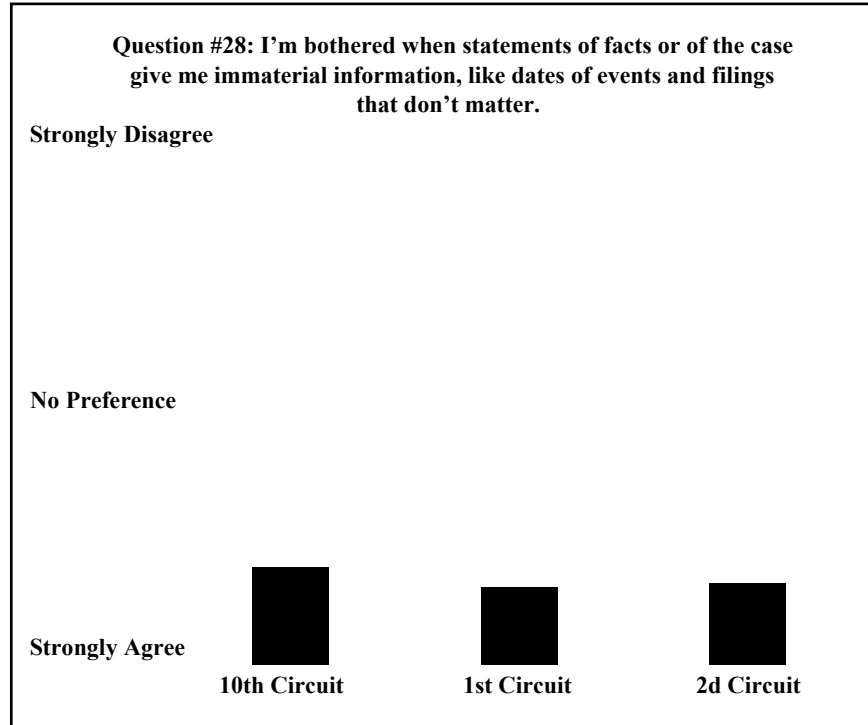


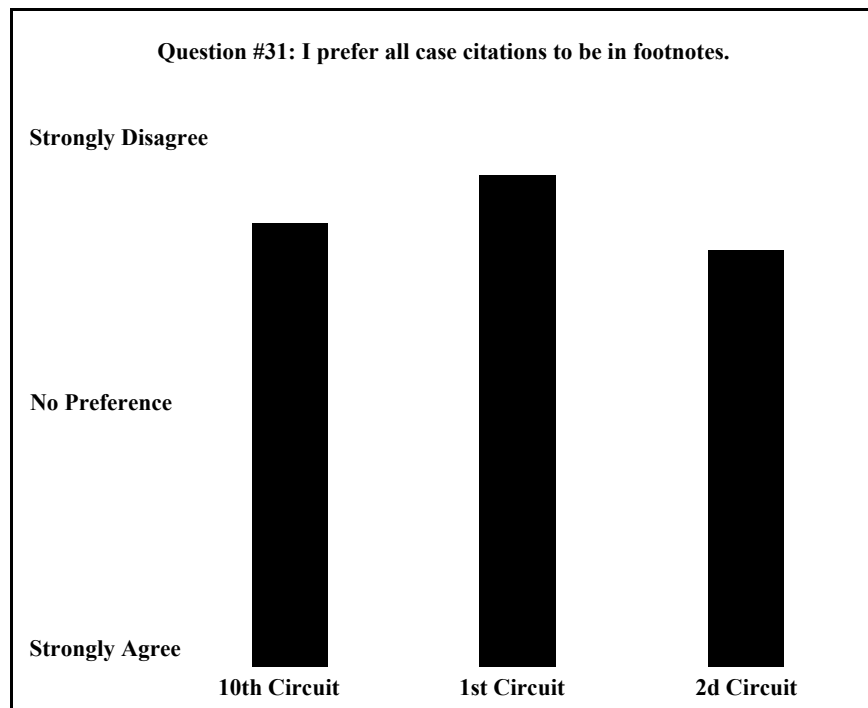
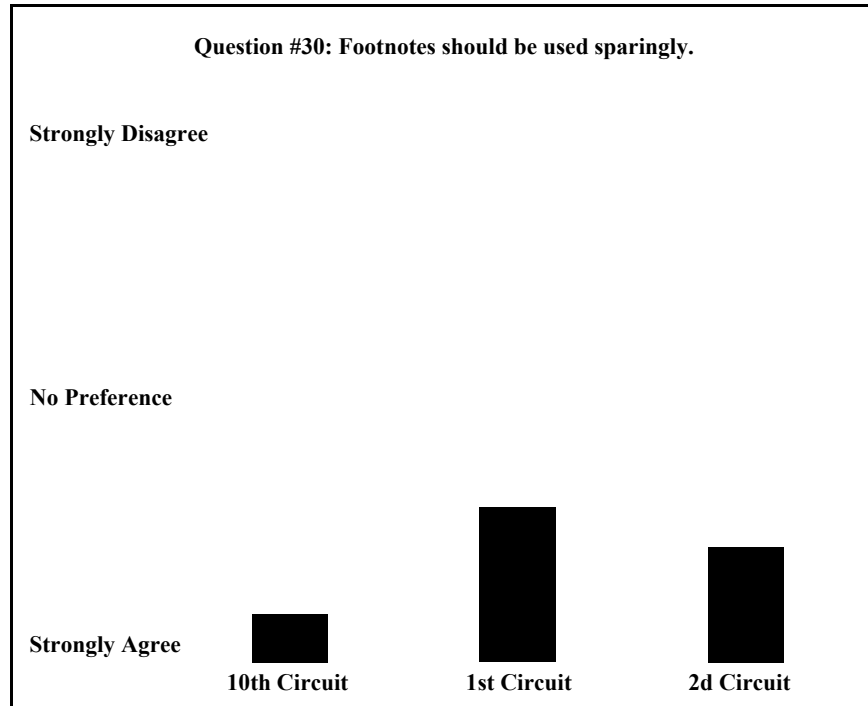


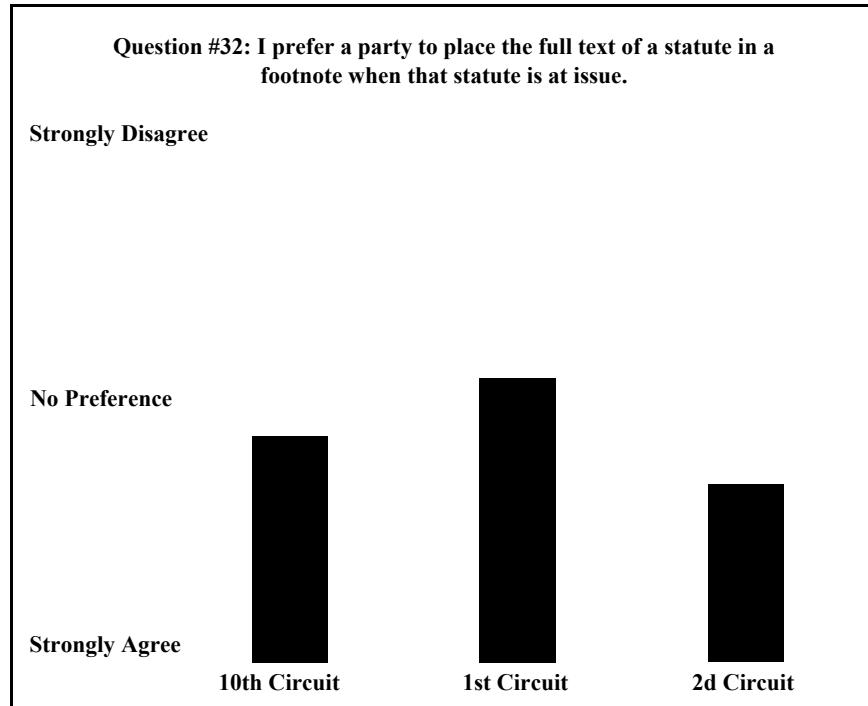




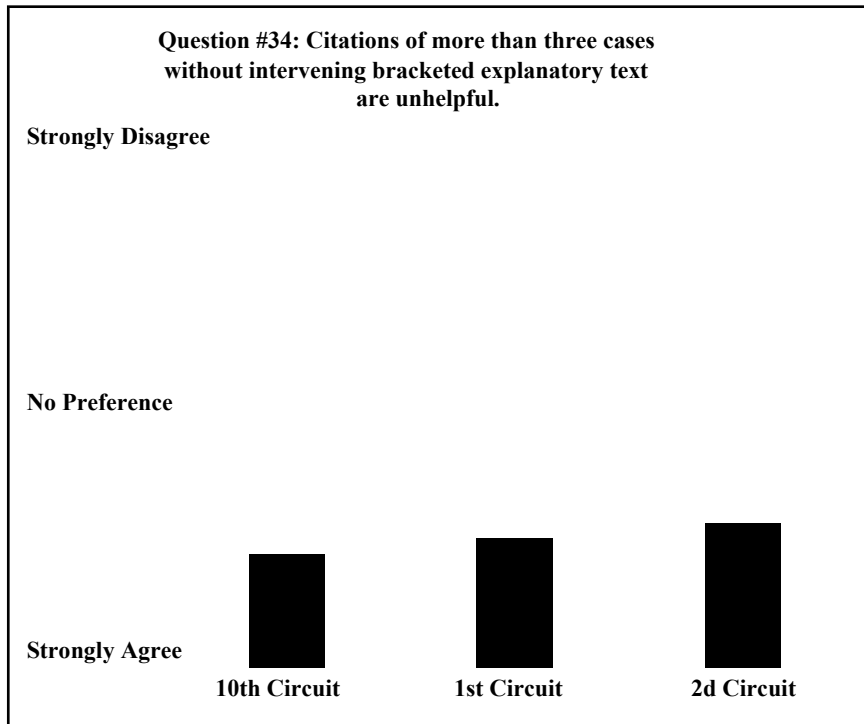
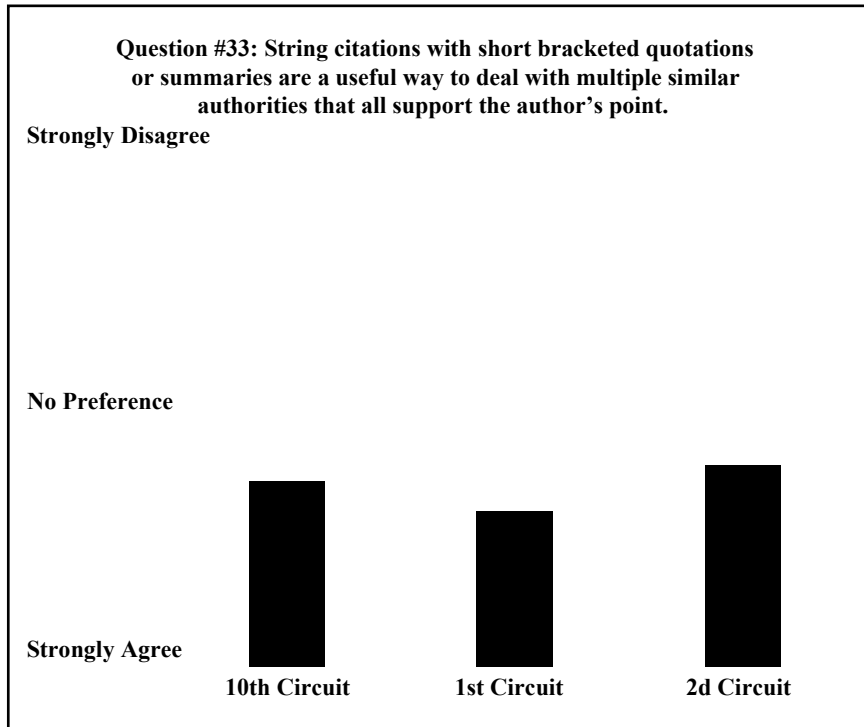


