

WHAT'S THE DIFFERENCE? COMPARING THE ADVOCACY PREFERENCES OF STATE AND FEDERAL APPELLATE JUDGES

David Lewis*

I. 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 current results of my survey, which consisted of eighty-six questions divided into seven sections. I mailed this survey 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 I received responses from 138 judges, which amounts to over forty-nine percent of those who received the survey.

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. The graphs shown in this article, in comparison, present the responses to every question in the survey from every judge who responded.

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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).

2. David Lewis, *Common Knowledge about Appellate Briefs: True or False?* 6 J. App. Prac. & Process 331 (2004).

II. METHODOLOGY

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

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

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 and state court, and for all the courts, federal and state, within each of the First, Second, and Tenth Circuits.

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

III. UNDERSTANDING THE GRAPHS

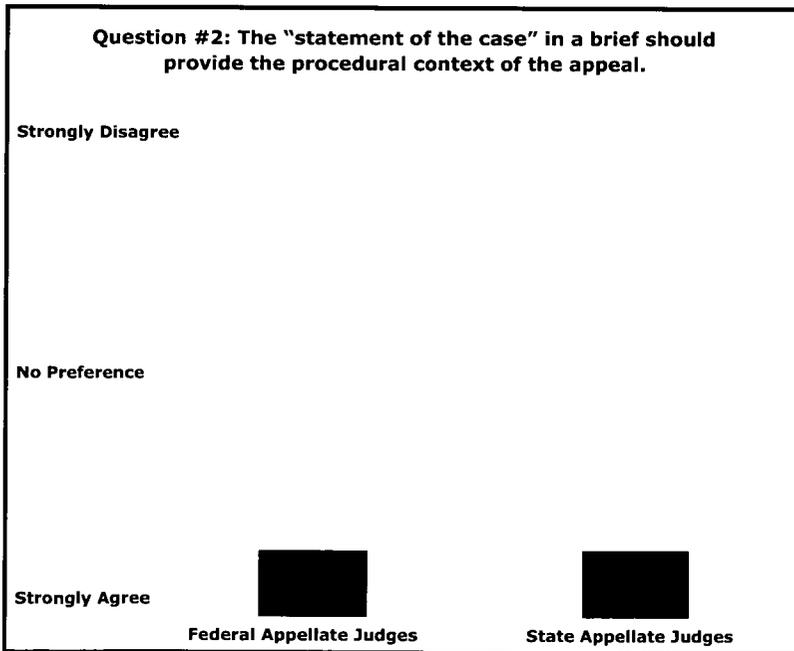
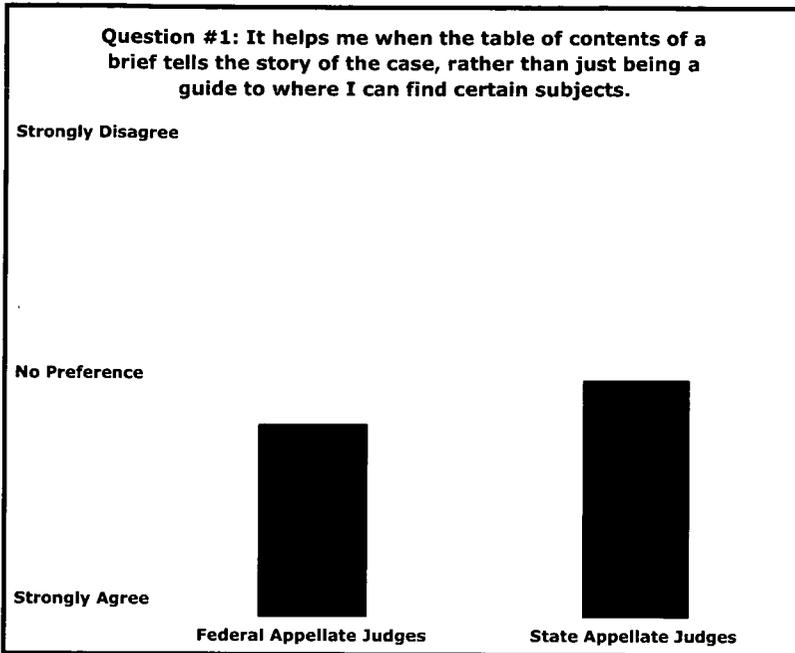
The survey results presented here remain in their original sections, and they are in order, so the article shows the results in the same context in which the judges saw the questions. The graphs in all of the sections other than Section VI (which was measured using a different scale), show how strongly 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.

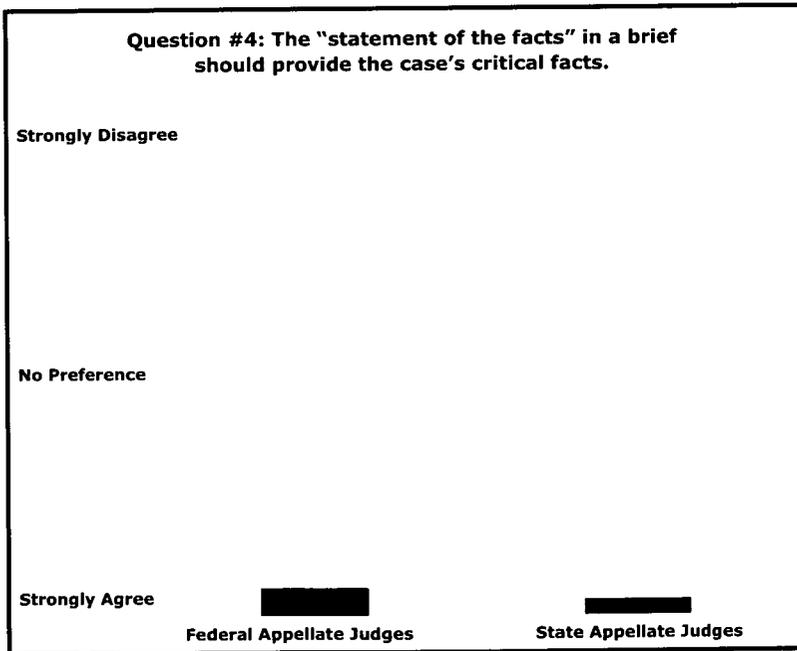
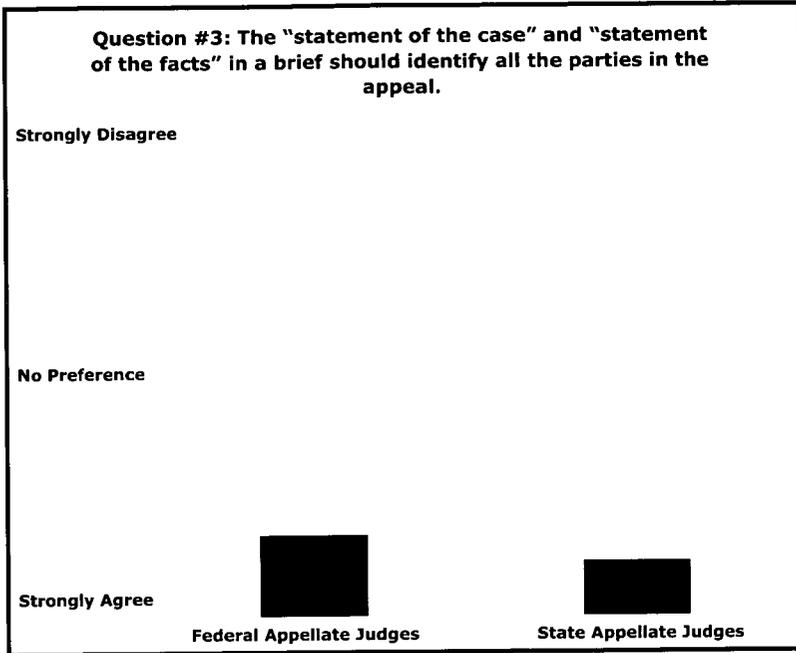
The graphs generated from judges' answers to Section Six of the Survey (shown in Section IX of this paper) are somewhat different. They indicate through percentages how often an error appeared to the judges to be occurring for each type of case. The graphs in this Section are also not broken out to reflect any state and federal differences; for this Section—but only for this Section—all of the judges' responses are presented together.

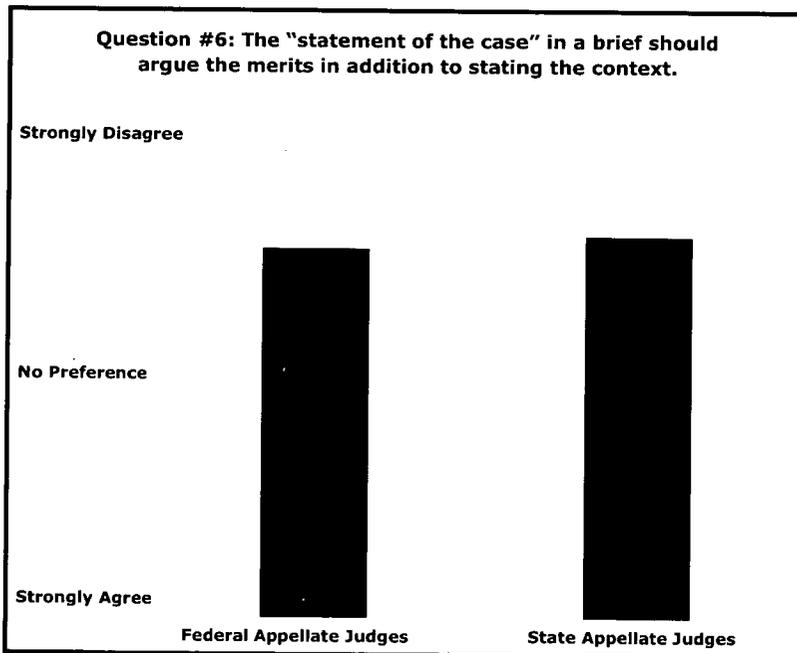
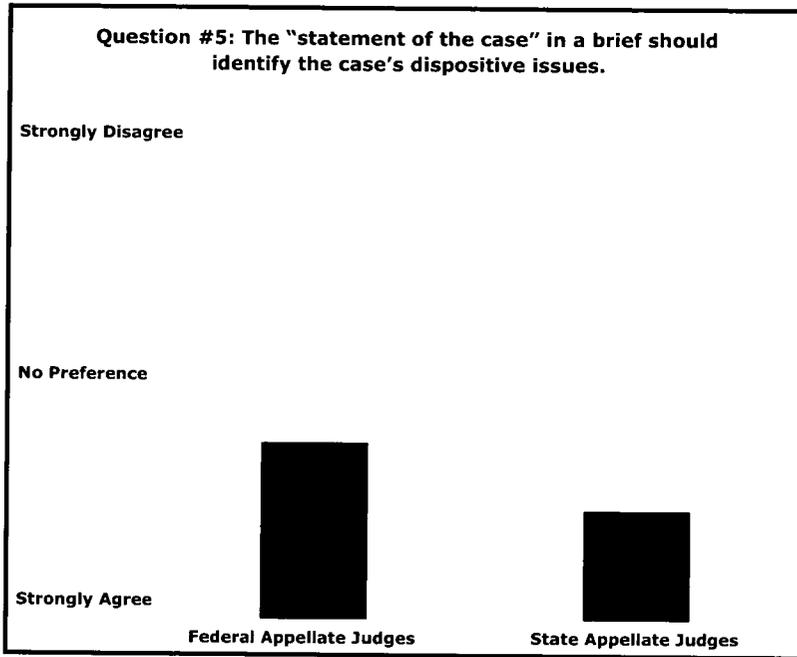
I have not broken any of the graphs down by region, state, or individual court. The graphs reflect the combined data for all of the federal judges surveyed (from the United States Courts of Appeals for the First, Second, and Tenth Circuits) in one column, and the combined data for all of the state judges surveyed (from Colorado, Connecticut, Kansas, Maine, Massachusetts, New Hampshire, New Mexico, New York, Oklahoma, Rhode Island, Utah, Vermont, and Wyoming) in the other column. 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-two federal appellate judges and 116 state appellate judges. I believe that the graphs generally speak for themselves, so I do not provide any comments about individual graphs.

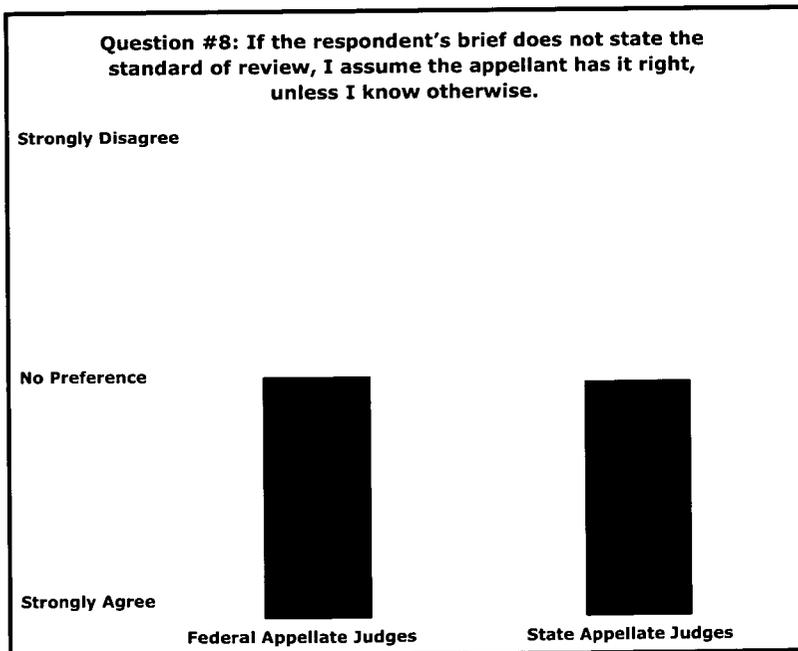
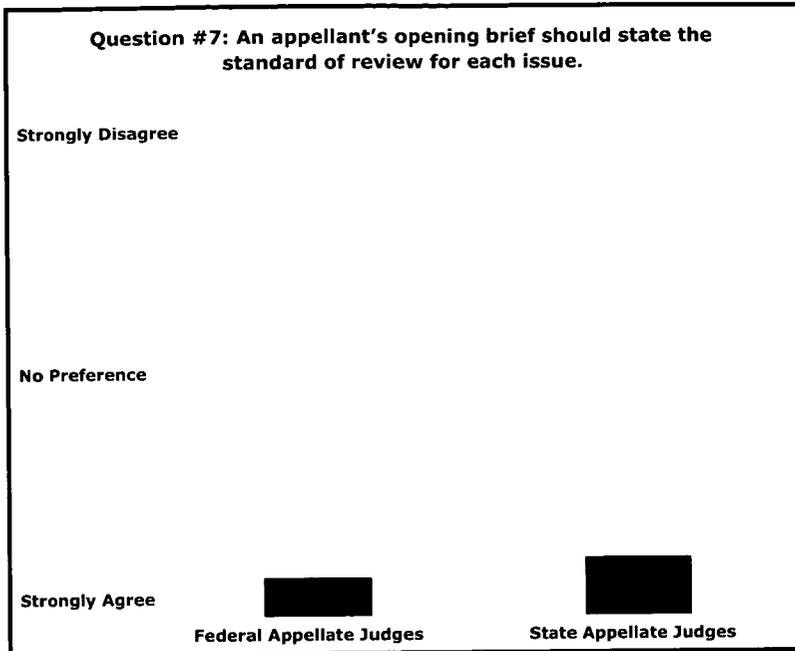
IV. SECTION ONE GRAPHS

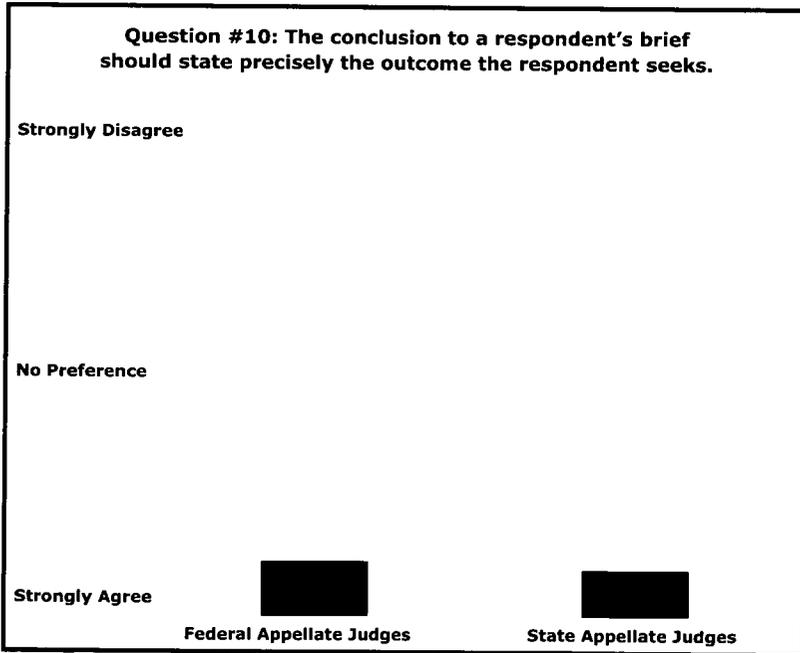
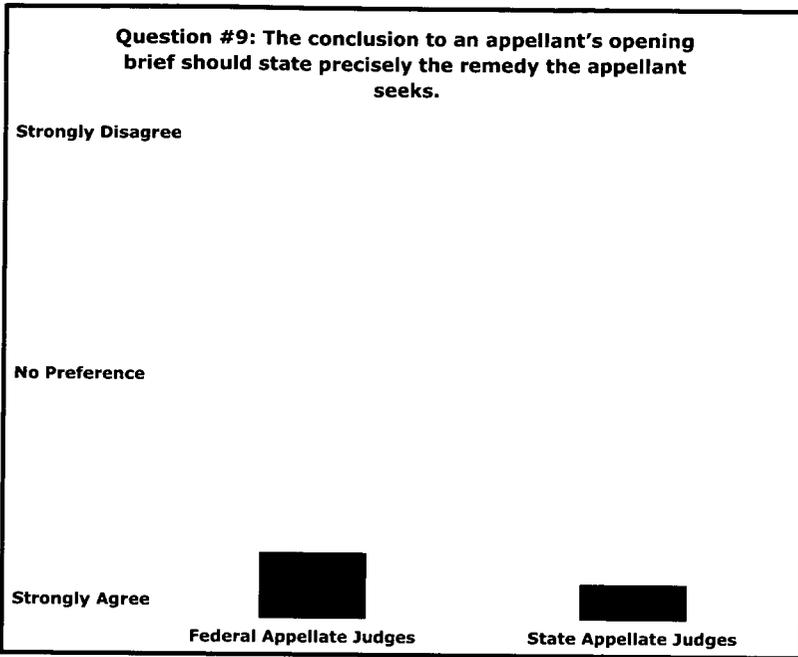
The graphs in this Section were generated from the judges' answers to the questions in Section One of the Survey, which addressed the structural elements of briefs:

