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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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If You Have Seen One Circuit, Have You Seen Them All? A Comparison of the Advocacy Preferences of Three Federal Circuit Courts of Appeal

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[†]

INTRODUCTION	893
I. METHODOLOGY	894
II. UNDERSTANDING THE GRAPHS	895
III. SURVEY RESULTS.....	895
<i>A. The Structural Elements of Briefs</i>	896
<i>B. Writing Style and Advocacy</i>	904
<i>C. Use of Authority and the Record</i>	913
<i>D. Typography of Briefs</i>	917
<i>E. Physical Characteristics of Appellate Work Product</i>	926
<i>F. Frequency of Certain Errors</i>	931
<i>G. Oral Argument</i>	936
CONCLUSION.....	942

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.¹ 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 Argument¹⁰

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.

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 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.

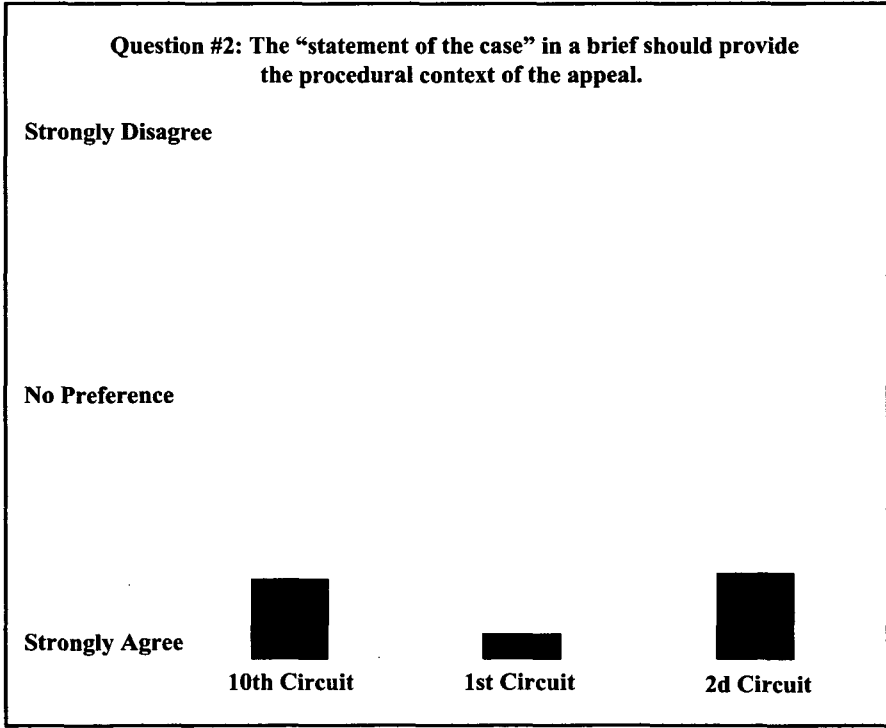
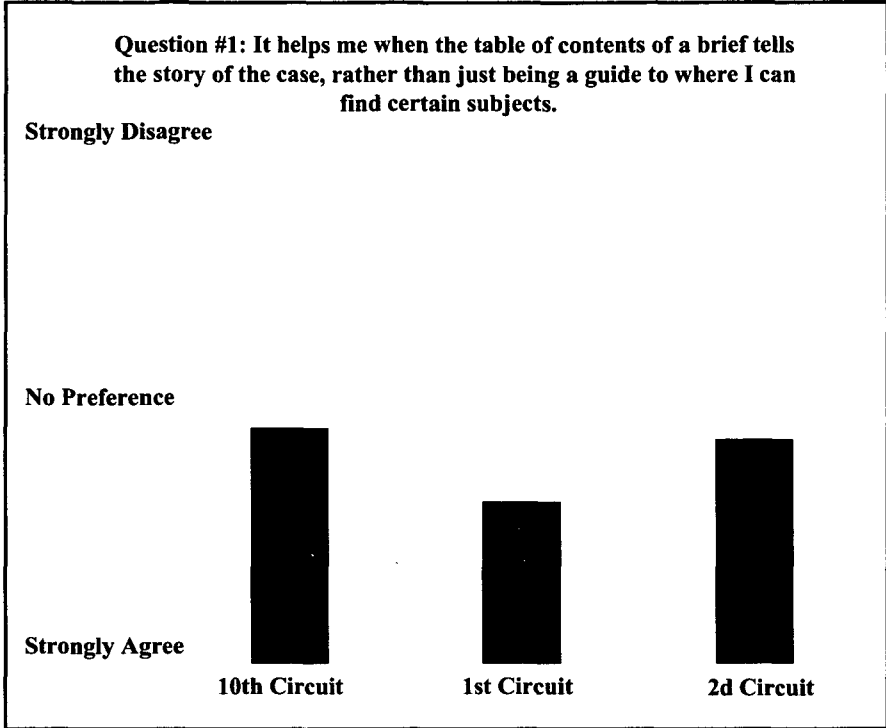
I recognize as well that some of the survey questions are not particularly germane to federal practice either because the issue is addressed in the federal rules of appellate procedure or the practice area is not litigated in federal court. In short, this was the by-product of conducting a multi-jurisdictional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



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

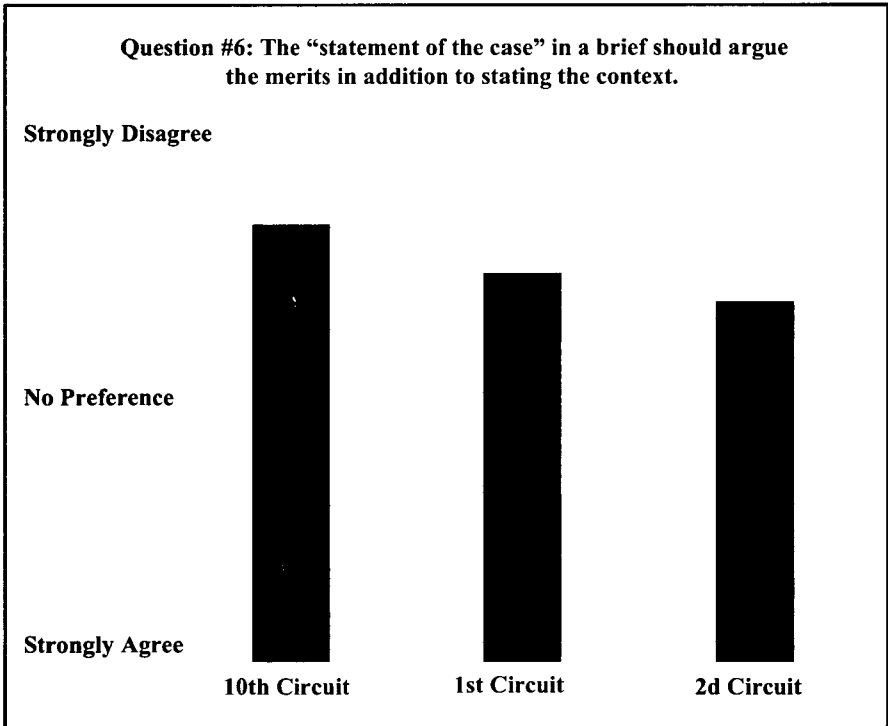
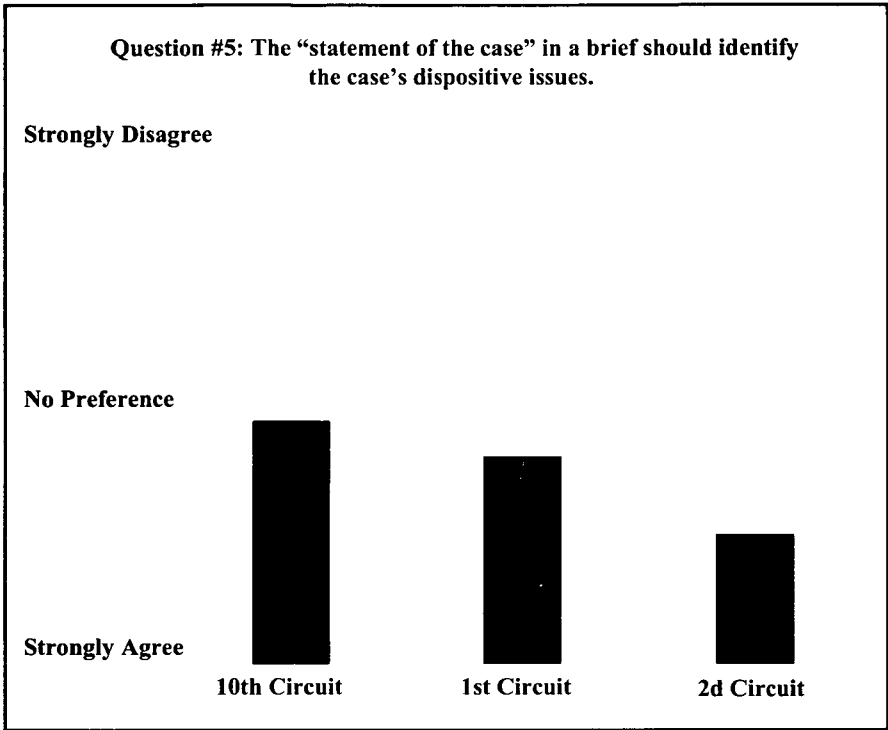
Strongly Agree

10th Circuit

1st Circuit

2d Circuit





Question #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

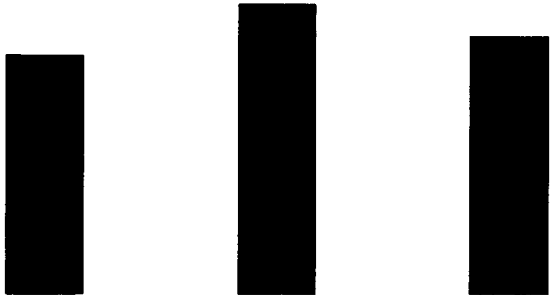
No Preference

Strongly Agree

10th Circuit

1st Circuit

2d Circuit

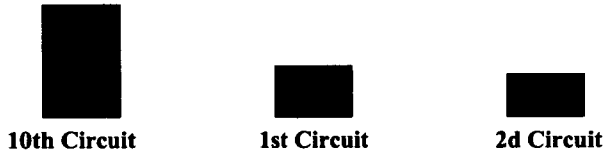


Question #9: The conclusion to an appellant's opening brief should state precisely the remedy the appellant seeks.

Strongly Disagree

No Preference

Strongly Agree

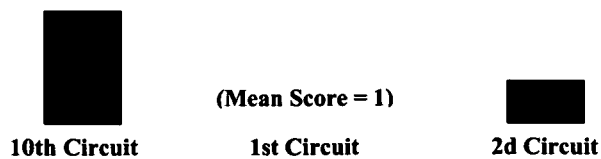


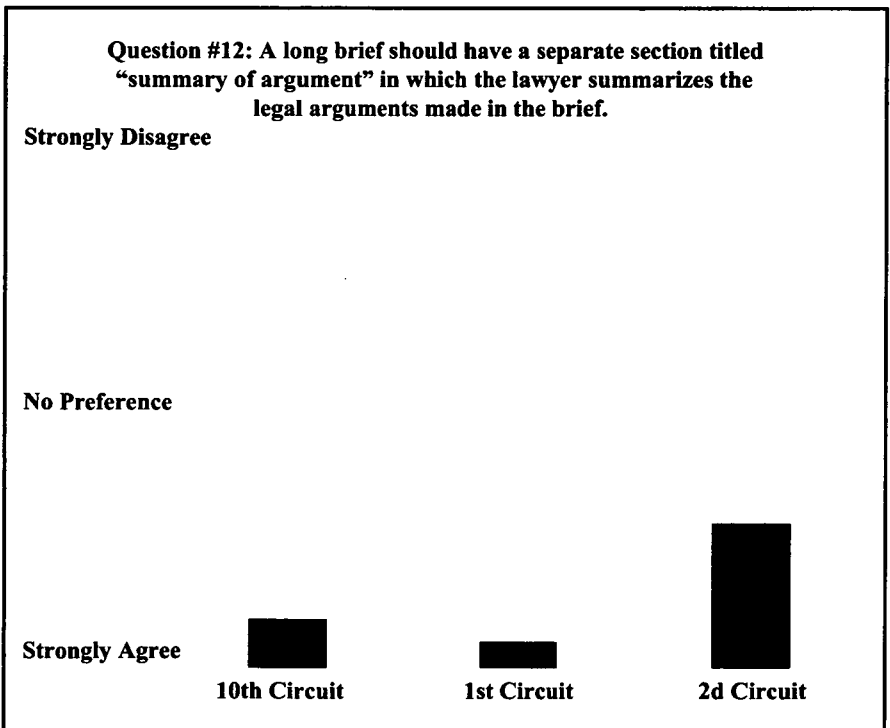
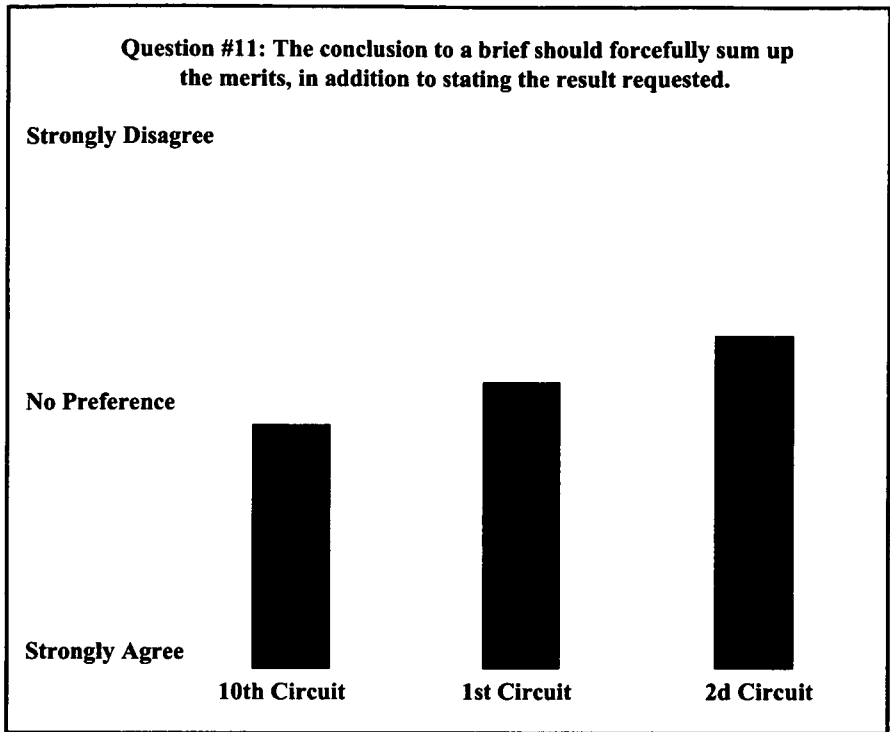
Question #10: The conclusion to a respondent's brief should state precisely the outcome the respondent seeks.