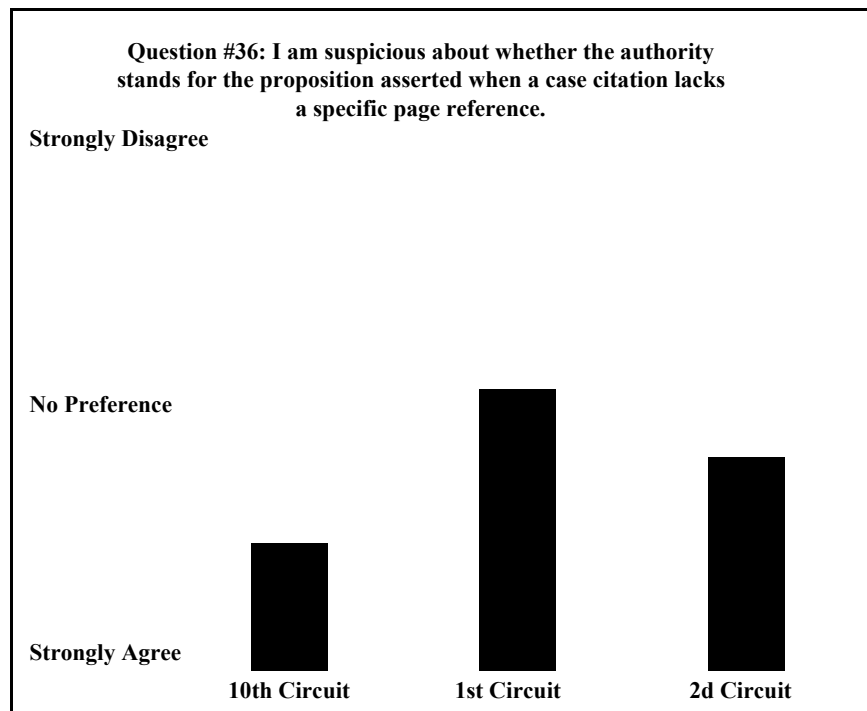
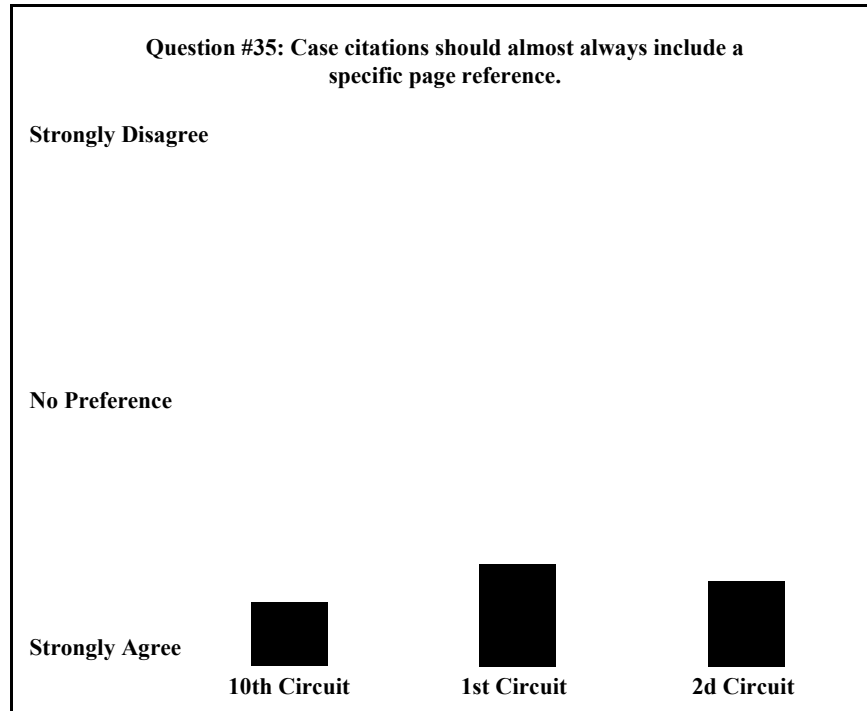


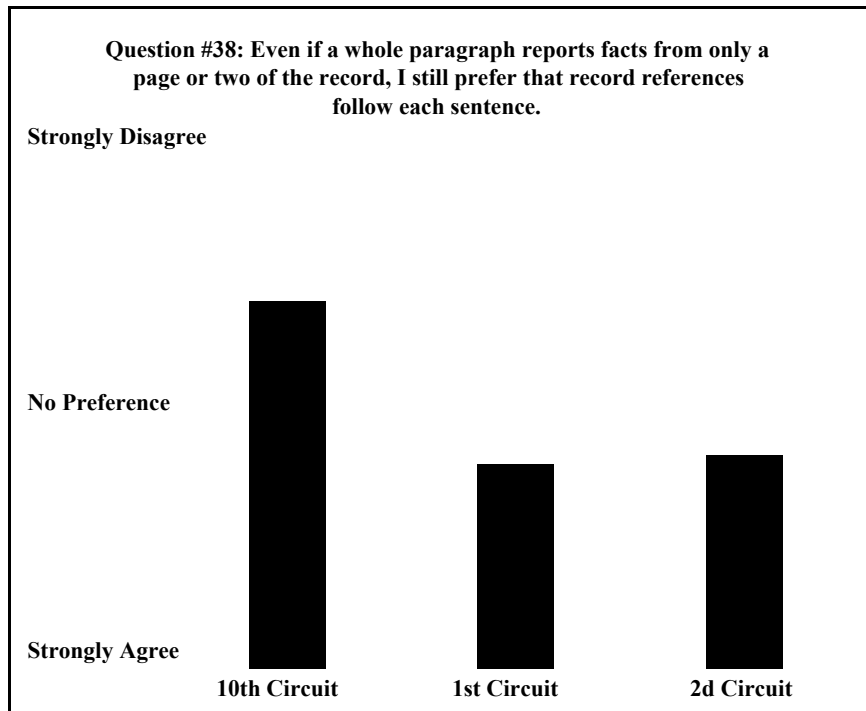
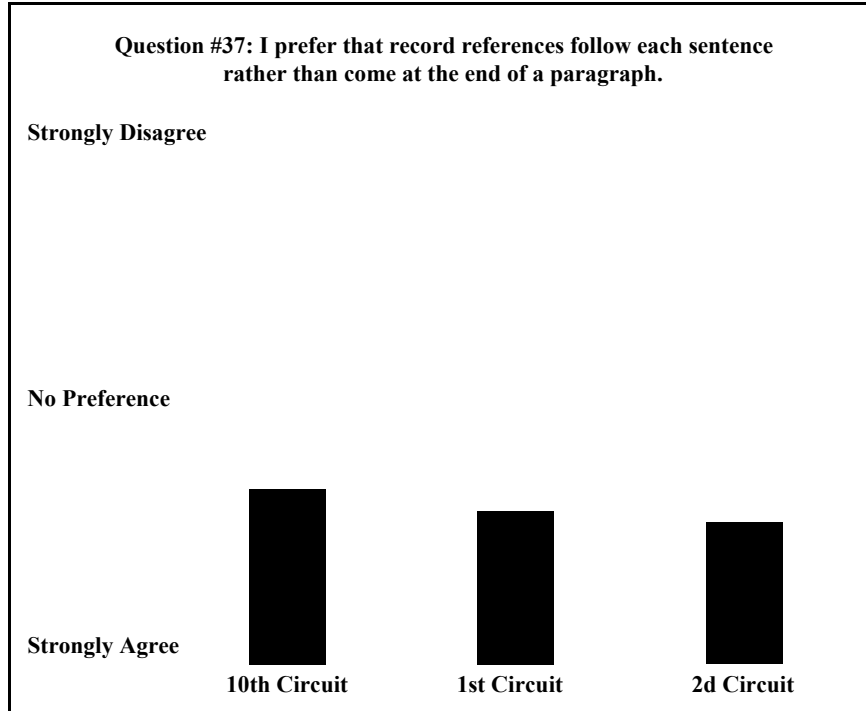


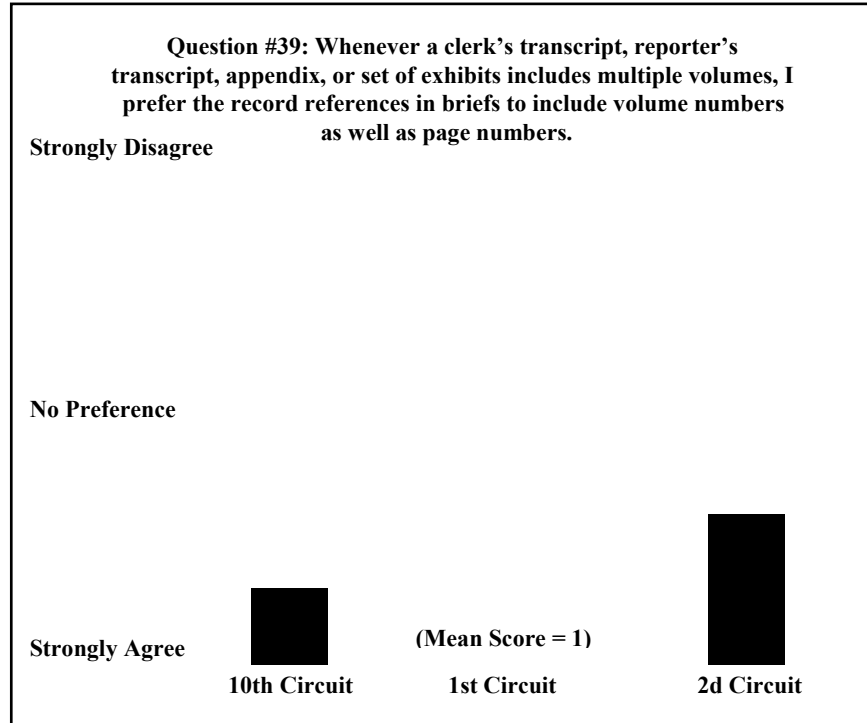


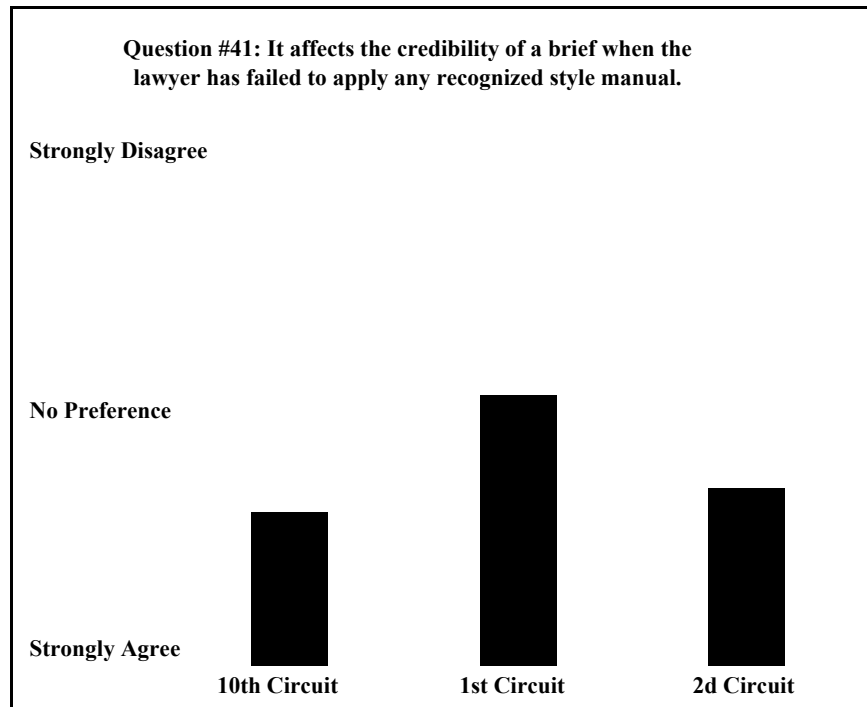
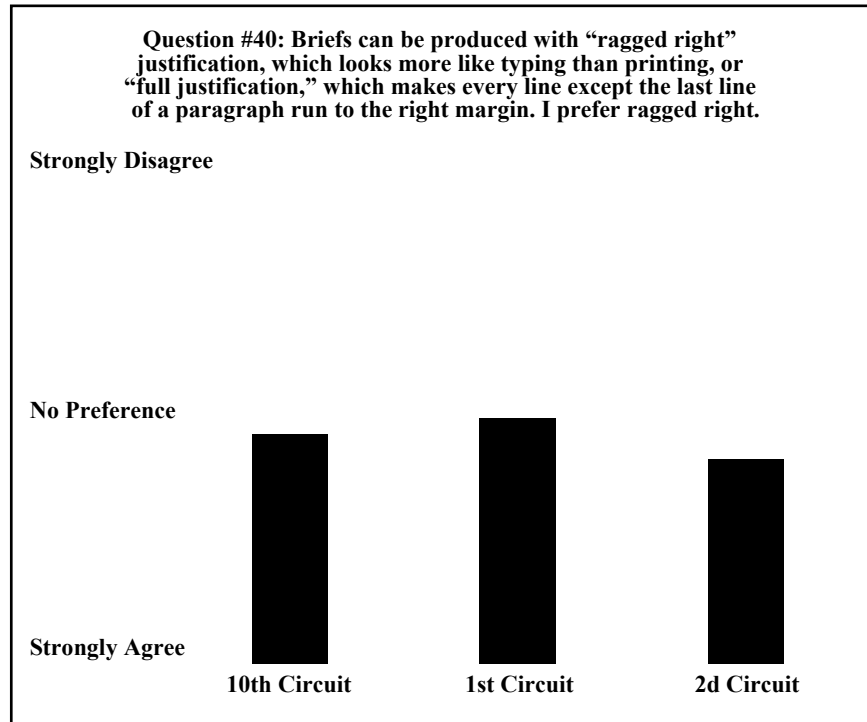
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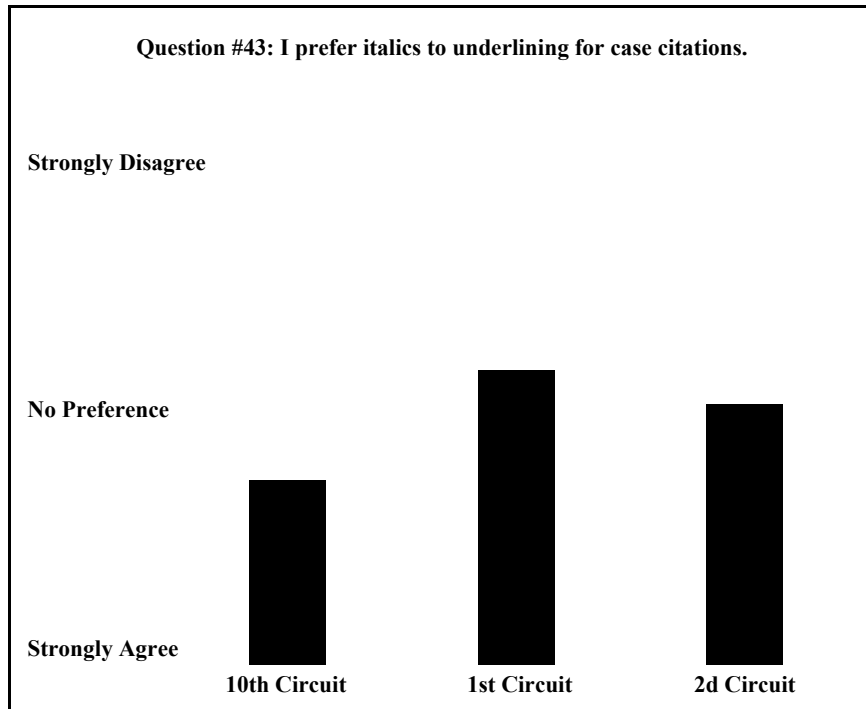
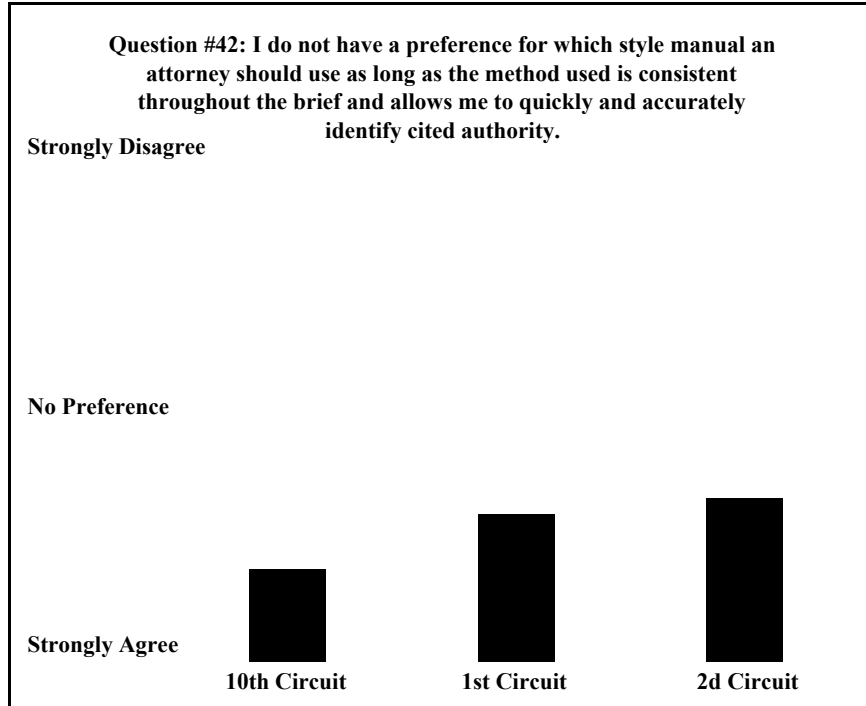