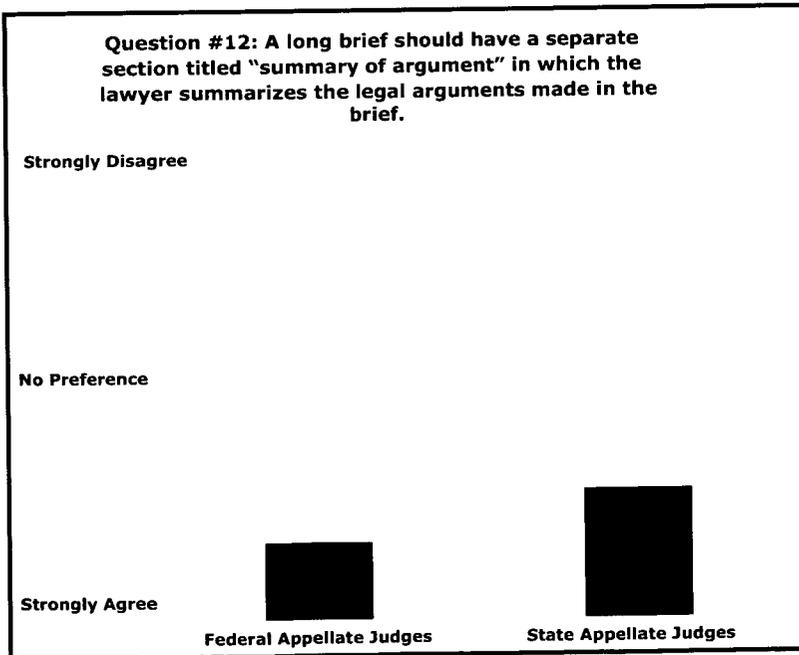
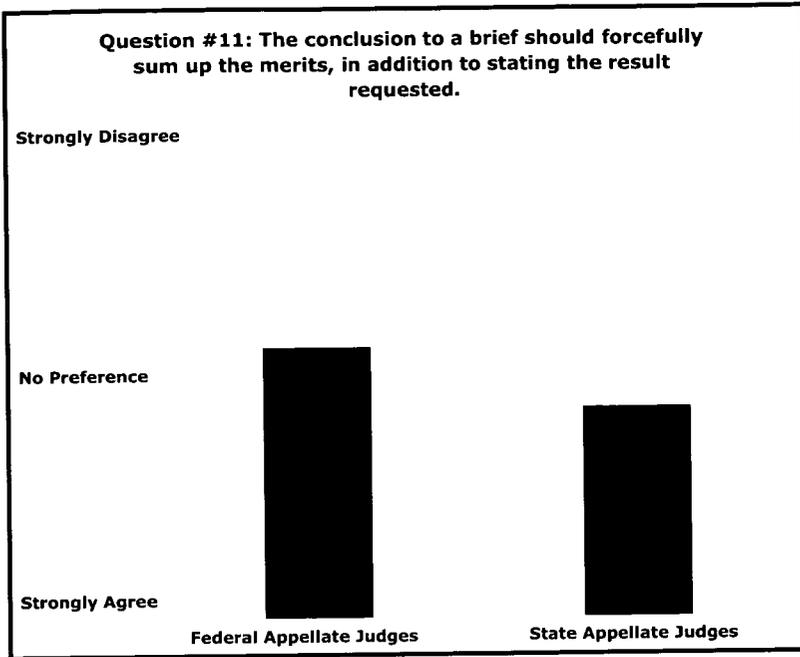


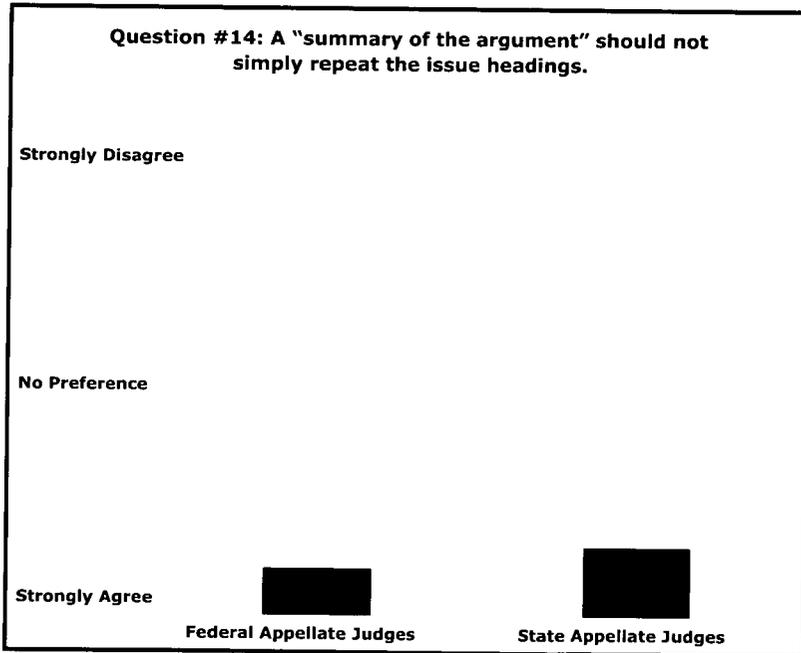
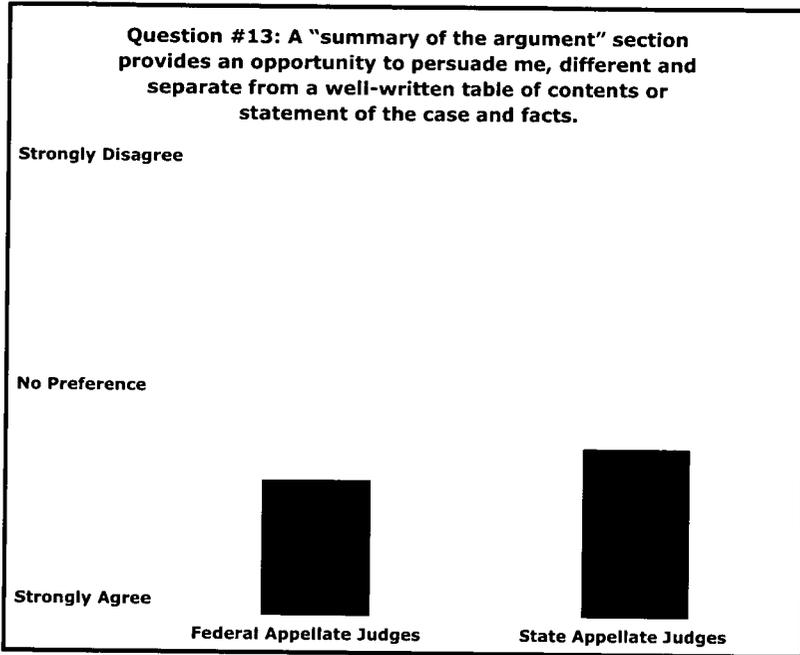


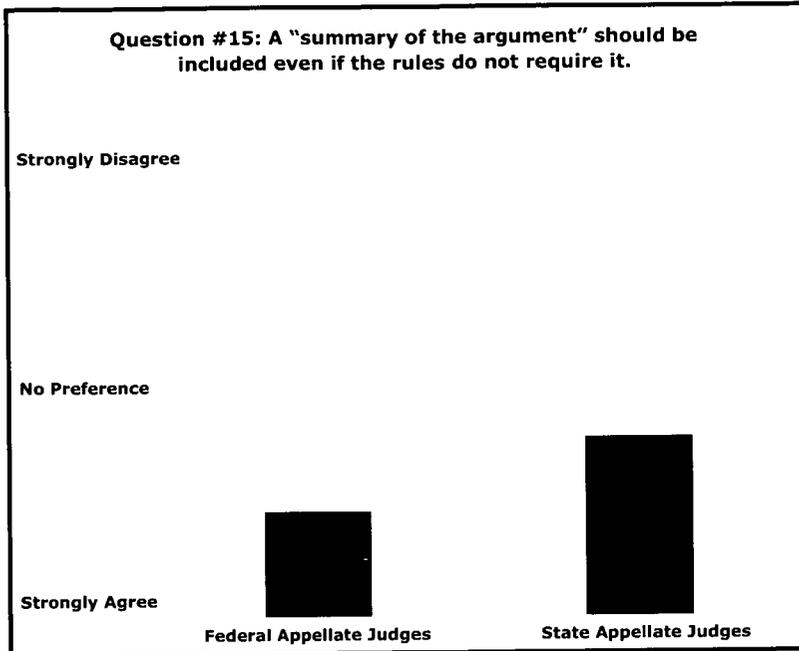








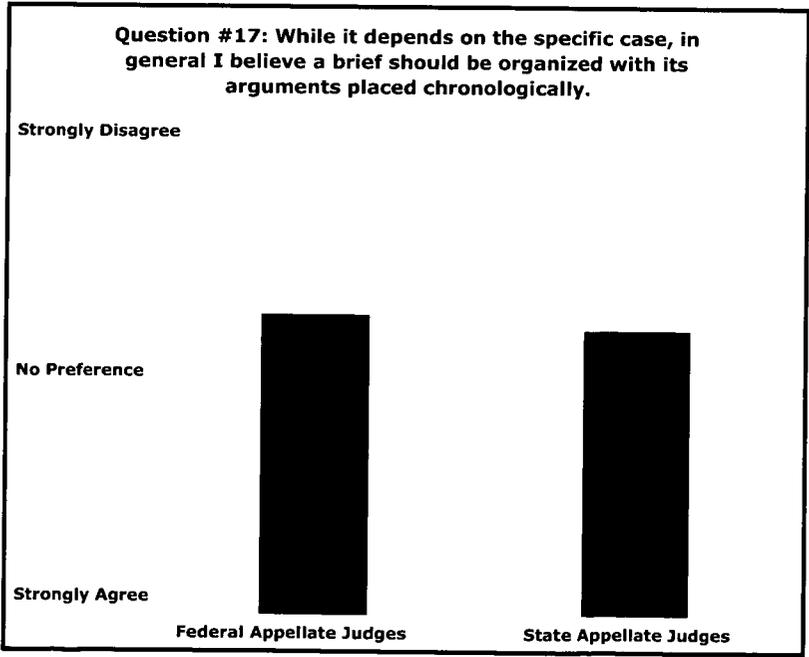
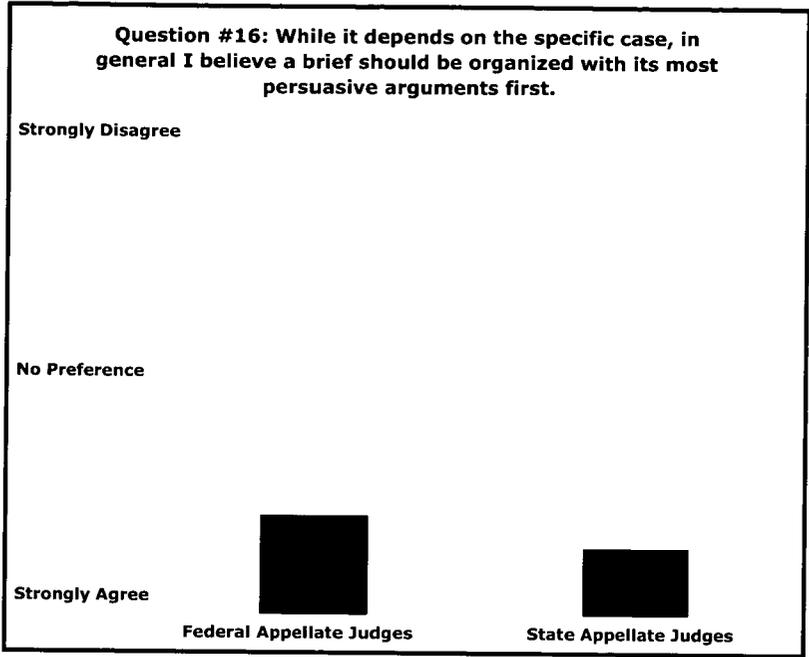


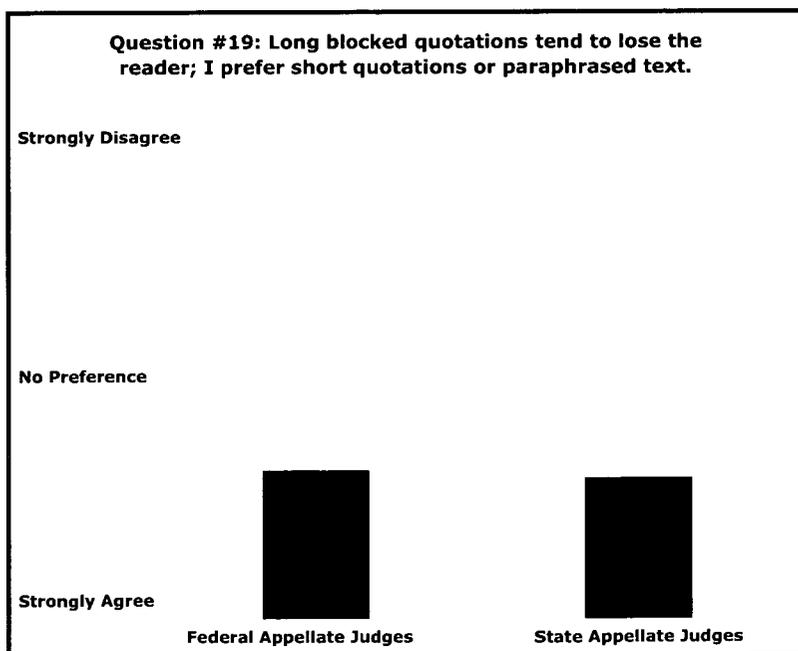
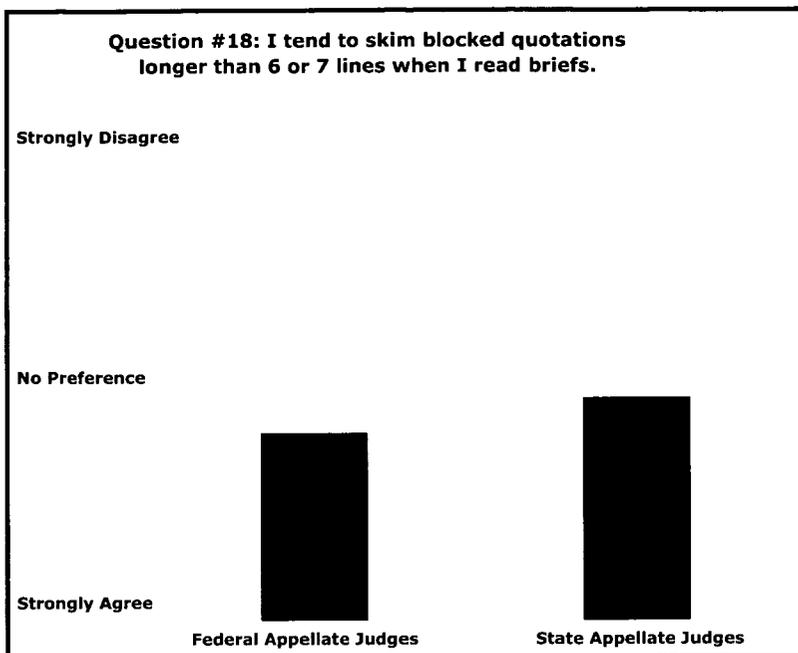


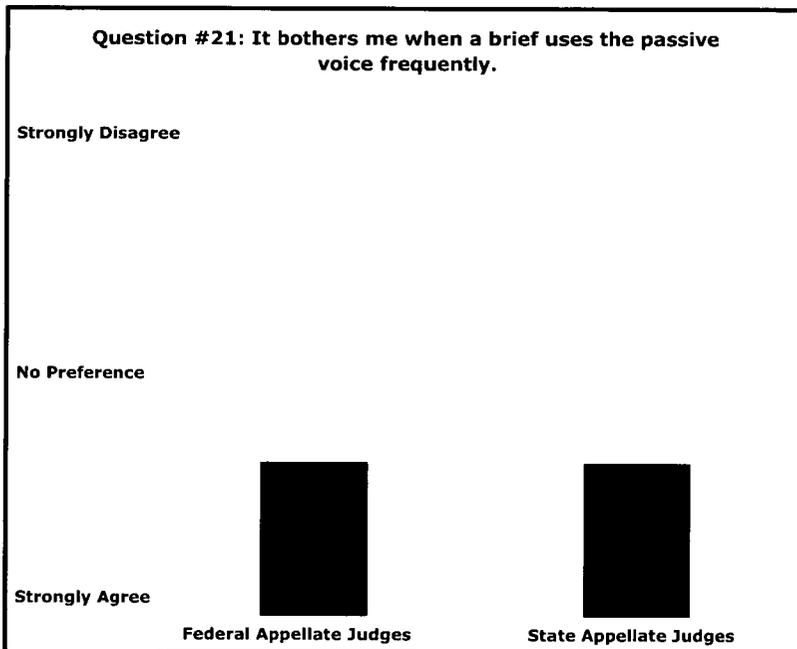
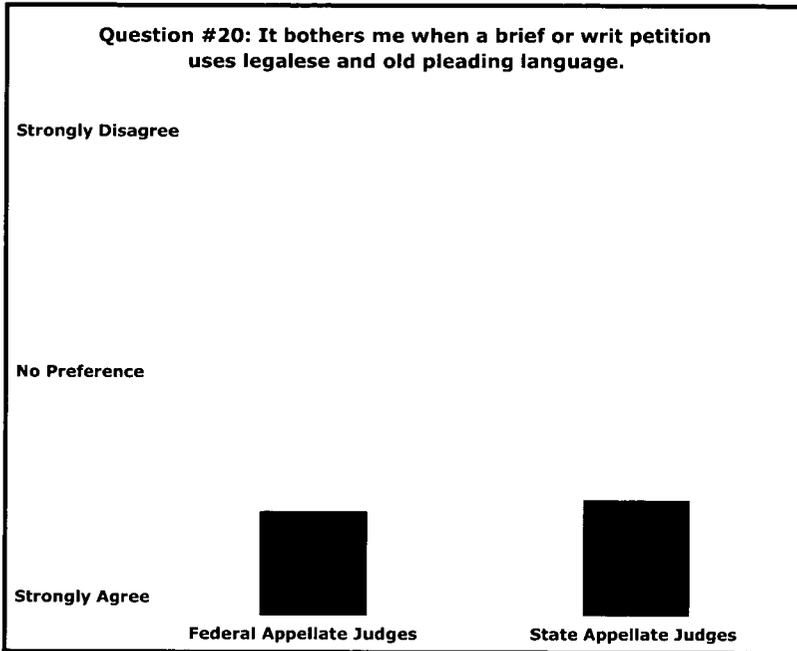
This graph completes my display of material from Section One of the Judicial Survey, as question fifteen (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges' answers to the questions asked in Section Two of the Judicial Survey, which focused on a different topic.