Strongly Disagree

No Preference

Strongly Agree



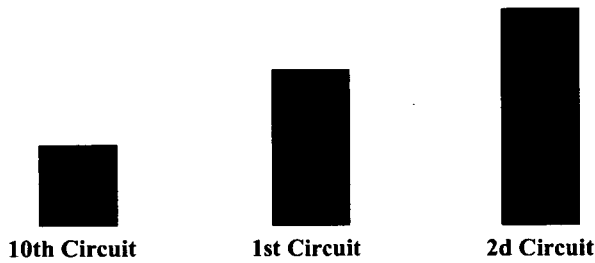


Question #13: A “summary of the argument” section provides an opportunity to persuade me, different and separate from a well-written table of contents or statement of the case and facts.

Strongly Disagree

No Preference

Strongly Agree

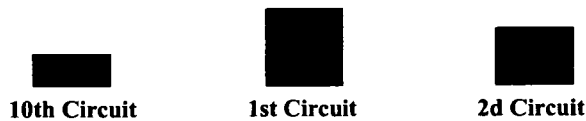


Question #14: A “summary of the argument” should not simply repeat the issue headings.

Strongly Disagree

No Preference

Strongly Agree

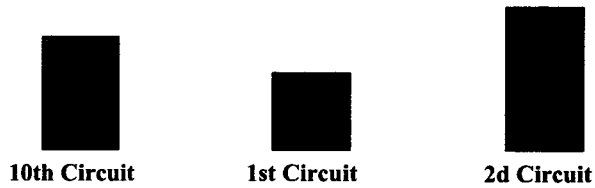


Question #15: A "summary of the argument" should be included even if the rules do not require it.

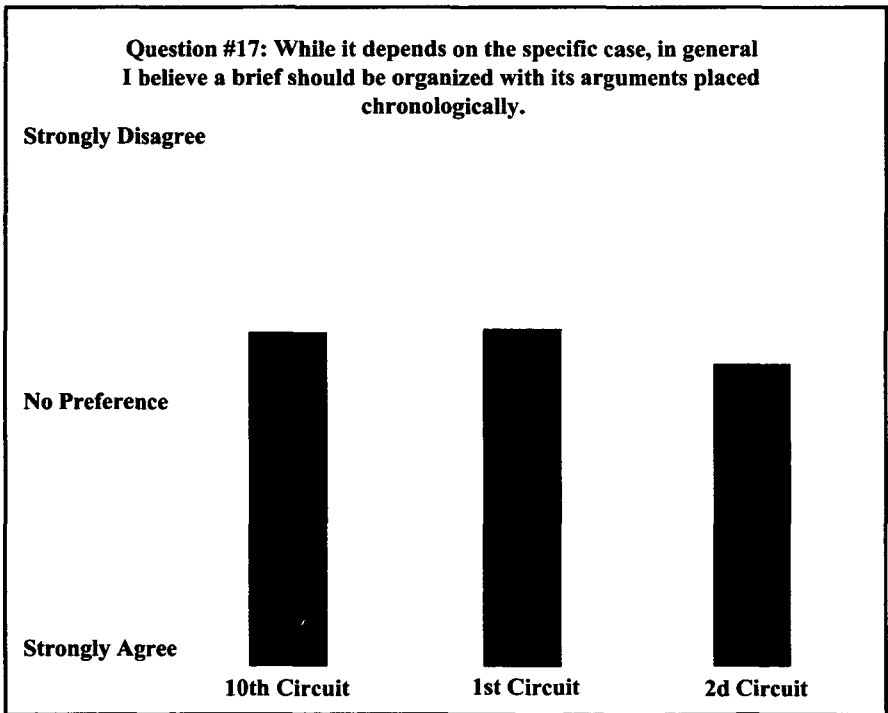
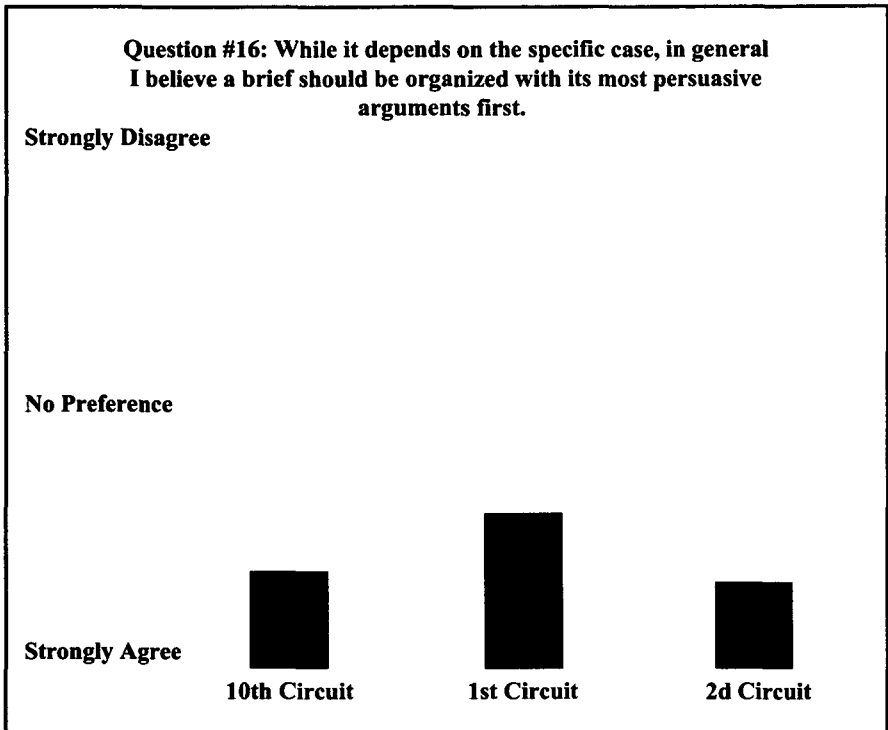
Strongly Disagree

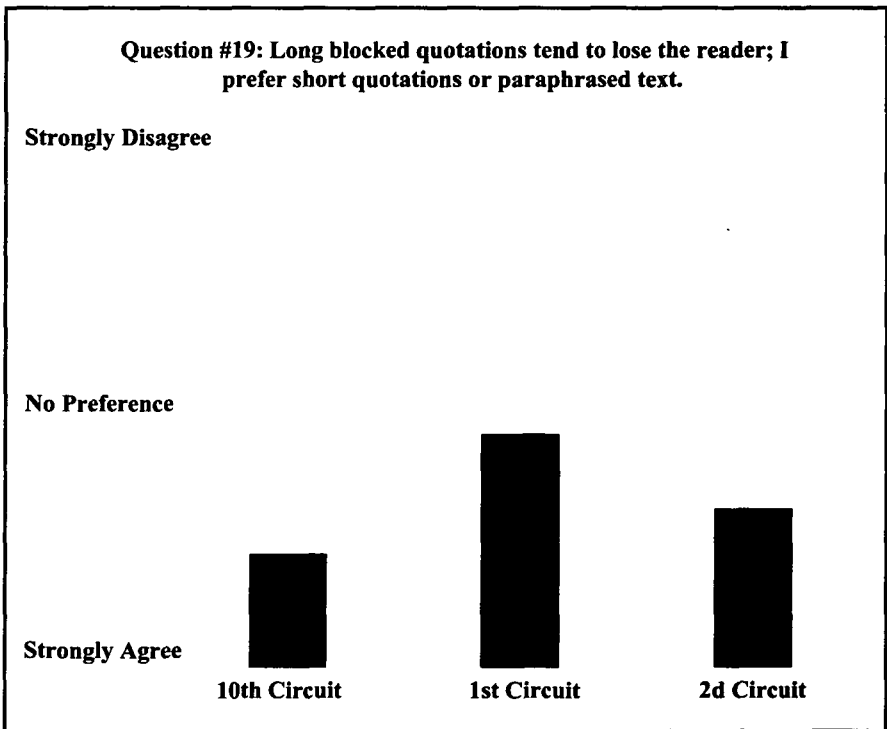
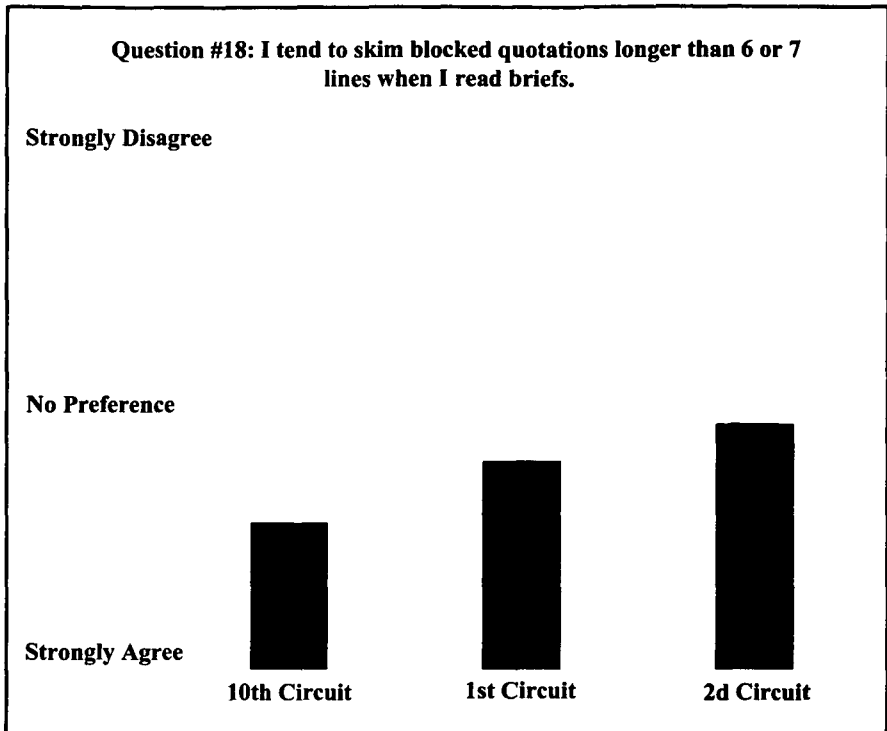
No Preference

Strongly Agree



B. Writing Style and Advocacy



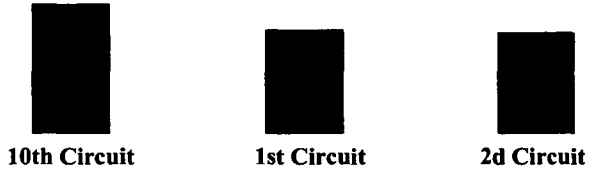


Question #20: It bothers me when a brief or writ petition uses legalese and old pleading language.