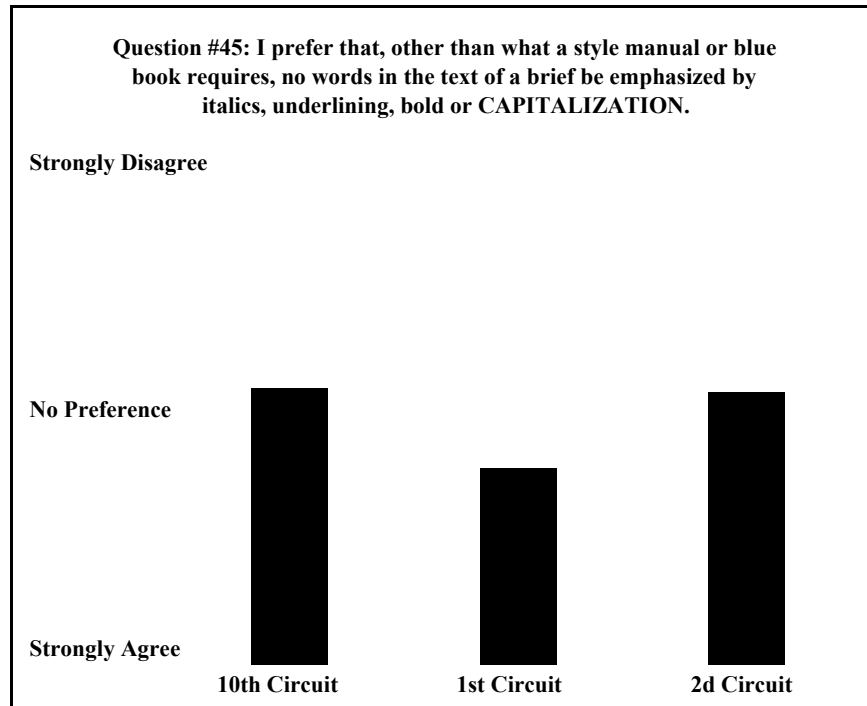
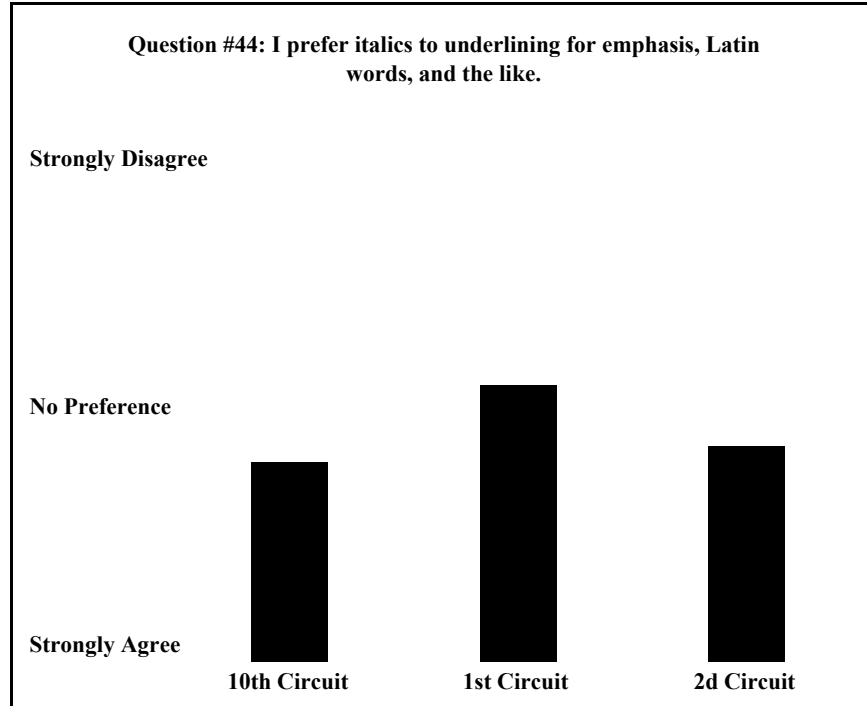


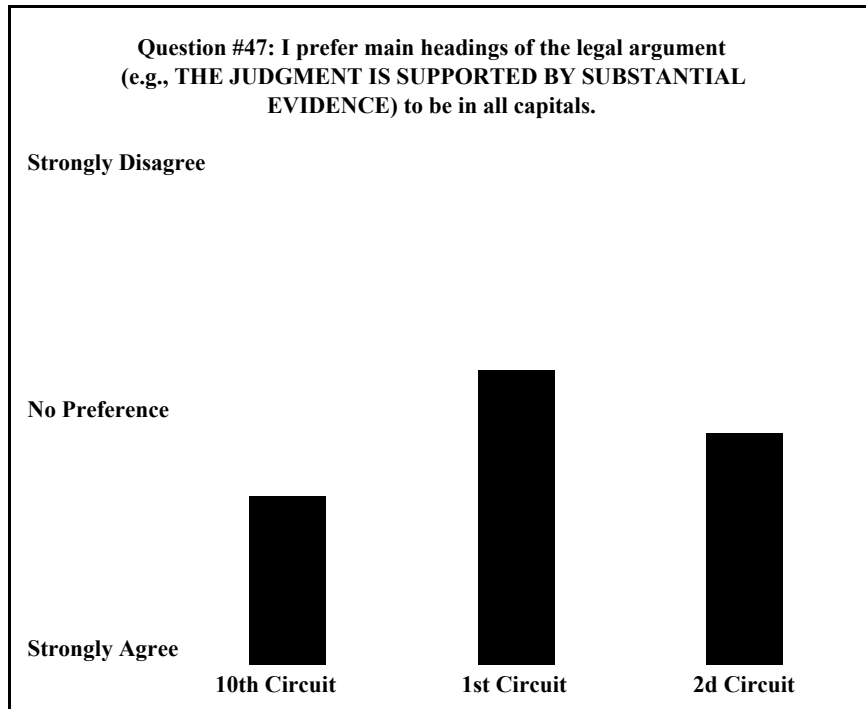
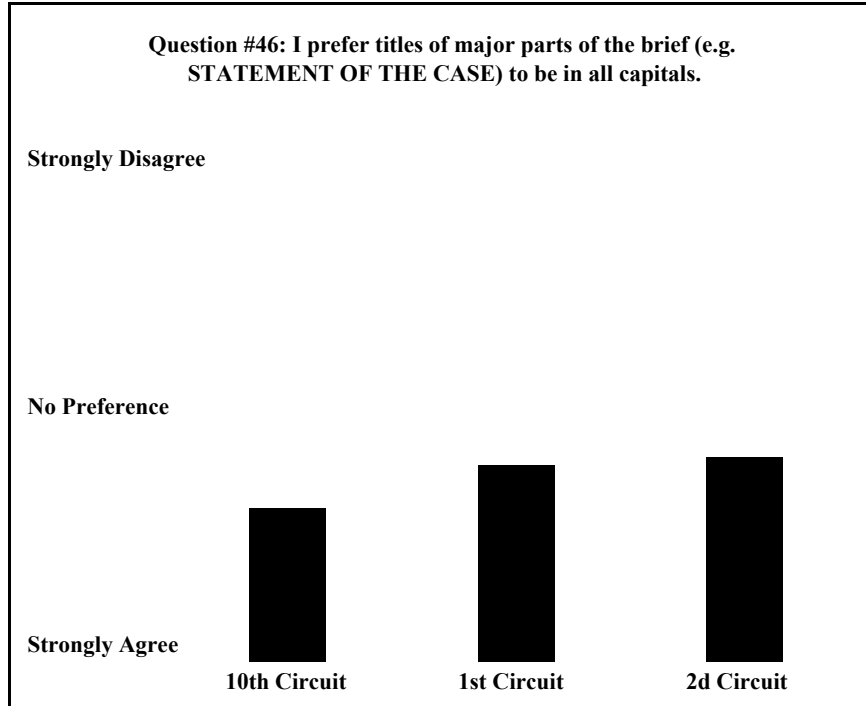


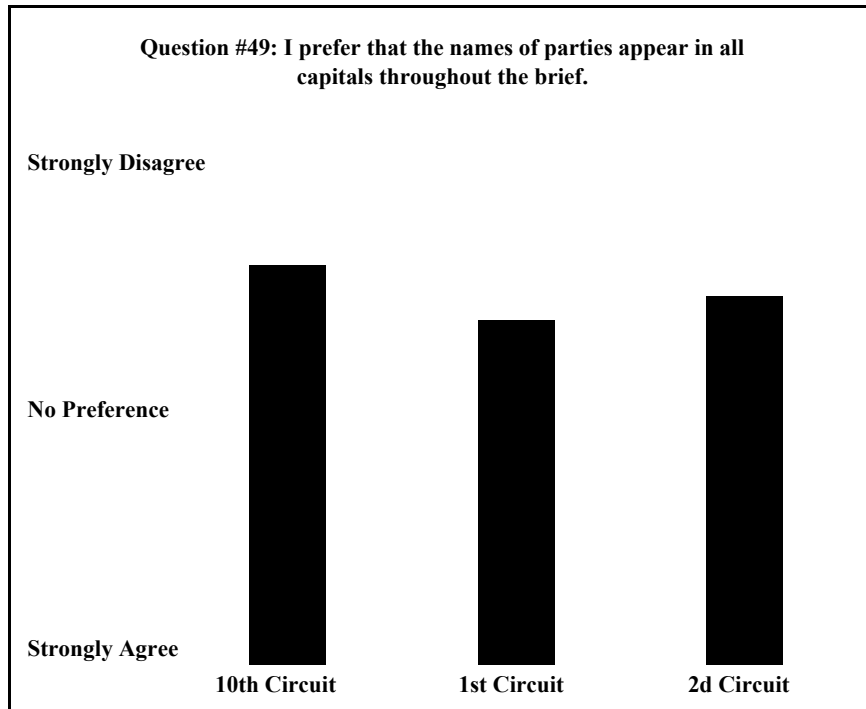
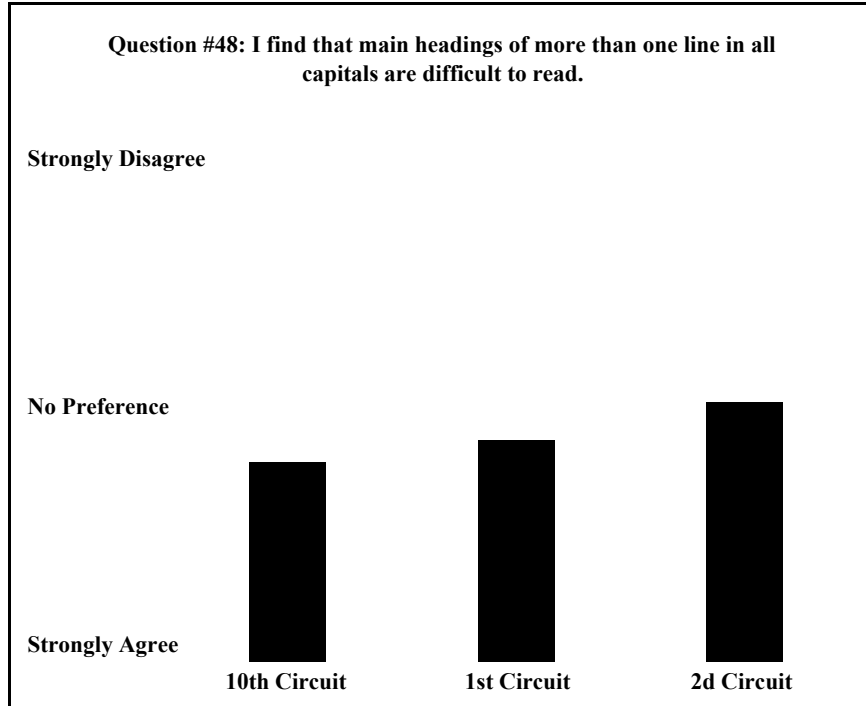


