



# Make Your Writing More Appealing

## Part 3

BY DAVID LEWIS

*This four-part article series summarizes the results of surveys sent to state and federal appellate court judges to evaluate their advocacy preferences. This part 3 discusses the advocacy preferences of appellate judges at oral argument.*

As discussed in parts 1 and 2 of this series,<sup>1</sup> several years ago I began sending surveys to state and federal appellate court judges around the country to learn more about their attitudes regarding various aspects of appellate advocacy. My interest was both professional and personal: I have been litigating civil and criminal appeals in state and federal courts for over 20 years, love what I do, and am always striving to make myself better at it. I also act as a consultant for lawyers

who don't litigate appeals as often as I do and wanted to conduct research that would make my advice as helpful and informed as possible.

This article provides the data results for the study's key findings regarding oral argument. It begins by briefly describing the surveys and how to interpret a graph of the results so that you can better understand and apply the data when appearing for your next appellate (or trial) hearing. It also summarizes some of the most important takeaways from the study. While

much of what I learned was confirmatory, a few things surprised me.

### Methodology of the Survey

Over the course of several years, I sent surveys to all federal and state appellate judges within the federal First, Second, Third, Seventh, and Tenth Circuits. The courts surveyed comprise 39 appellate courts in 18 states. (New Jersey did not give me approval to survey its judges, which is why the numbers are slightly "off.") I received responses from 192 judges, a response rate of slightly under 43%. This is a relatively high response rate for a survey that was submitted "cold" (i.e., I didn't prepare anyone ahead of time).

The survey contained 86 questions divided into seven sections:

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

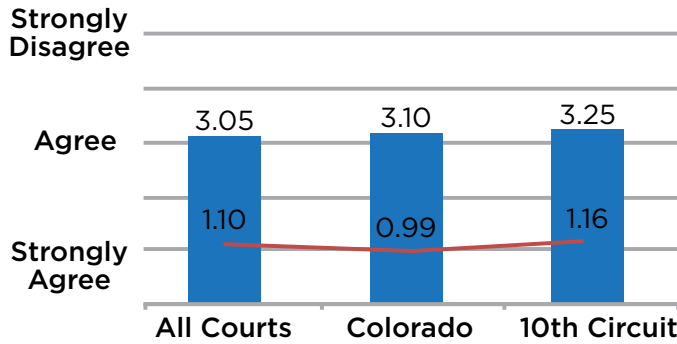
The questions in each section sought not only to discover the advocacy preferences of the judges on those topics, but also to gauge the strength of their preferences. To accomplish this, the questions in six of the seven sections gave the judges a Likert scale consisting of five answer choices ranging from "Strongly Agree" (indicated by a "1") to "Strongly Disagree" (indicated by a "5").<sup>2</sup> The Likert scale looked like this:

Strongly Agree 1 2 3 4 5 Strongly Disagree

Mean (average) values and standard deviations were calculated for each individual court. I calculated standard deviations to have a quantity that indicated the extent of deviation for a group as a whole. This allowed me to gauge how much a group of judges disagreed with one another. I've also included a table with each graph that shows the number of responses to each choice. The tables show the spread of responses that may get hidden in a calculation of the mean average. The graphs in this article are focused on oral argument.