Strongly Disagree

No Preference

Strongly Agree

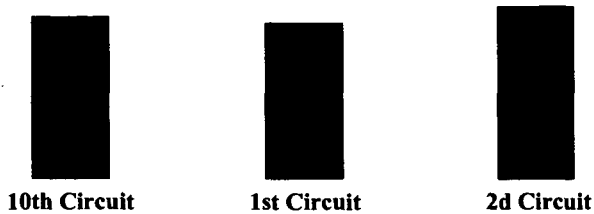


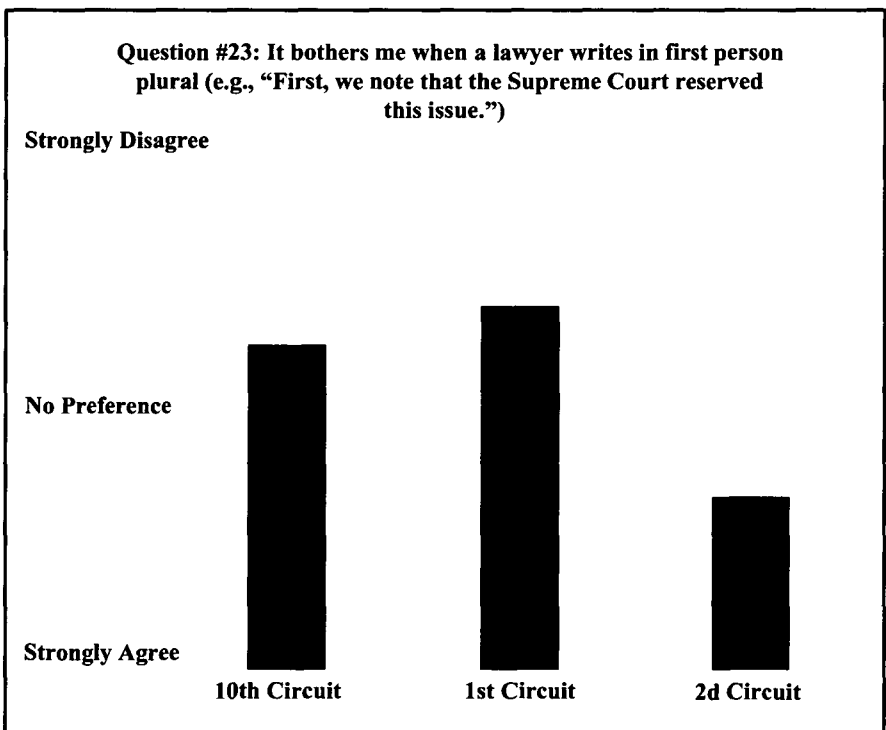
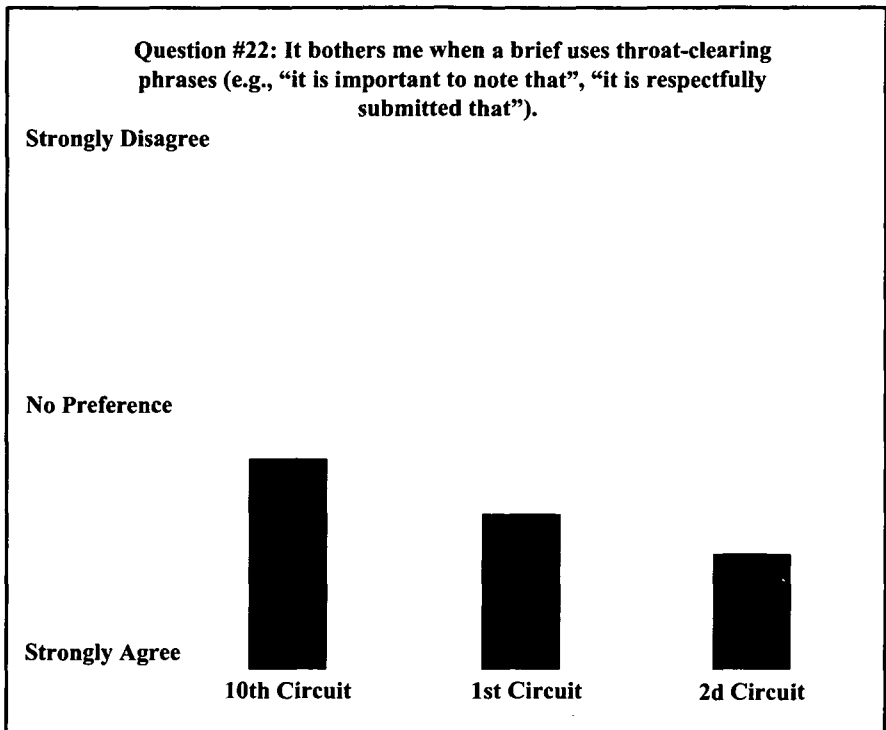
Question #21: It bothers me when a brief uses the passive voice frequently.

Strongly Disagree

No Preference

Strongly Agree



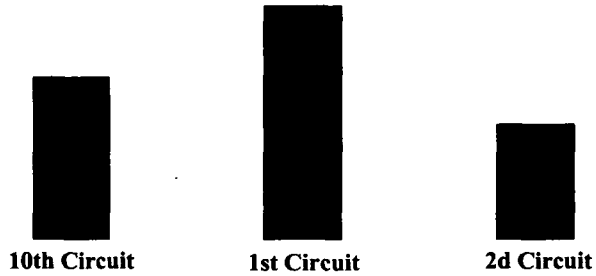


Question #24: It bothers me when a brief uses adverbs like “clearly” and “obviously” to support arguments.

Strongly Disagree

No Preference

Strongly Agree

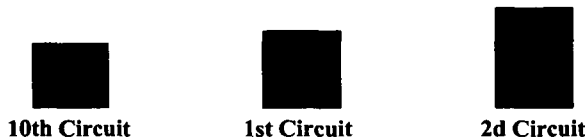


Question #25: Sometimes long sentences are distracting or confusing even if they are grammatically correct.

Strongly Disagree

No Preference

Strongly Agree

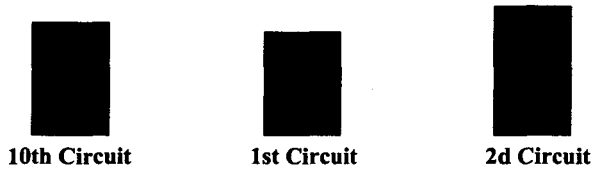


Question #26: Lawyers should try to use shortened names rather than acronyms as abbreviations for corporate parties, statutes, and the like.

Strongly Disagree

No Preference

Strongly Agree

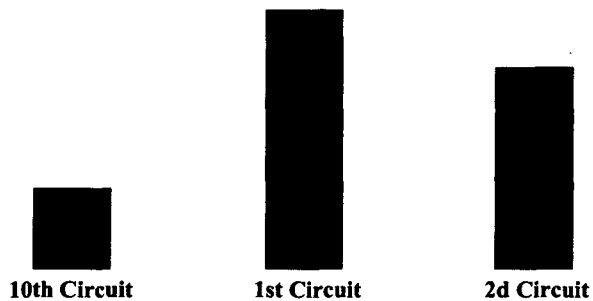


Question #27: I notice, and it bothers me, when arguments longer than six or seven pages lack subheadings.

Strongly Disagree

No Preference

Strongly Agree

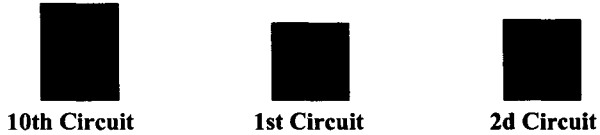


Question #28: I'm bothered when statements of facts or of the case give me immaterial information, like dates of events and filings that don't matter.

Strongly Disagree

No Preference

Strongly Agree

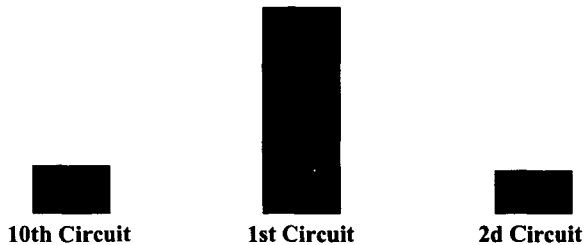


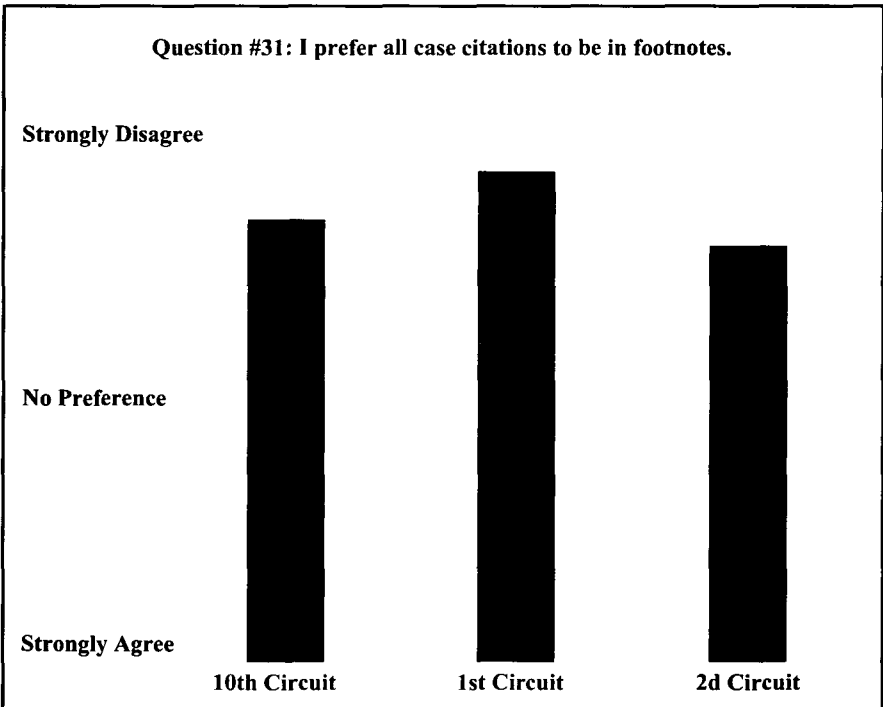
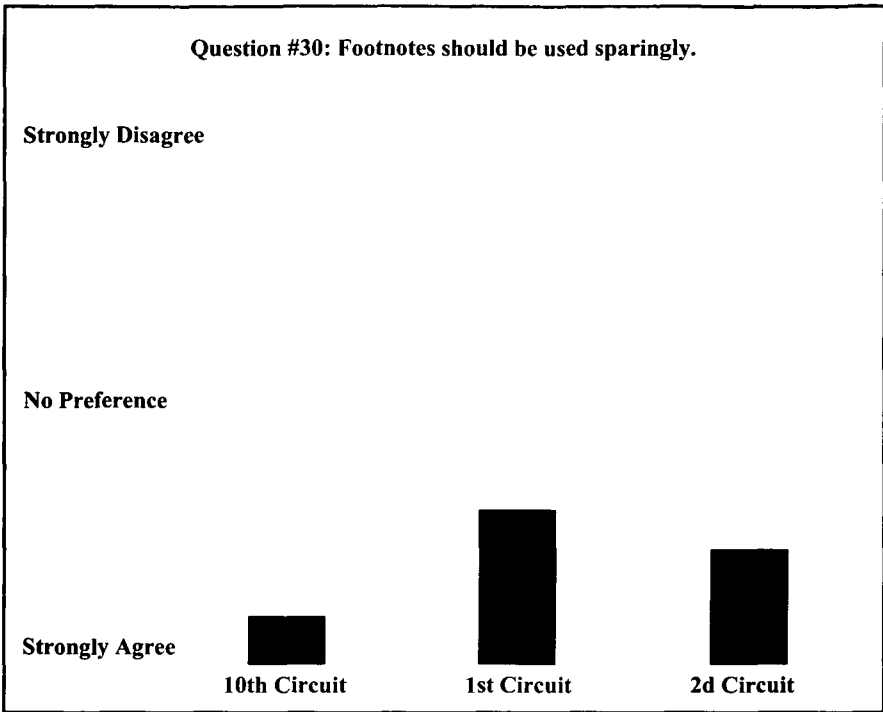
Question #29: Substantive arguments should not be made in footnotes.

