

**2004 Survey of Advocacy Preferences
Of Kentucky Appellate Justices and Judges**

In 2004, a survey was conducted of the members of the Kentucky Supreme Court and Court of Appeals to gauge their preferences in appellate practice. The form used had been developed by the San Diego Division of the California Court of Appeals for a court sponsored seminar and had been modified by David Lewis, a New England practitioner, for surveying other Courts.

The survey was conducted by presenting the responding judges with a series of statements. For each statement, the judges were asked to select a number between 1 and 5, depending on the strength of the judge's own reaction to the statement. 1 indicated strong agreement; 2 indicated general agreement; 3 indicated no position; 4 indicated general disagreement; and 5 indicated strong disagreement. The results have been compiled into the following tables.

In the tables, the first five columns following each statement count the responses of the judges and justices. These are broken down by court, with the Court of Appeals responses to the left of the double line and the Supreme Court responses to the right. Five of the Supreme Court justices and thirteen of the Court of Appeals Judges responded to the survey although not all responded to every question.

The three columns following the summary of the answers contain the mean of the responses of the two separate courts and the mean of all responses. This calculation adds the total of the responses and divides that total by the number of responses. This number gives weight to the relative strength of the responses. In this instance, the closer the mean is to 1.00, the stronger the indication of agreement among the respondents. The closer the mean is to 5.00, the stronger the indication of disagreement. However, in reviewing the mean score for a question, the raw response data cannot be ignored since a mean of 3.00 could indicate that all respondents had no position on a question, or it could mean that there were an equal number of respondents with equally strong positions on each side of the issue.

An article describing the survey has been prepared for publication in the May 2006 Issue of the *Kentucky Bench and Bar*. Any questions concerning the survey should be addressed to George E. Fowler, Jr., Chief Staff Attorney, Kentucky court of Appeals.

**2004 APPELLATE JUDICIAL SURVEY
KENTUCKY APPELLATE COURTS
SUMMARY OF RESULTS**

Preliminary Instructions

Please respond to this survey by stating your preferences to some issues that face attorneys who appear before appellate courts.

Please circle the number indicating your level of agreement or disagreement with the statement. If you have no preference, or if you do not notice or care about the point raised in the statement, circle "3." Scores of "2" or "4" indicate general agreement or disagreement, respectively. "1" indicates "Strongly Agree"; "5" indicates "Strongly Disagree."

**Section 1
Structural Elements of Briefs**

	Survey Item	1	2	3	4	5	CA	SC	T
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.	0 // 2	4 // 3	6 // 0	3 // 0	0 // 0	2.92	1.60	2.55
2	The "statement of the case" in a brief should provide the procedural context of the appeal.	4 // 3	6 // 2	0 // 0	2 // 0	1 // 0	2.23	1.40	2.00
3	The "statement of the case" and "statement of the facts" in a brief should identify all parties in the appeal.	5 // 2	5 // 2	1 // 1	2 // 0	0 // 0	2.00	1.80	1.94
4	The "statement of the facts" in a brief should provide the case's critical facts.	9 // 4	4 // 1	0 // 0	0 // 0	0 // 0	1.30	1.20	1.27
5	The "statement of the case" in a brief should identify the case's dispositive issues.	6 // 4	3 // 0	1 // 0	1 // 1	0 // 0	1.72	1.60	1.68
6	The "statement of the case" in a brief should argue the merits in addition to stating the context.	0 // 0	0 // 1	1 // 0	8 // 2	3 // 2	4.16	4.00	4.11
7	An appellant's opening brief should state the standard of review for each issue.	8 // 2	0 // 3	4 // 0	1 // 0	0 // 0	1.84	1.60	1.77