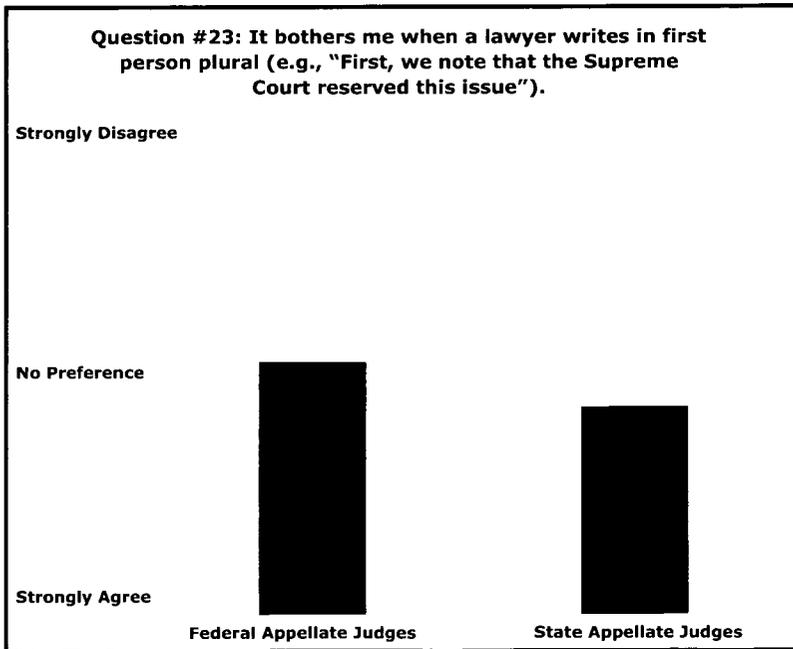
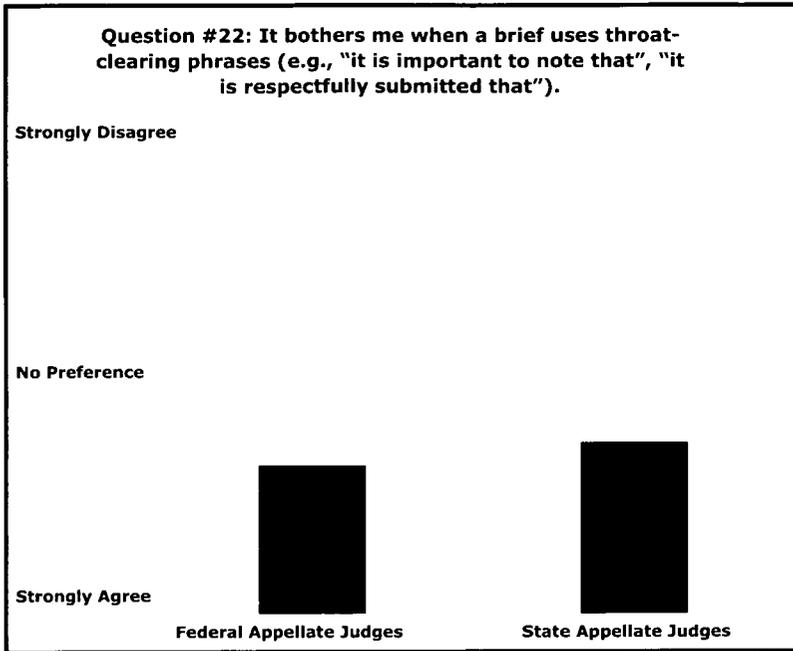
V. SECTION TWO GRAPHS

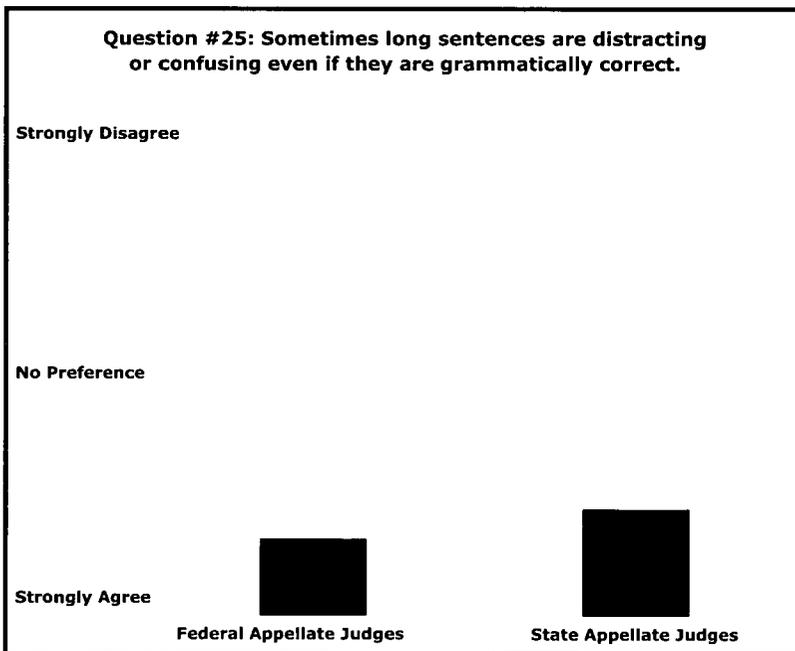
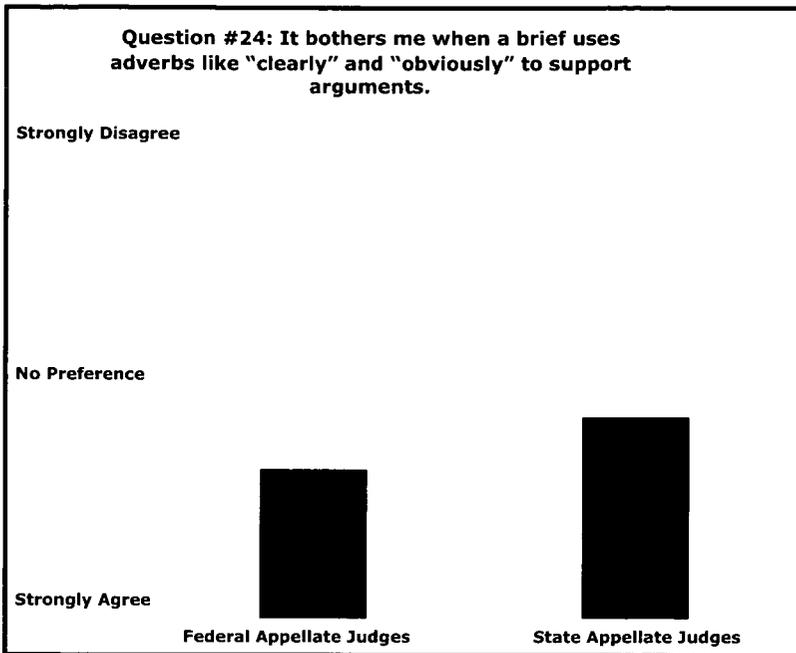
The graphs in this Section were generated from the judges' answers to the questions in Section Two of the Survey, which addressed writing style and advocacy:

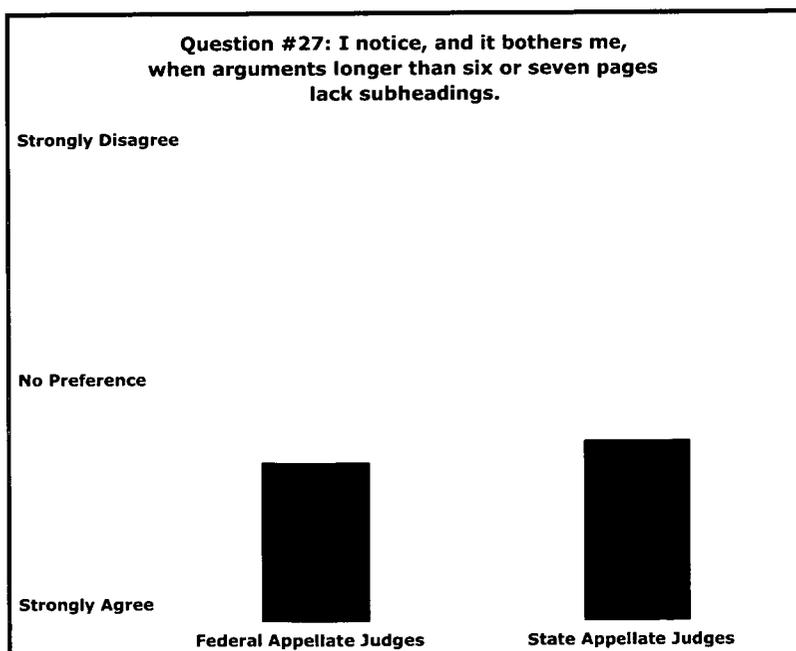
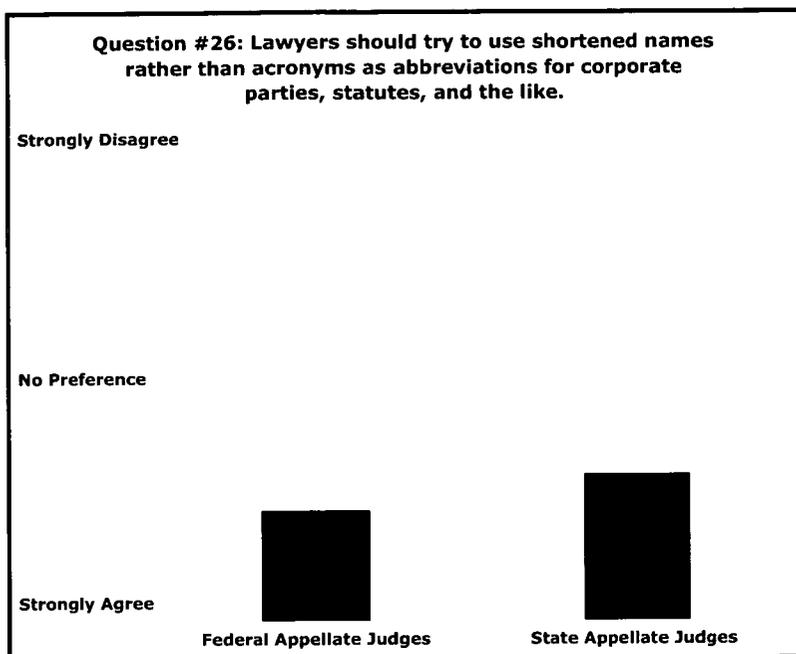


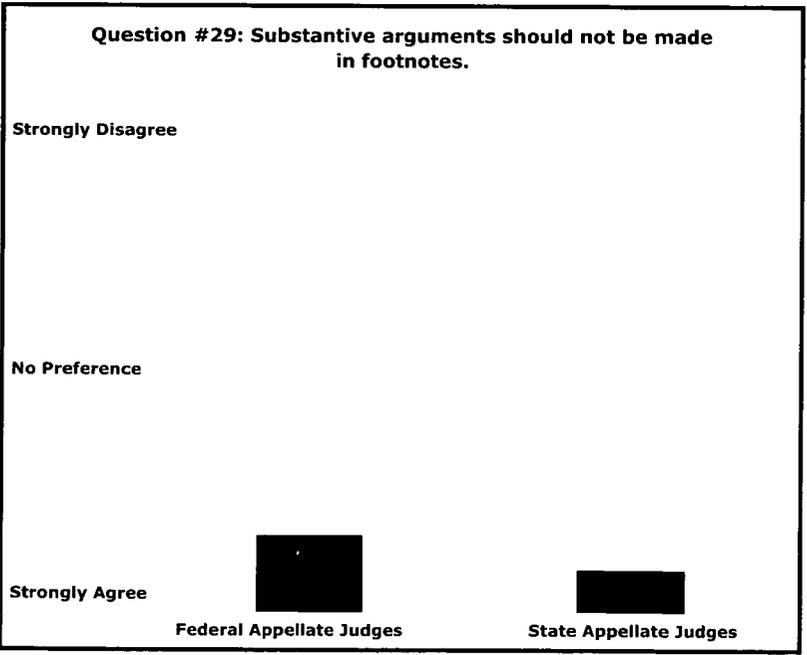
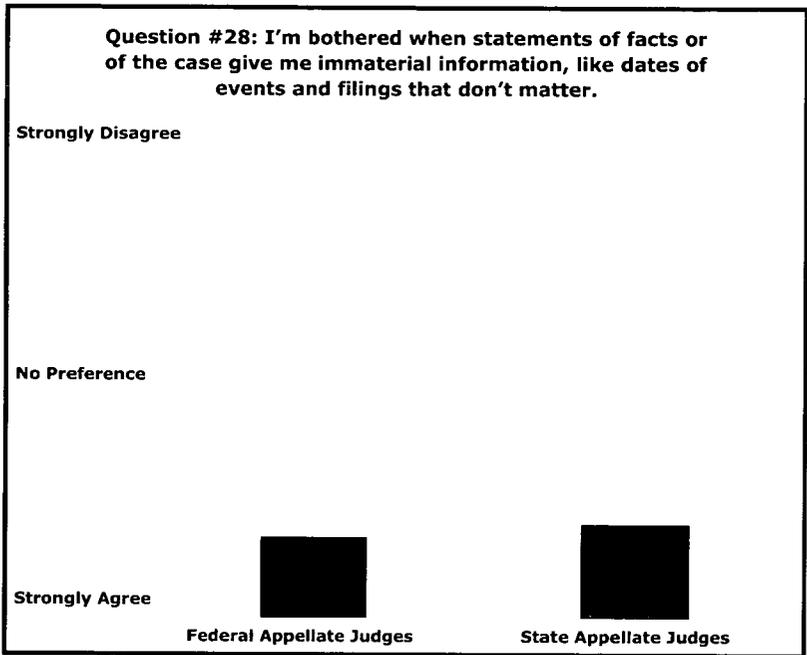


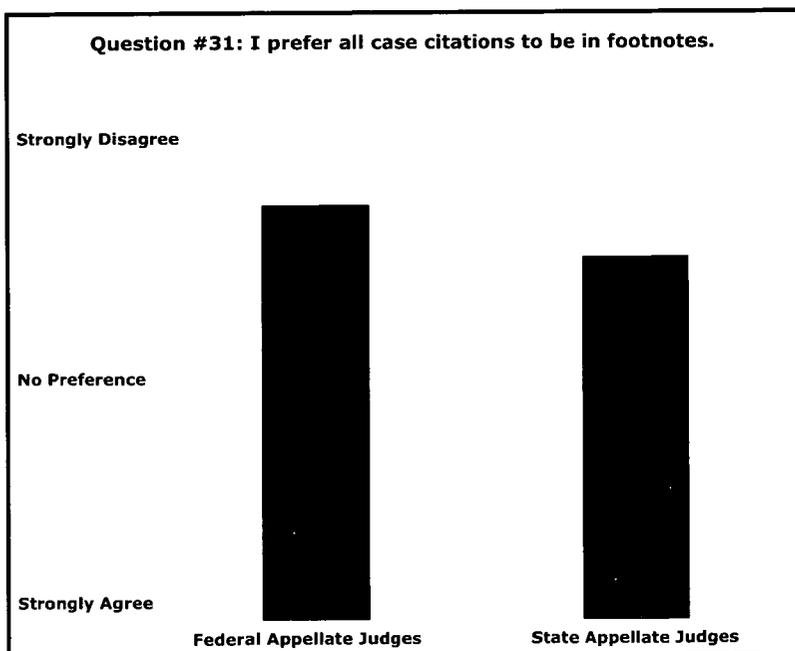
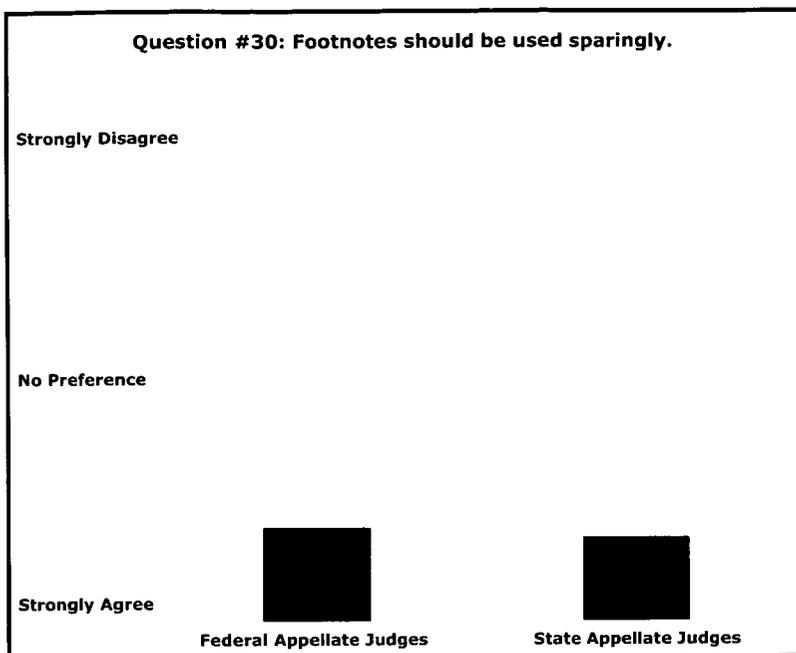