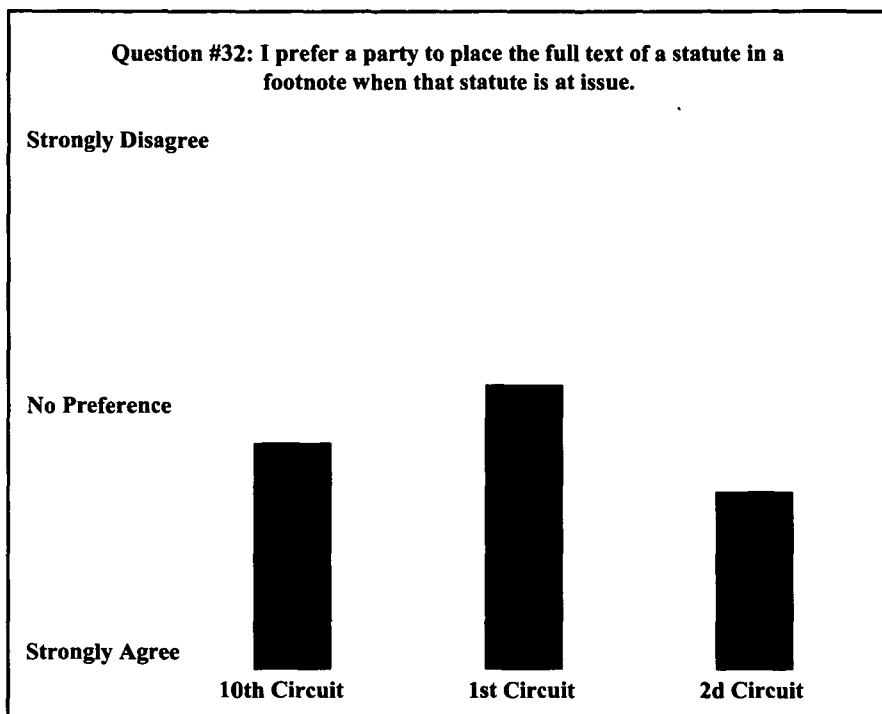
Strongly Disagree

No Preference

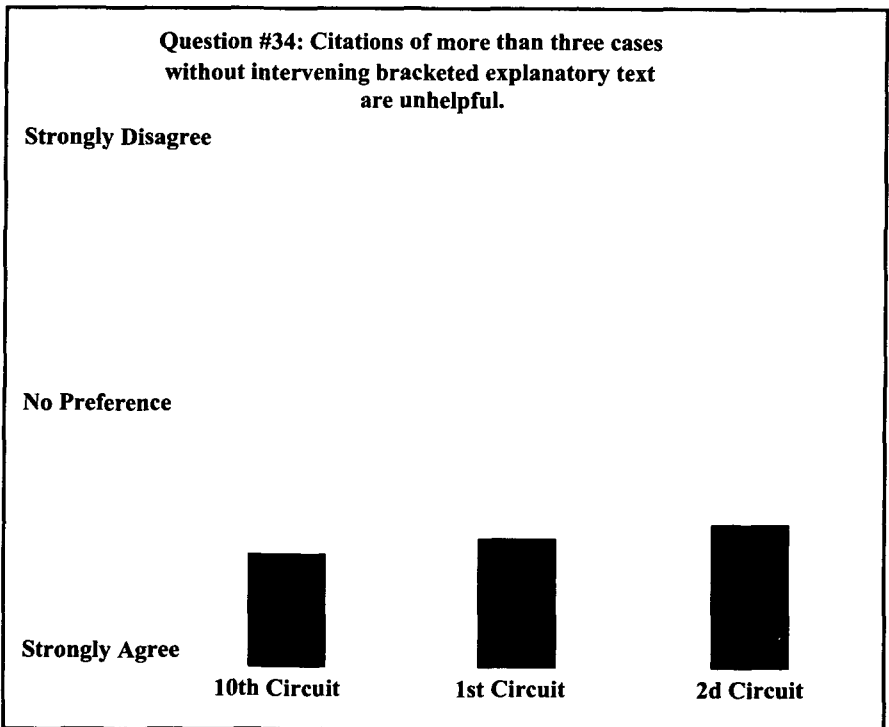
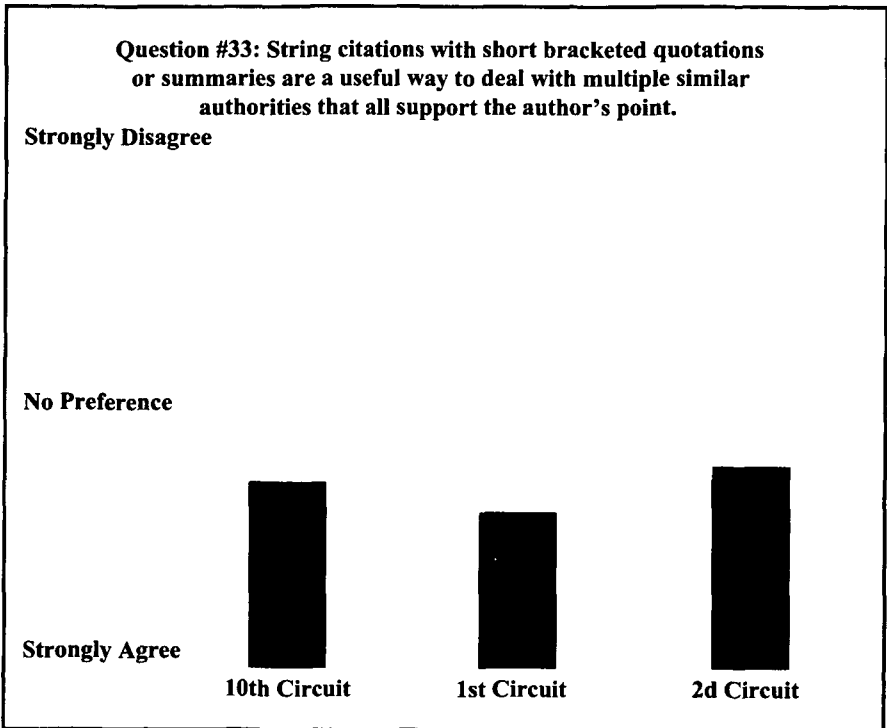
Strongly Agree







C. Use of Authority and the Record

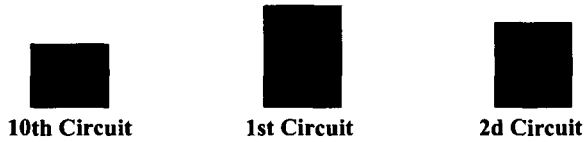


Question #35: Case citations should almost always include a specific page reference.

Strongly Disagree

No Preference

Strongly Agree

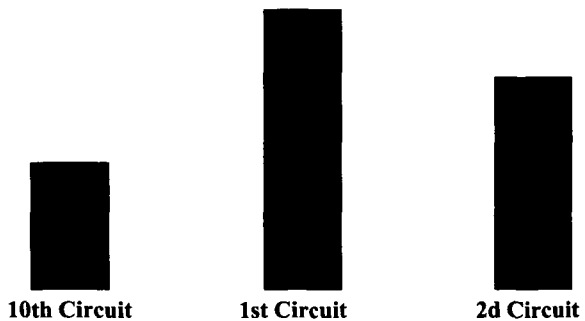


Question #36: I am suspicious about whether the authority stands for the proposition asserted when a case citation lacks a specific page reference.

Strongly Disagree

No Preference

Strongly Agree

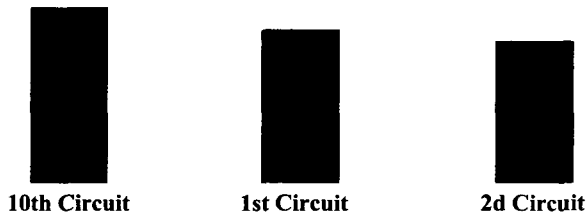


Question #37: I prefer that record references follow each sentence rather than come at the end of a paragraph.

Strongly Disagree

No Preference

Strongly Agree

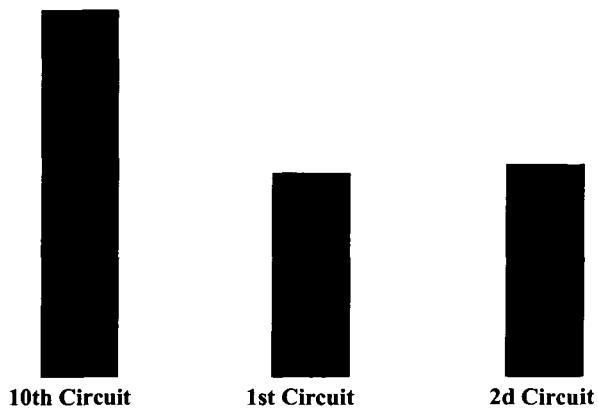


Question #38: Even if a whole paragraph reports facts from only a page or two of the record, I still prefer that record references follow each sentence.

Strongly Disagree

No Preference

Strongly Agree



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

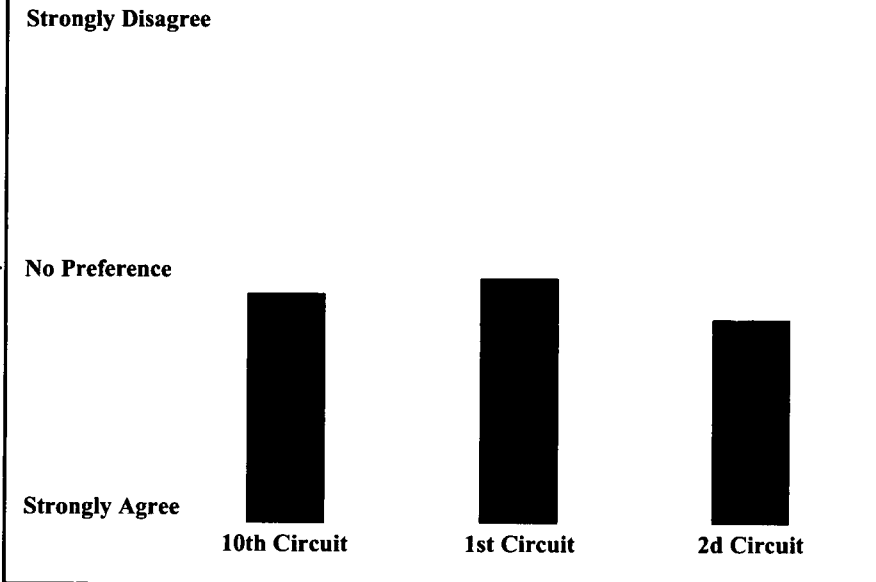


(Mean Score = 1)
1st Circuit

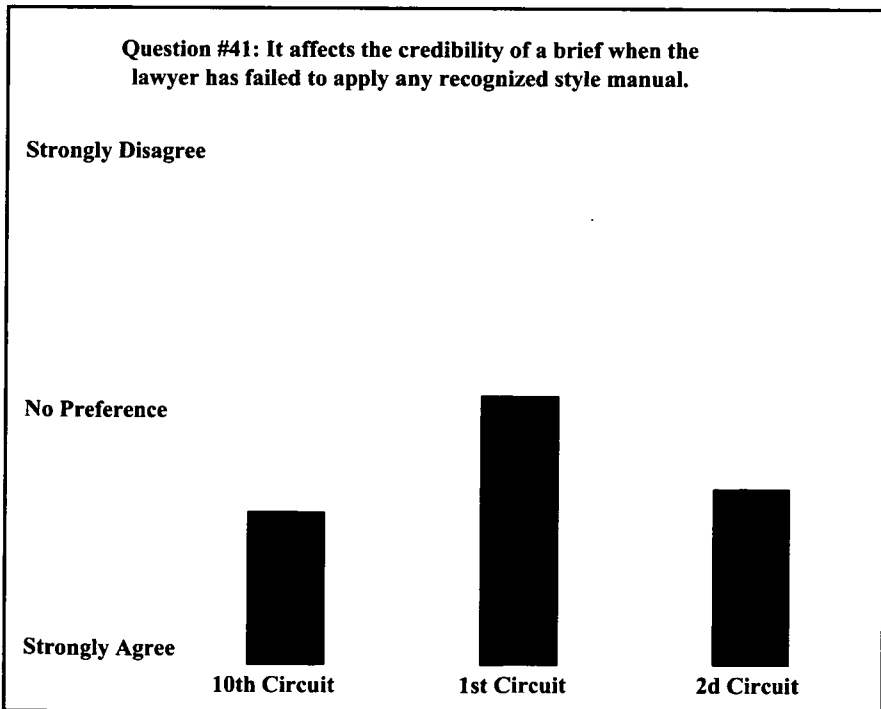


D. Typography of Briefs

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.



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

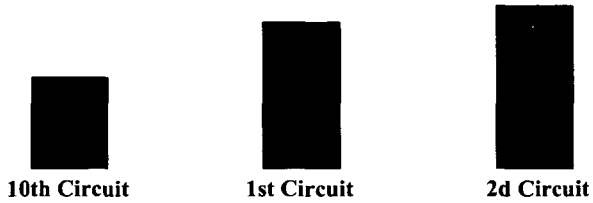


Question #42: I do not have a preference for which style manual an attorney should use as long as the method used is consistent throughout the brief and allows me to quickly and accurately identify cited authority.