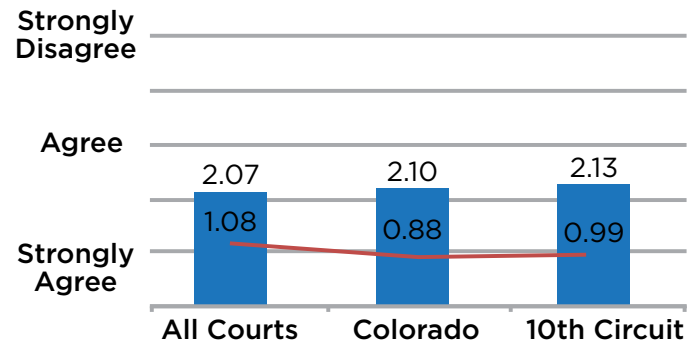
## SURVEY RESULTS: ORAL ARGUMENT

Judges often make up their minds on important points during oral argument



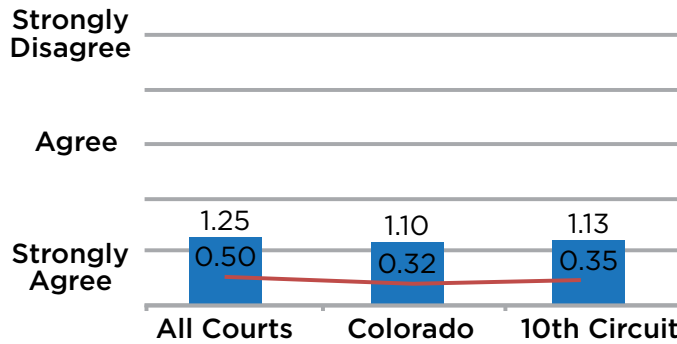
Strongly Agree		Agree		Strongly Disagree
10	58	51	47	20

Judges often find oral argument helpful in shaping a good decision



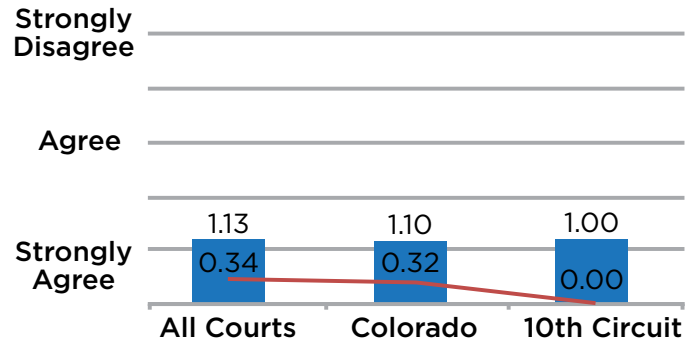
Strongly Agree		Agree		Strongly Disagree
64	78	17	23	5

Judges appreciate when counsel ceases argument when all points have been made even though time may be remaining



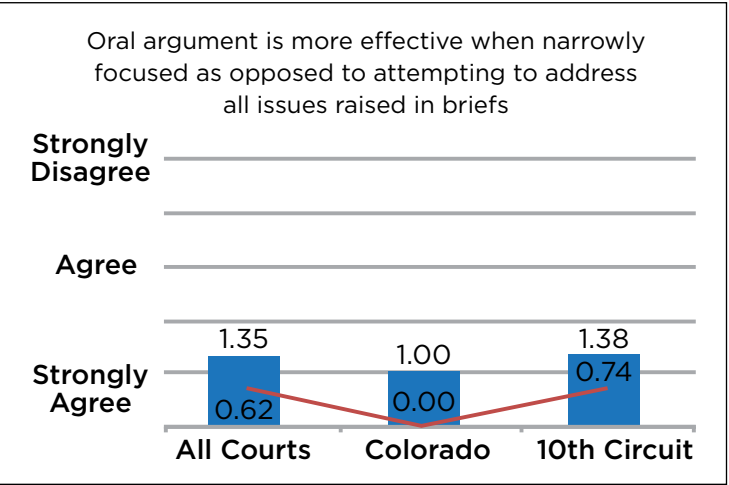
Strongly Agree		Agree		Strongly Disagree
146	34	6	0	0

Judges appreciate a candid response (e.g., "I don't know") when counsel does not know the answer to a question

