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

DAVID LEWIS†

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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. 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*.\(^2\) 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*.\(^3\)

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,**\(^4\)
- **B. Writing Style and Advocacy,**\(^5\)
- **C. Use of Authority and the Record,**\(^6\)
- **D. Typography of Briefs,**\(^7\)
- **E. Physical Characteristics of Appellate Work Product,**\(^8\)
- **F. Frequency of Certain Errors,**\(^9\) and
- **G. Oral Argument**\(^10\)

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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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 survey11 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.

III. SURVEY RESULTS

The survey results are summarized beginning on the following page.

11. See infra Part III.F.
A. The Structural Elements of Briefs

<table>
<thead>
<tr>
<th>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.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Disagree</td>
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<tr>
<td>No Preference</td>
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<td>Strongly Agree</td>
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| 10th Circuit | 1st Circuit | 2d Circuit |

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<thead>
<tr>
<th>Question #2: The “statement of the case” in a brief should provide the procedural context of the appeal.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Disagree</td>
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<td>No Preference</td>
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<td>Strongly Agree</td>
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</tbody>
</table>

| 10th Circuit | 1st Circuit | 2d Circuit |
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

10th Circuit
1st Circuit
2d Circuit

Question #4: The “statement of the facts” in a brief should provide the case’s critical facts.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit
1st Circuit
2d Circuit
Question #5: The “statement of the case” in a brief should identify the case’s dispositive issues.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit

1st Circuit

2d Circuit

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

10th Circuit

1st Circuit

2d Circuit
Question #7: An appellant’s opening brief should state the standard of review for each issue.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

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

10th Circuit 1st Circuit 2d Circuit
Question #9: The conclusion to an appellant’s opening brief should state precisely the remedy the appellant seeks.

- Strongly Disagree
- No Preference
- Strongly Agree

1st Circuit 10th Circuit 2d Circuit

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

- Strongly Disagree
- No Preference
- Strongly Agree

1st Circuit 10th Circuit 2d Circuit

(Mean Score = 1)
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

10th Circuit 1st Circuit 2d Circuit

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

10th Circuit 1st Circuit 2d Circuit
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

Strongly Agree

10th Circuit

1st Circuit

2d Circuit

No Preference

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

Strongly Disagree

No Preference

Strongly Agree

10th Circuit

1st Circuit

2d Circuit
Question #15: A “summary of the argument” should be included even if the rules do not require it.

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<td>Strongly Disagree</td>
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B. 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.

- Strongly Disagree
- No Preference
- Strongly Agree

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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.

- Strongly Disagree
- No Preference
- Strongly Agree

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- Strongly Agree
- No Preference
- Strongly Agree
Question #18: I tend to skim blocked quotations longer than 6 or 7 lines when I read briefs.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

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

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit
Question #20: It bothers me when a brief or writ petition uses legalese and old pleading language.

Strongly Disagree

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

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

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit
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

10th Circuit 1st Circuit 2d Circuit

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

10th Circuit 1st Circuit 2d Circuit
Question #24: It bothers me when a brief uses adverbs like “clearly” and “obviously” to support arguments.

- Strongly Disagree
- No Preference
- Strongly Agree

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

- Strongly Disagree
- No Preference
- Strongly Agree

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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

10th Circuit 1st Circuit 2d Circuit

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

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit
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

10th Circuit
1st Circuit
2d Circuit

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

Strongly Disagree

No Preference

Strongly Agree

10th Circuit
1st Circuit
2d Circuit
Question #30: Footnotes should be used sparingly.

- Strongly Disagree
- No Preference
- Strongly Agree

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

- Strongly Disagree
- No Preference
- Strongly Agree

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Question #32: I prefer a party to place the full text of a statute in a footnote when that statute is at issue.

Strongly Disagree

No Preference

Strongly Agree  10th Circuit  1st Circuit  2d Circuit
C. 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 10th Circuit 1st Circuit 2d Circuit

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

Strongly Disagree

No Preference

Strongly Agree 10th Circuit 1st Circuit 2d Circuit
Question #35: Case citations should almost always include a specific page reference.