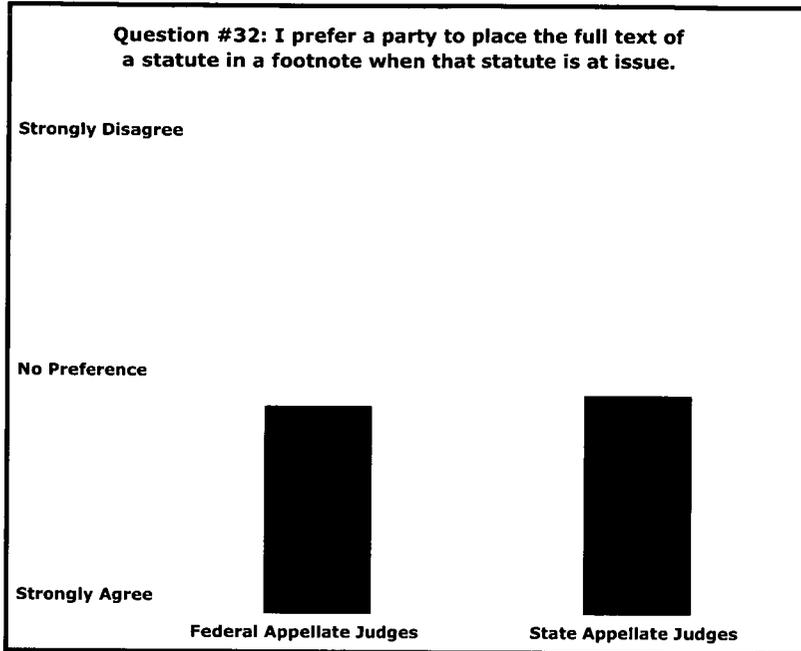








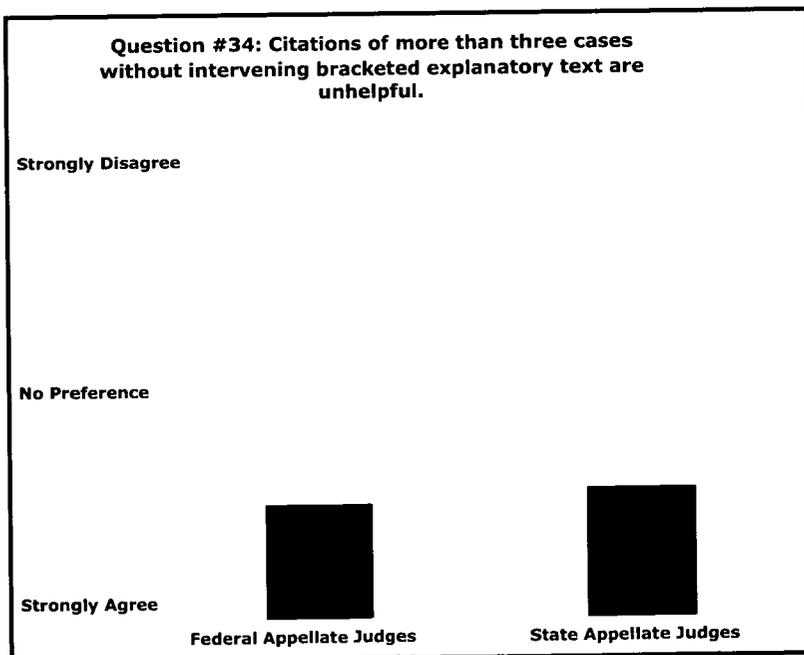
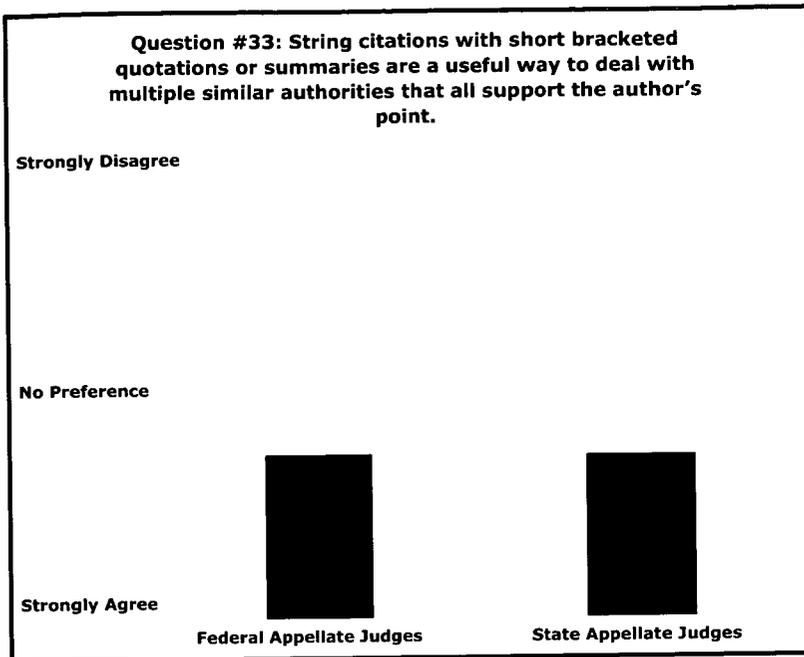


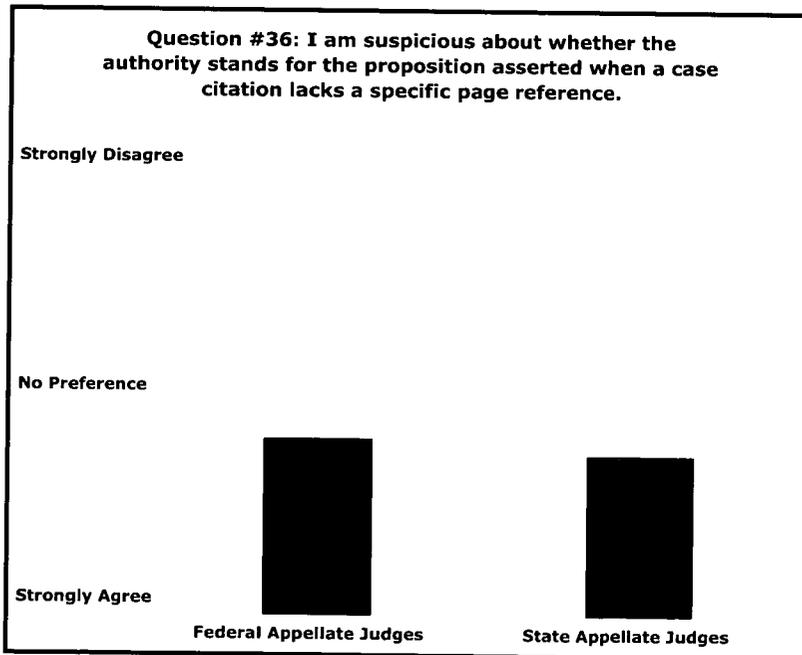
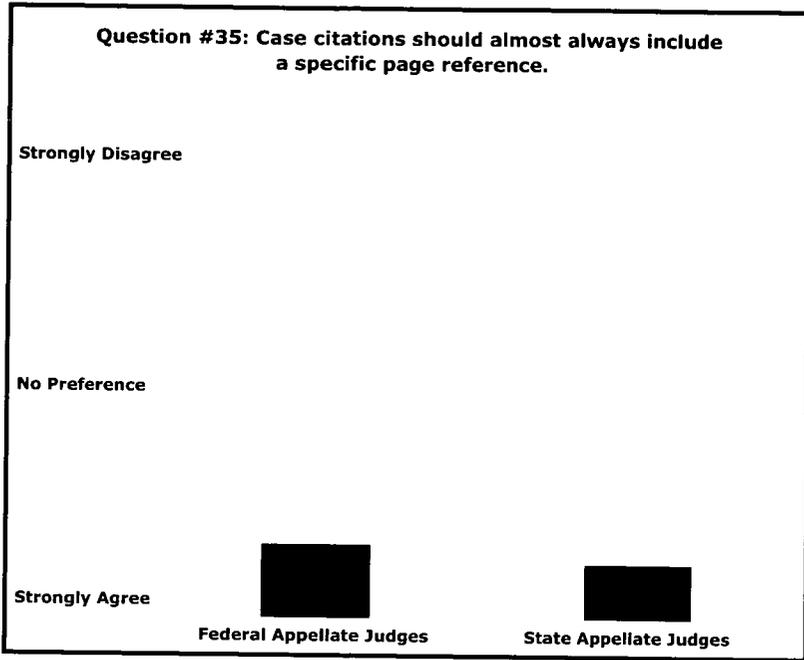


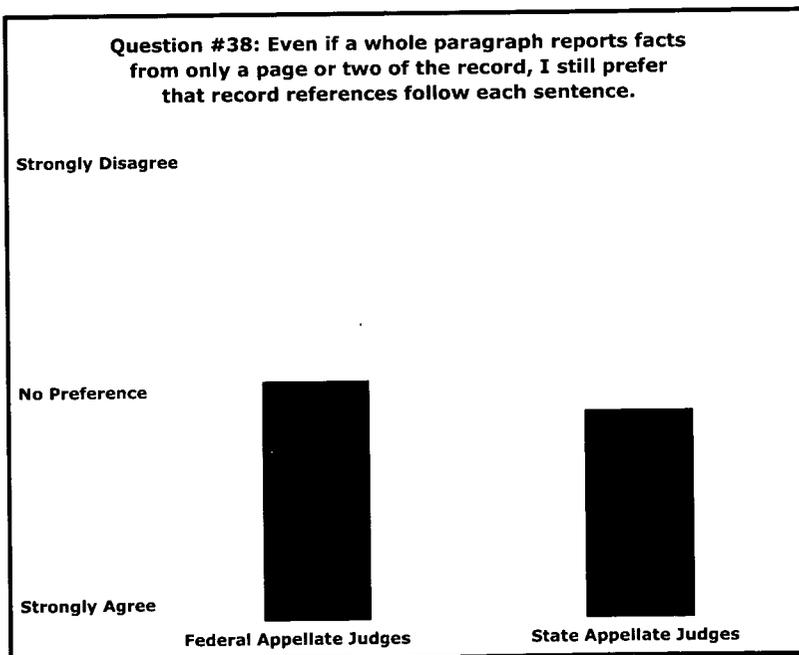
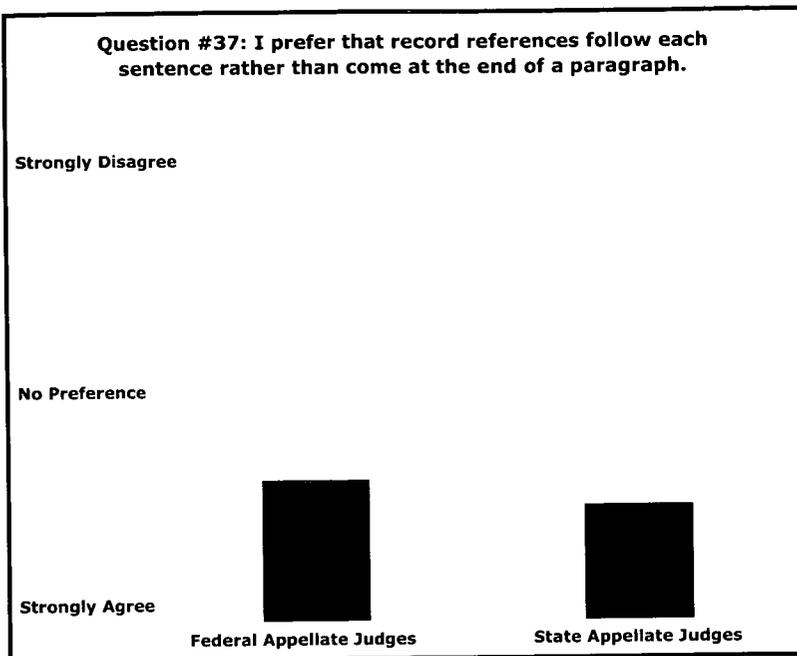
This graph completes my display of material from Section Two of the Judicial Survey, as question 32 (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges' answers to the questions asked in Section Three of the Judicial Survey, which focused on a different topic.

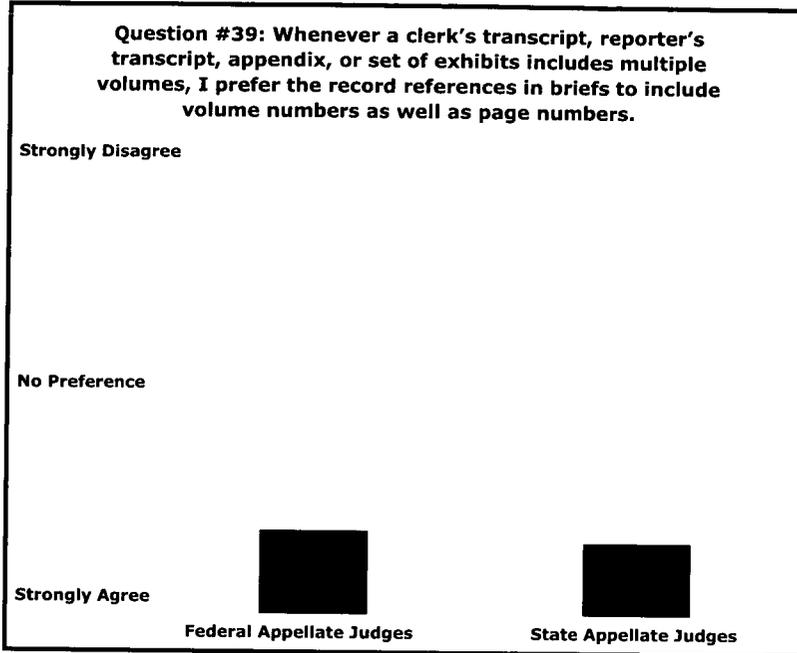
VI. SECTION THREE GRAPHS

The graphs in this Section were generated from the judges' answers to the questions in Section Three of the Survey, which addressed the use of authority and the record:





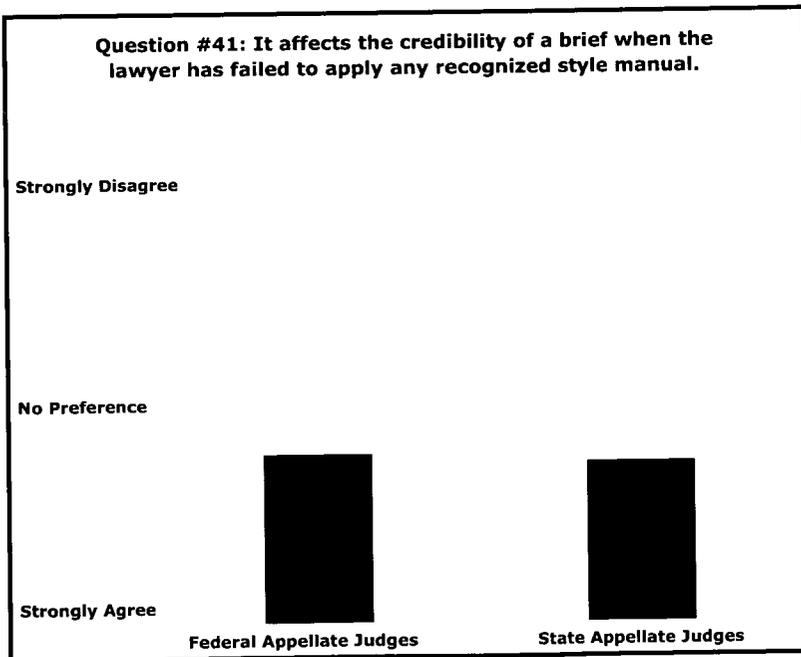
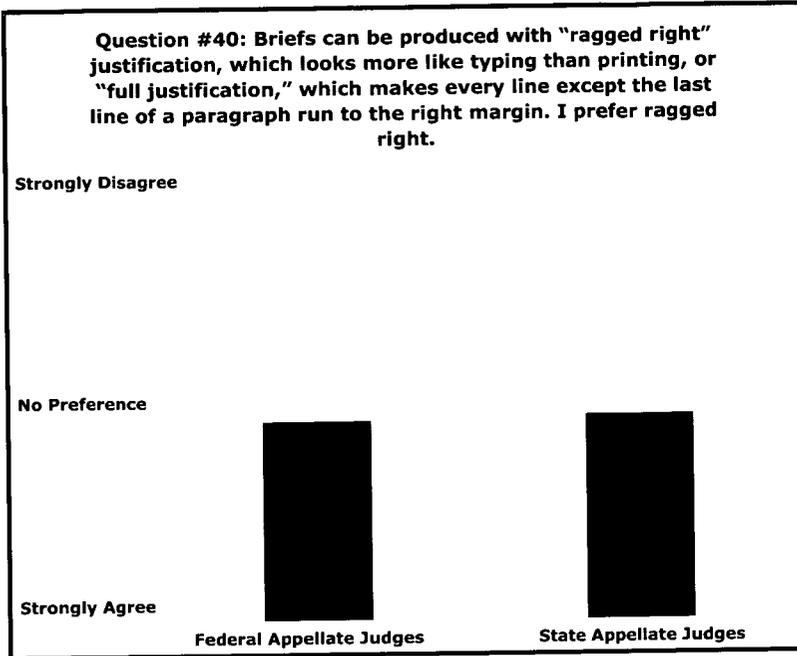