8	If the respondent's brief does not state the standard of review, I assume the appellant has it right, unless I know otherwise.	2 // 1	4 // 2	4 // 0	1 // 1	2 // 1			
							2.61	2.80	2.66
9	The conclusion to an appellant's opening brief should state precisely the remedy the appellant seeks.	8 // 5	5 // 0	0 // 0	0 // 0	0 // 0			
							1.38	1.00	1.27
10	The conclusion to a respondent's brief should state precisely the outcome the respondent seeks.	8 // 4	4 // 0	1 // 1	0 // 0	0 // 0			
							1.46	1.40	1.44
11	The conclusion to a brief should forcefully sum up the merits, in addition to stating the result requested.	2 // 2	5 // 2	3 // 1	2 // 0	1 // 0			
							2.15	1.60	2.00
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.	0 // 0	7 // 2	3 // 2	1 // 0	2 // 1			
							3.00	3.00	3.00
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.	1 // 0	2 // 3	6 // 1	1 // 0	3 // 1			
							3.20	2.80	3.11
14	A "summary of the argument" should not simply repeat the issue headings.	2 // 0	7 // 3	2 // 0	1 // 1	0 // 1			
							2.00	2.80	2.22
15	A "summary of the argument" should be included even if the rules do not require it.	0 // 0	4 // 2	5 // 1	2 // 0	2 // 2			
							2.38	3.40	2.66

Section 2 Writing Style and Advocacy

#	Statement	1	2	3	4	5	CA	SC	T
16	While it depends on the specific case, in general I believe a brief should be organized with its most persuasive arguments first.	5 // 3	8 // 2	0 // 0	0 // 0	0 // 0			
							1.61	1.40	1.55
17	While it depends on the specific case, in general I believe a brief should be organized with its arguments placed chronologically.	0 // 0	2 // 1	2 // 2	8 // 1	1 // 1			
							3.61	3.40	3.55
18	I tend to skim blocked quotations longer than 6 or 7 lines when I read briefs.	1 // 1	2 // 1	3 // 1	3 // 2	4 // 0			
							3.53	2.80	3.33
19	Long blocked quotations tend to lose the reader; I prefer short quotations or paraphrased text.	1 // 2	5 // 3	4 // 0	2 // 0	1 // 0			
							2.76	1.60	2.44
20	It bothers me when a brief or writ petition uses legalese and old pleading language.	1 // 1	6 // 0	4 // 2	2 // 1	0 // 1			
							2.53	3.20	2.72
21	It bothers me when a brief uses the passive voice frequently.	0 // 1	4 // 0	5 // 1	4 // 1	0 // 0			
							3.30	2.60	2.94
22	It bothers me when a brief uses throat-clearing phrases (e.g., it is important to note that", it is respectfully submitted that").	0 // 2	3 // 0	7 // 1	2 // 2	1 // 0			
							3.07	2.60	2.94

23	It bothers me when a lawyer writes in first person plural (e.g., First, we note that the Supreme Court reserved this issue.").	1 // 0	4 // 0	5 // 4	3 // 1	0 // 0			
							2.76	3.20	2.88
24	It bothers me when a brief uses adverbs like "clearly" and "obviously" to support arguments.	0 // 0	6 // 0	4 // 3	3 // 2	0 // 0			
							2.76	3.40	2.94
25	Sometimes long sentences are distracting or confusing even if they are grammatically correct.	2 // 2	7 // 1	2 // 2	2 // 0	0 // 0			
							2.30	2.00	2.22
26	Lawyers should try to use shortened names rather than acronyms as abbreviations for corporate parties, statutes, and the like.	2 // 2	5 // 2	4 // 0	2 // 1	0 // 0			
							2.46	2.00	2.33
27	I notice, and it bothers me, when arguments longer than six or seven pages lack subheadings.	1 // 1	3 // 1	4 // 2	4 // 1	1 // 0			
							3.07	2.60	2.94
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.	2 // 1	5 // 2	5 // 2	0 // 0	0 // 0			
							2.25	2.20	2.23
29	Substantive arguments should not be made in footnotes.	7 // 4	5 // 1	1 // 0	0 // 0	0 // 0			
							1.53	1.20	1.44
30	Footnotes should be used sparingly.	5 // 4	7 // 0	1 // 0	0 // 0	0 // 1			
							1.69	1.80	1.72
31	I prefer all case citations to be in footnotes (e.g., [T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."1) (Footnote: In Re Winship, 397 U.S. 358, 364 (1970).)	1 // 1	1 // 0	1 // 3	5 // 0	5 // 1			
							3.92	3.00	3.66
32	I prefer a party to place the full text of a statute in a footnote when that statute is at issue.	1 // 0	2 // 0	4 // 1	2 // 2	4 // 2			
							3.46	4.20	3.66