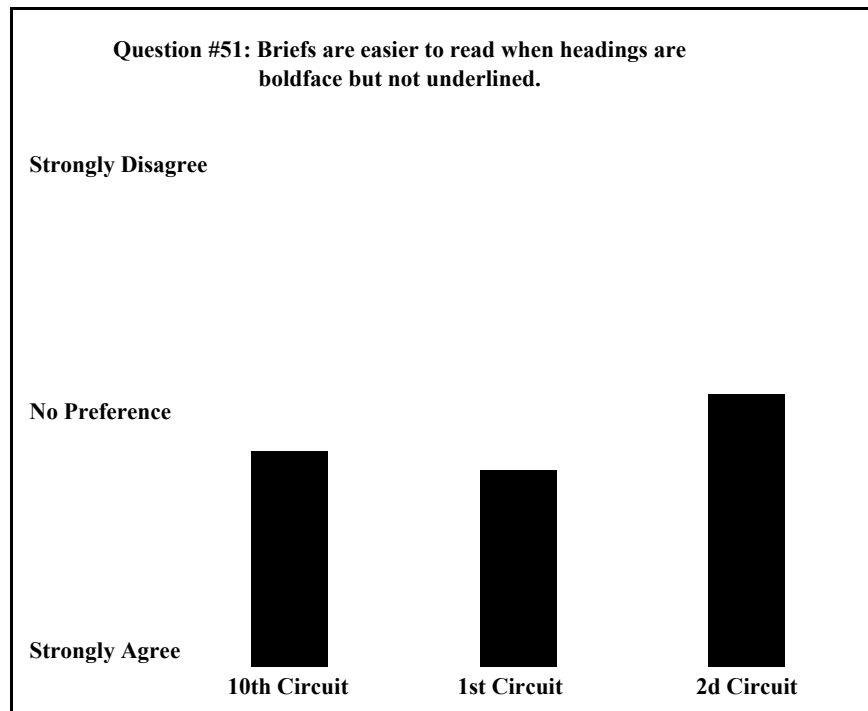
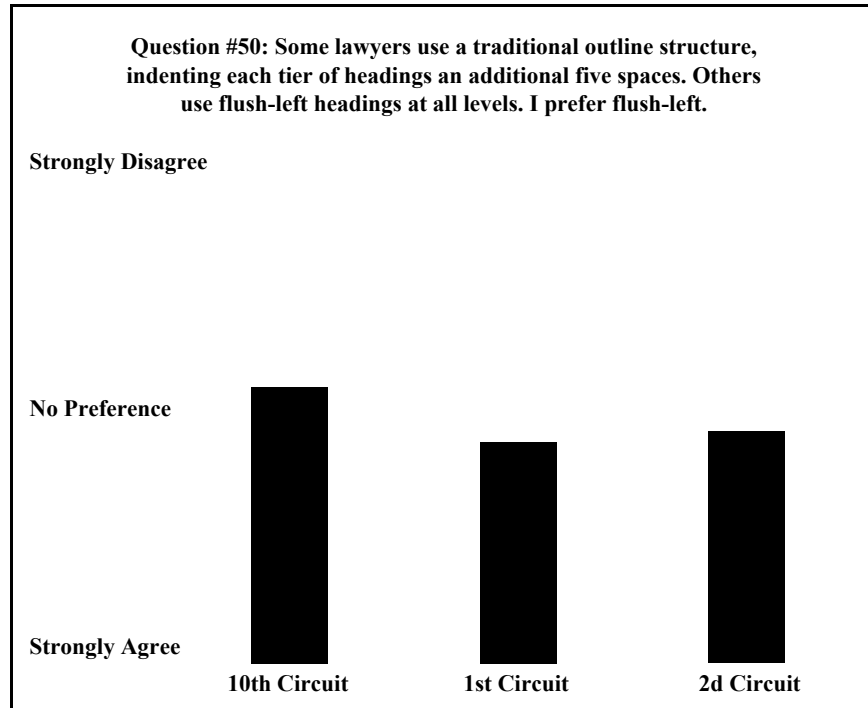
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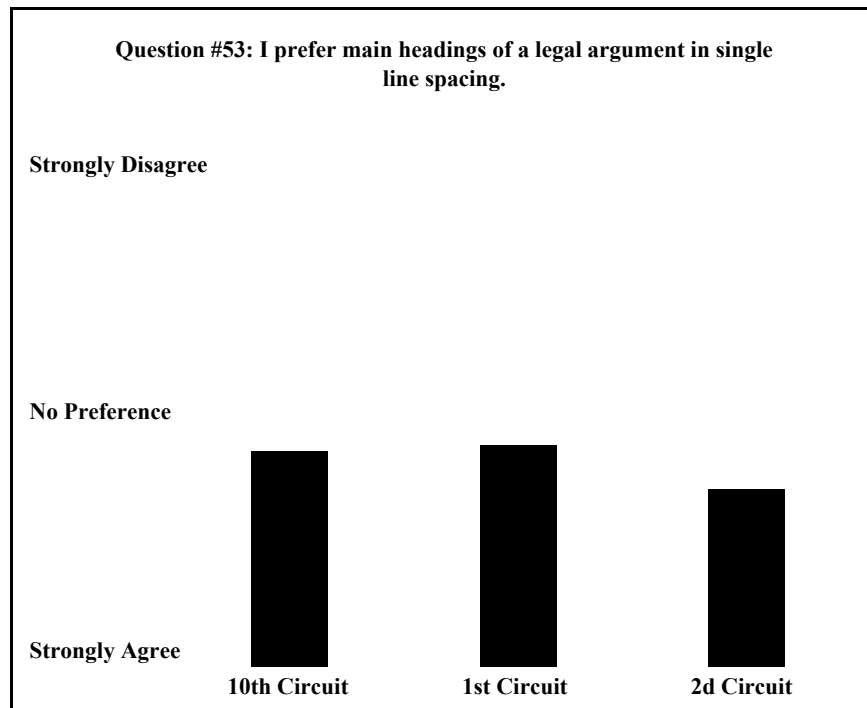
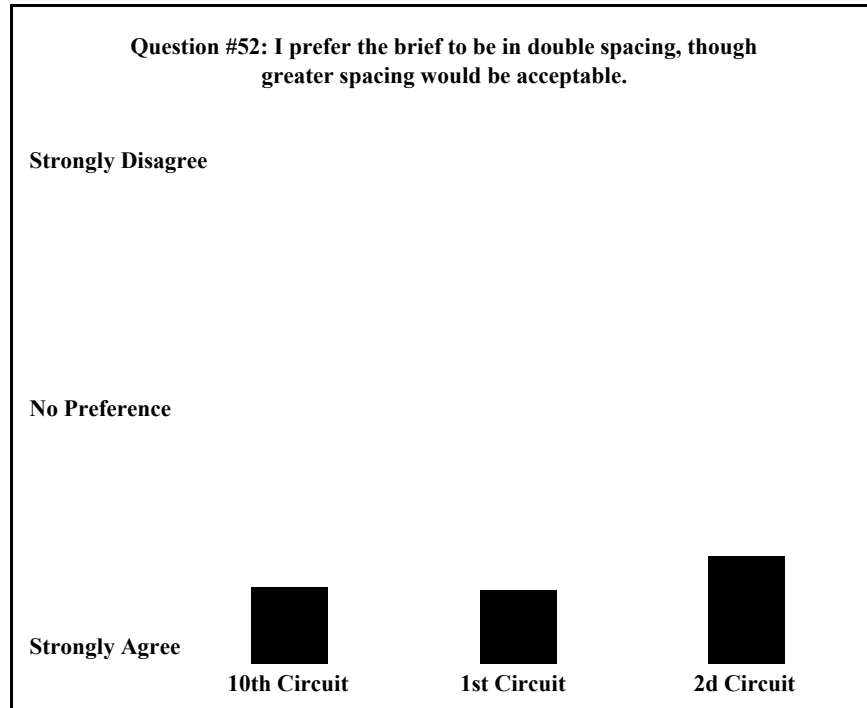


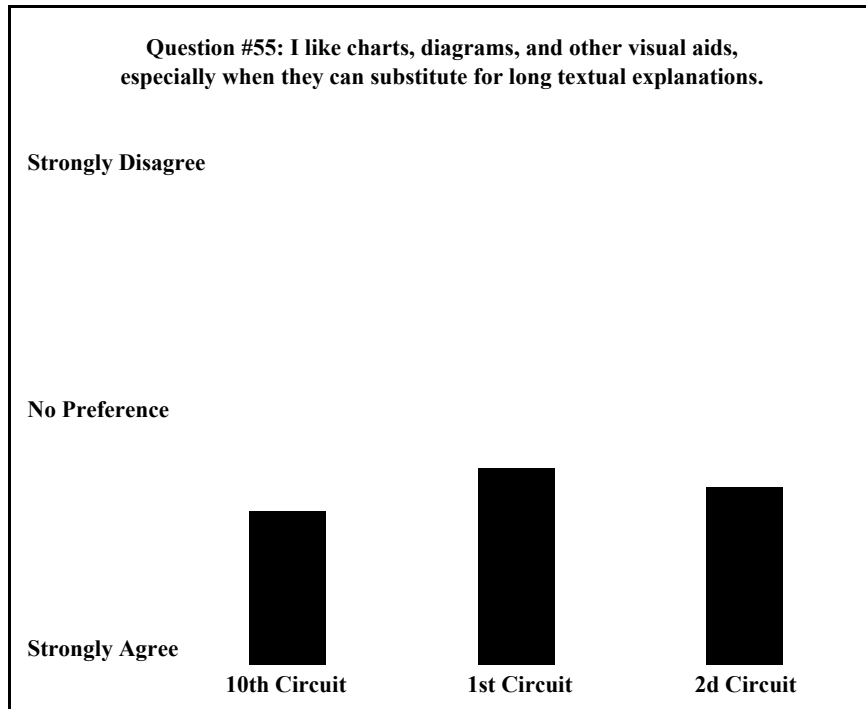
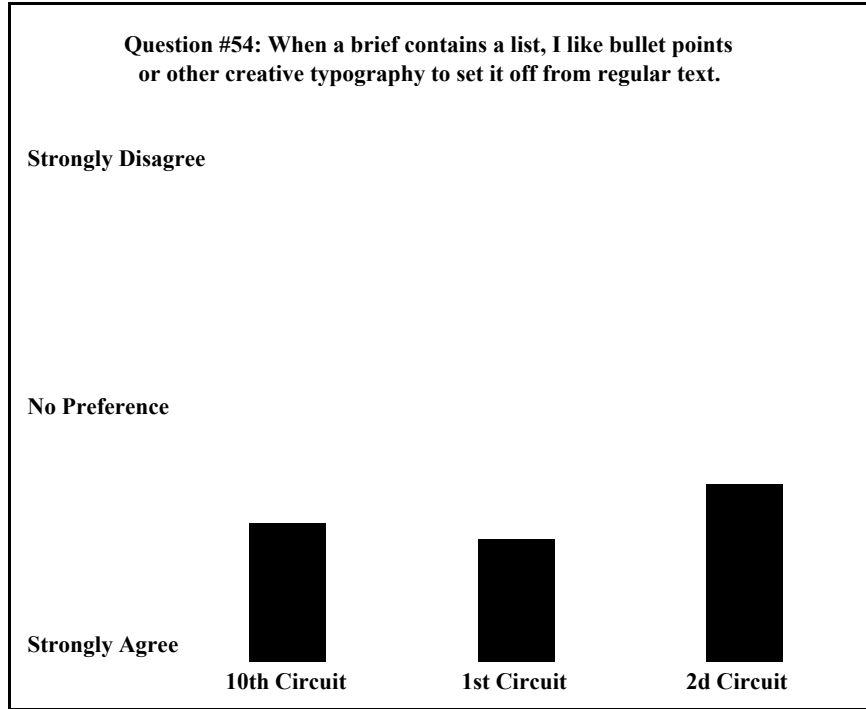


