

PRESENTED AT
30th Annual Conference on State and Federal Appeals

June 4-5, 2020
Austin, Texas

Results of the 2020 Texas Appellate Judicial Survey

Scott Rothenberg
Kent Rutter
JoAnn Storey

SCOTT ROTHENBERG
Law Offices of Scott Rothenberg
6575 West Loop South, Suite 500
Bellaire, Texas 77401-3609
Telephone: (713) 667-5300
scott@rothenberglaw.com

KENT RUTTER
Haynes and Boone, LLP
1221 McKinney, Suite 2100
Houston, Texas 77010-2007
Telephone: (713) 547-2211
kent.rutter@haynesboone.com

JOANN STOREY
JoAnn Storey, P.C.
1005 Heights Blvd.
Houston Texas 77008
Telephone: (713) 529-0048
storeyj@heightslaw.com

TABLE OF CONTENTS

I. Introduction..... 1

II. Briefs..... 1

 A. Principal Briefs..... 1

 B. Reply Briefs..... 6

III. Oral Argument 7

IV. Post-Submission Briefing..... 11

V. Zoom Oral Arguments 11

VI. Ethics, Professionalism, and Sanctions 11

VII. Miscellaneous..... 13

RESULTS OF THE 2020 JUDICIAL SURVEY

I. INTRODUCTION

The Texas Rules of Appellate Procedure are a terrific framework for the handling of civil appeals in the State of Texas. Unfortunately, they leave a great deal to the experience and judgment of appellate litigators. How many issues should we raise on appeal? How should issues be phrased? How important is the table of contents, and what should it contain? How should language be emphasized in briefs? Should we use block quotes from authority? Cite authority in footnotes or in the body of the brief? Should we include graphs, charts, and pictures in our briefs? And so on. The list of matters as to which the rules provide no guidance is lengthy.

Wouldn't it be great if Texas appellate justices would simply tell us their preferences when it comes to written briefs and oral argument? Their likes? Their dislikes? Of course. And so, five times over the past quarter century, Texas appellate lawyers have asked Texas appellate justices to "help us help them to get it right." This year, the result of that collaborative effort is this 2020 Texas Appellate Judicial Survey.

We disseminated this survey to all Texas Supreme Court justice and Texas intermediate appellate court justices during the throes of Corona Quarantine 2020 and this spring's ransomware attack on our appellate courts. We did it because a sizeable number of Texas appellate justices are new to the appellate bench within the past year and a half. We knew that despite the adversity of responding under the conditions presented, answers to this survey are more important now to Texas appellate lawyers and their clients than ever before. We were both pleased and gratified with the results. Approximately 2/3rds of the justices responded. We hope that you find the results to be as interesting, enlightening, and beneficial to your clients in future appeals as we did.

II. BRIEFS

A. Principal Briefs

1. In a civil appeal of moderate complexity, how many issues do you expect to see from a wise advocate?

54% Two to four.
41% Three to five.
5% Four to six.
0% Seven or more.

- As many issues as necessary to present each issue that could result in correction of an error.

2. How do you prefer that the appellant phrase the issues?

51% As a positive statement: "The trial court erred by excluding expert testimony on the issue of whether the moon is made of green cheese."
12% As a question: "Did the trial court err by excluding expert testimony on the issue of whether the moon is made of green cheese?"
4% Neutrally: "Whether the trial court erred by excluding expert testimony on the issue of whether the moon is made of green cheese."
12% As a positive assertion of law, followed by a question: "Expert testimony is reliable if it is grounded in the methods and procedures of science, and if it is more than mere subjective belief or unsupported speculation. Did the trial court abuse its discretion by failing to follow these principles and excluding expert testimony on the issue of whether the moon is made of green cheese?"
14% No preference.
7% Other:

- It depends on the complexity of the issue(s). In most cases, the positive assertion of the law followed by the question is preferred; however, if the law is textbook (i.e., did a party meet the standard for SJ) this is not necessary.
 - I do not care how the issue is presented as long as it is followed by a reference to the appellate record where the issue is preserved! (and yes I know nobody does it that way).
 - Garner “deep issue.” Short factual or legal statements to provide context, as appropriate, followed by a question. Can be brief. “Does the X Act apply to Y?” Shouldn’t be more than 75 words.
 - Different types of issues require different formulations—sometimes a question works, other times a positive statement, other times a combination. Counsel should avoid trying to shoehorn a complex issue into one long question.
3. Which of the following should counsel use to identify the parties in the brief?
- 27% Their status on appeal: Appellant/Appellee, Petitioner/Respondent.
 - 4% Their status at trial: Plaintiff/Defendant.
 - 55% Proper names, abbreviated proper names, or descriptive labels: Bank of America, BoA, the Bank.
 - 9% No preference.
 - 5% Other:
- It depends on the situation. It should always be what is easiest to follow, clarity, but which also protects the person referenced from unnecessary disclosure.
 - Keep it simple and clear, if possible.
 - Any of the above is fine; just don’t use acronyms. Find a shorthand reference that it not an acronym.
4. Which of the following statements describe your view of the Table of Contents? (Please check all that apply.)
- 50% It is the best place to turn for a quick overview of the issues.
 - 32% It is helpful only if the Argument section of the brief is organized in outline form.
 - 43% Even if the Argument is organized in outline form, the Table of Contents is unhelpful if the headings are too lengthy or there are too many subheadings, sub-subheadings, etc.
 - 9% Other:
 - It is a place to be an advocate. As the appellee beware of the danger of trying to reorganize the issues.
 - Its only function is to help me find stuff in the brief. So I don’t pay much attention to it for other purposes.
 - Helpful only if the Issues are restated in the body of the Table of Contents, instead of simply Issue 1.....16; Issue 2.....24; Issue 3.....37, etc. That’s not helpful at all.
 - The table of contents is most helpful when the brief writer uses declarative statements for headings, so that those headings, read in succession, provide an overview of (or refresher on) the issues and arguments.
 - It is helpful only if each section is bookmarked.
5. Which of the following best describes your view of the Statement of Facts?
- 29% The Statement of Facts must be purely objective.
 - 50% The Statement of Facts should be persuasive, although not argumentative.
 - 2% The Statement of Facts may be argumentative.
 - 7% No preference.
 - 12% Other:

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Results of the 2020 Texas Appellate Judicial Survey

Also available as part of the eCourse

[eSupplement to the 2021 Robert O. Dawson Conference on Criminal Appeals](#)

First appeared as part of the conference materials for the
30th Annual Conference on State and Federal Appeals session
"2020 Texas Appellate Judicial Survey"