



Make Your Writing More Appealing

Part 4

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 final article discusses typography and other visual elements of appellate work product, including tips on making briefs tablet-friendly.

As discussed in parts 1, 2, and 3 of this series,¹ 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 I 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 the typography and other visual elements of a brief. 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 drafting your next appellate (or trial) brief. It also summarizes some of the most important takeaways from the study.

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

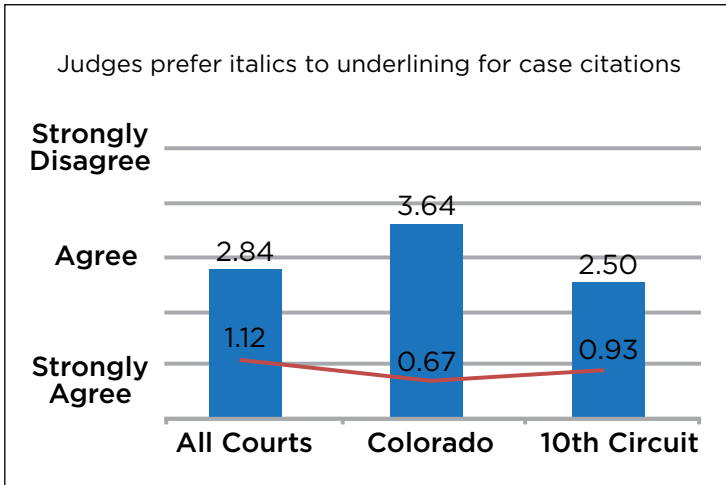
The questions in each section sought not only to discover the advocacy preferences of the judges on those topics, but also to gauge the strength of their preferences. To accomplish this, the questions in six of the seven sections gave the judges a Likert scale consisting of five answer choices ranging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

The Likert scale used in most of the sections of the survey looked like this:

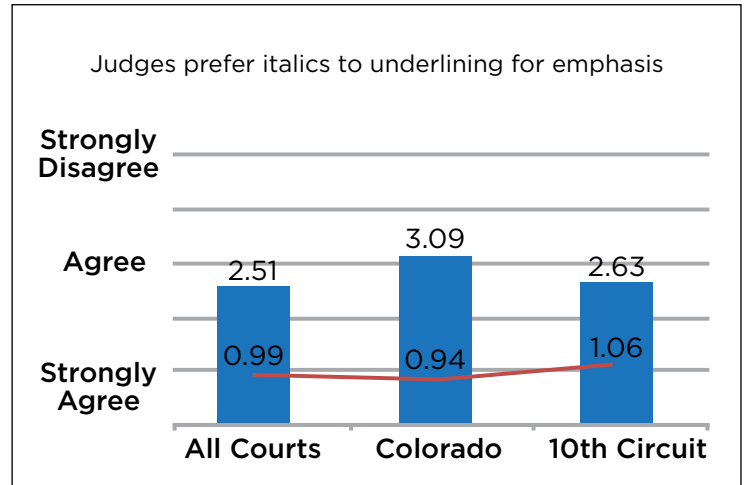
Strongly Agree 1 2 3 4 5 Strongly Disagree

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.