Strongly Disagree

No Preference

Strongly Agree

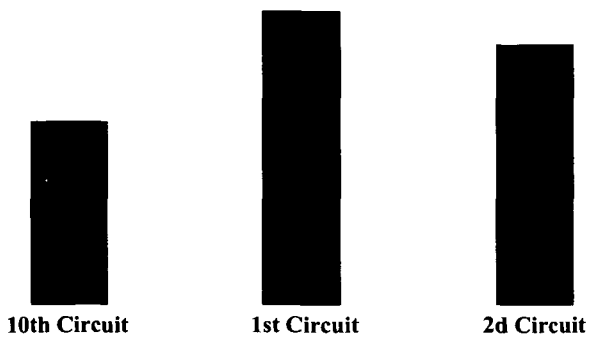


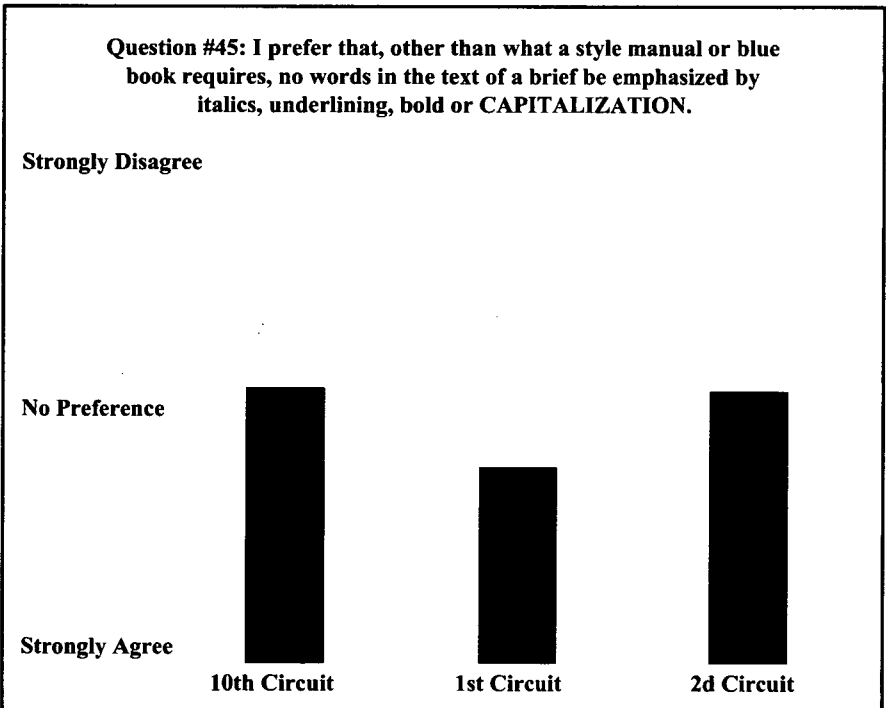
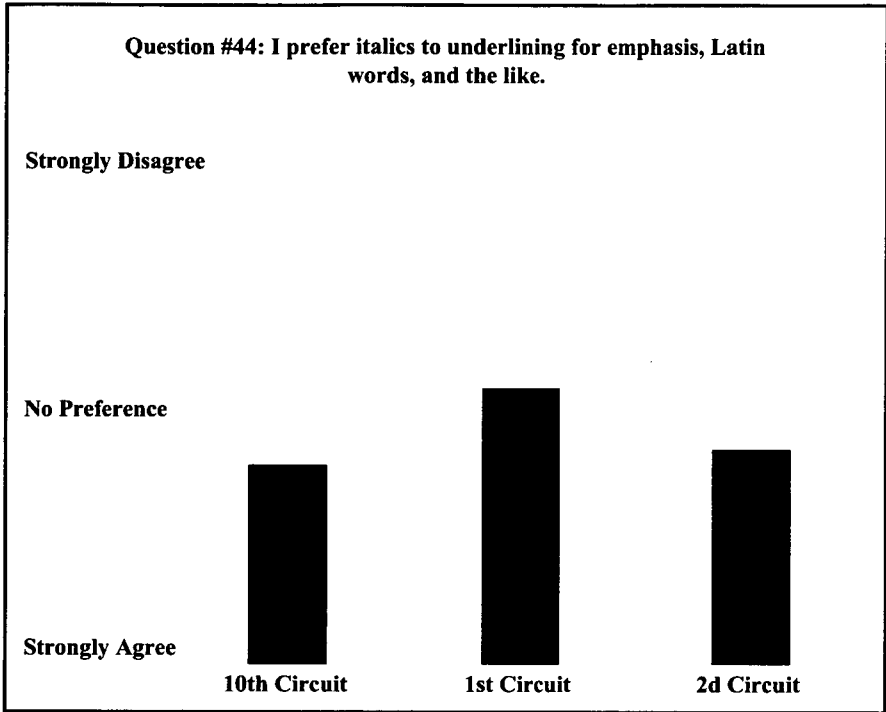
Question #43: I prefer italics to underlining for case citations.

Strongly Disagree

No Preference

Strongly Agree



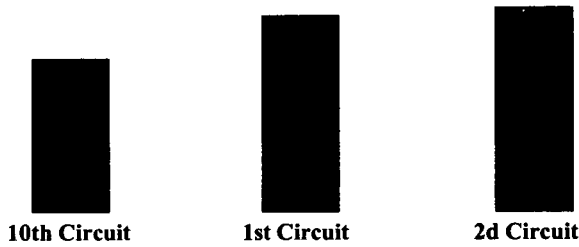


Question #46: I prefer titles of major parts of the brief (e.g. STATEMENT OF THE CASE) to be in all capitals.

Strongly Disagree

No Preference

Strongly Agree

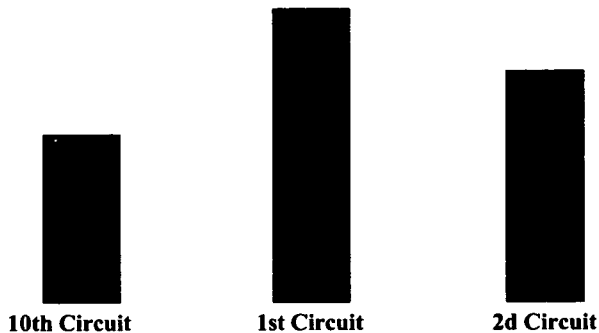


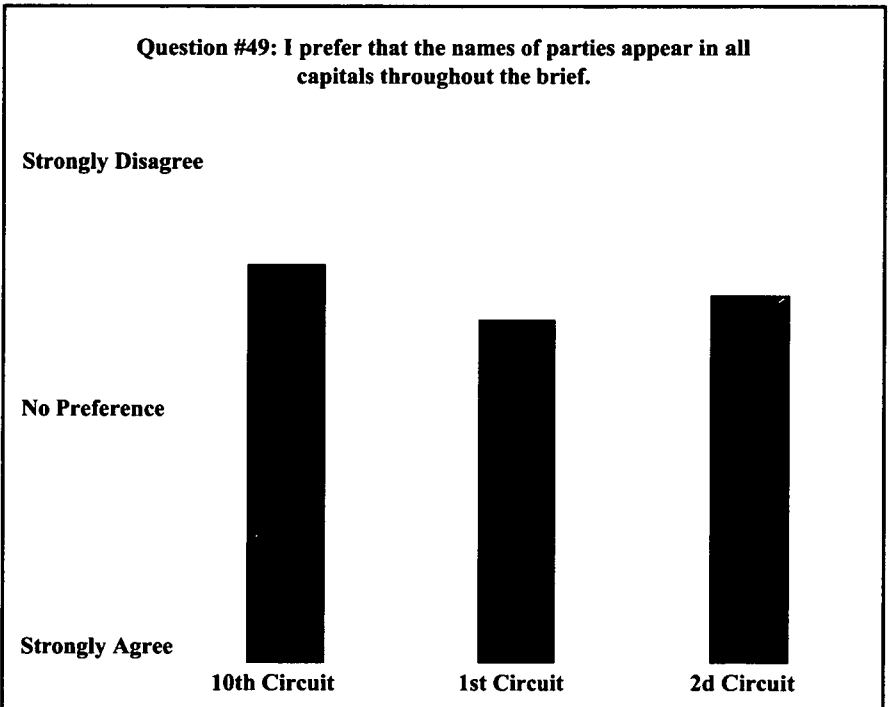
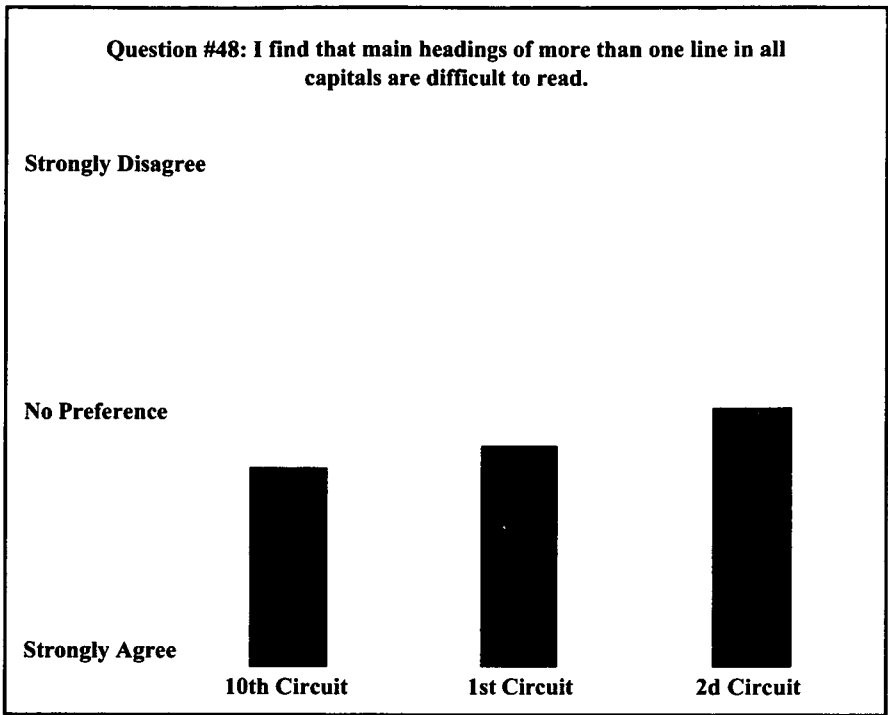
Question #47: I prefer main headings of the legal argument (e.g., THE JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE) to be in all capitals.

Strongly Disagree

No Preference

Strongly Agree



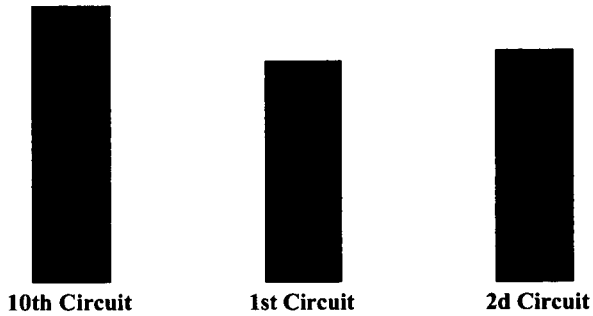


Question #50: Some lawyers use a traditional outline structure, indenting each tier of headings an additional five spaces. Others use flush-left headings at all levels. I prefer flush-left.

Strongly Disagree

No Preference

Strongly Agree

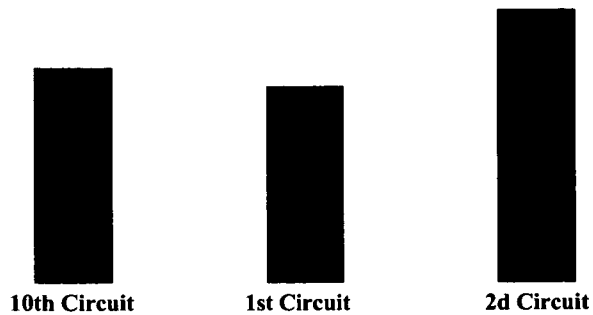


Question #51: Briefs are easier to read when headings are boldface but not underlined.

Strongly Disagree

No Preference

Strongly Agree

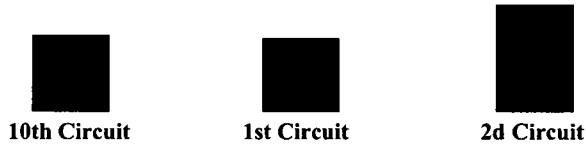


Question #52: I prefer the brief to be in double spacing, though greater spacing would be acceptable.

Strongly Disagree

No Preference

Strongly Agree

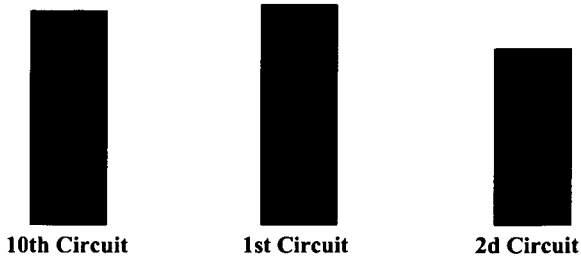


Question #53: I prefer main headings of a legal argument in single line spacing.

Strongly Disagree

No Preference

Strongly Agree

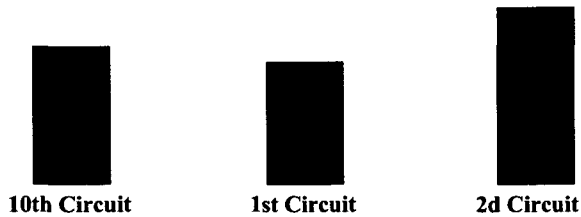


Question #54: When a brief contains a list, I like bullet points or other creative typography to set it off from regular text.

Strongly Disagree

No Preference

Strongly Agree

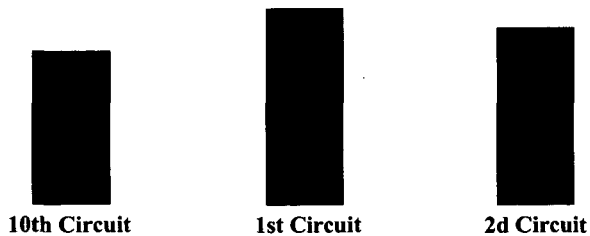


Question #55: I like charts, diagrams, and other visual aids, especially when they can substitute for long textual explanations.