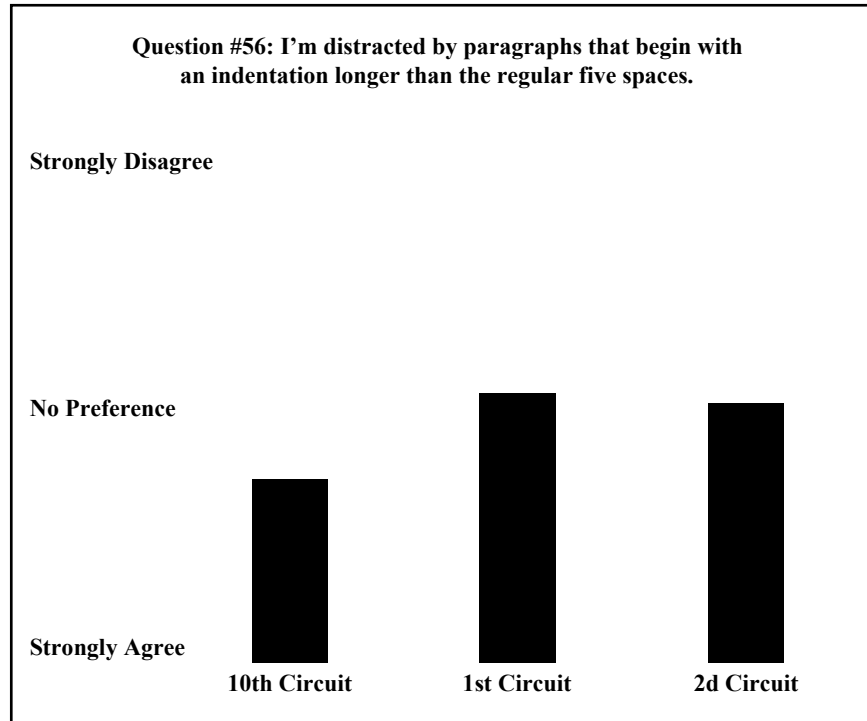


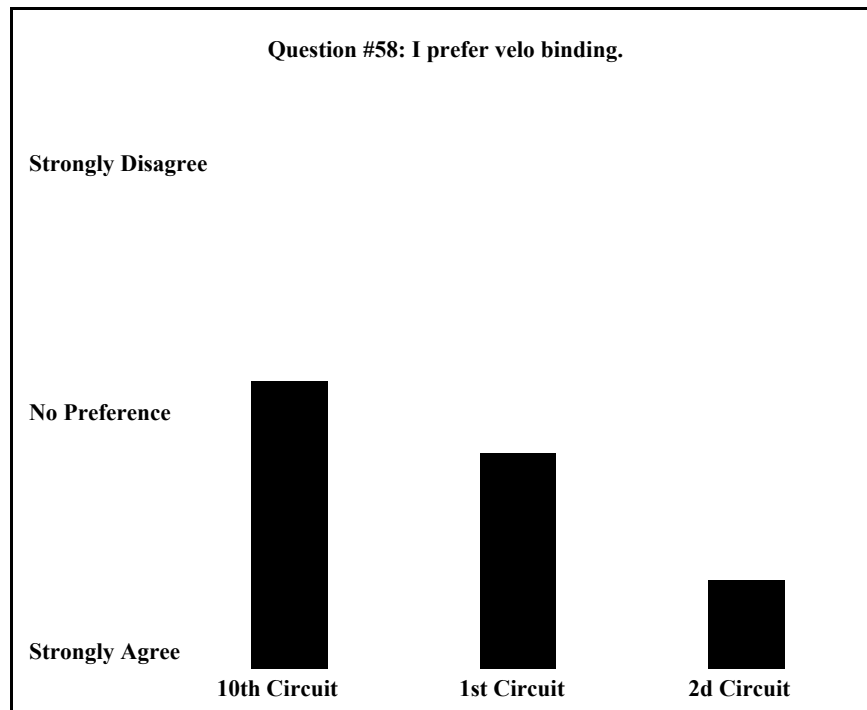
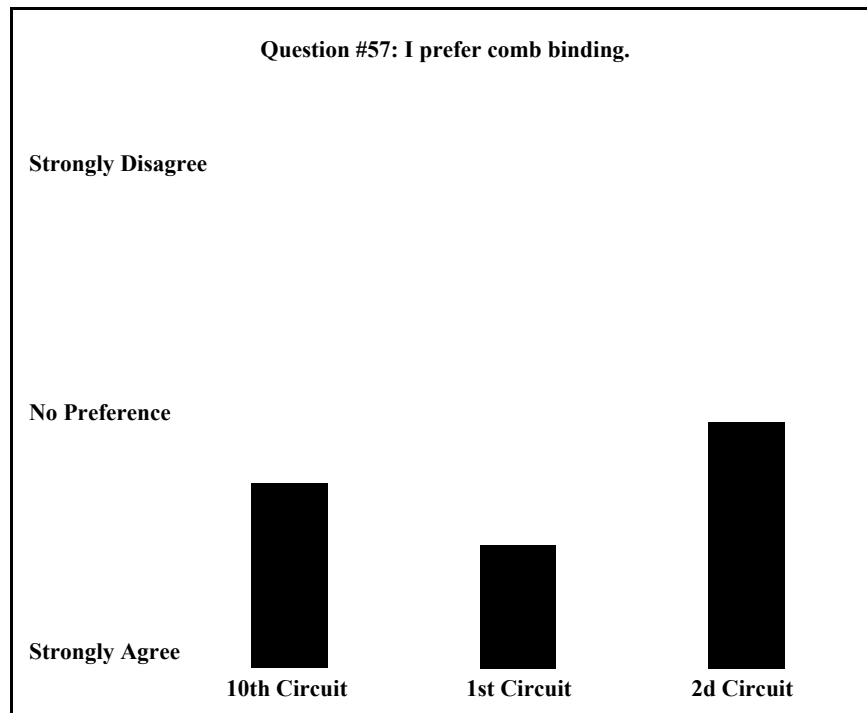


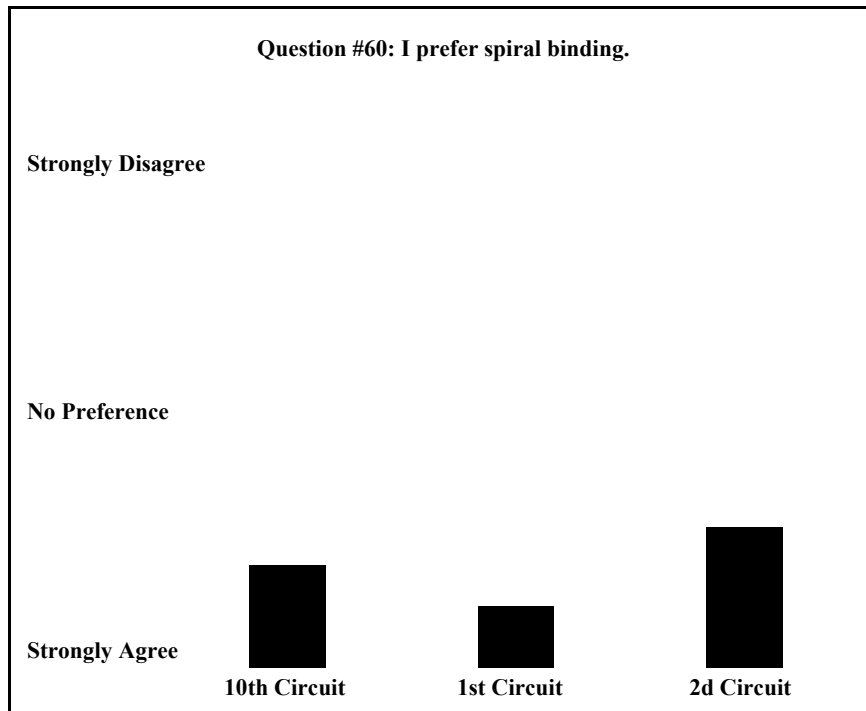
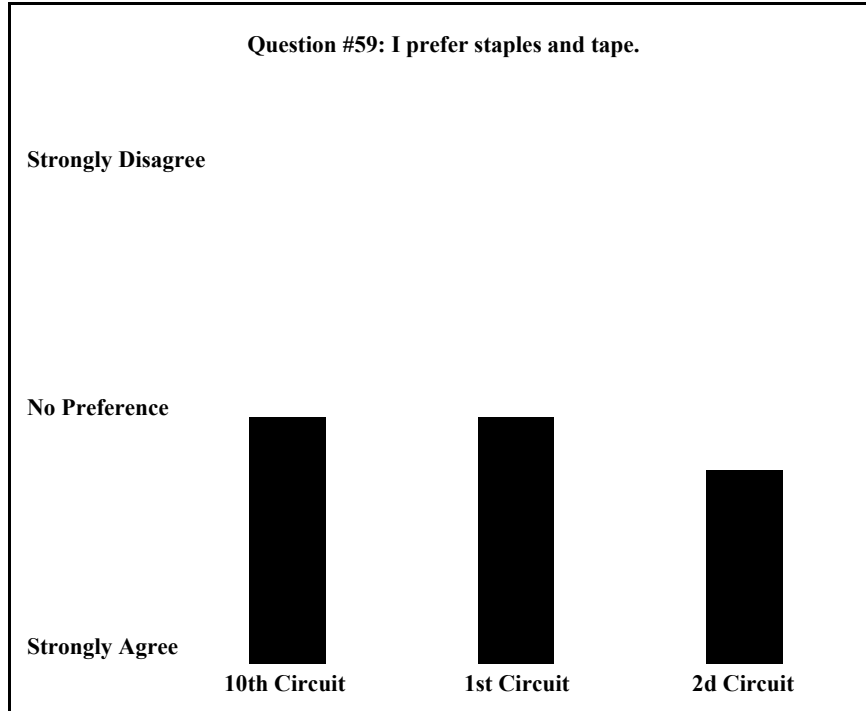


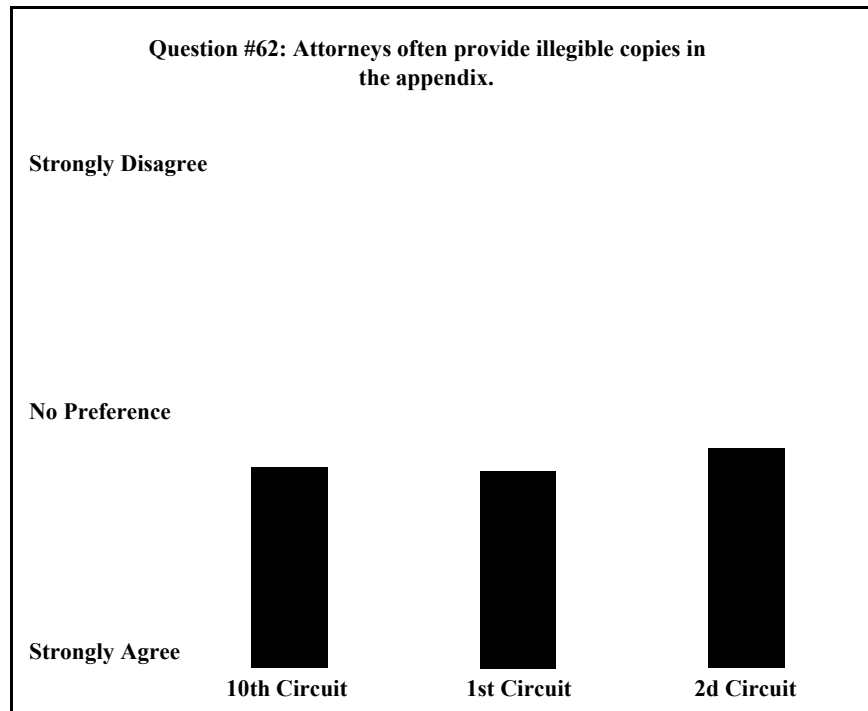
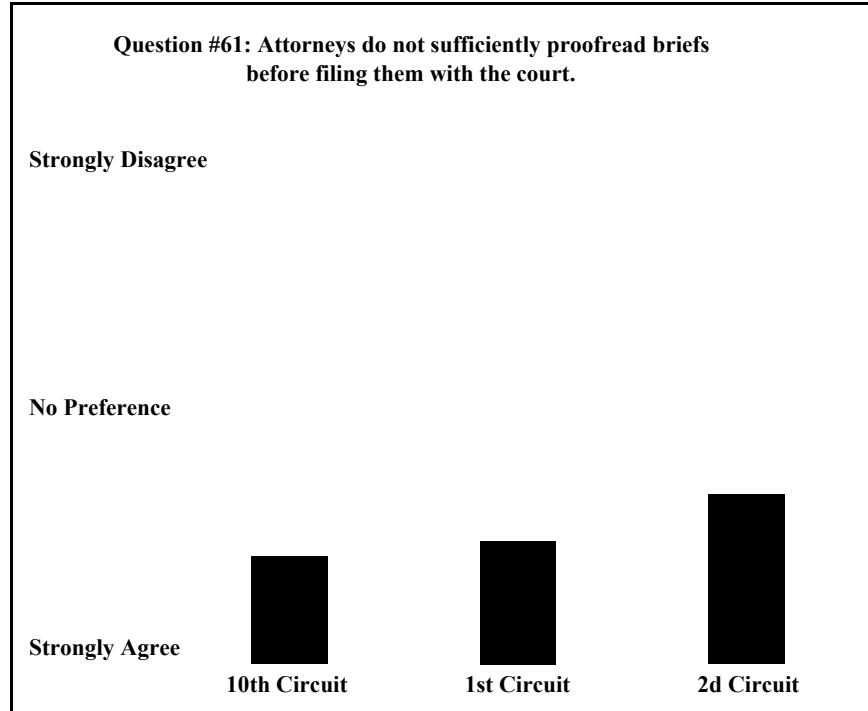