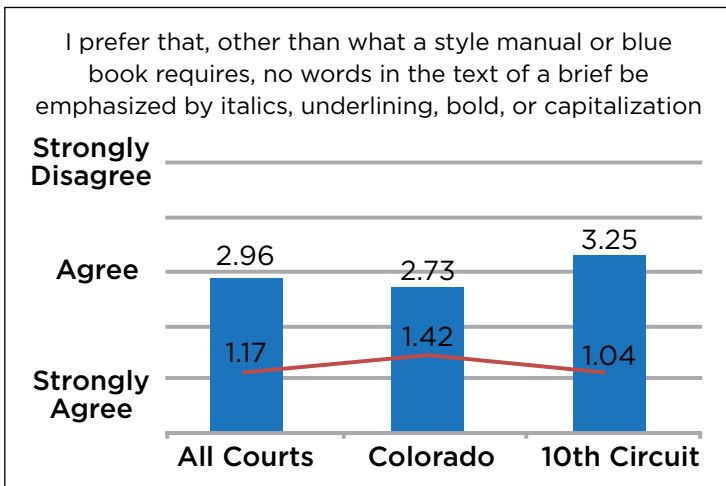
TYPOGRAPHY AND OTHER VISUAL ELEMENTS



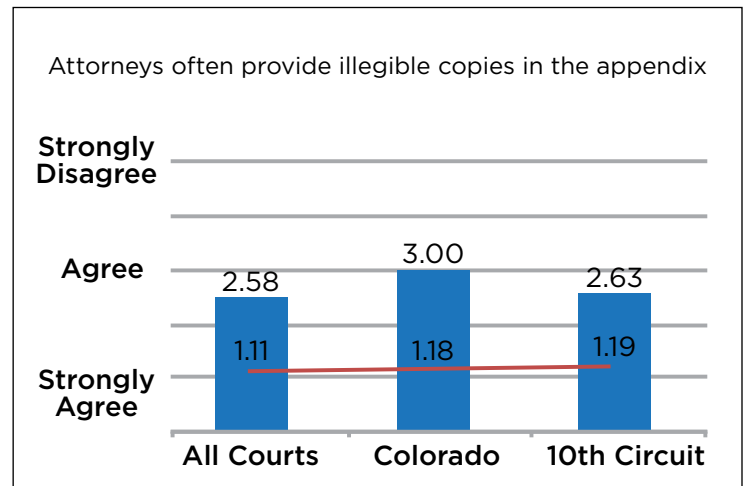
Strongly Agree	Agree	Strongly Disagree
31	28	84
		34
		13



Strongly Agree	Agree	Strongly Disagree
35	51	83
		15
		6

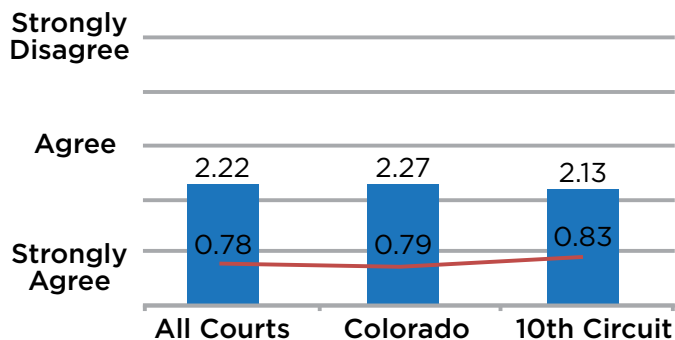


Strongly Agree	Agree	Strongly Disagree
26	38	61
		49
		17

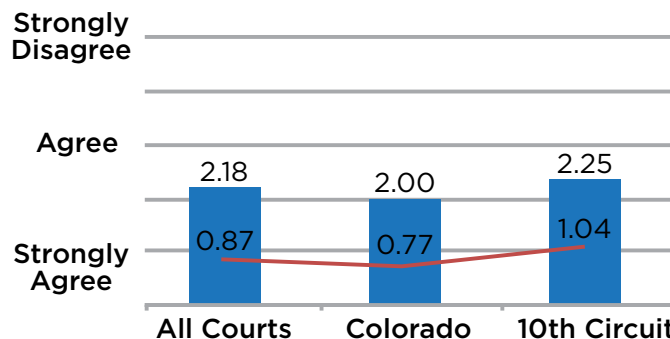


Strongly Agree	Agree	Strongly Disagree
30	64	40
		46
		4

When a brief contains a list, judges like bullet points or other creative typography to set it off from regular text



Judges like charts, diagrams, and other visual aids, especially when they can substitute for long textual explanations



Strongly Agree	Agree	Disagree	Strongly Disagree
27	110	45	10

Strongly Agree	Agree	Disagree	Strongly Disagree
40	96	41	13

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Making Briefs Tablet-Friendly

When reviewing the data, keep in mind that a significant number of appellate judges—both state and federal—now read briefs and other pleadings on iPads or other tablets.² This can affect the comprehension and retention of the arguments made in a brief or other pleading by judges, staff attorneys, and clerks.³

Analyses of reading patterns when something is being read on a tablet or similar device reveals that material is read in an “F-pattern.” In heat maps, the red shows the text that gets the most attention, the yellow shows the text that gets the next level of attention, and the purple shows the text that gets even less attention.⁴ The pattern looks like the letter “F.”