Strongly Disagree

No Preference

Strongly Agree



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

Strongly Disagree

No Preference

Strongly Agree

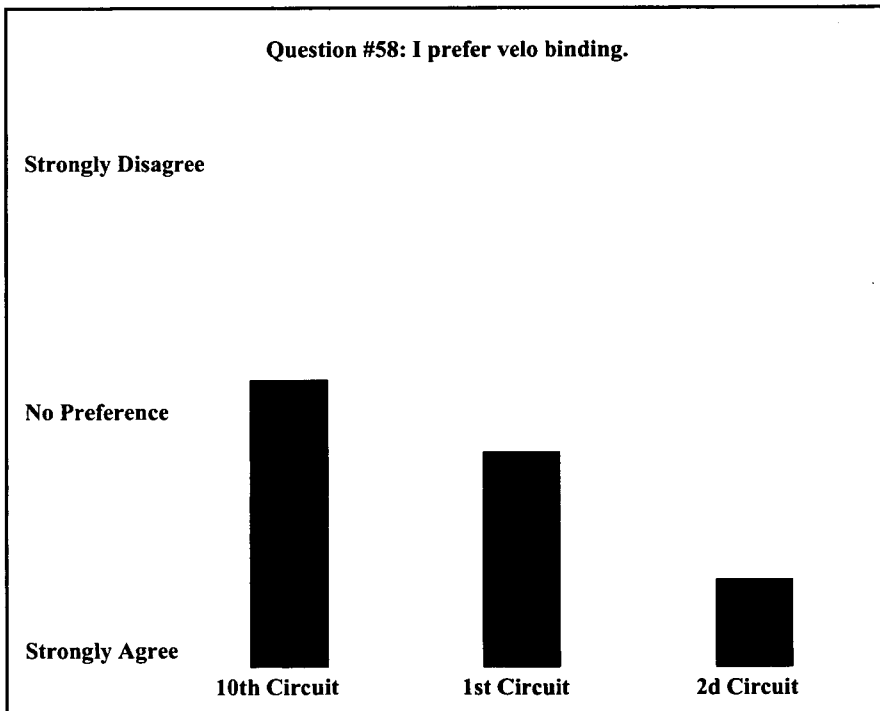
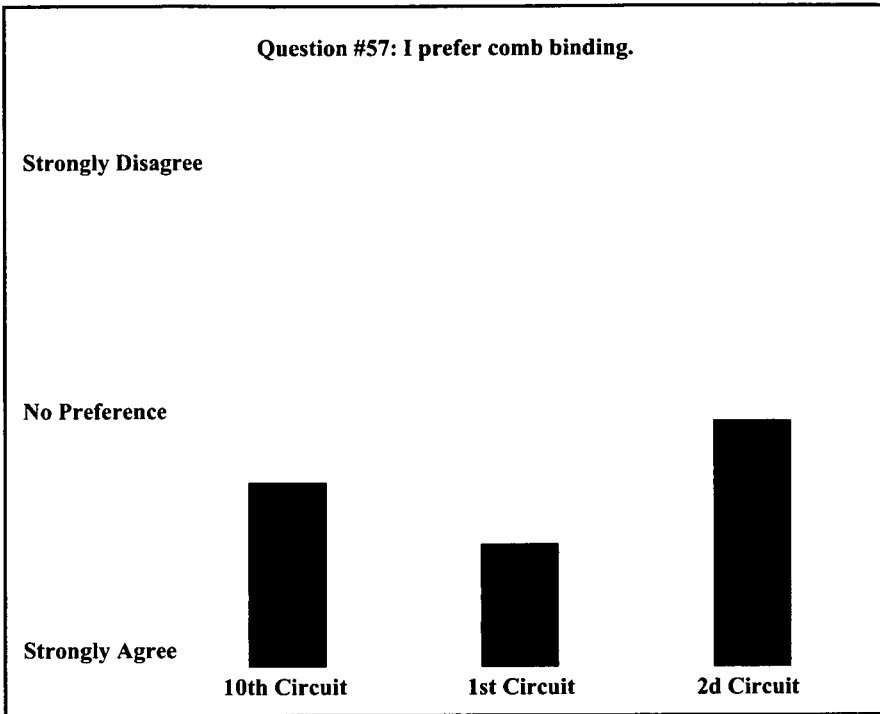
10th Circuit

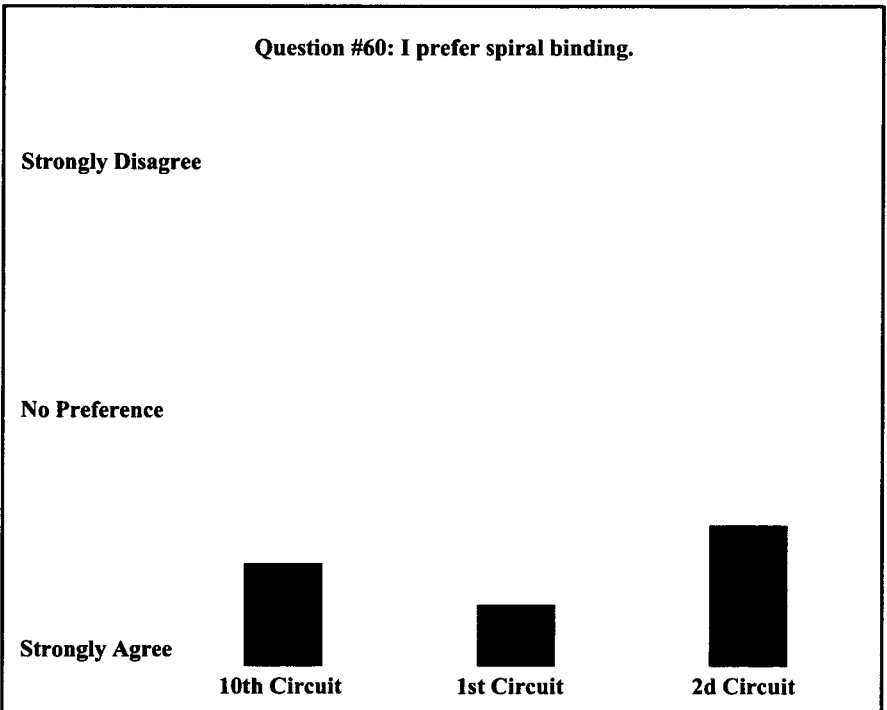
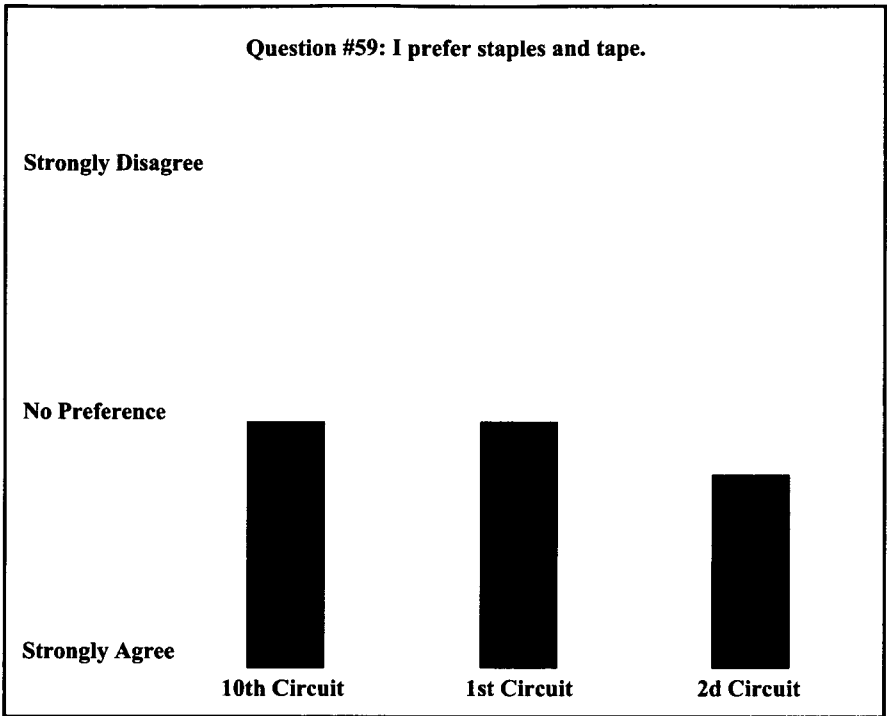
1st Circuit

2d Circuit



E. Physical Characteristics of Appellate Work Product



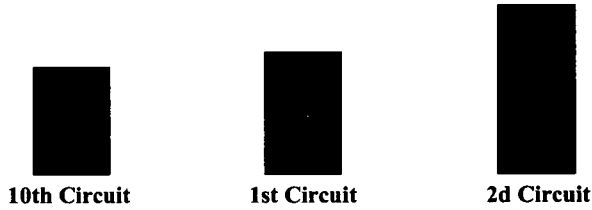


Question #61: Attorneys do not sufficiently proofread briefs before filing them with the court.

Strongly Disagree

No Preference

Strongly Agree

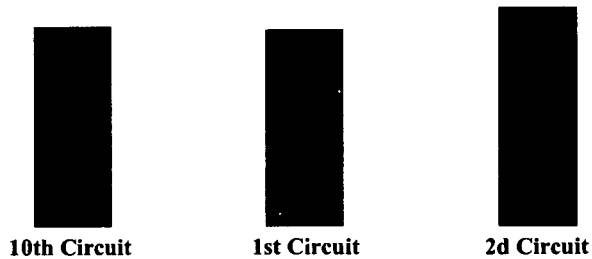


Question #62: Attorneys often provide illegible copies in the appendix.

Strongly Disagree

No Preference

Strongly Agree

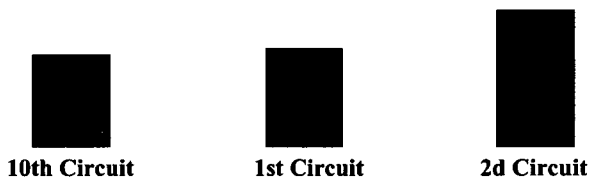


Question #63: It negatively affects the credibility of an appeal when I believe that the appellant failed to make a good faith effort to include all appropriate documents in the appellant's appendix or addendum.

Strongly Disagree

No Preference

Strongly Agree

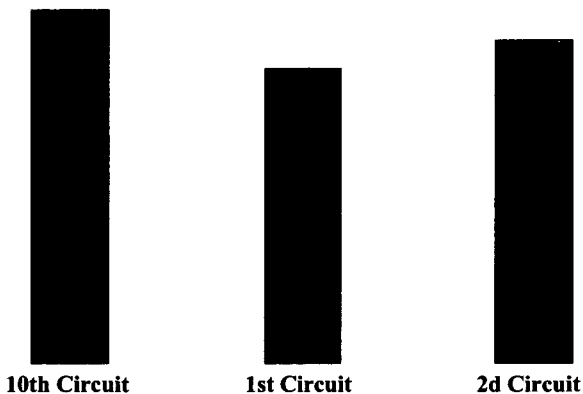


Question #64: I prefer a party to include all exhibits in an appendix, not just those cited in the briefs.

Strongly Disagree

No Preference

Strongly Agree



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

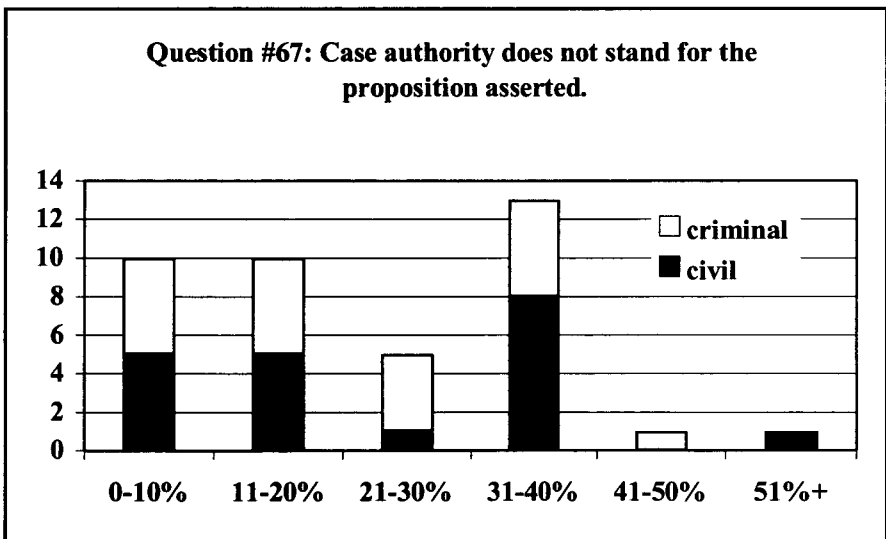
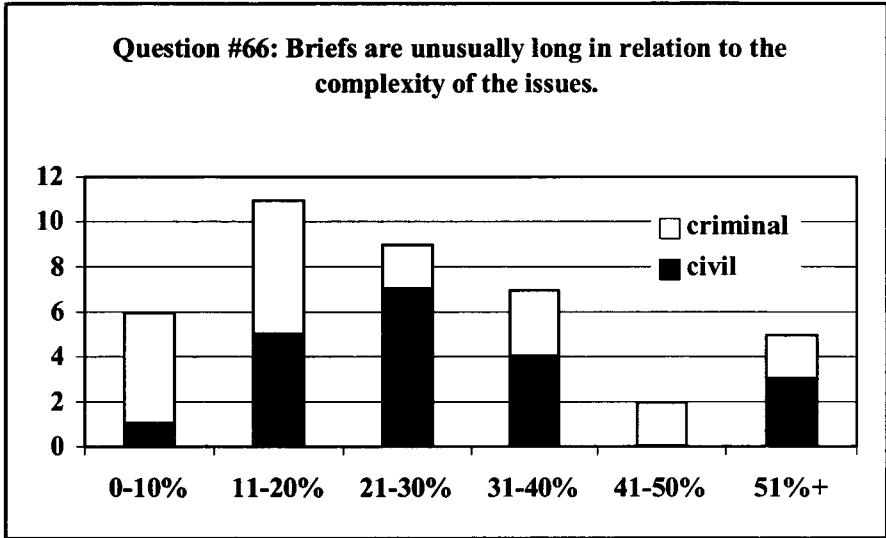
1st Circuit

2d Circuit



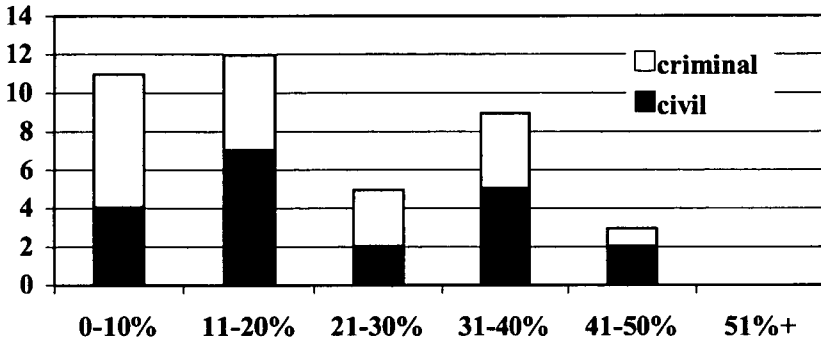
F. Frequency of Certain Errors¹²

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.