Section 3
Use of Authority and the Record

	Statement	1	2	3	4	5	CA	SC	T
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.	1 // 0	6 // 1	3 // 3	1 // 0	2 // 1			
							2.76	3.20	2.88
34	Citations of more than three cases without intervening bracketed explanatory text are unhelpful.	2 // 2	7 // 2	3 // 1	1 // 0	0 // 0			
							2.23	1.80	2.11
35	Case citations should almost always include a specific page reference.	3 // 1	6 // 3	4 // 1	0 // 0	0 // 0			
							2.07	1.80	2.00
36	I am suspicious about whether the authority stands for the proposition asserted when a case citation lacks a specific page reference.	1 // 0	3 // 3	6 // 2	2 // 0	1 // 0			
							2.92	2.40	2.77

37	I prefer that record references follow each sentence rather than come at the end of a paragraph.	2 // 1	3 // 3	6 // 1	2 // 0	0 // 0	2.61	2.00	2.44
38	Even if a whole paragraph reports facts from only a page of two of the record, I still prefer that record references follow each sentence.	1 // 0	2 // 3	3 // 1	6 // 1	1 // 0	3.30	2.60	3.11
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.	5 // 2	7 // 2	1 // 1	0 // 0	0 // 0	1.69	2.00	1.77

Section 4 Typography of Briefs

#	Statement	1	2	3	4	5	CA	SC	T
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.	0 // 2	0 // 0	11 // 3	1 // 0	1 // 0	3.23	2.20	2.94
41	It affects the credibility of a brief when the lawyer has failed to apply any recognized style manual.	2 // 1	4 // 1	7 // 1	0 // 1	0 // 1	2.38	3.00	2.55
42	I do not have a preference for which style manual an attorney should use (e.g., Bluebook or ALWD Citation Manual) as long as the method used is consistent throughout the brief and allows me to quickly and accurately identify cited authority.	5 // 2	5 // 2	2 // 0	1 // 1	0 // 0	1.92	2.00	1.94
43	I prefer italics to underlining for case citations.	1 // 1	2 // 1	5 // 0	3 // 2	2 // 1	3.23	3.20	3.22
44	I prefer italics to underlining for emphasis, Latin words, and the like.	3 // 1	2 // 2	4 // 0	4 // 1	0 // 1	2.69	2.80	2.72
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.	3 // 0	2 // 2	3 // 0	3 // 2	2 // 1	2.92	3.40	3.05
46	I prefer titles of major parts of the brief (e.g. STATEMENT OF THE CASE) to be in all capitals.	3 // 1	7 // 2	3 // 1	0 // 1	0 // 0	2.00	2.40	2.11
47	I prefer main headings of the legal argument (e.g., THE JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE) to be in all capitals.	1 // 1	6 // 1	4 // 1	2 // 2	0 // 0	2.53	2.80	2.61
48	I find that main headings of more than one line in all capitals are difficult to read.	1 // 1	5 // 2	4 // 1	3 // 0	0 // 1	2.69	2.60	2.66
49	I prefer that the names of parties appear in all capitals throughout the brief.	0 // 0	0 // 1	1 // 0	6 // 2	6 // 2	4.38	4.00	4.27

50	Some lawyers use a traditional outline structure, indenting each tier of headings an additional five spaces. The traditional style sometimes results in subheadings being indented almost to the middle of the page. Others use flush-left headings at all levels. I prefer flush-left.	2 // 1	3 // 0	6 // 3	2 // 1	0 // 0	2.61	2.80	2.66
51	Briefs are easier to read when headings are boldface but not underlined.	4 // 1	5 // 3	2 // 1	2 // 0	0 // 0	2.15	2.00	2.11
52	I prefer the brief to be in double spacing, though greater spacing would be acceptable.	2 // 3	9 // 2	0 // 0	2 // 0	0 // 0	2.15	1.40	1.94
53	I prefer main headings of a legal argument in single line spacing.	2 // 1	8 // 2	2 // 2	1 // 0	0 // 0	2.15	2.20	2.16
54	When a brief contains a list, I like bullet points or other creative typography to set it off from regular text.	2 // 1	7 // 3	3 // 1	1 // 0	0 // 0	2.23	2.00	2.16
55	I like charts, diagrams, and other visual aids, especially when they can substitute for long textual explanations.	2 // 1	6 // 3	5 // 0	0 // 1	0 // 0	2.23	2.20	2.22
56	I'm distracted by paragraphs that begin with an indentation longer than the regular five spaces.	0 // 0	1 // 4	8 // 1	4 // 0	0 // 0	3.23	2.20	2.94