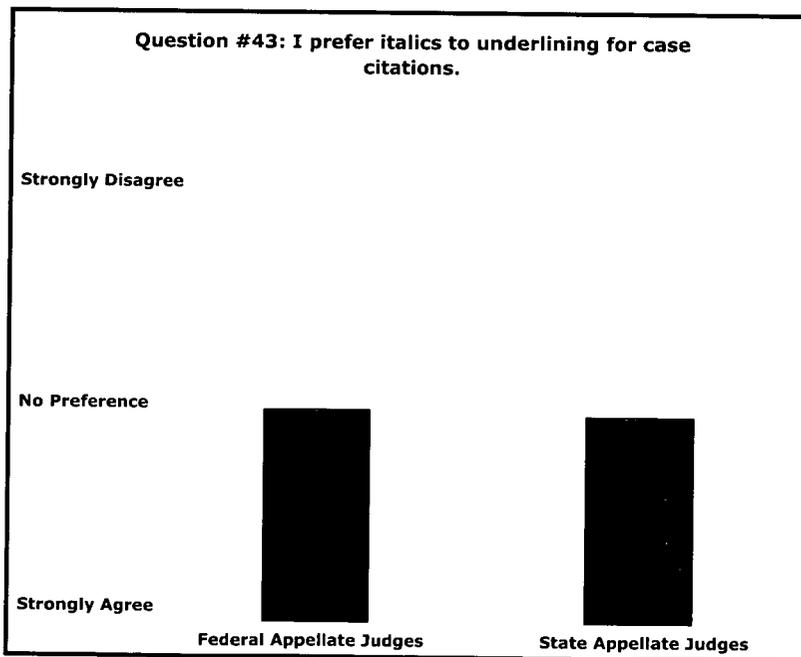
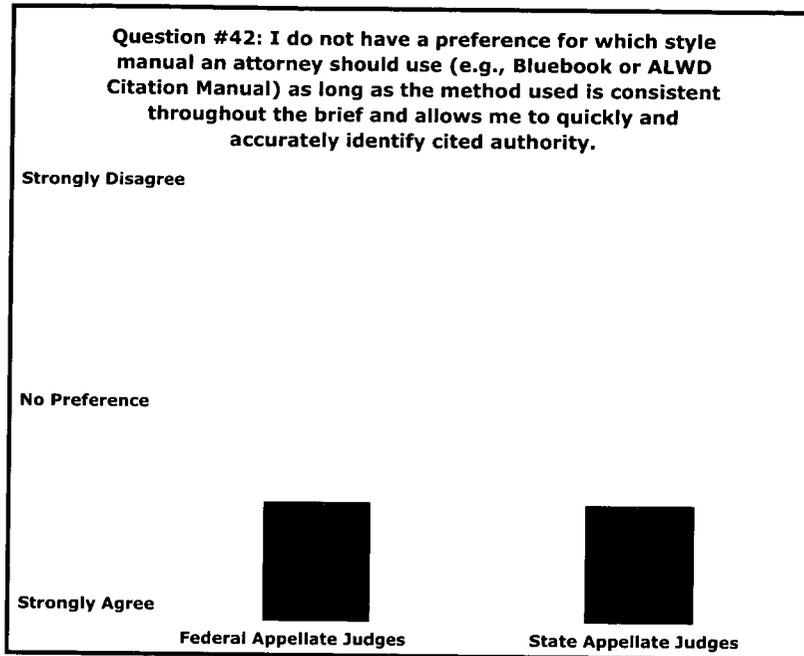


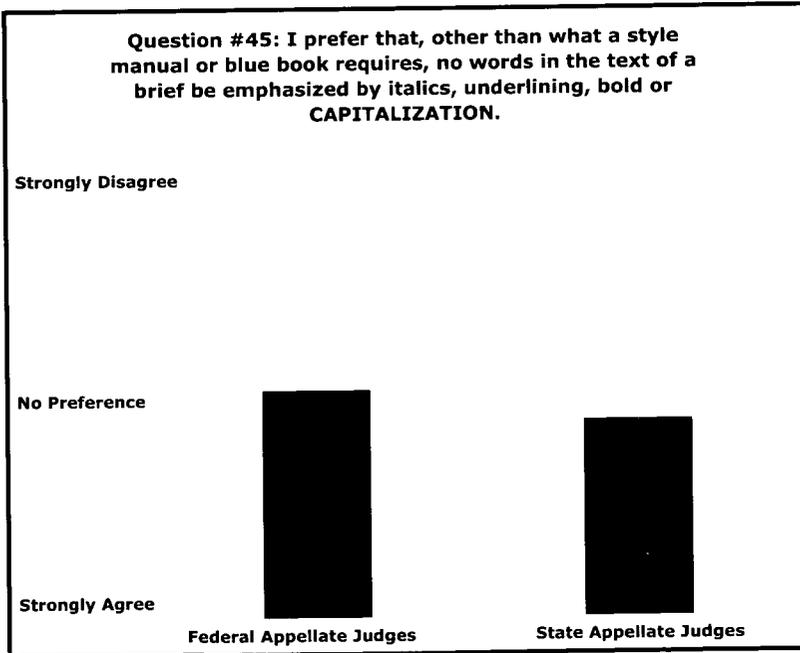
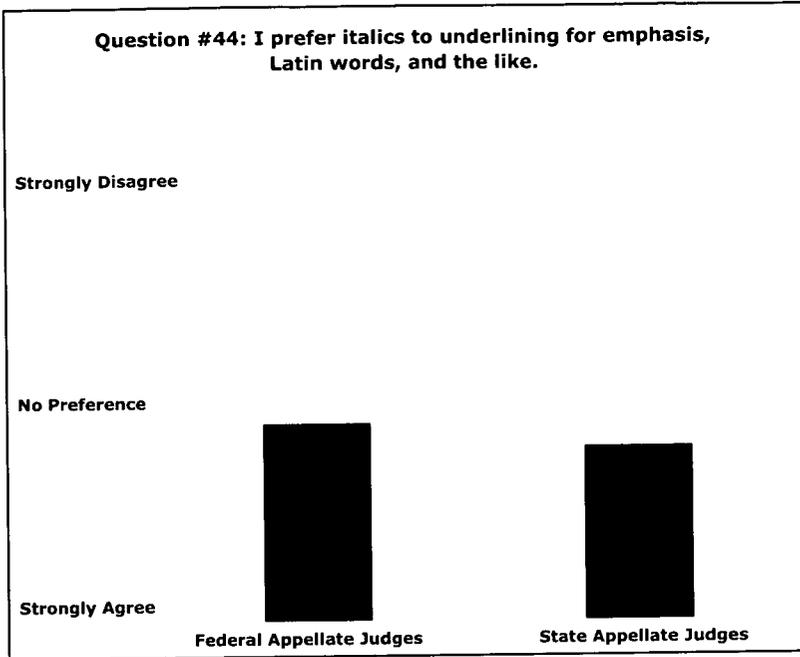
This graph completes my display of material from Section Three of the Judicial Survey, as question 39 (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges' answers to the questions asked in Section Four of the Judicial Survey, which focused on a different topic.

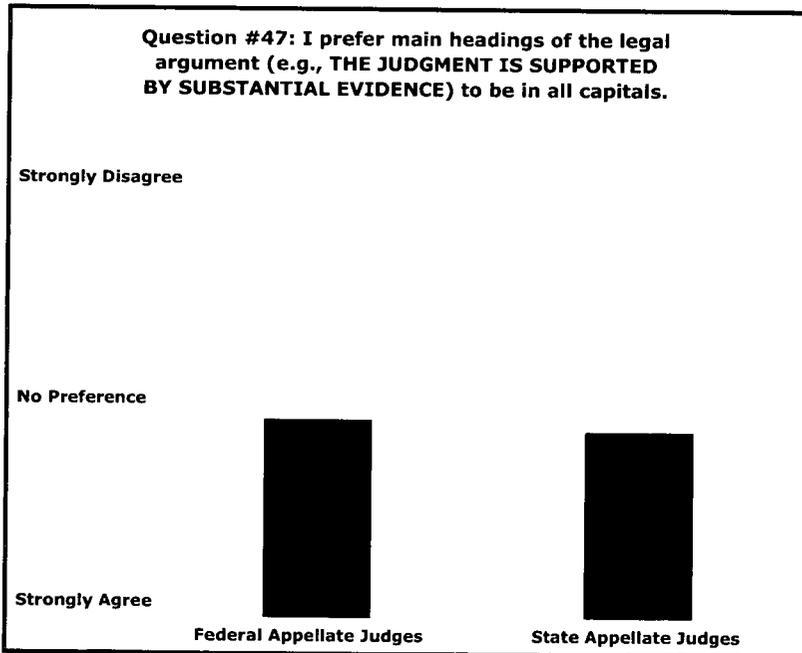
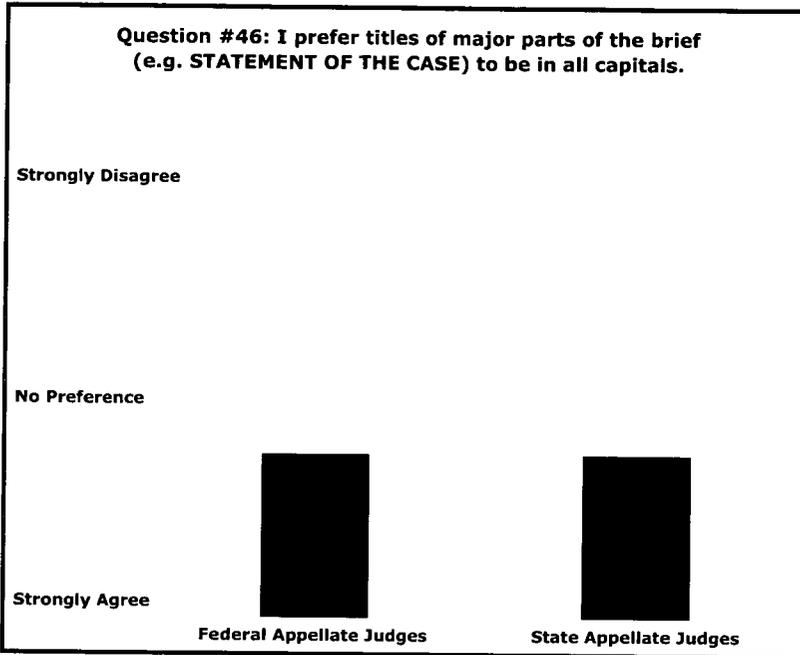
VII. SECTION FOUR GRAPHS

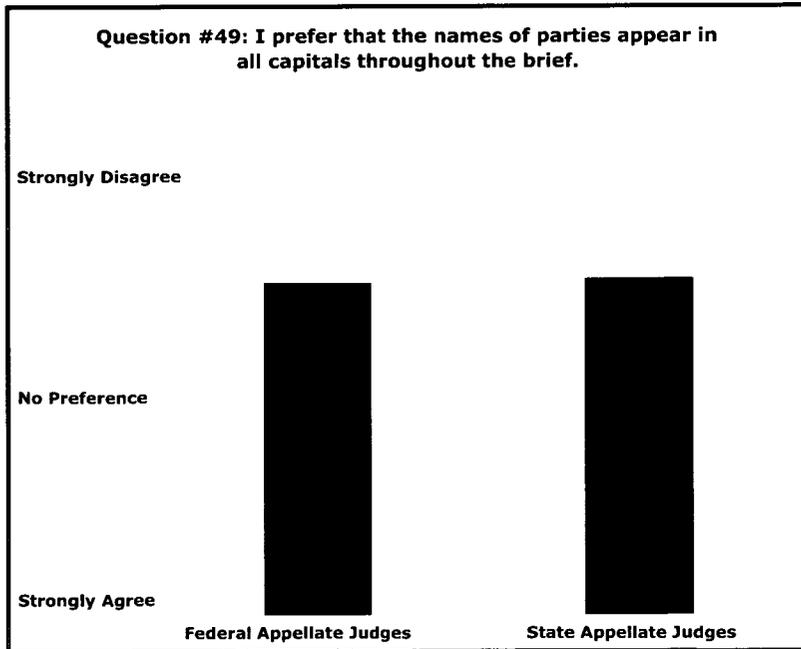
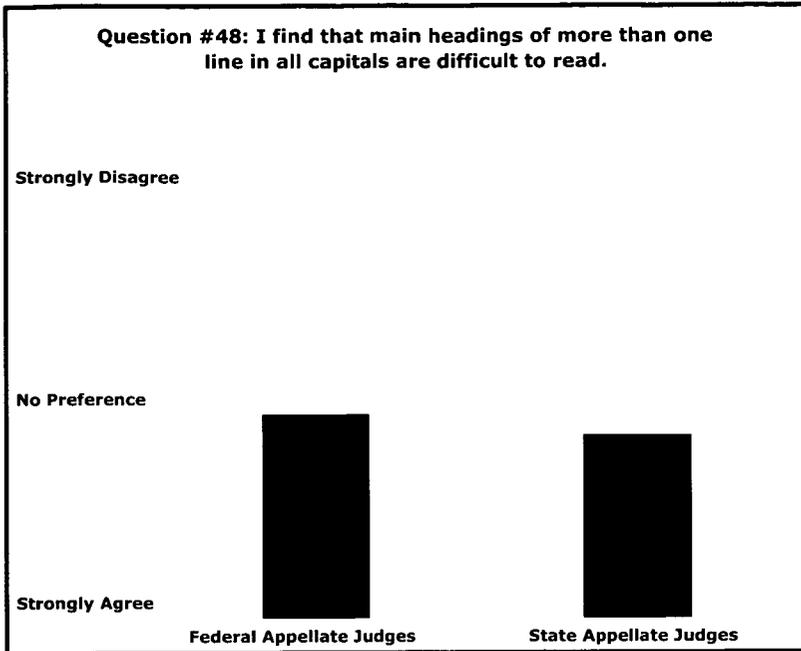
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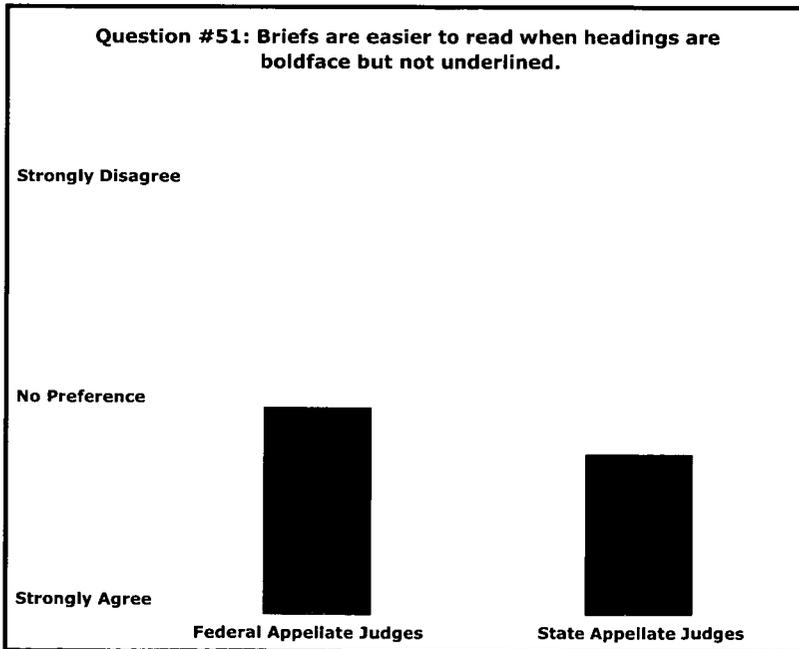
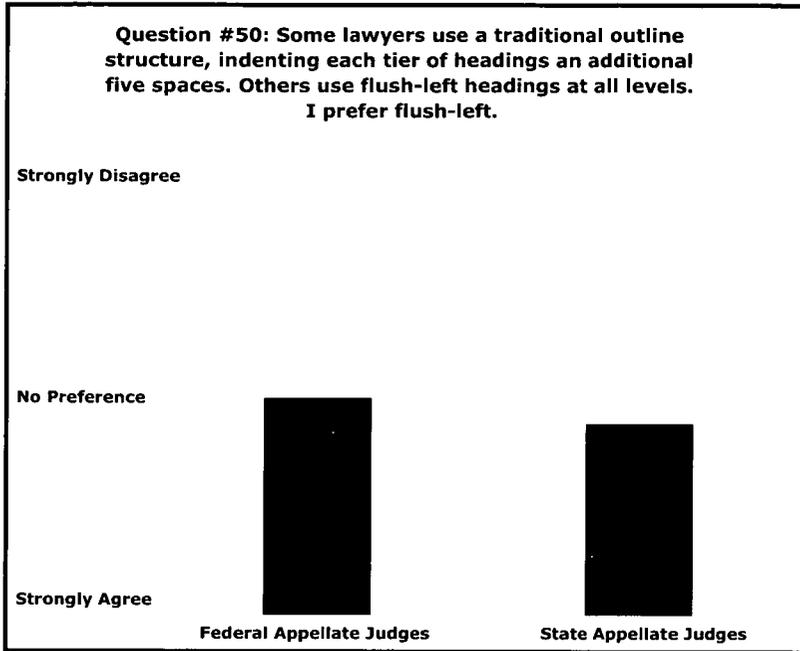