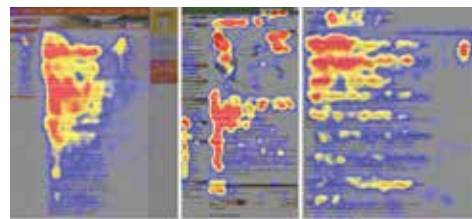


Photo credit: NN/g, www.nngroup.com

F-pattern studies show that reading something in an electronic format often results in skimming. Numerous articles have been written suggesting strategies to deal with this

and other issues that occur when text is read on an electronic device.⁵ These techniques should be part of an overall strategy to enhance the readability and comprehension of your briefs. Of course, any strategy employed to make your briefs easier to read and visually more appealing must comply with existing court rules. **CL**



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KEY TAKEAWAYS

1 These surveys were conducted before many appellate judges started reading briefs electronically—today’s judges are almost exclusively reading briefs and pleadings on iPads or tablets.¹ One tip for attorneys is to download a copy of an application that allows reading and commenting on PDFs—Goodreader is used by many courts—and read the brief on it before filing. You’ll see what the judges and staff attorneys will see and can make appropriate adjustments.

2 The judges expressed a preference for using italics rather than underlining for case citations. As one article pointed out, “Case names are not underlined in the United States Reports, the Solicitor General briefs, or law reviews, for good reason. Underlining masks the descenders (the bottom parts of g, j, p, q, and y).”² I expect the italics preference would be even more pronounced toward “Strongly Agree” if the surveys were

conducted in this age of electronic reading.

3 Similarly, italics are generally preferred over underlining to denote emphasis. I also expect this preference would be more pronounced today.

4 But pay close attention to what your style manual—and the court’s rules—tell you about using italics versus bold or underlining. You should always have a good reason to deviate from your stylebook—and you should always follow the court’s formatting rules.

5 Make sure you provide clear, legible copies of photos or other documents in your appendix. Bear in mind that what may look fine printed out may be illegible on a screen, and vice versa.

6 Lastly, bullet points, charts, diagrams, and other visual aides are encouraged to both set something off from the text around it and to replace a long, wordy explanation.

NOTES

1. See November 2017 (part 1), February 2018 (part 2), and April 2018 (part 3) issues.
2. Council of Appellate Lawyers, “The Leap From E-Filing to E-Briefing: Recommendations and Options for Appellate Courts to Improve the Functionality and Readability of E-Briefs” at 5–8 (ABA 2017), www.americanbar.org/content/dam/aba/administrative/appellate_lawyers/2017_cal_ebrief_report.authcheckdam.pdf.
3. Szalavitz, “Do E-Books Make It Harder to Remember What You Just Read?” *Time* (Mar. 14 2012), <http://healthland.time.com/2012/03/14/do-e-books-impair-memory>; Niccoli, “Paper or Tablet? Reading Recall and Comprehension,” *EDUCAUSE* (Sept. 28, 2015), <https://er.educause.edu/articles/2015/9/paper-or-tablet-reading-recall-and-comprehension>.
4. Nielsen, “F-Shaped Pattern for Reading Web Content (original study),” Nielsen Norman Group (Apr. 17, 2006), www.nngroup.com/articles/f-shaped-pattern-reading-web-content-discovered.
5. Volokh, “Writing Briefs When Judges Read on iPads,” *The Volokh Conspiracy* (Jan. 17, 2014), <http://volokh.com/2014/01/17/writing-briefs-judges-read-ipads>; Maher and Romes, “The Quiet Revolution in Brief Writing,” *Law Practice Today* (Feb. 12, 2016), www.lawpracticetoday.org/article/the-quiet-revolution-in-brief-writing.

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1. Council of Appellate Lawyers, “The Leap From E-Filing to E-Briefing: Recommendations and Options for Appellate Courts to Improve the Functionality and Readability of E-Briefs” at 5–8 (ABA 2017), www.americanbar.org/content/dam/aba/administrative/appellate_lawyers/2017_cal_ebrief_report.authcheckdam.pdf.
2. Maher and Romes, “The Quiet Revolution in Brief Writing,” *Law Practice Today* (Feb. 12, 2016), www.lawpracticetoday.org/article/the-quiet-revolution-in-brief-writing.