Section 5
Physical Characteristics of Appellate Work Product

#	Statement	1	2	3	4	5	CA	SC	T
	Some lawyers use comb binding because briefs lie flat when opened; the defect is that the combs can fall apart. Others use velo binding because it is virtually fail-safe, but it's also stiff. A few use staples and tape, the cheapest solution. A few have access to spiral binding equipment. Please rate the following binding methods: "1" is the binding you prefer most, "4" is the method you like least.								
57	Comb binding.	3 // 1	5 // 1	3 // 0	1 // 2		2	3	
58	Velo binding	2 // 0	2 // 1	7 // 0	1 // 3		3	4	
59	Staples and tape	0 // 2	3 // 1	1 // 1	8 // 1		4	1	
60	Spiral binding	8 // 1	2 // 0	1 // 2	1 // 1		1	2	
61	Attorneys do not sufficiently proofread briefs before filing them with the court.	4 // 4	6 // 0	2 // 0	1 // 1	0 // 0	2.00	1.60	1.88
62	Attorneys often provide illegible copies in the appendix.	1 // 4	7 // 0	1 // 0	4 // 1	0 // 0	2.61	1.60	2.33
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.	2 // 1	8 // 3	2 // 1	1 // 0	0 // 0	2.15	2.00	2.11

64	I prefer a party to include all exhibits in an appendix, not just those cited in the briefs.	0 // 0	1 // 1	1 // 1	8 // 0	3 // 3			
							4.00	4.00	4.00
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).	6 // 2	5 // 3	2 // 0	0 // 0	0 // 0			
							1.69	1.60	1.66

Section 6
Frequency of Certain Errors

#		0 - 10%	11 - 20%	21 - 30%	31 - 40%	41 - 50%	51% plus	CA	SC
66	Briefs are unusually long in relation to the complexity of the issues.								
	General Civil	2 // 1	5 // 0	3 // 1	1 // 1	1 // 0	1 // 1	17%	25%
	Criminal	4 // 1	2 // 0	3 // 0	2 // 1	1 // 0	1 // 2	17%	32%
	Family	2 // 1	1 // 1	3 // 1	6 // 0	0 // 0	1 // 1	23%	20%
67	Case authority does not stand for the proposition asserted.								
	General Civil	5 // 2	5 // 0	2 // 1	0 // 0	0 // 1	1 // 0	10%	15%
	Criminal	6 // 2	4 // 0	0 // 0	1 // 0	0 // 1	2 // 1	13%	22%
	Family	6 // 2	4 // 0	0 // 0	1 // 1	1 // 0	1 // 1	12%	20%
68	Briefs misstate the record.								
	General Civil	5 // 2	6 // 1	2 // 0	0 // 0	0 // 1	0 // 0	8%	13%
	Criminal	4 // 2	7 // 0	0 // 0	0 // 1	1 // 1	1 // 0	13%	17%
	Family	4 // 2	6 // 0	2 // 1	0 // 0	1 // 1	0 // 0	10%	15%
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 the appellant).								
	General Civil	5 // 2	1 // 1	2 // 0	2 // 0	1 // 1	1 // 0	16%	12%
	Criminal	6 // 2	1 // 0	2 // 0	1 // 1	0 // 0	2 // 1	15%	20%
	Family	5 // 2	0 // 0	2 // 1	4 // 0	1 // 0	0 // 1	16%	17%
70	Briefs make personal attacks on opposing counsel.								
	General Civil	8 // 4	5 // 0	0 // 0	0 // 0	0 // 0	0 // 0	6%	4%
	Criminal	8 // 2	2 // 1	1 // 0	1 // 1	1 // 0	0 // 0	8%	10%
	Family	7 // 2	2 // 1	3 // 1	1 // 0	0 // 0	0 // 0	8%	8%
71	Briefs make personal attacks on the trial court.								
	General Civil	12 // 4	1 // 0	0 // 0	0 // 0	0 // 0	0 // 0	5.0%	4.0%
	Criminal	10 // 2	2 // 1	0 // 1	1 // 0	0 // 0	0 // 0	6.0%	8.0%
	Family	10 // 2	1 // 2	2 // 0	0 // 0	0 // 0	0 // 0	6.0%	6.0%
72	Briefs are not sufficiently edited or proofread.								
	General Civil	4 // 2	3 // 1	3 // 0	2 // 0	0 // 1	1 // 0	15%	13%
	Criminal	2 // 1	4 // 1	3 // 0	0 // 0	2 // 1	2 // 1	21%	25%