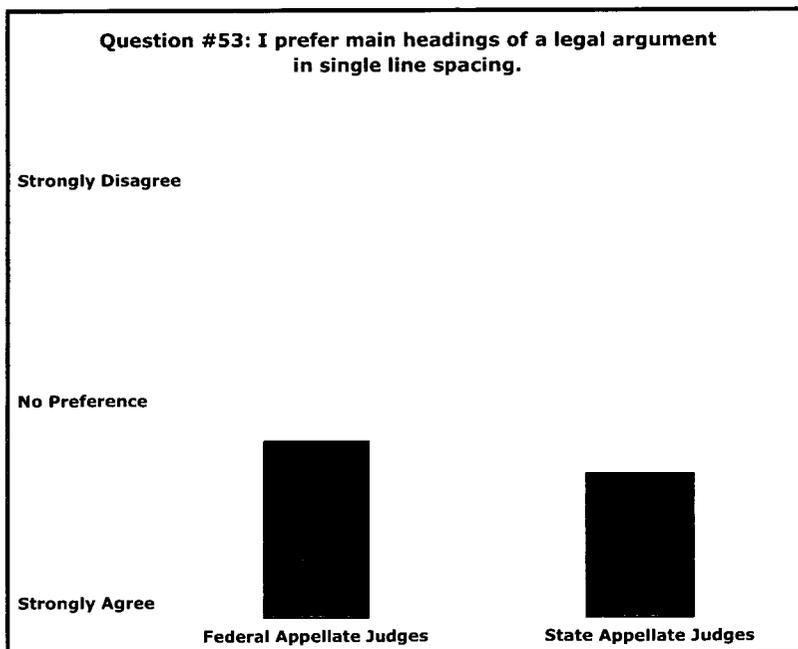
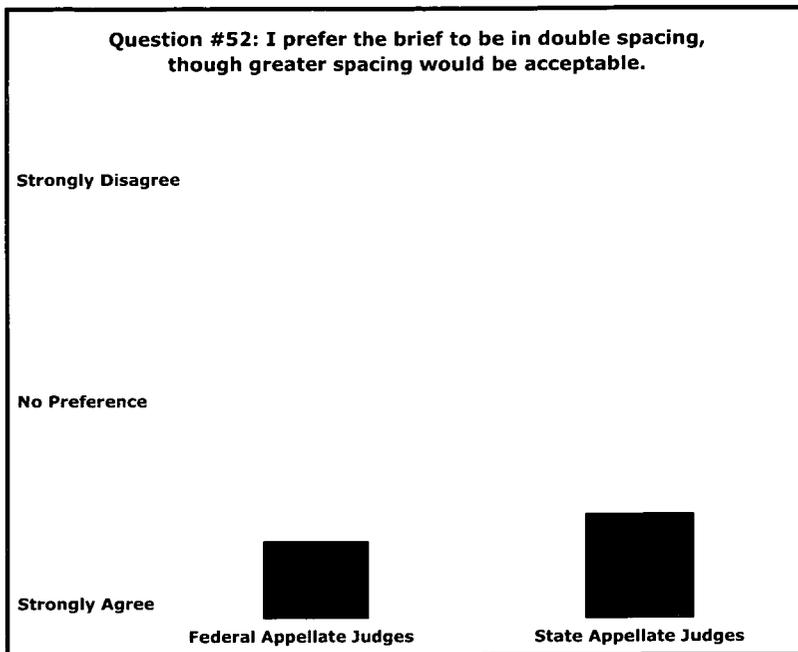


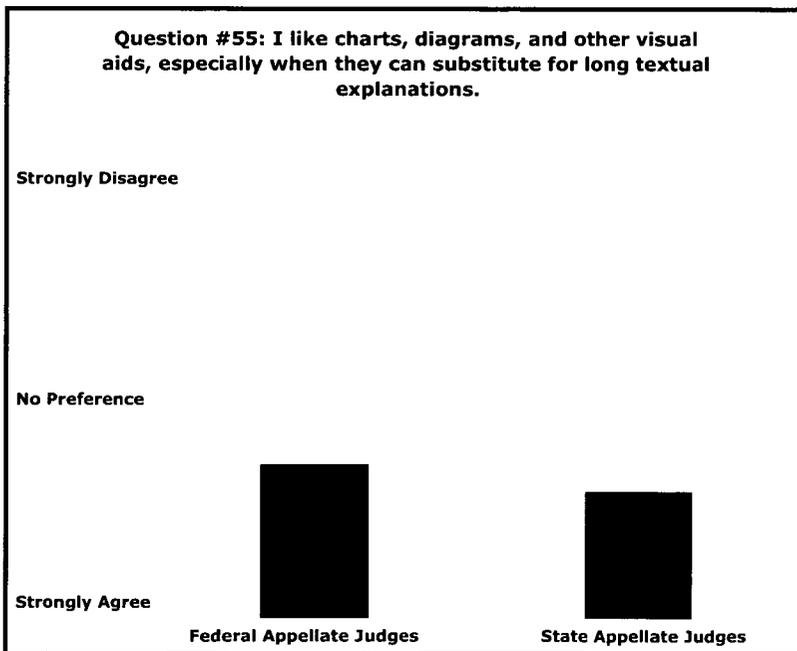
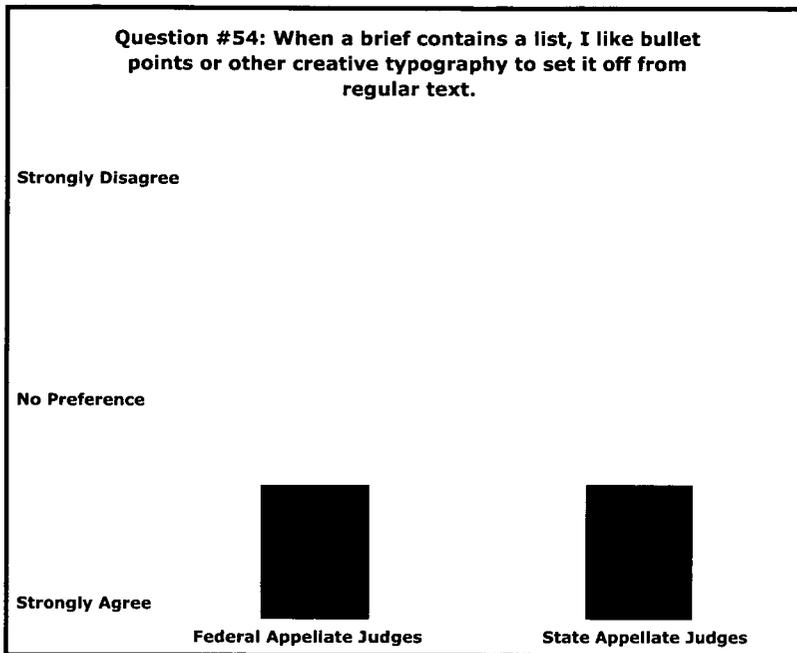


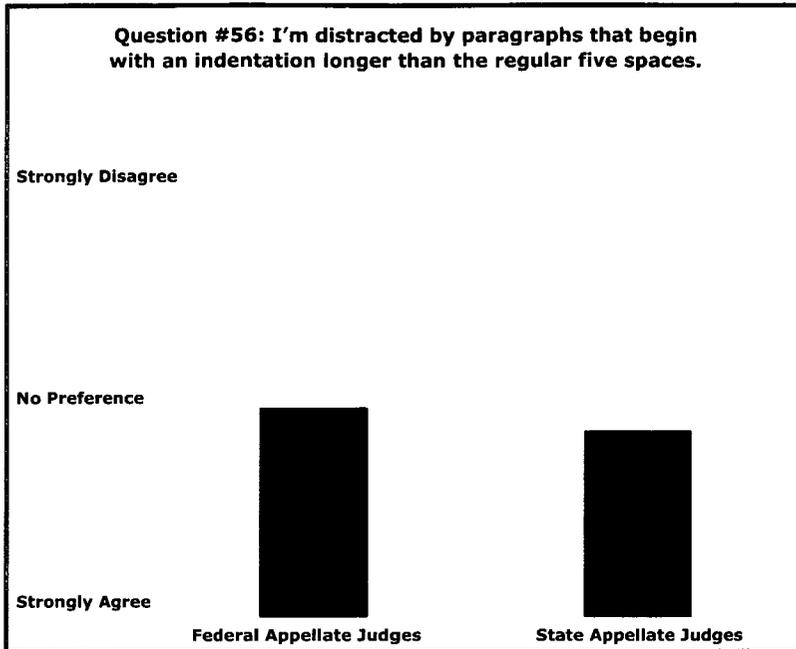








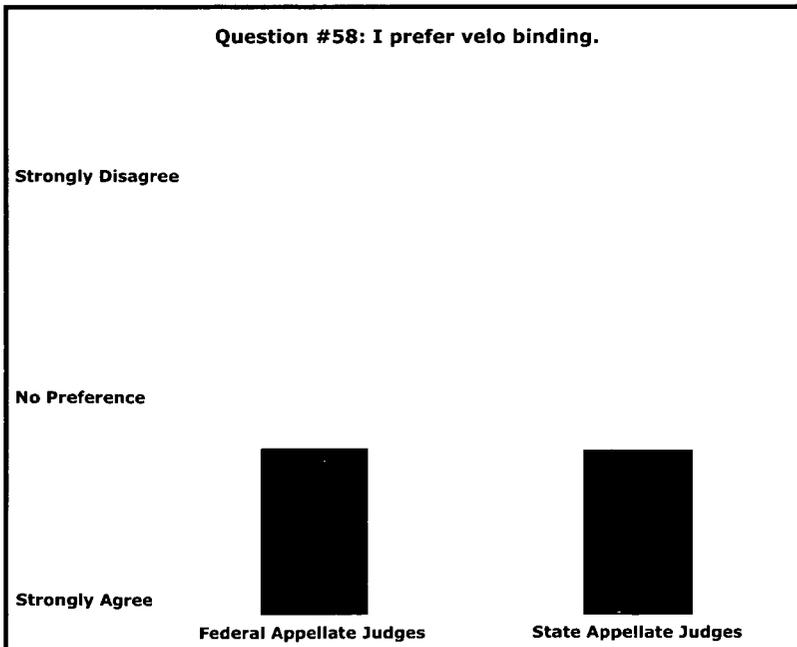
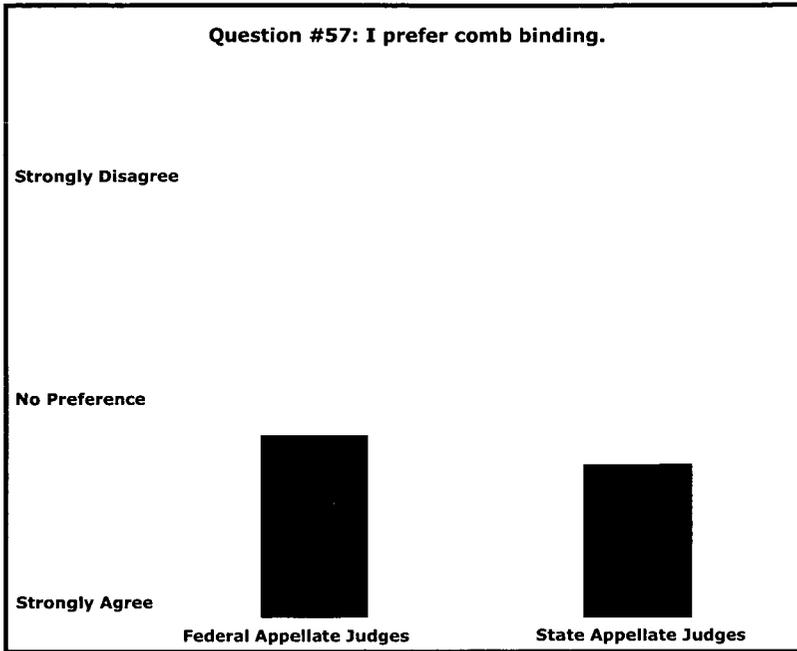


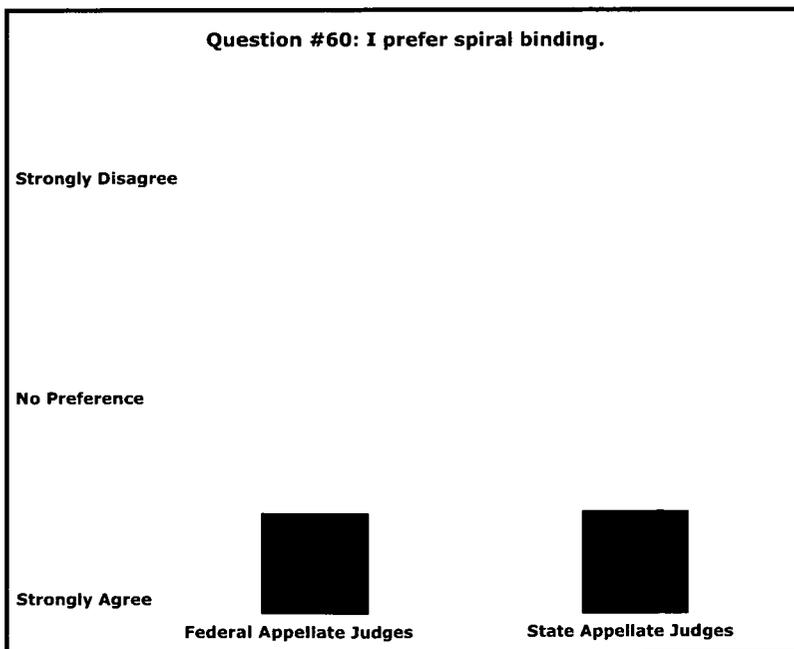
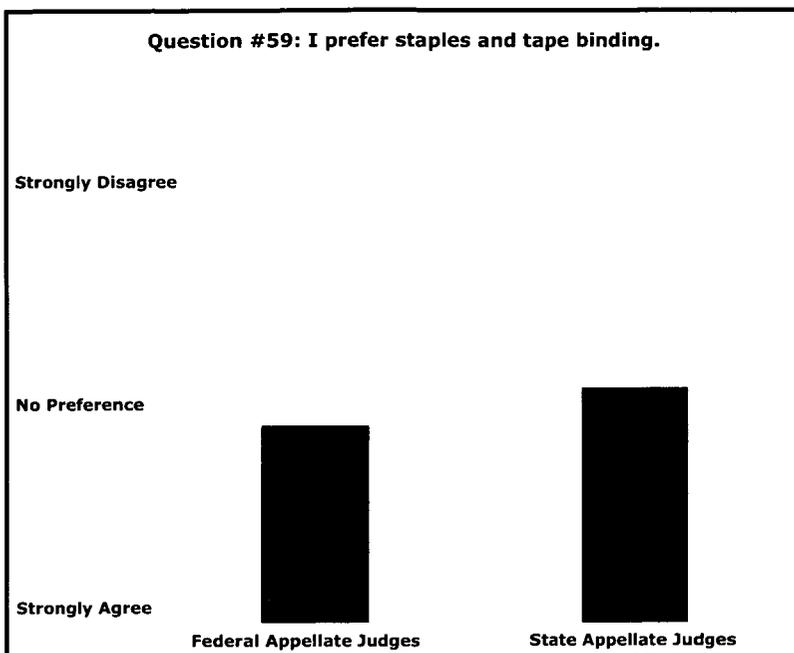


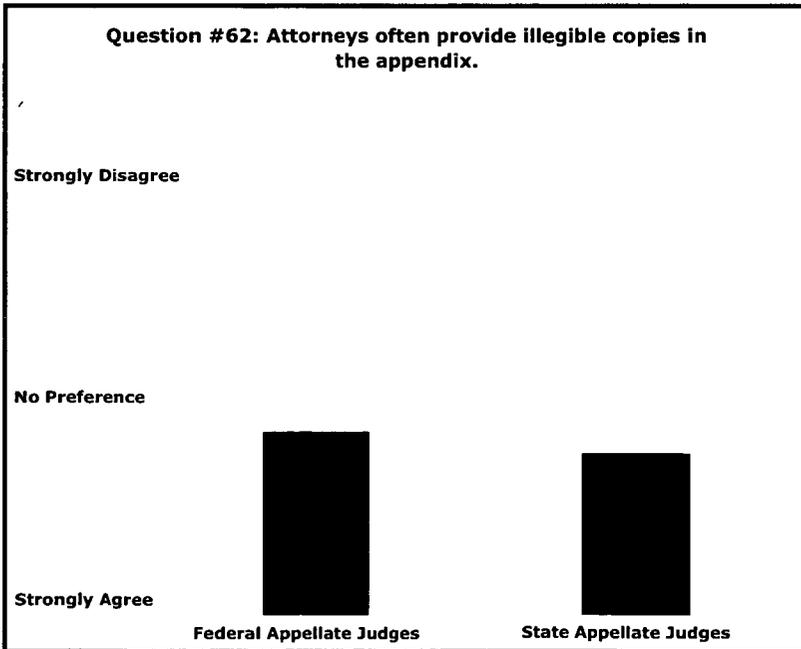
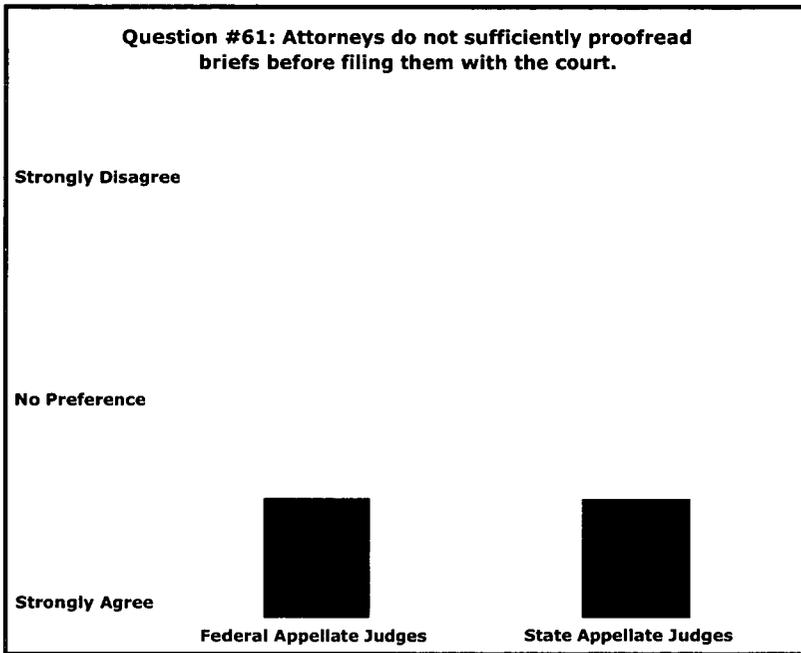
This graph completes my display of material from Section Four of the Judicial Survey, as Question 56 (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges' answers to the questions asked in Section Five of the Judicial Survey, which focused on a different topic.