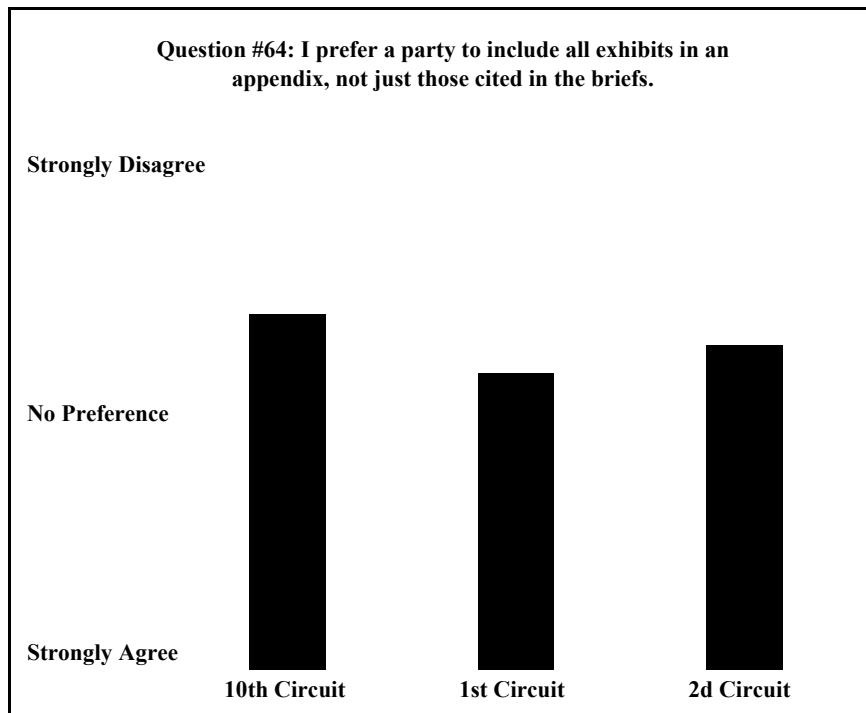
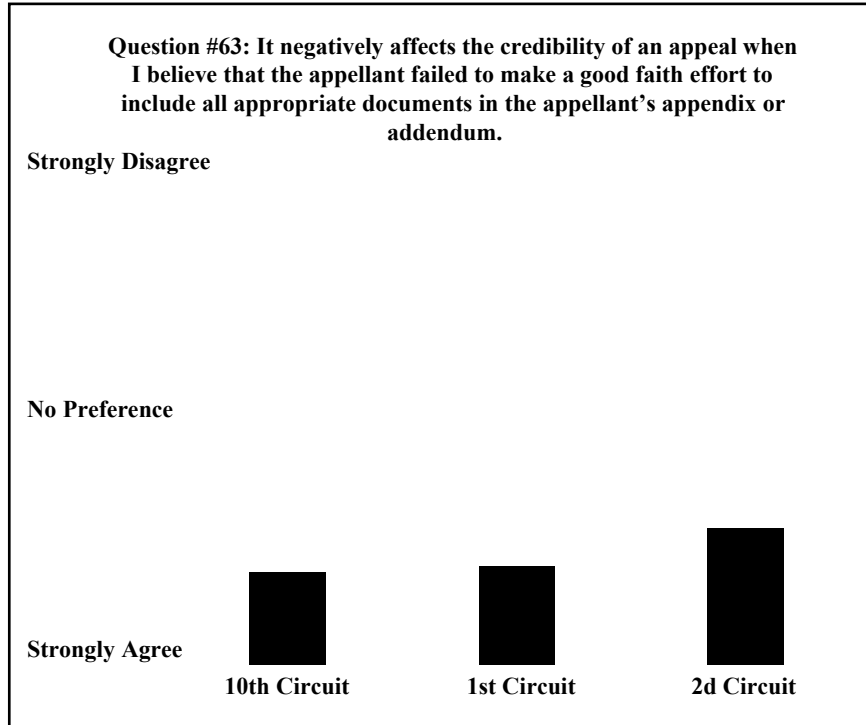


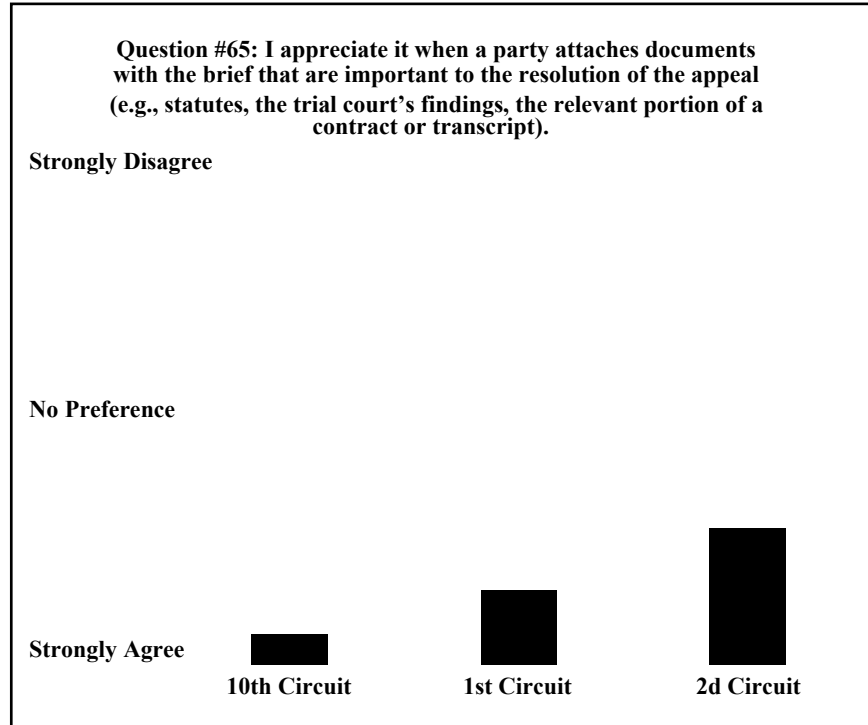


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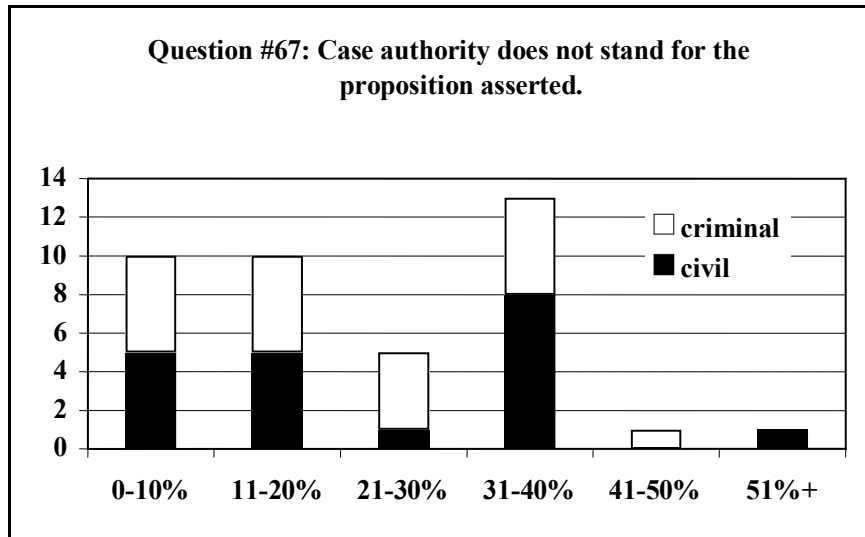
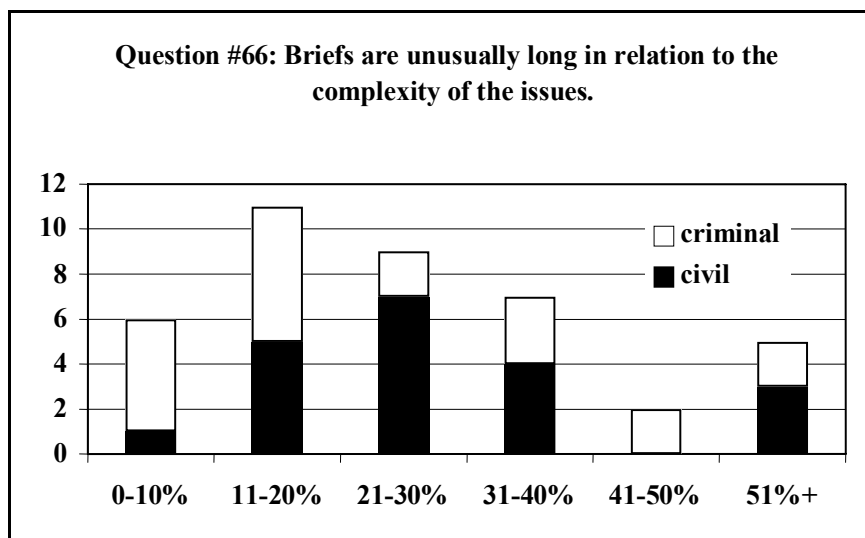




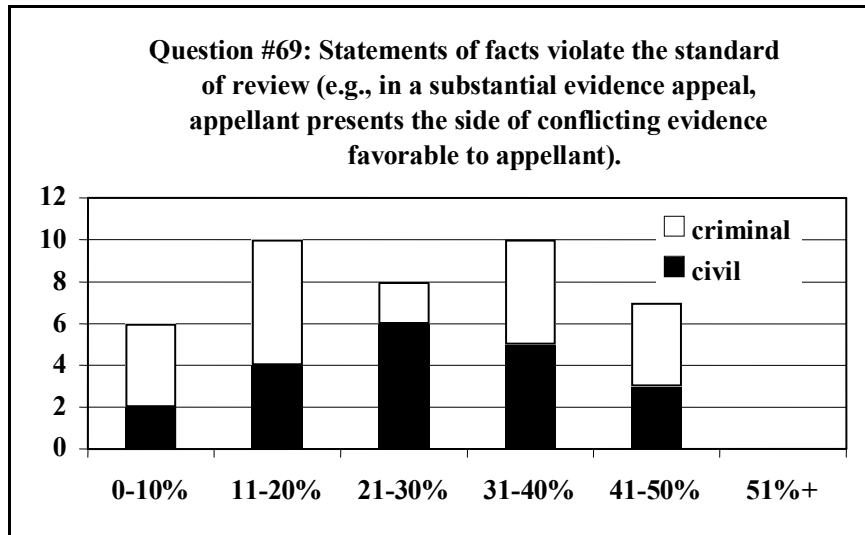
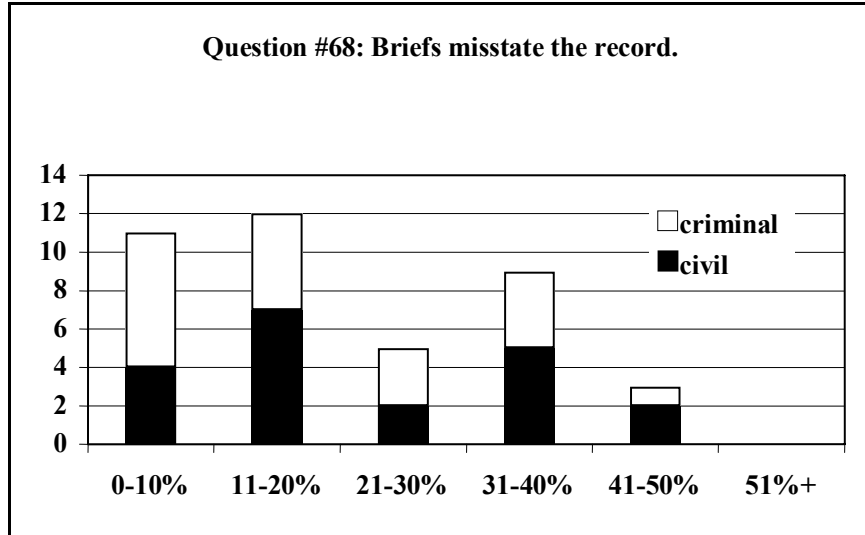