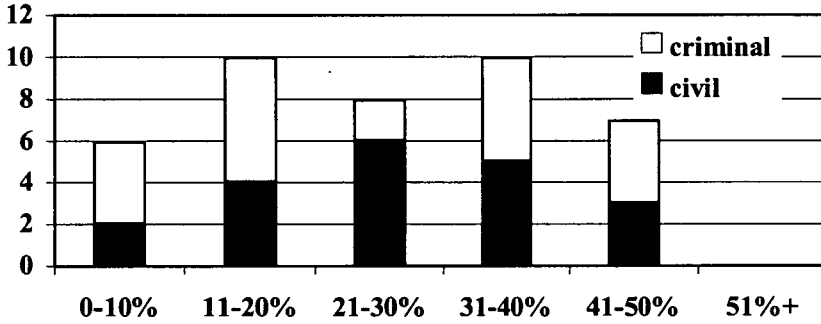


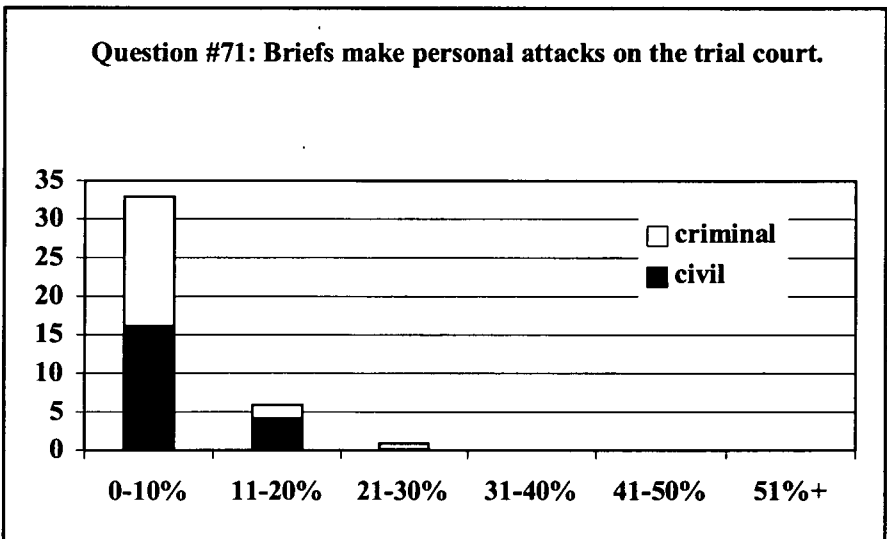
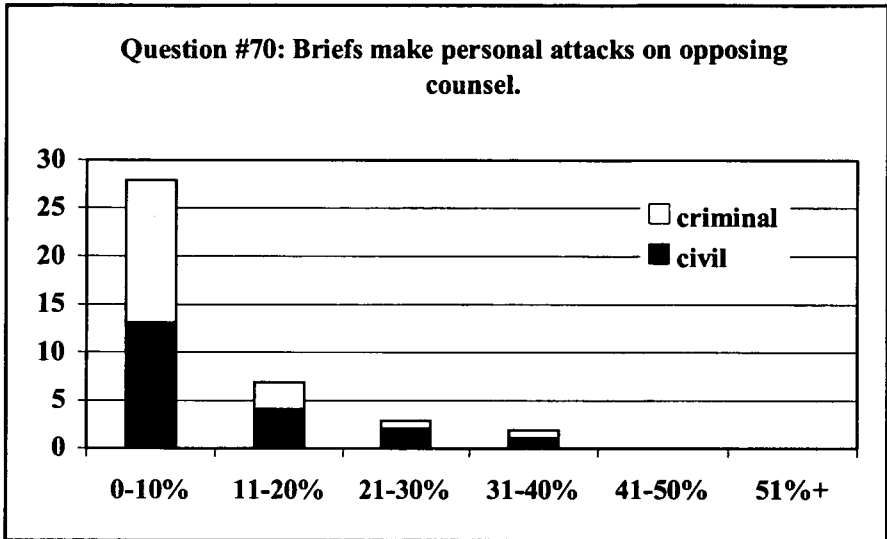
12. See *supra* Part I for a detailed discussion of this information.

Question #68: Briefs misstate the record.

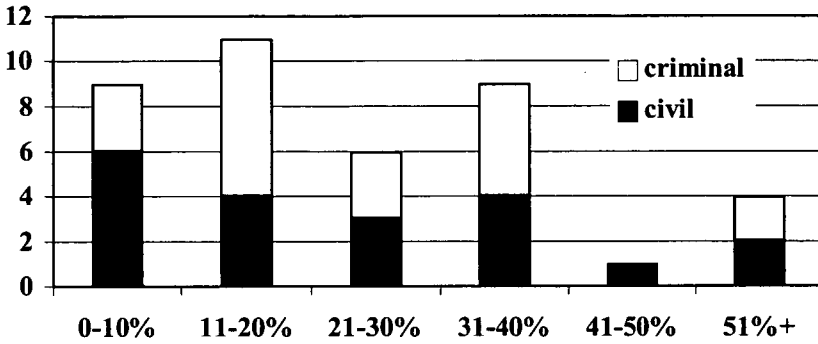


Question #69: Statements of facts violate the standard of review (e.g., in a substantial evidence appeal, appellant presents the side of conflicting evidence favorable to appellant).

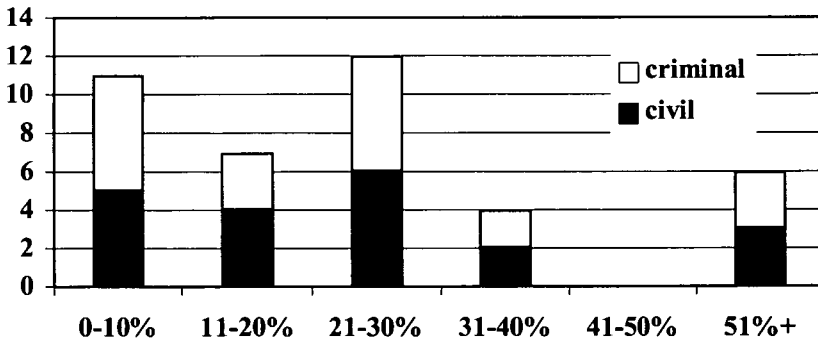


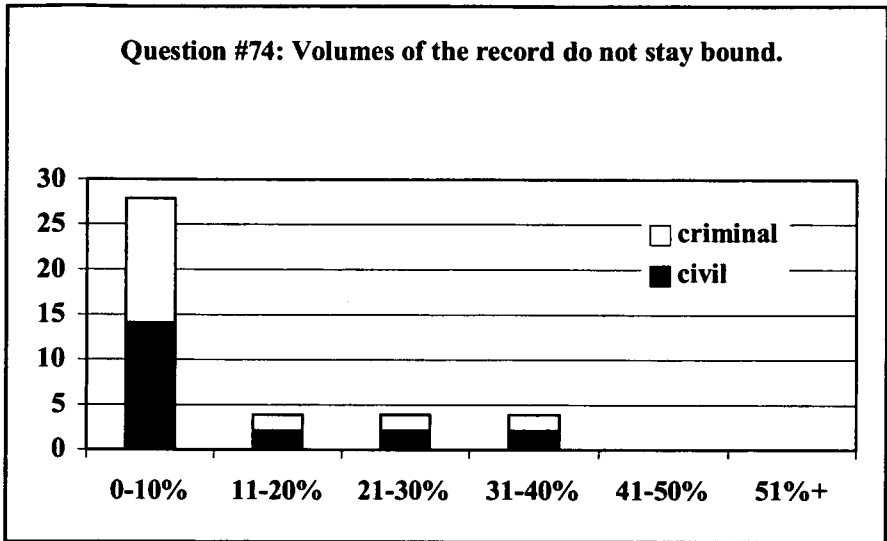


Question #72: Briefs are not sufficiently edited or proofread.

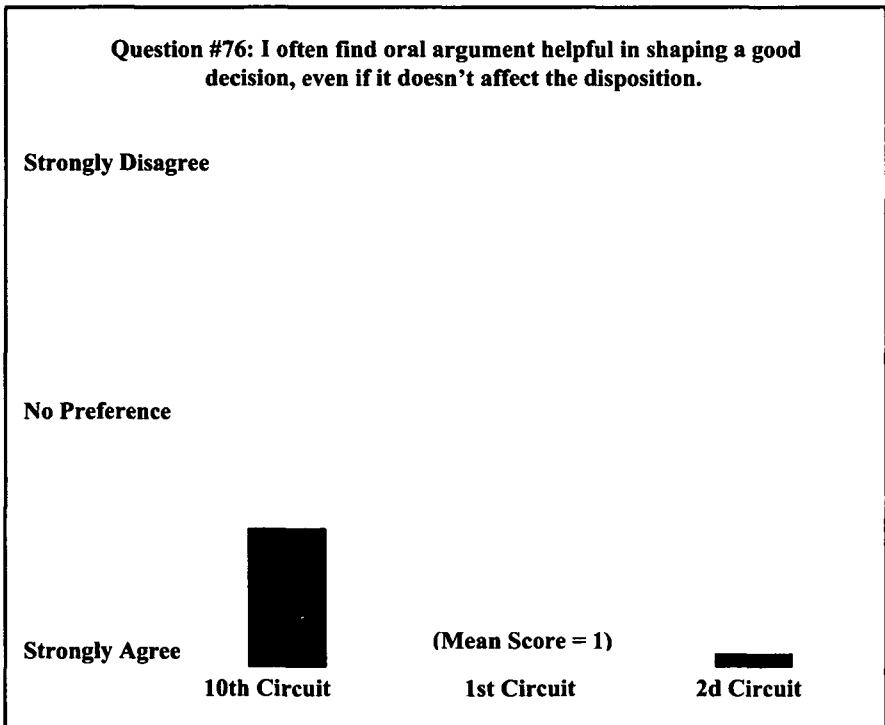
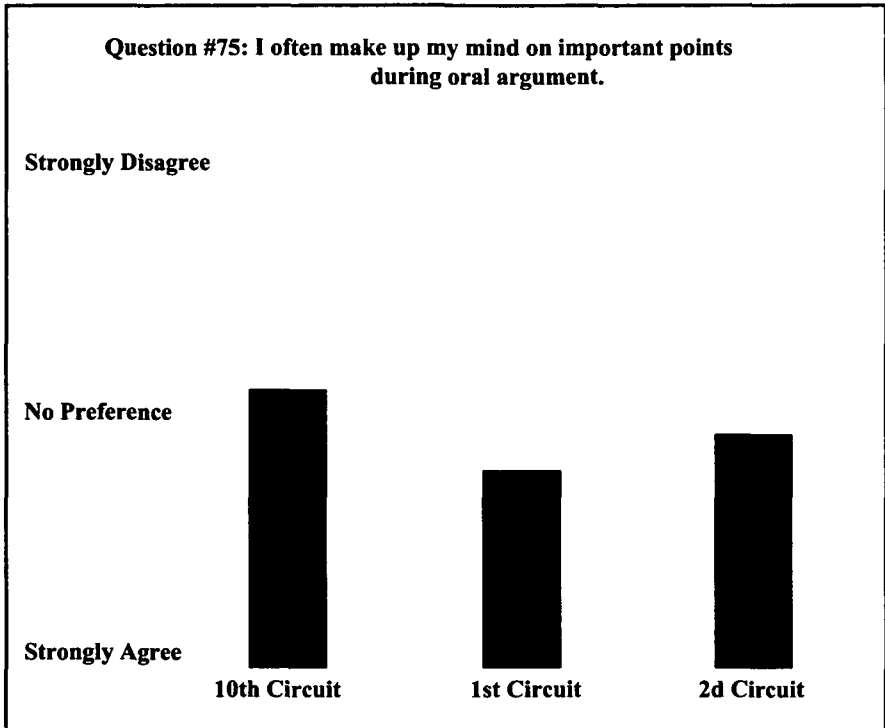


Question #73: Briefs contain improper grammar, punctuation, or use of apostrophes.