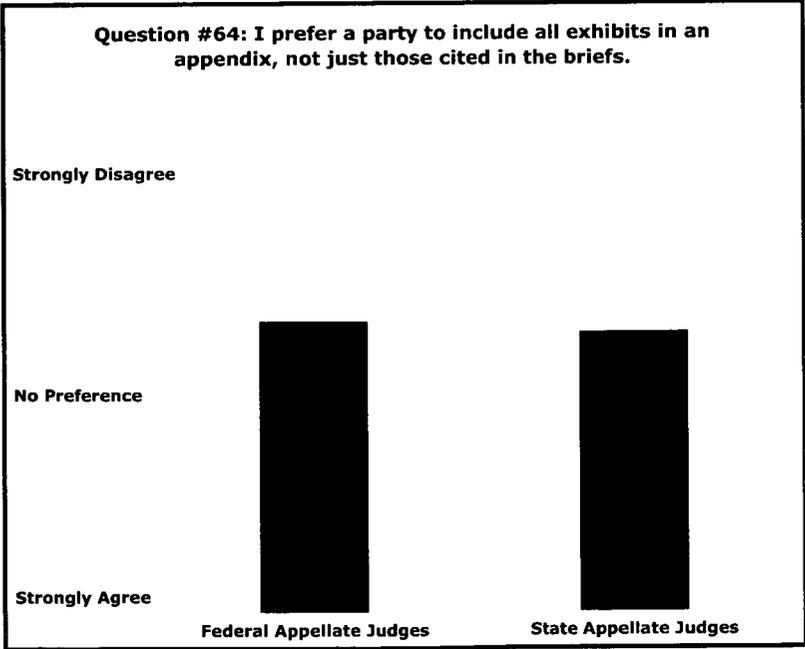
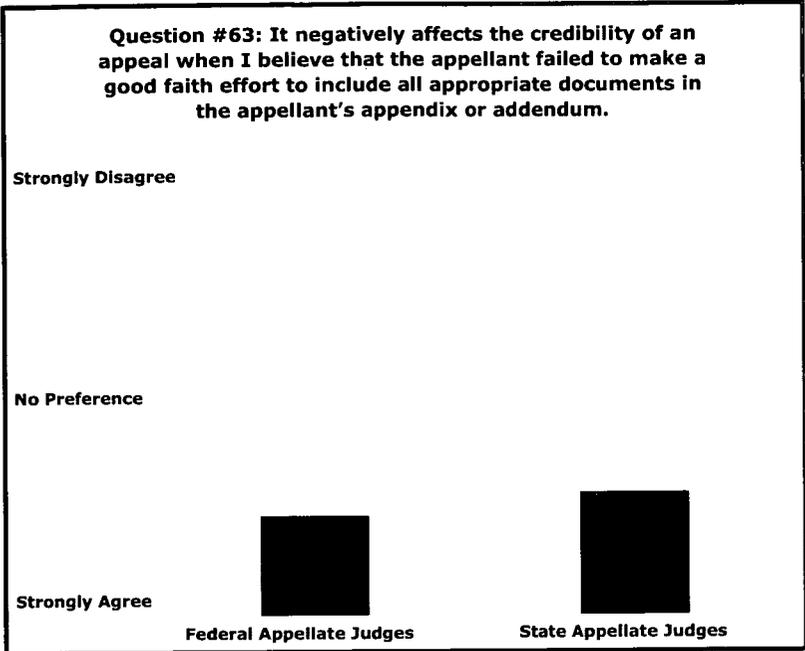
VIII. SECTION FIVE GRAPHS

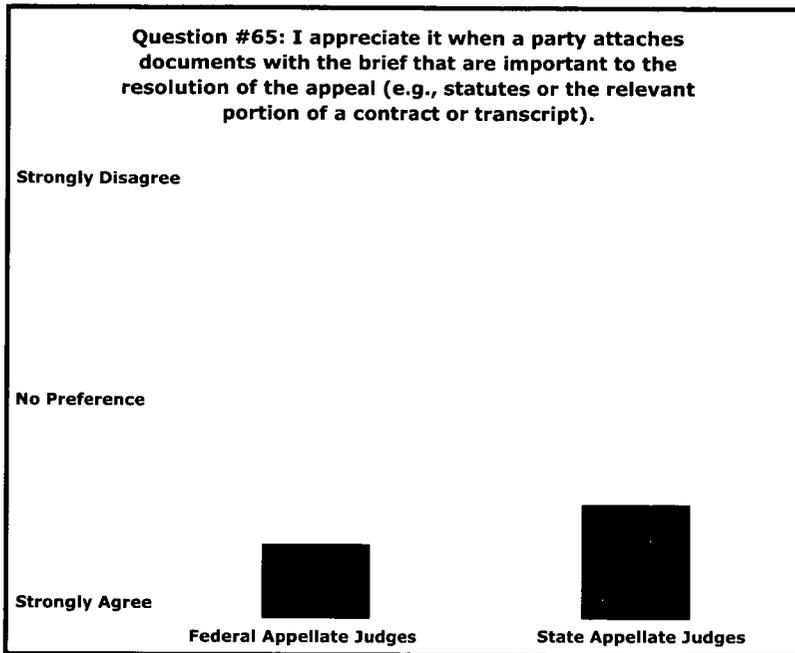
The graphs in this Section were generated from the judges' answers to the questions in Section Five of the Survey, which addressed the physical characteristics of appellate work product:







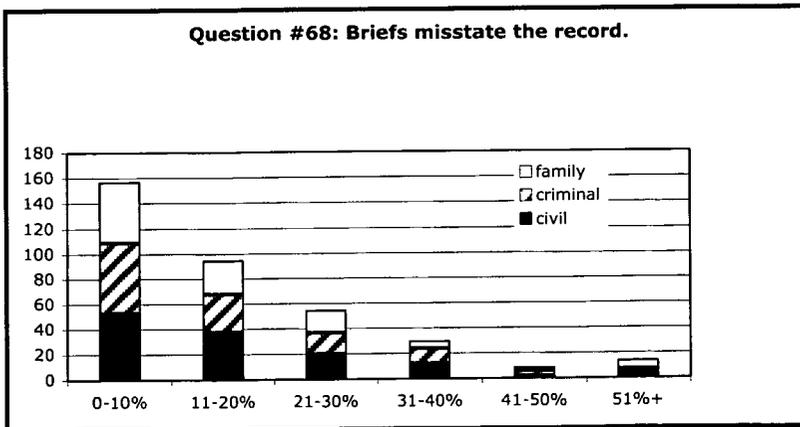
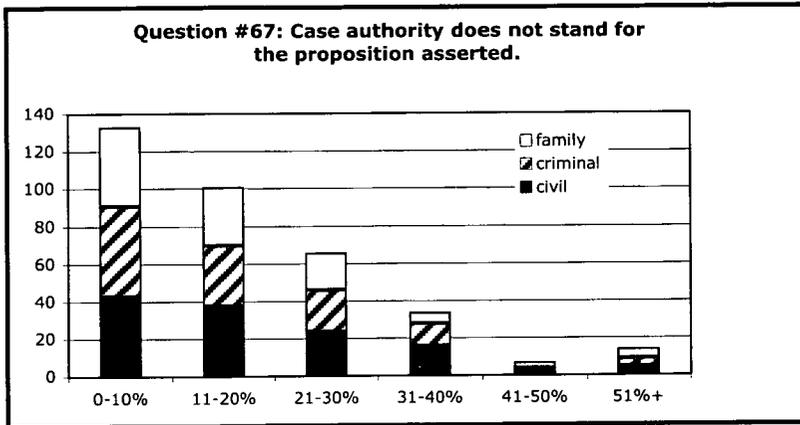
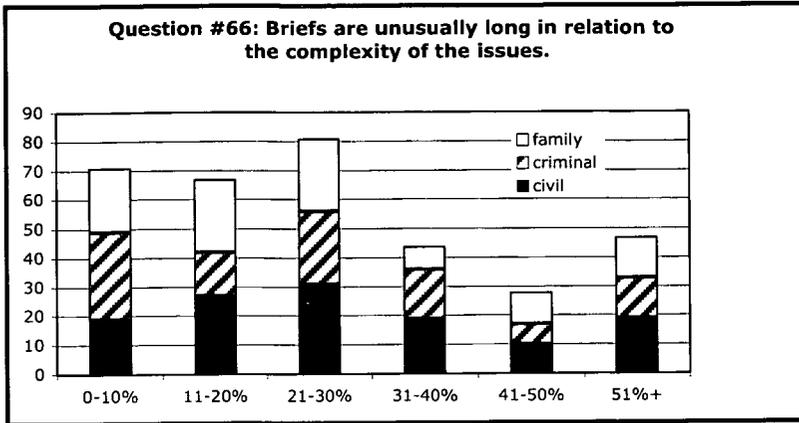


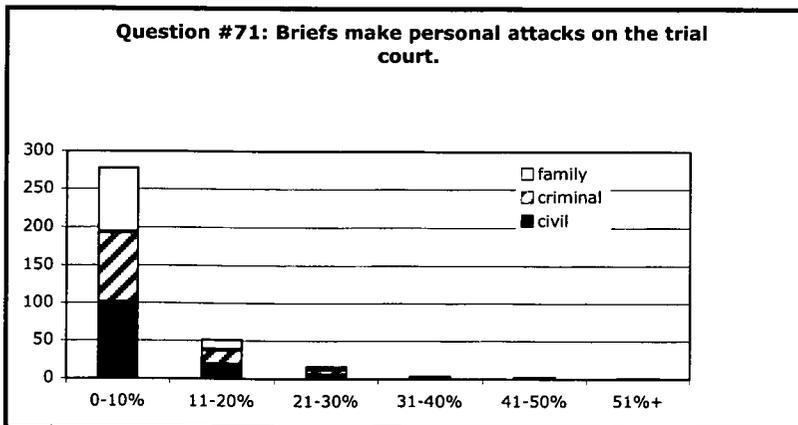
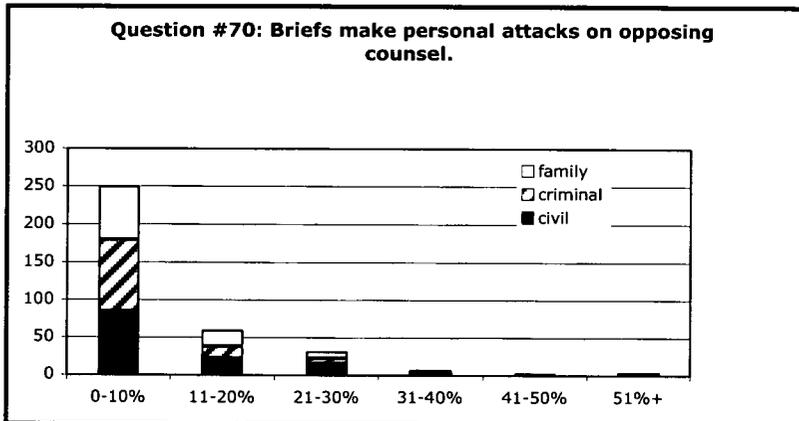
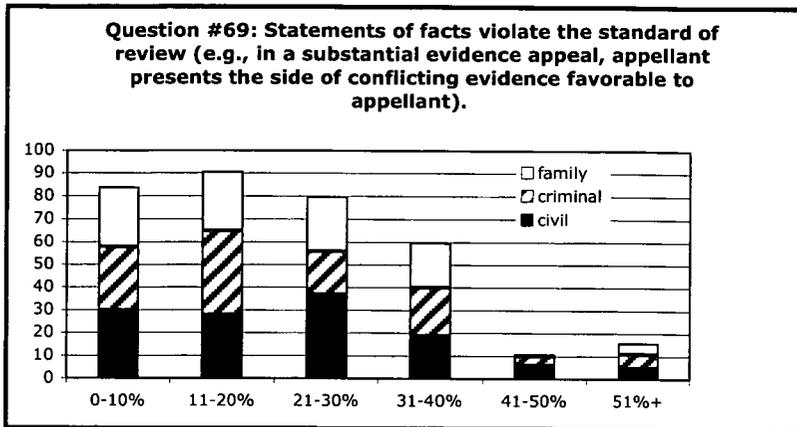


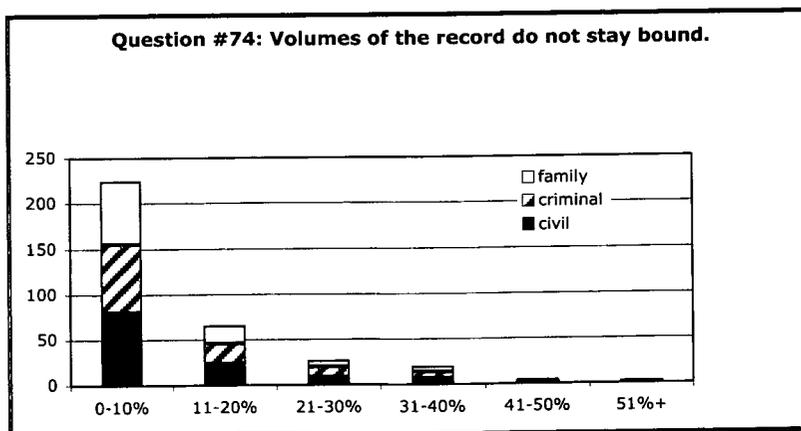
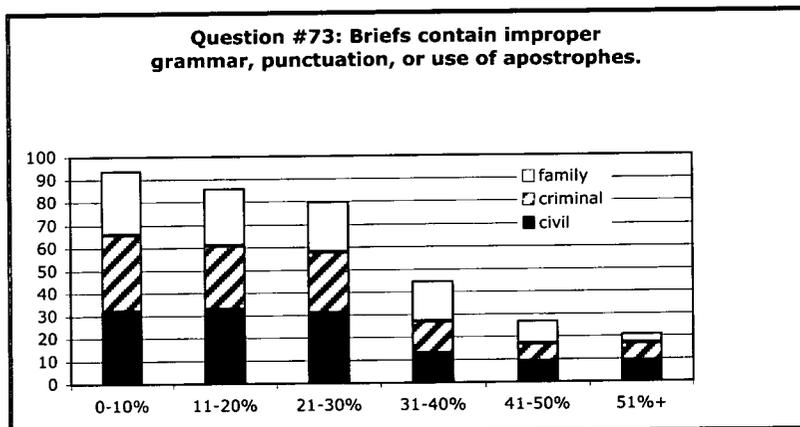
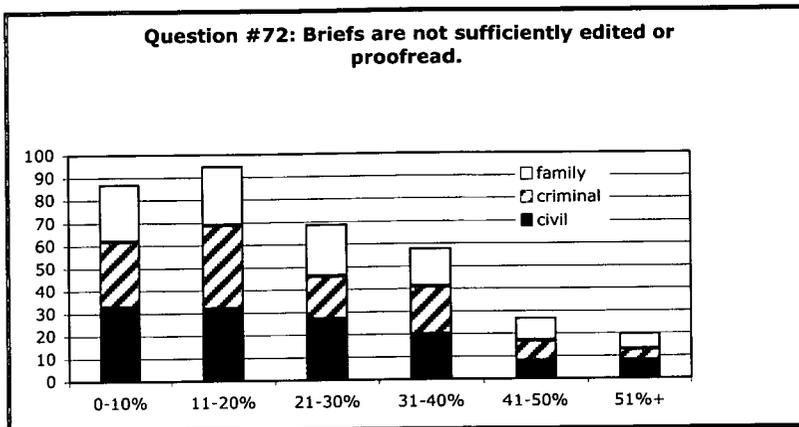
This graph completes my display of material from Section Five of the Judicial Survey, as Question 65 (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges' answers to the questions asked in Section Six of the Judicial Survey, which focused on a different topic.