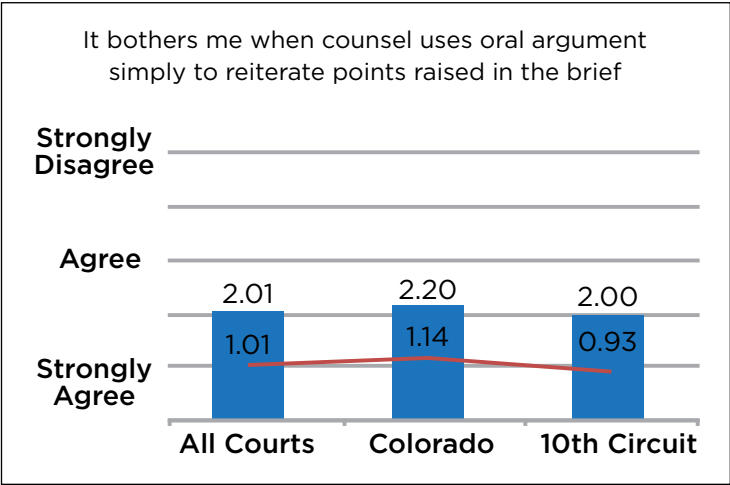


Strongly Agree		Agree		Strongly Disagree
163	24	0	0	0

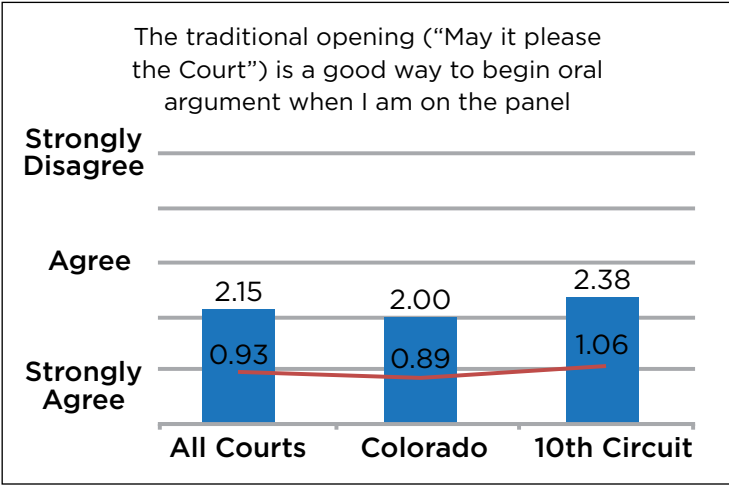
SURVEY RESULTS: ORAL ARGUMENT



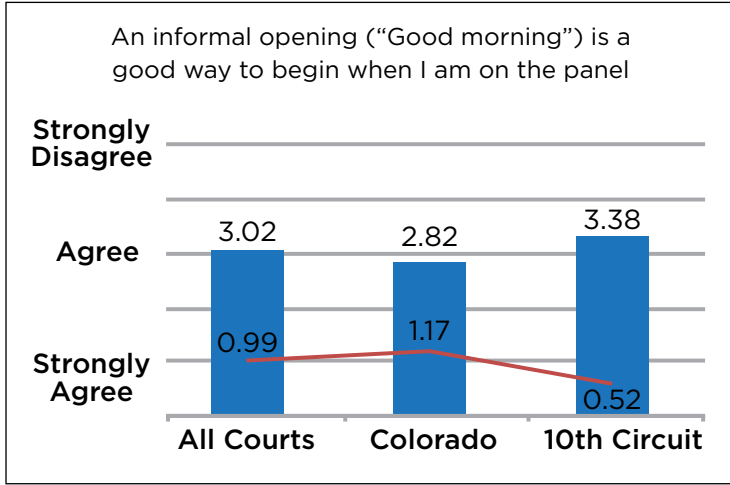
Strongly Agree		Agree		Strongly Disagree
134	43	8	2	0



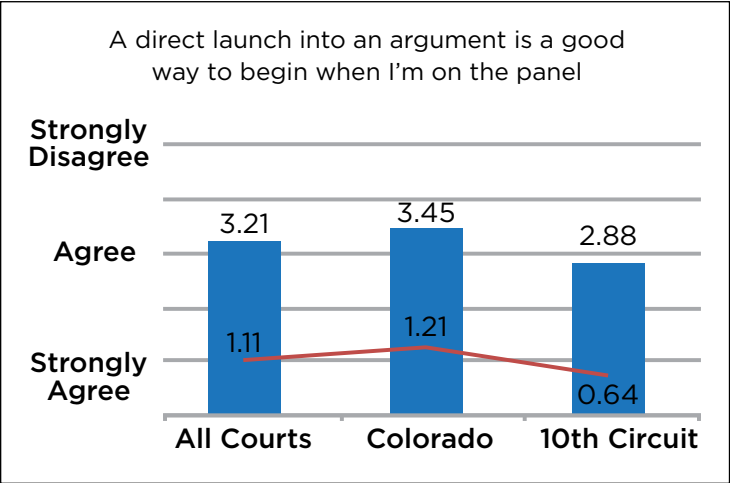
Strongly Agree		Agree		Strongly Disagree
71	64	38	11	4