	Family	3 // 2	3 // 0	3 // 0	3 // 1	0 // 0	1 // 1	17%	20%
73	Briefs contain improper grammar, punctuation, or use of apostrophes.								
	General Civil	2 // 3	2 // 1	2 // 0	3 // 0	3 // 0	1 // 0	24%	6%
	Criminal	2 // 2	2 // 0	1 // 0	2 // 1	4 // 1	2 // 0	27%	17%
	Family	1 // 2	2 // 0	1 // 1	4 // 0	3 // 1	1 // 0	27%	15%
74	Volumes of the record do not stay bound.								
	General Civil	10 // 2	2 // 2	0 // 0	1 // 0	0 // 0	0 // 0	5%	6%
	Criminal	11 // 2	1 // 0	0 // 1	1 // 0	0 // 1	0 // 0	5%	15%
	Family	11 // 2	1 // 0	0 // 0	0 // 2	0 // 0	0 // 0	4%	15%

Section 7 Oral Argument

#	Statement	1	2	3	4	5	CA	SC	T
75	I often make up my mind on important points during oral argument.	0 // 0	3 // 3	4 // 1	5 // 1	1 // 0	3.30	2.60	3.11
76	I often find oral argument helpful in shaping a good decision, even if it doesn't affect the disposition.	3 // 1	8 // 2	1 // 1	1 // 1	0 // 0	2.00	2.40	2.11
77	I expect counsel to strictly abide by the time estimates unless the court indicates counsel may exceed that time.	4 // 2	7 // 2	1 // 1	1 // 0	0 // 0	1.92	1.80	1.88
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.	10 // 5	3 // 0	0 // 0	0 // 0	0 // 0	1.23	1.00	1.16
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.	9 // 5	4 // 0	0 // 0	0 // 0	0 // 0	1.30	1.00	1.22
80	I believe argument is more effective when it is narrowly focused as opposed to attempting to address all issues raised in the briefs.	8 // 3	4 // 2	1 // 0	0 // 0	0 // 0	1.46	1.40	1.44
81	It bothers me counsel uses oral argument simply to reiterate those points raised in the briefs.	4 // 1	3 // 2	4 // 1	2 // 1	0 // 0	2.30	2.40	2.33
	Writers on the practice of oral argument differ about whether counsel should start his or her appearance with the traditional "may it please the court," state a less formal greeting (e.g., "Good Morning.") or just launch into the argument after self-identifying for the record.								
82	The traditional opening is a good way to start when I'm on the panel.	3 // 2	6 // 3	4 // 0	0 // 0	0 // 0	2.07	1.60	1.94

83	An informal opening is a good way to start when I'm on the panel.	0 // 1	2 // 0	5 // 1	6 // 2	0 // 1	3.30	3.40	3.33
84	A direct launch is a good way to start when I'm on the panel.	0 // 0	1 // 0	4 // 1	6 // 3	2 // 1	3.69	4.00	3.77
85	The phrase "your honors" grates on my ears.	0 // 0	2 // 1	4 // 1	6 // 2	1 // 1	3.46	3.60	3.50
86	When responding to my questions, I prefer counsel to refer to me by name (e.g., "Justice Doe").	1 // 0	1 // 2	9 // 2	2 // 1	0 // 0	2.92	2.80	2.88