Strongly Agree

No Preference

Strongly Agree

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
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

10th Circuit 2d Circuit 1st Circuit

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

10th Circuit 2d Circuit 1st Circuit
Question #39: Whenever a clerk’s transcript, reporter’s transcript, appendix, or set of exhibits includes multiple volumes, I prefer the record references in briefs to include volume numbers as well as page numbers.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit

1st Circuit

2d Circuit

(Mean Score = 1)
D. 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

10th Circuit 1st Circuit 2d Circuit

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

10th Circuit 1st Circuit 2d Circuit
Question #42: I do not have a preference for which style manual an attorney should use as long as the method used is consistent throughout the brief and allows me to quickly and accurately identify cited authority.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

Question #43: I prefer italics to underlining for case citations.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit
Question #44: I prefer italics to underlining for emphasis, Latin words, and the like.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

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

10th Circuit 1st Circuit 2d Circuit
Question #46: I prefer titles of major parts of the brief (e.g., STATEMENT OF THE CASE) to be in all capitals.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 2d Circuit

Question #47: I prefer main headings of the legal argument (e.g., THE JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE) to be in all capitals.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 2d Circuit
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

10th Circuit 1st Circuit 2d Circuit

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

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit
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

10th Circuit 1st Circuit 2d Circuit

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

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit
**Question #52:** I prefer the brief to be in double spacing, though greater spacing would be acceptable.

- Strongly Disagree
- No Preference
- Strongly Agree

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

- Strongly Disagree
- No Preference
- Strongly Agree

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<td><img src="image6" alt="Bar Graph" /></td>
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</table>
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

1st Circuit

2d Circuit

10th Circuit

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

1st Circuit

2d Circuit

10th Circuit
Question #56: I’m distracted by paragraphs that begin with an indentation longer than the regular five spaces.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit
1st Circuit
2d Circuit
E. Physical Characteristics of Appellate Work Product

Question #57: I prefer comb binding.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

Question #58: I prefer velo binding.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit
Question #59: I prefer staples and tape.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

Question #60: I prefer spiral binding.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit
Question #61: Attorneys do not sufficiently proofread briefs before filing them with the court.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

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

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit
**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.

<table>
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<th>Strongly Disagree</th>
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**Question #64:** I prefer a party to include all exhibits in an appendix, not just those cited in the briefs.

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<th>Strongly Disagree</th>
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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, the trial court’s findings, the relevant portion of a contract or transcript).

Strongly Disagree

No Preference

Strongly Agree

10th Circuit

1st Circuit

2d Circuit
F. Frequency of Certain Errors

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.

**Question #66: Briefs are unusually long in relation to the complexity of the issues.**

![Bar chart showing the percentage of briefs that are unusually long in relation to the complexity of the issues for civil and criminal cases.

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

![Bar chart showing the percentage of briefs that have case authority not standing for the proposition asserted for civil and criminal cases.

12. See supra Part I for a detailed discussion of this information.
Question #68: Briefs misstate the record.

![Bar Graph]

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).

![Bar Graph]
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.

![Bar chart showing distribution of editing quality for criminal and civil briefs.]

- 0-10%: 8 criminal, 4 civil
- 11-20%: 6 criminal, 10 civil
- 21-30%: 4 criminal, 3 civil
- 31-40%: 2 criminal, 5 civil
- 41-50%: 1 criminal, 1 civil
- 51%+: 1 criminal, 1 civil

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

![Bar chart showing distribution of grammar issues for criminal and civil briefs.]

- 0-10%: 13 criminal, 11 civil
- 11-20%: 8 criminal, 7 civil
- 21-30%: 4 criminal, 4 civil
- 31-40%: 2 criminal, 3 civil
- 41-50%: 1 criminal, 1 civil
- 51%+: 1 criminal, 1 civil
Question #74: Volumes of the record do not stay bound.

- 0-10%
- 11-20%
- 21-30%
- 31-40%
- 41-50%
- 51%+

Criminal

Civil
G. Oral Argument

Question #75: I often make up my mind on important points during oral argument.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit

1st Circuit

2d Circuit

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

10th Circuit

1st Circuit

2d Circuit

(Mean Score = 1)
Question #77: I expect counsel to strictly abide by their time estimates unless the court indicates counsel may exceed it.

- Strongly Disagree

- No Preference

- Strongly Agree

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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

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<th>1st Circuit</th>
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<tr>
<td>Mean Score</td>
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<td>(Mean Score = 1)</td>
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</table>
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 nonresponsively.

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
Question #81: It bothers me when counsel uses oral argument simply to reiterate those points raised in the briefs.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

Question #82: The traditional opening (“May it please the Court”) is a good way to start when I’m on the panel.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit
Question #83: An informal opening ("Good morning") is a good way to start when I’m on the panel.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

Question #84: Directly launching into your argument is a good way to start when I’m on the panel.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit
Question #85: The phrase “your honors” grates on my ears.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

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

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,13 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.

13. See supra, notes 2–3.