G. Oral Argument



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

10th Circuit

1st Circuit

2d Circuit



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

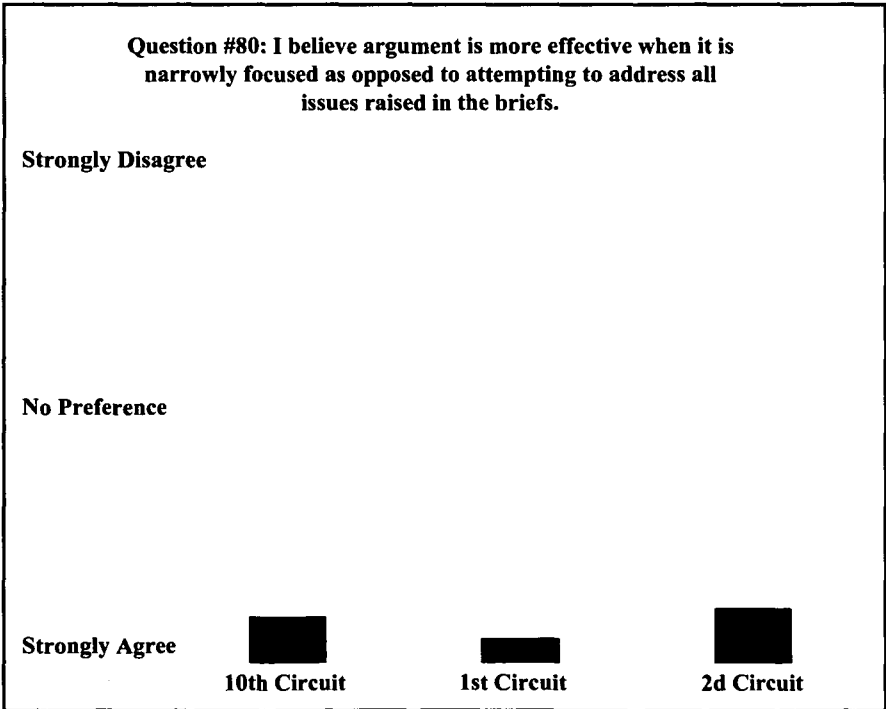
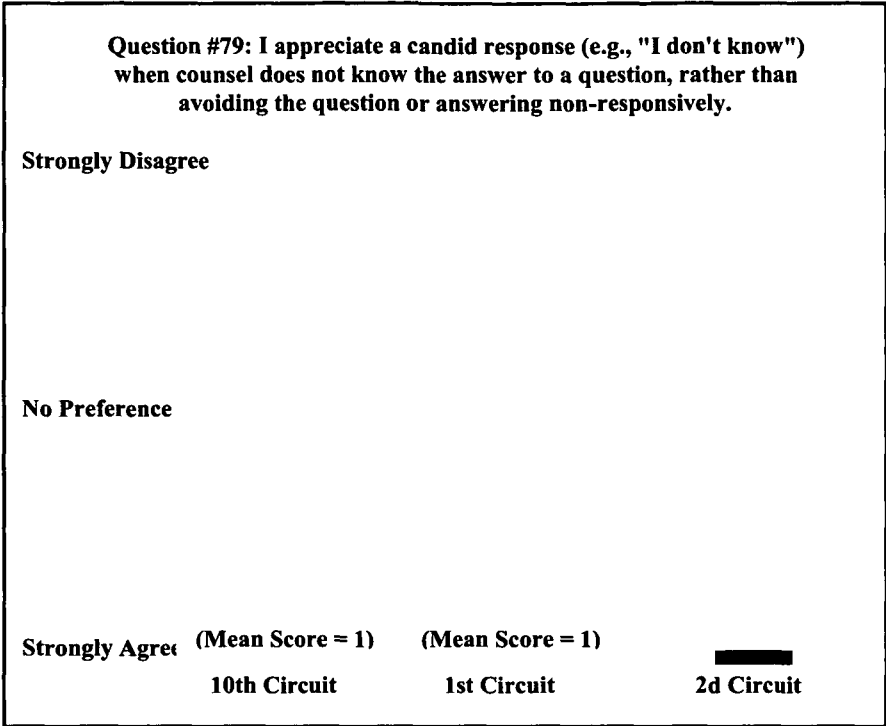
10th Circuit

(Mean Score = 1)

1st Circuit

2d Circuit



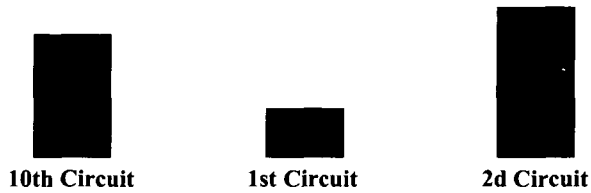


Question #81: It bothers me when counsel uses oral argument simply to reiterate those points raised in the briefs.

Strongly Disagree

No Preference

Strongly Agree

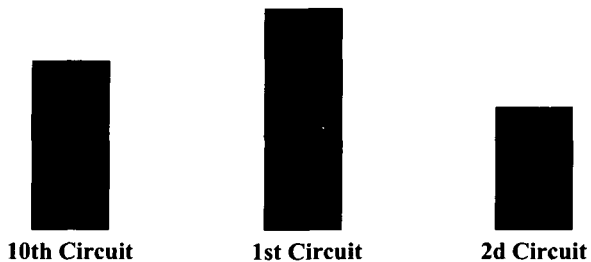


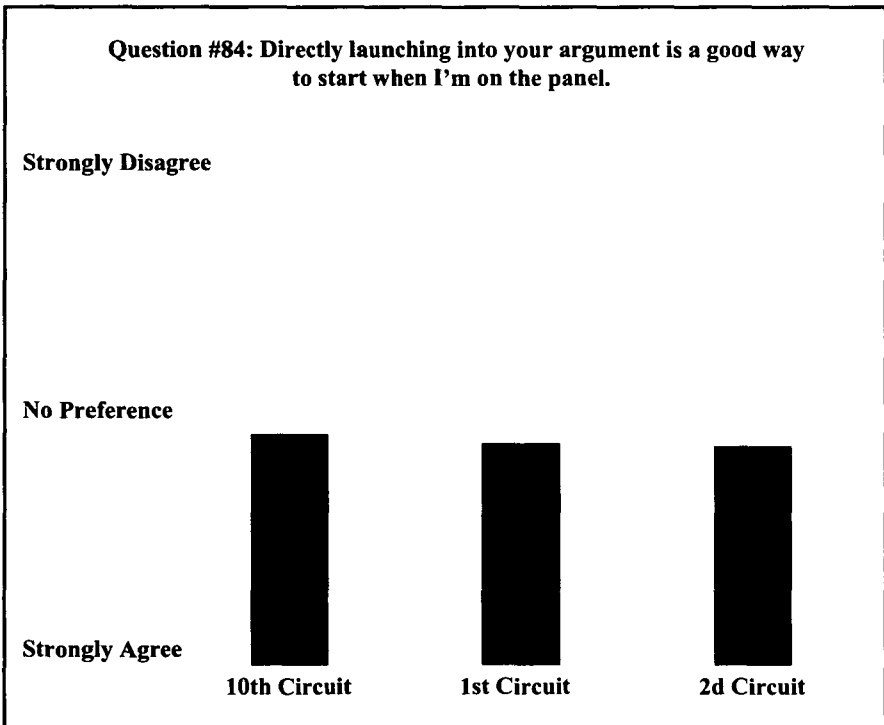
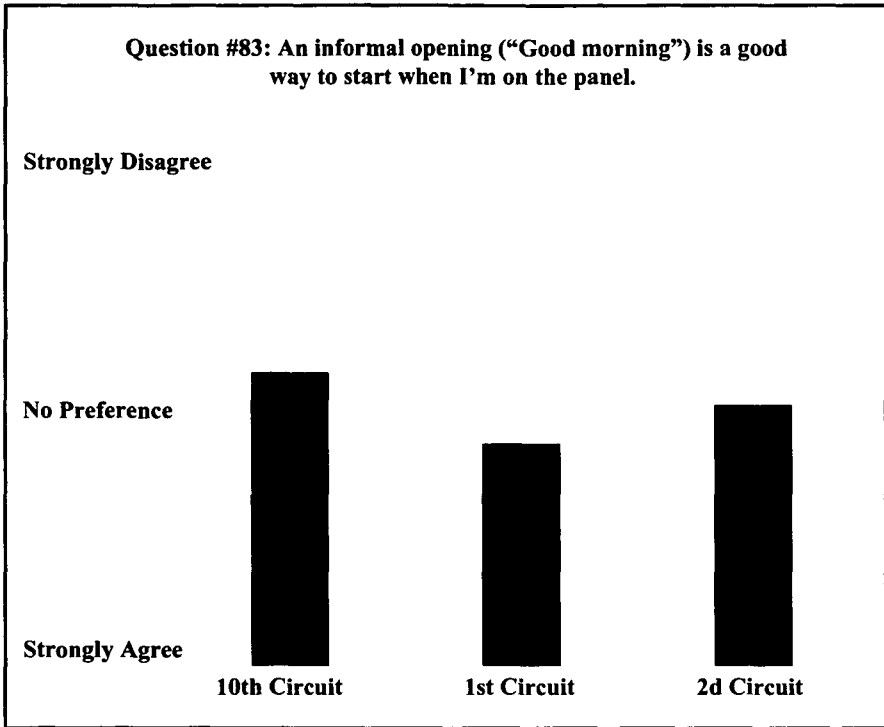
Question #82: The traditional opening ("May it please the Court") is a good way to start when I'm on the panel.

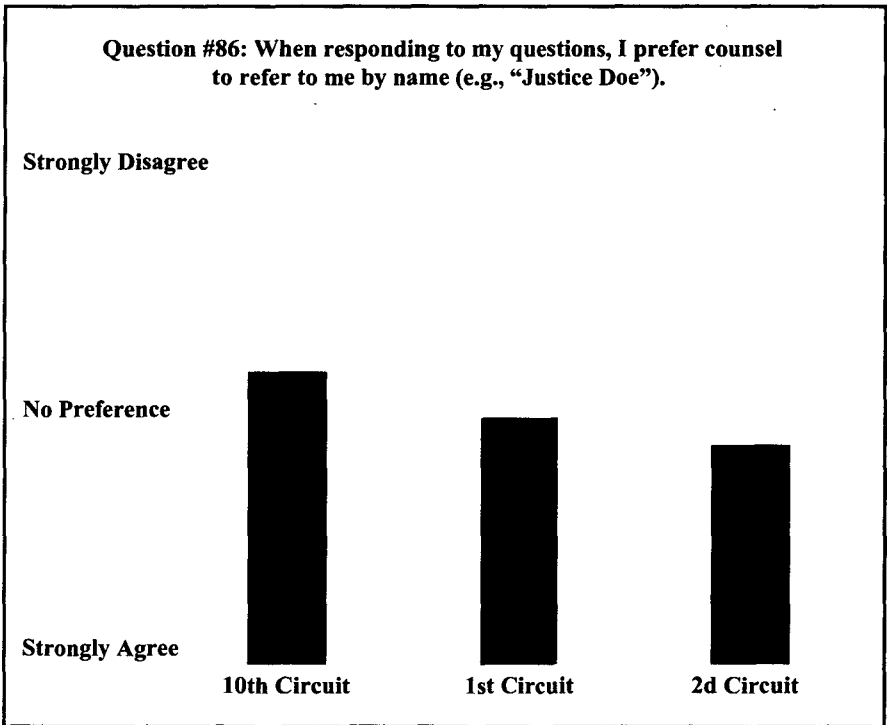
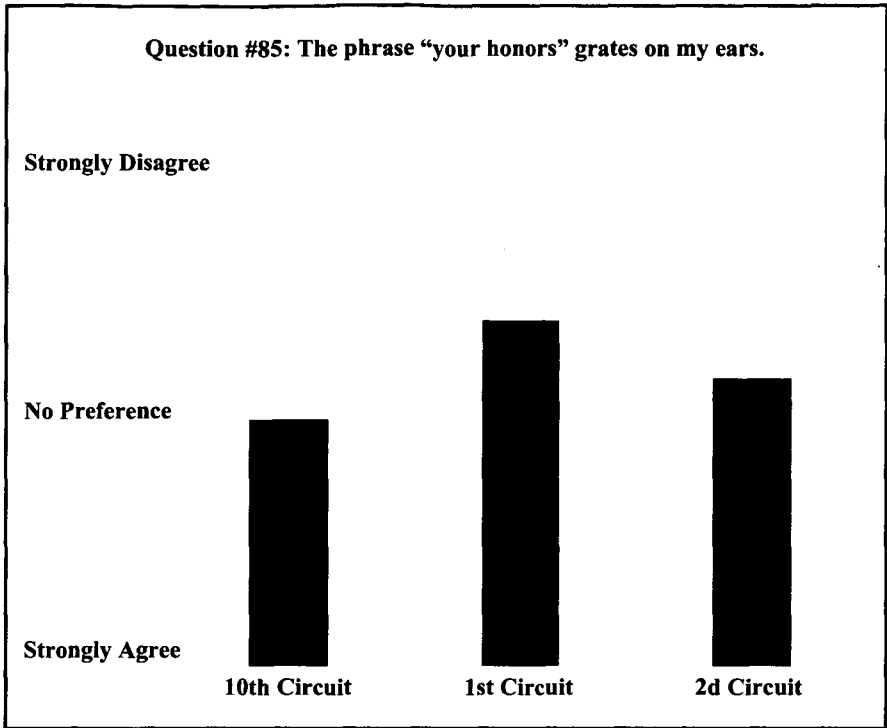
Strongly Disagree

No Preference

Strongly Agree







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.