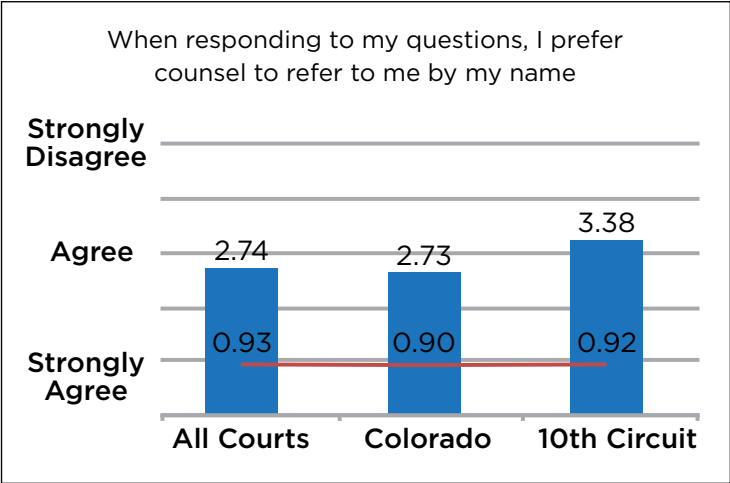
Strongly Agree		Agree		Strongly Disagree
58	56	67	6	2



Strongly Agree		Agree		Strongly Disagree
12	38	89	34	16



Strongly Agree		Agree		Strongly Disagree
15	30	70	49	25



Strongly Agree		Agree		Strongly Disagree
19	46	96	20	8

## KEY TAKEAWAYS

**1** The judges were pretty evenly split about whether they make up their minds about important issues in your appeal during oral argument. The safe course is to not rely solely on your written submissions because some of the judges may not have made up their minds yet.

**2** The judges were in general agreement that oral argument helps shape a good decision.

**3** The judges were strongly unified on this issue: When you are done making your points or answering any questions from the panel, stop talking and sit down even if you have time remaining.

**4** Similarly, if you don't know the answer to a question from the panel, say so. Virtually every appellate court has a procedural mechanism for attorneys to submit a non-argumentative supplement that answers a question posed from the panel.

**5** The judges were also in agreement—and particularly so in the Colorado state appellate courts—in their desire for advocates to remain focused on the core issues in the case and to not spend time trying to address every issue.

**6** In a related point, do not simply show up at oral argument and reiterate the points in your brief.

**7** The responses suggest that the best way to open your oral argument is with the traditional opening, "May it please the Court." Using an informal opening like "Good morning" or launching directly into your argument are not looked on as favorably. Most appellate arguments tend to combine the three (i.e., "May it please the Court. Good morning. I'd like to focus on . . .").

**8** Finally, the survey suggests that you should know your panel and how to pronounce their names.

## UP NEXT

Part 4 of the series will discuss how to be persuasive when submitting briefs in electronic format. The survey results provide quantitative support for drafting electronic briefs in different, more dynamic ways. **CT**



**David Lewis** has been litigating appeals in state and federal court for over 20 years. He earned his law degree at the University of Denver Sturm College of Law and is licensed to practice law in Massachusetts and Colorado. His practice focuses on appellate litigation as well as helping lawyers, businesses, and organizations make their briefs and motions more readable and dynamic—[www.appellateconsultant.com](http://www.appellateconsultant.com) and [facebook.com/appellateconsultant](https://facebook.com/appellateconsultant).

**Coordinating Editor:** John Campbell, [jcampbell@law.du.edu](mailto:jcampbell@law.du.edu)

## NOTES

1. Lewis, "Make Your Writing More Appealing—Part 1," 46 *Colorado Lawyer* 14 (Nov. 2017); Lewis, "Make Your Writing More Appealing—Part 2," 47 *Colorado Lawyer* 8 (Feb. 2018).
2. The other method was explored in part 2 of this series.

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