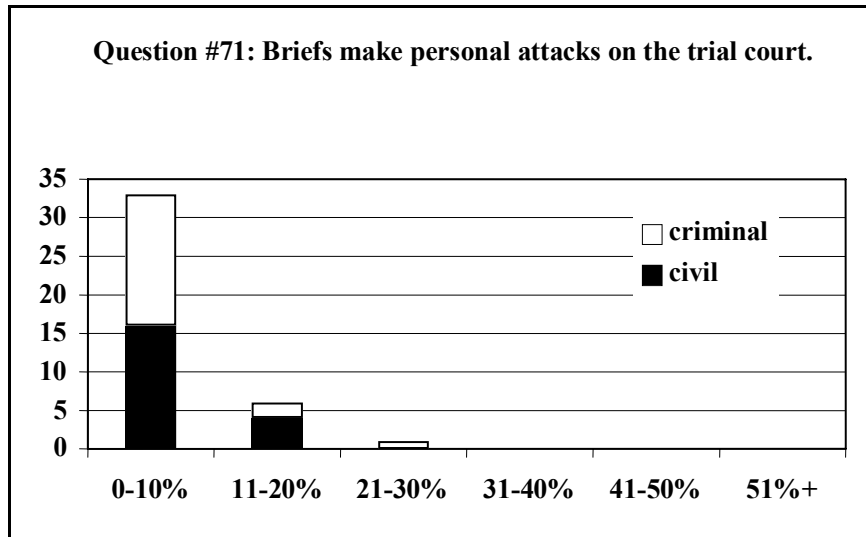
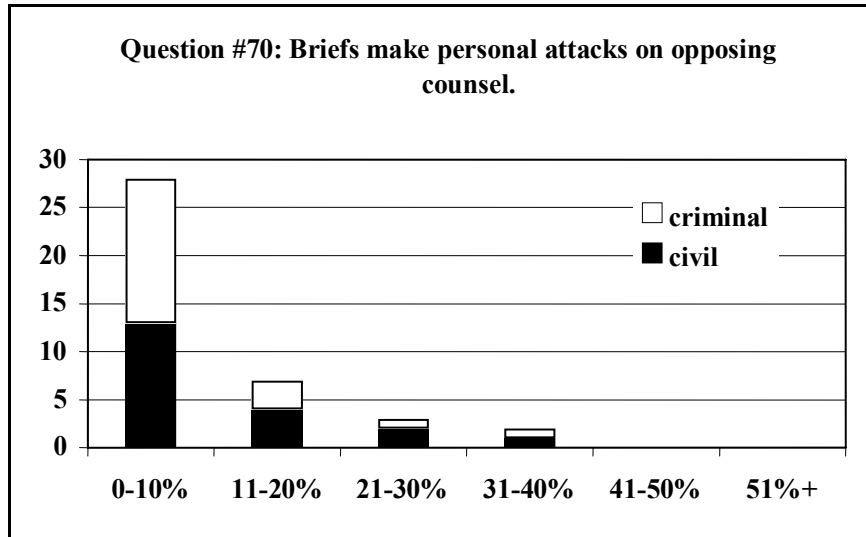
*F. Frequency of Certain Errors*<sup>12</sup>

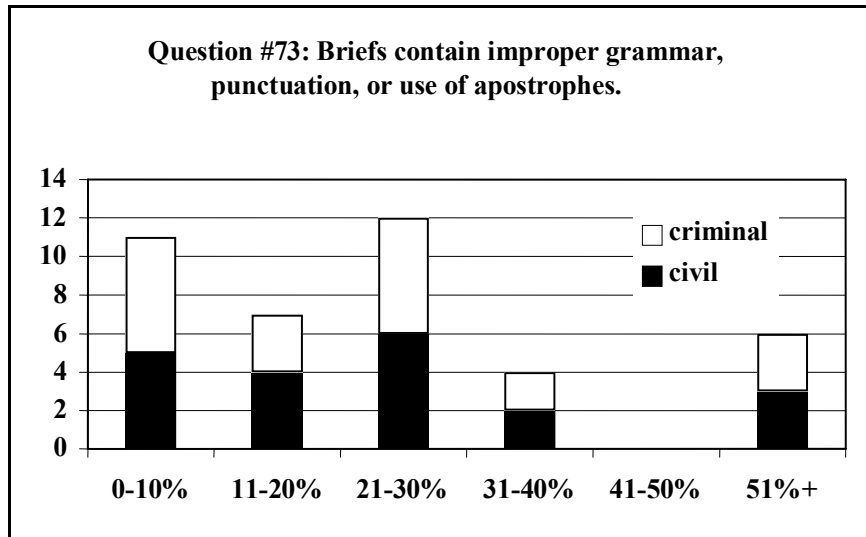
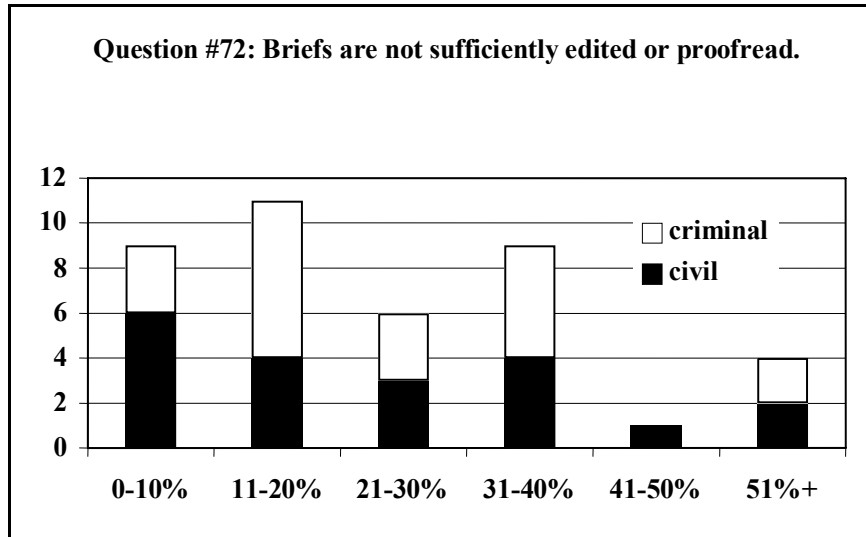
Justices, research attorneys, and advocates would all agree that the attributes of briefs listed in this section are errors. The justices saw these errors in the following percentage of briefs filed in civil and criminal cases.

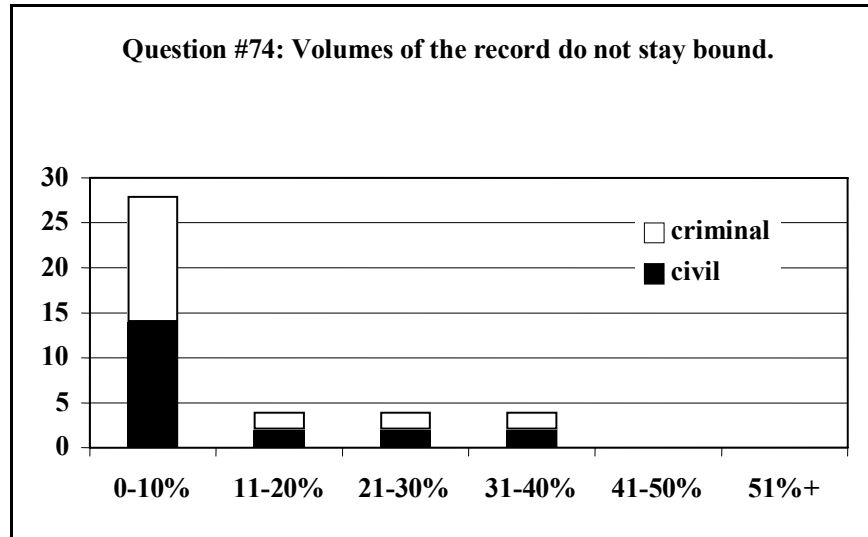


12. See *supra* Part I for a detailed discussion of this information.

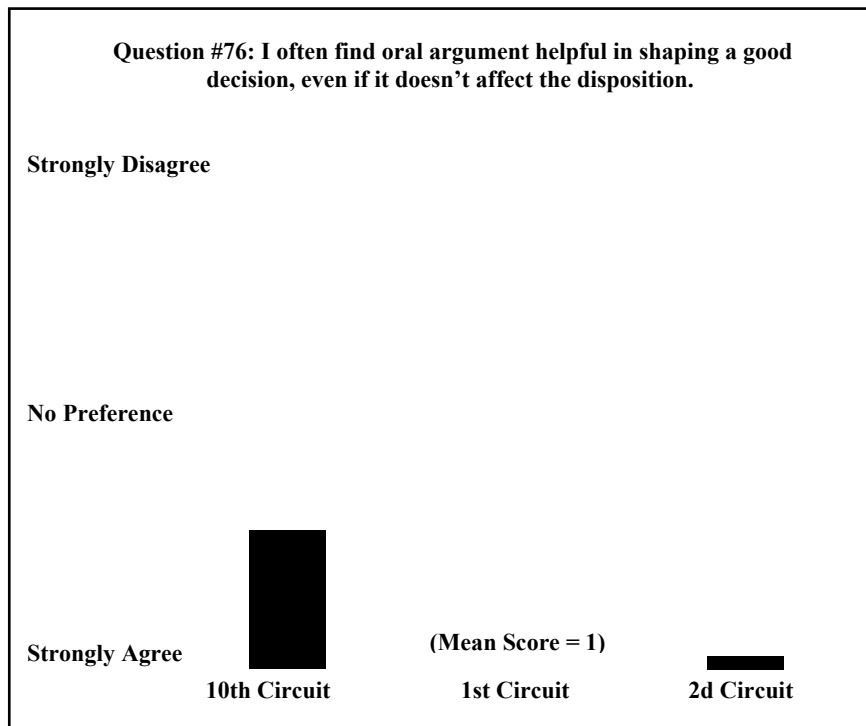
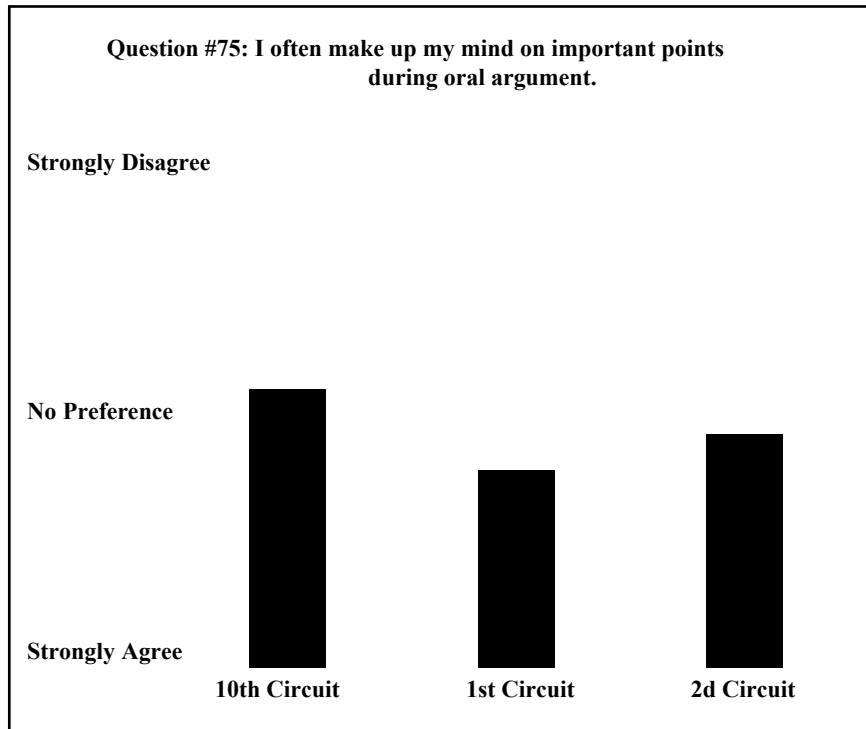


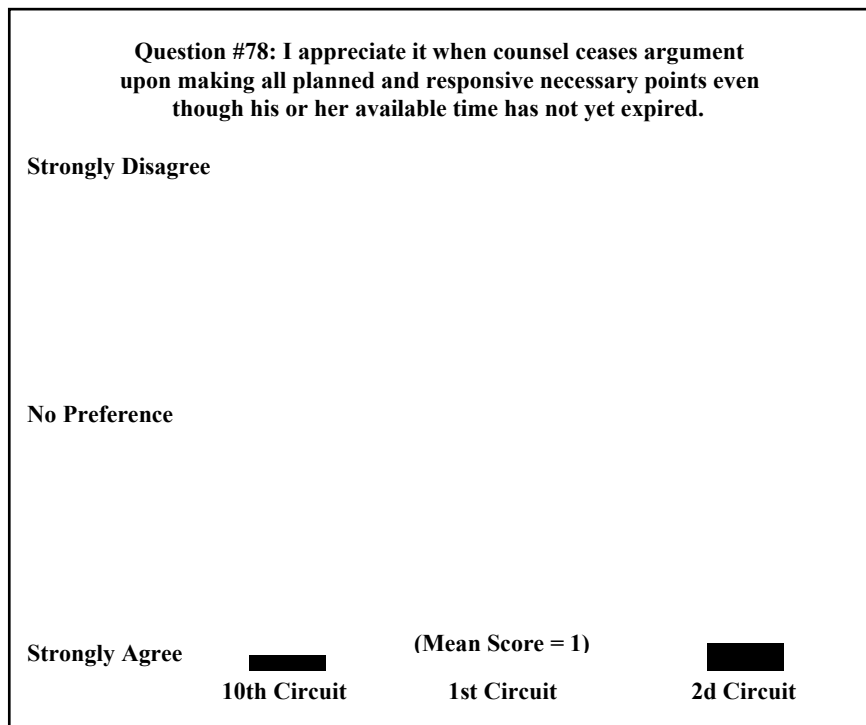
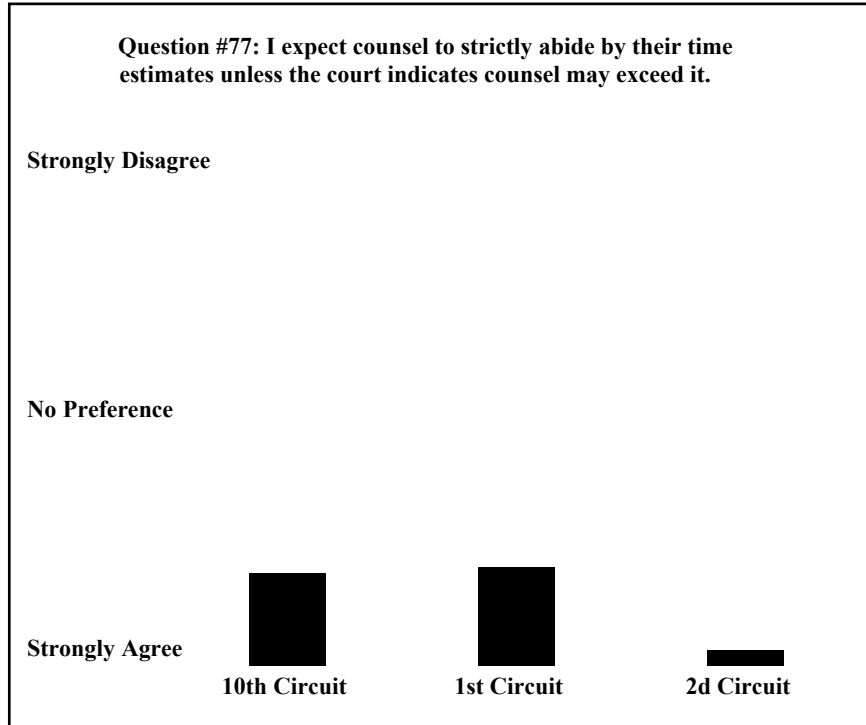