IX. SECTION SIX GRAPHS

The graphs in this Section were generated from the judges' answers to the questions in Section Six of the Survey, which addressed the frequency of certain errors:



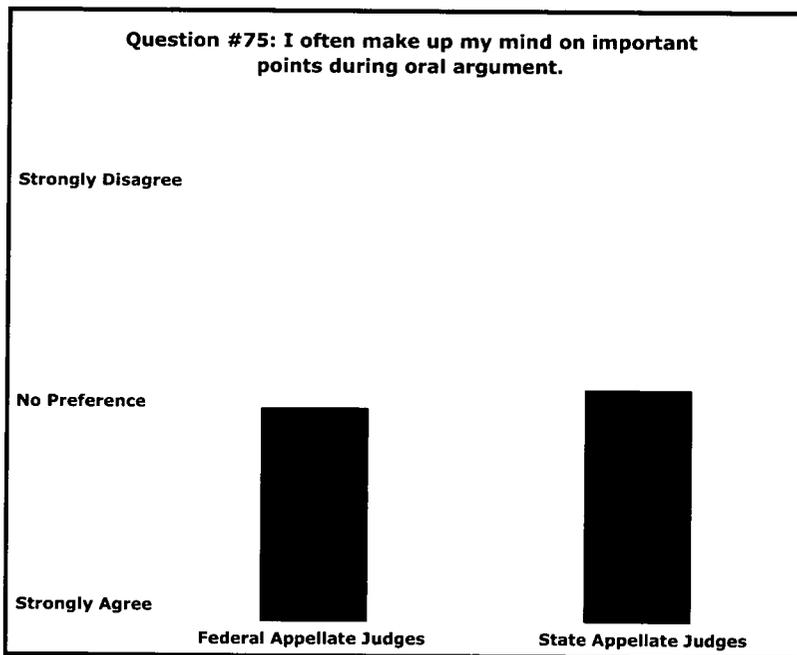


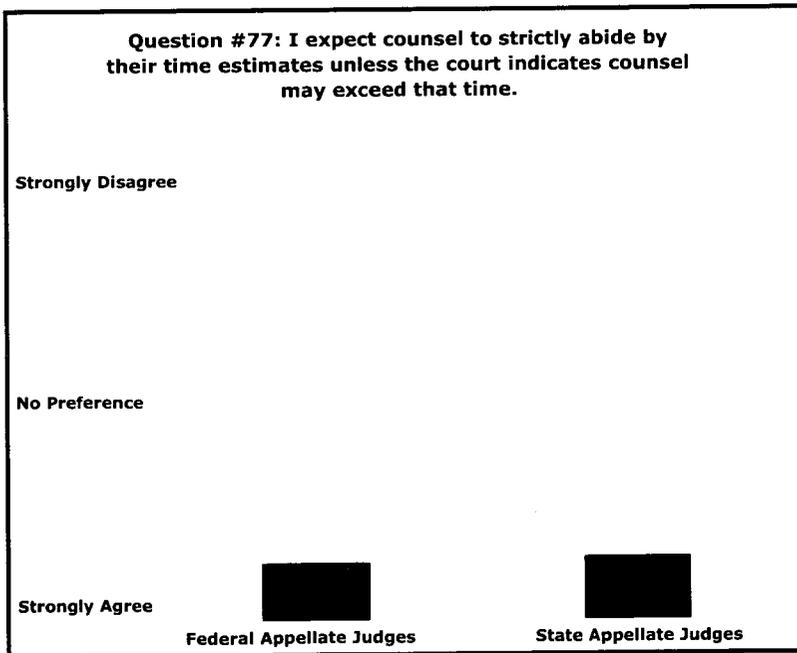
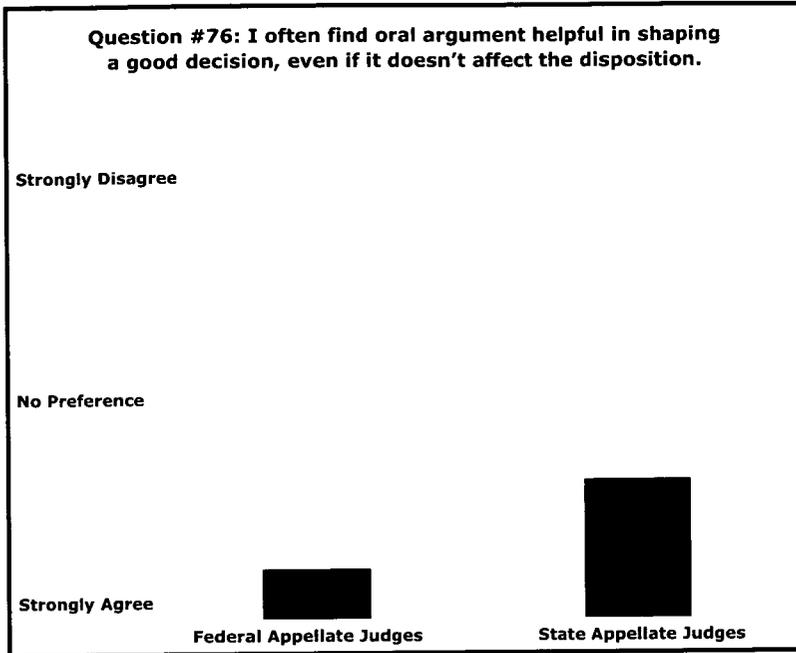


This graph completes my display of material from Section Six of the Judicial Survey, as Question 74 (answers to which are graphed immediately above) was the final question in that Section. The next section of this article includes graphs generated from the judges' answers to the questions asked in Section Seven of the Judicial Survey, which focused on a different topic.

X. SECTION SEVEN GRAPHS

The graphs in this Section were generated from the judges' answers to the questions in Section Seven of the Survey, which addressed oral argument:





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

██████████	██████████
Federal Appellate Judges	State Appellate Judges

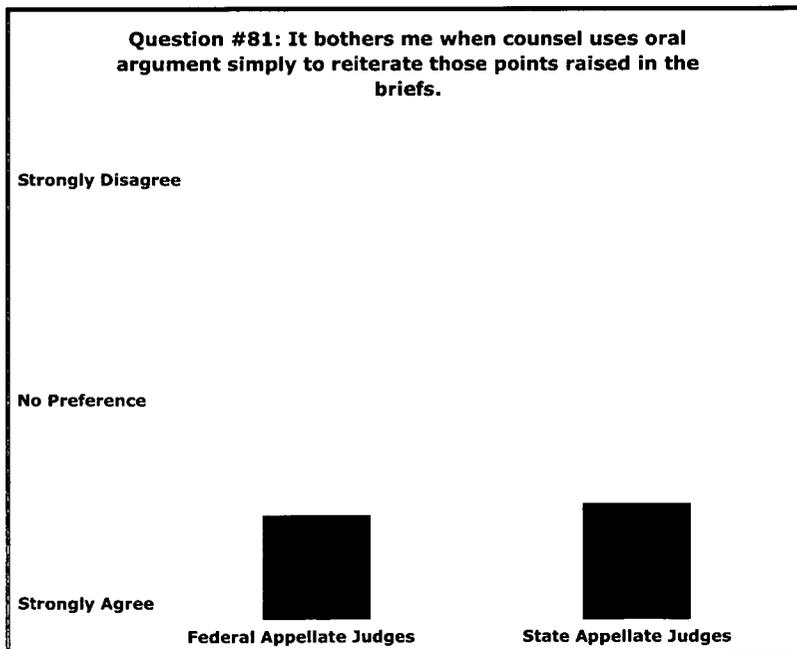
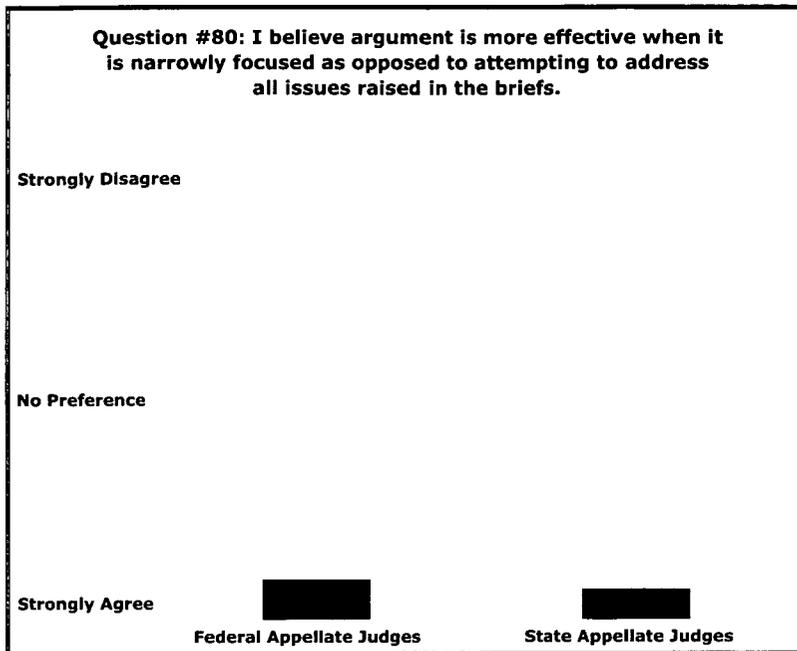
Question #79: I appreciate a candid response (e.g., "I don't know") when counsel does not know the answer to a question, rather than avoiding the question or answering non-responsively.

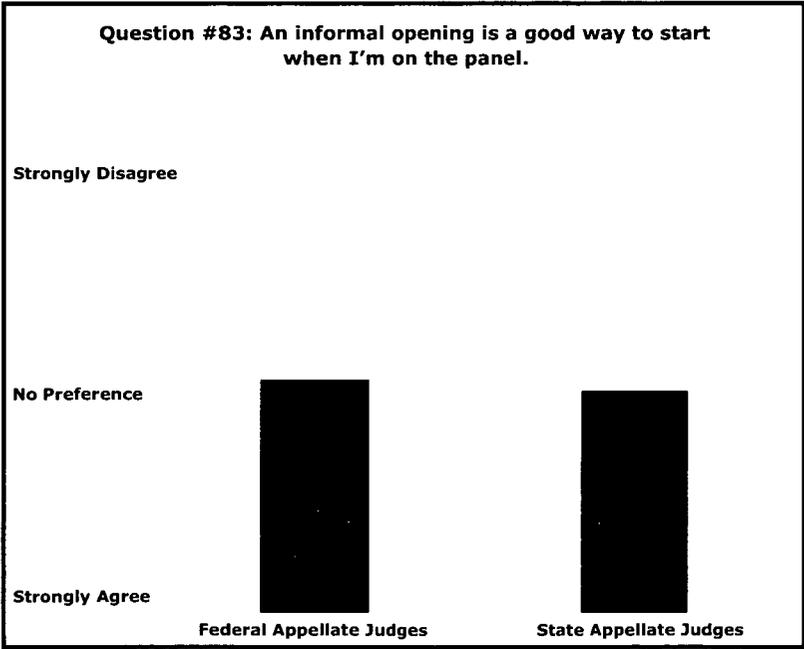
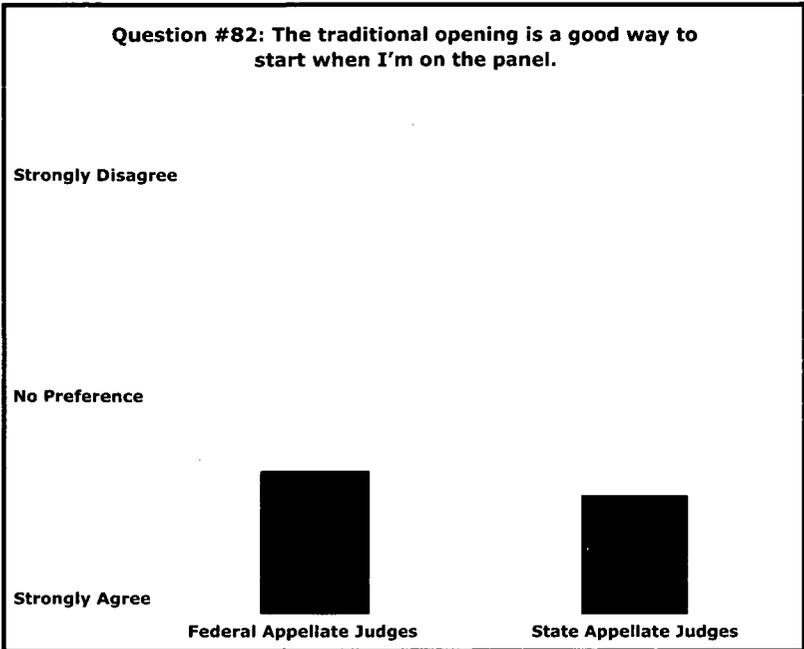
Strongly Disagree

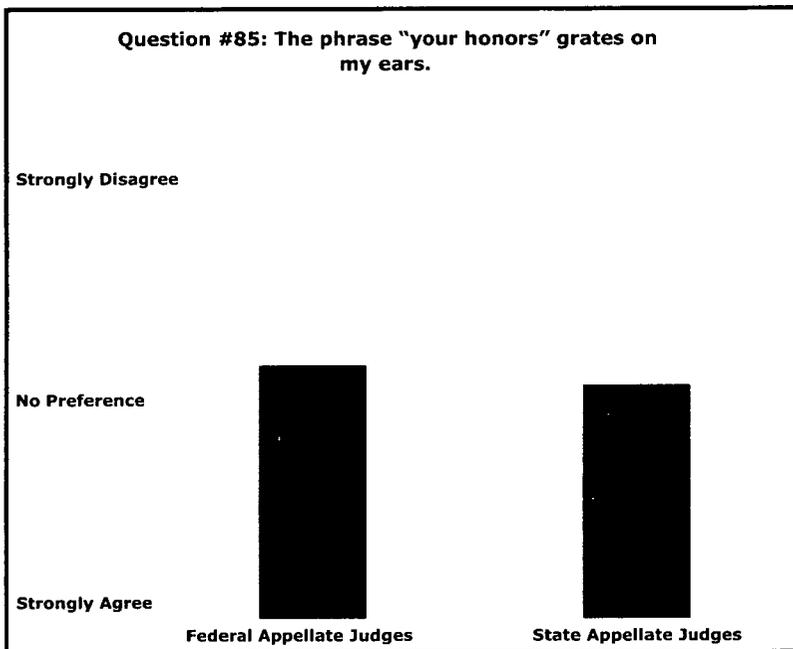
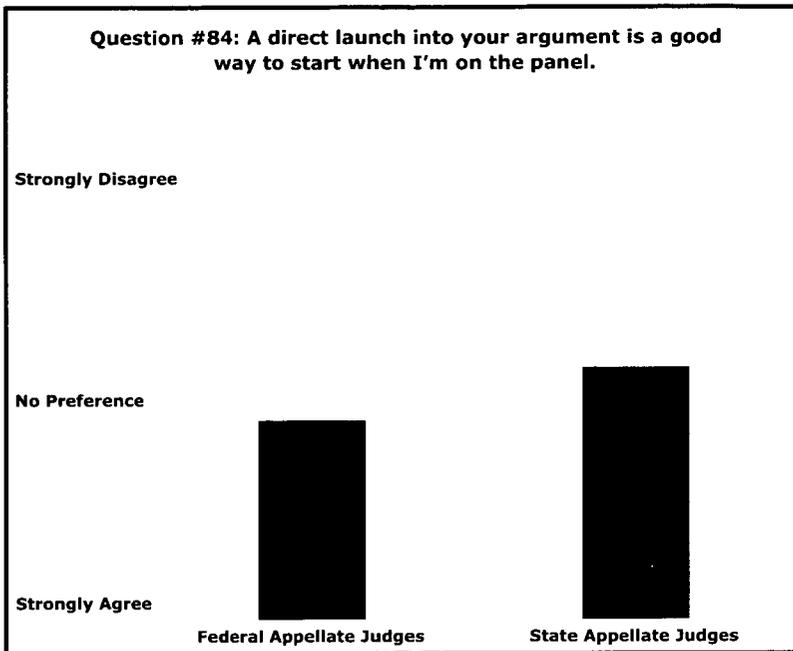
No Preference

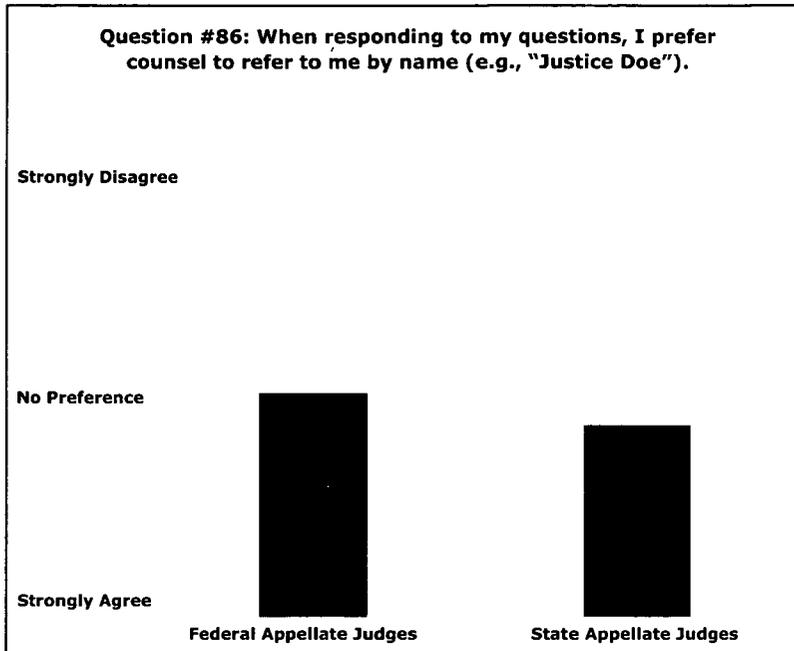
Strongly Agree

██████████	██████████
Federal Appellate Judges	State Appellate Judges









This graph completes my display of material from Section Seven of the Judicial Survey, as question 86 (answers to which are graphed immediately above) was the final question in that Section. Because there were no further questions in the Survey, this graph also completes the display portion of this article.

XI. CONCLUSION

I conclude by expressing my thanks 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 will benefit appellate lawyers in some way, and that the time spent by those judges will provide them with the benefit of briefs that are both more clear and better written, and advocacy that is conducted at a higher level overall.