*G. Oral Argument*






**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**

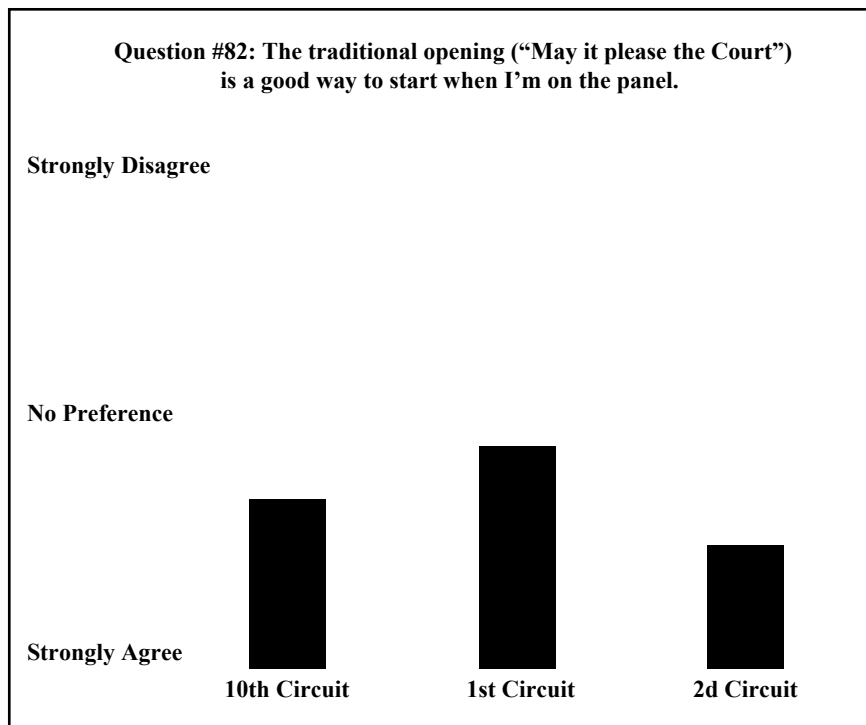
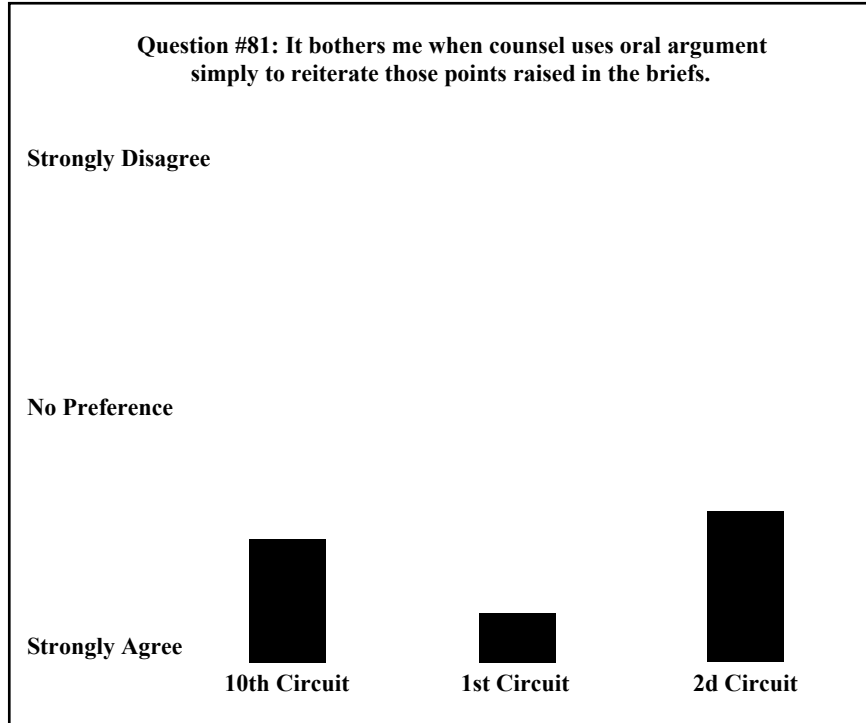
**Strongly Agree** (Mean Score = 1) (Mean Score = 1)   
10th Circuit 1st Circuit 2d Circuit

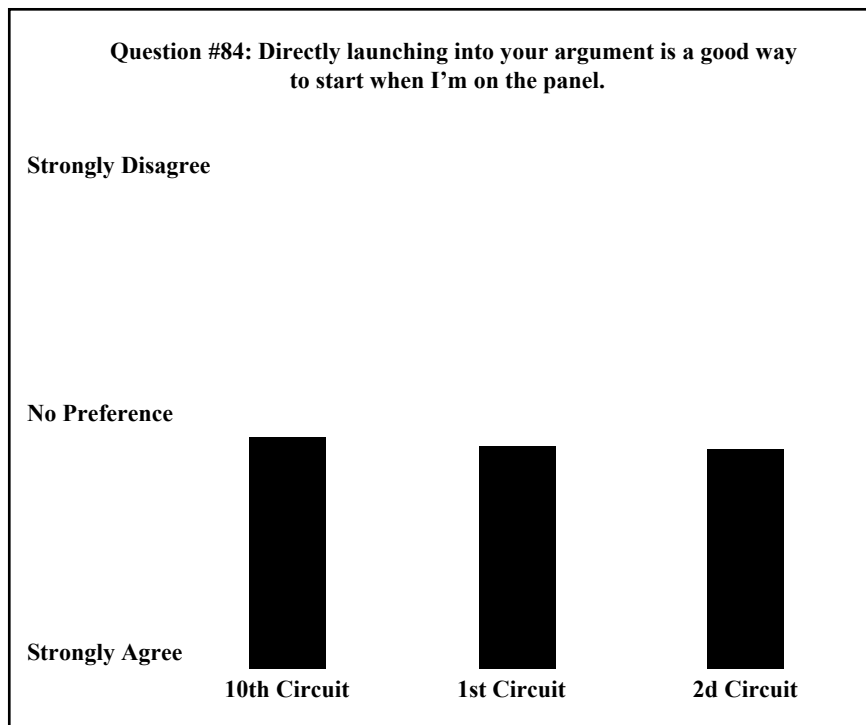
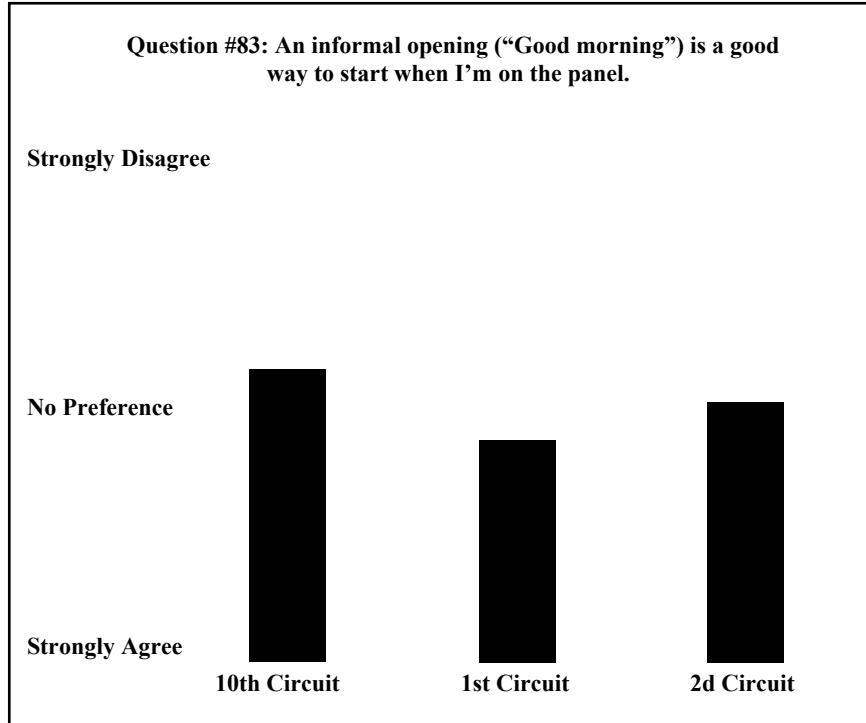
**Question #80: I believe argument is more effective when it is narrowly focused as opposed to attempting to address all issues raised in the briefs.**

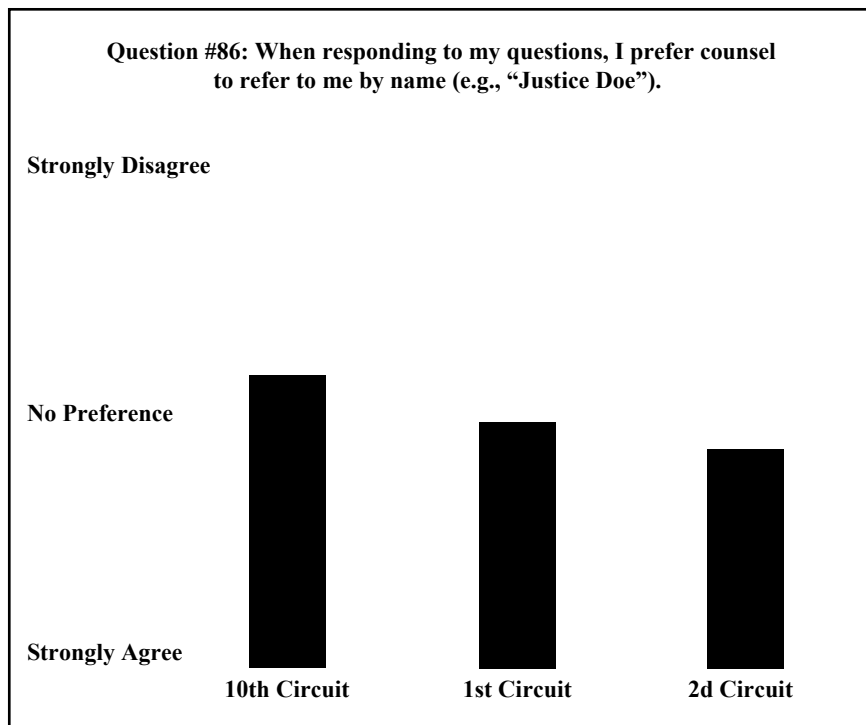
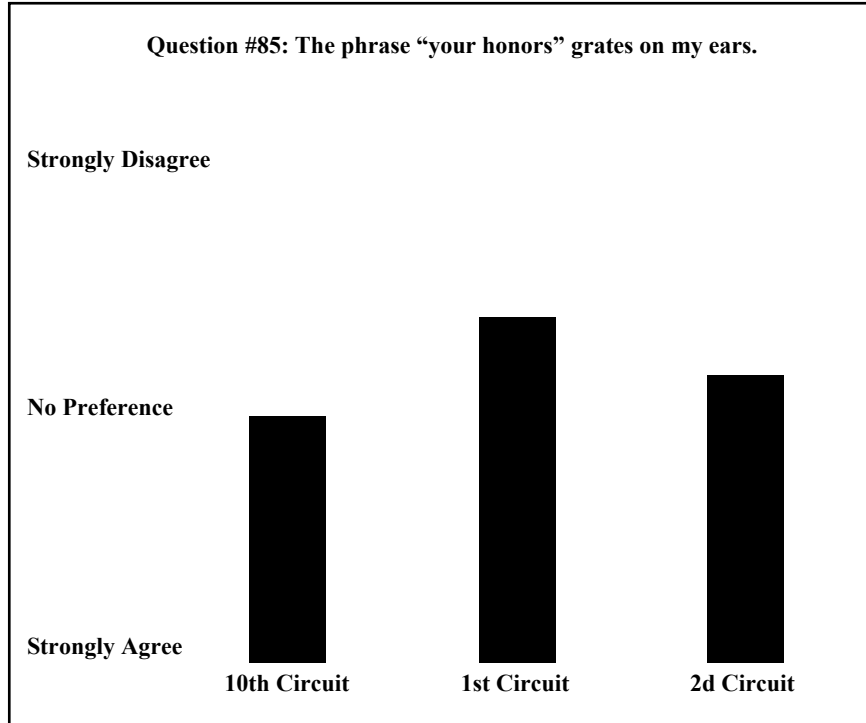
**Strongly Disagree**

**No Preference**

**Strongly Agree**     
10th Circuit 1st Circuit 2d Circuit







## CONCLUSION

I conclude by expressing my thanks once again 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, as well as the graphs presented in the *Journal of Appellate Practice and Process*,<sup>13</sup> will benefit both appellate lawyers and judges and result in briefs that are both more clear and better written, and advocacy that is conducted at a higher level overall.

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13. See *supra*, notes 2–3.