



## SEE HOW WE READ

*Rhonda K. Wood & Brian Johnston*

**O**UR CHAMBER OPERATES LIKE MOST, or so we thought. We sit around with our coffee (or Diet Coke, tea, or water), we read our briefs on our iPads (or desktops, Kindles, Surfaces, or paper), and we discuss the law (or language, SCOTUS, #appellatetwitter, or the news). We were genuinely surprised – ok, downright shocked – when we learned that every chamber at our court does not function the same way we do. So, we decided to find out how others across the county function.

We polled state supreme court justices about their reading habits. The questions ranged from those about preferences – paper or electronic briefs? – to those that are more methodological – when deciding a case, which brief do you read first? The results offer a glimpse into these justices’ working lives. The sample size – around 95 – offers interesting, if not necessarily statistically significant, results.<sup>1</sup> They come with one caveat: these results are predominately pre-COVID-19.<sup>2</sup> We received the last response on April 3, 2020. Some questions, especially those about electronic reading habits, would likely prompt vastly different answers today.

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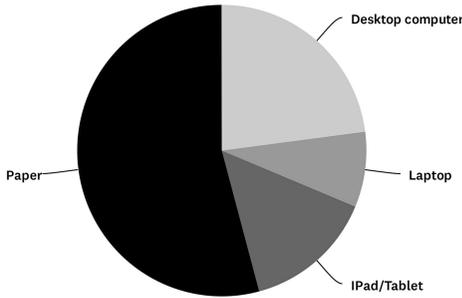
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<sup>1</sup> We are not researchers by nature. And the respondents are self-selecting – justices who are at least minimally comfortable with technology are predisposed to respond. All state chief justices were sent the survey by email and asked to share it with their fellow court members. All responses were anonymous. We used SurveyMonkey and had the survey open from February 1 to April 2, 2020. We omit question 1 because it does not add to the article. There was an initial thought of conducting a broader inquiry to include law clerks and staff. The first question addressed it, but the attempt at casting a wider net failed.

<sup>2</sup> Only six responses were submitted after March 12, 2020.

Q2 Do you primarily read appellate briefs on

Answered: 96 Skipped: 1



ANSWER CHOICES	RESPONSES	
Desktop computer	22.92%	22
Laptop	8.33%	8
iPad/Tablet	14.58%	14
Kindle/eReader	0.00%	0
Paper	54.17%	52
TOTAL		96

These practices in Q2 have probably changed the most since we asked our questions in early 2020. At the time, slightly less than half of the responding justices reported they read briefs electronically. Now, we would guess this number has jumped significantly. Many courts have been working remotely.<sup>3</sup> We think it unlikely that most staff and clerks’ offices, who were also working remotely, printed out paper copies and mailed them to justices reading at home. We also think it unlikely justices were printing briefs out on their own. But once again, we just generally assume everyone acts efficiently, yet intuitively we know that to be false – and printers still exist. Work-from-home protocols probably accelerated the shift to electronic briefs temporarily, if not permanently.

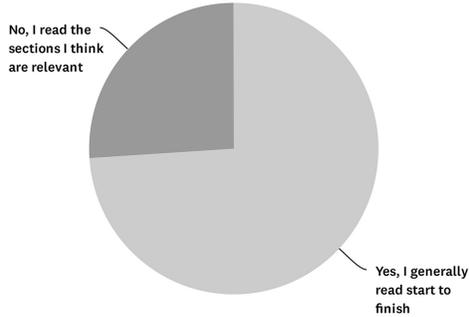
The results in Q3 aren’t surprising. Court rules generally prescribe the layout in a logical manner. It is worth wondering if responses were skewed because to answer “no” implied that the respondent might not actually read the entire brief.

<sup>3</sup> Matt Reynolds, *Courts attempt to balance innovation with access in remote proceedings*, ABA Journal, [www.abajournal.com/magazine/article/courts-attempt-to-balance-innovation-with-access-in-remote-proceedings](http://www.abajournal.com/magazine/article/courts-attempt-to-balance-innovation-with-access-in-remote-proceedings) (last accessed May 11, 2021).

## See How We Read

### Q3 Do you read the appellant's brief in the order it is written

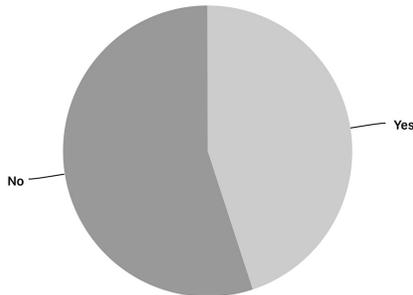
Answered: 96 Skipped: 1



ANSWER CHOICES	RESPONSES	
Yes, I generally read start to finish	73.96%	71
No, I read the sections I think are relevant	26.04%	25
TOTAL		96

### Q4 If there are hyperlinks in briefs do you utilize them

Answered: 89 Skipped: 8

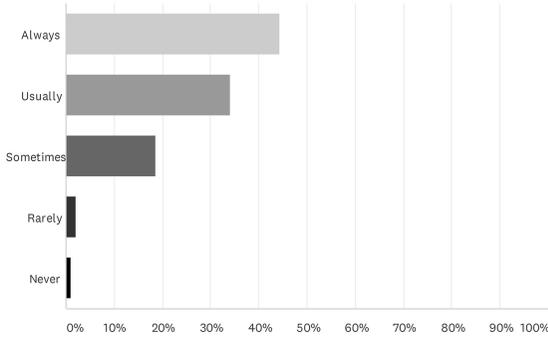


ANSWER CHOICES	RESPONSES	
Yes	44.94%	40
No	55.06%	49
TOTAL		89

In Q2, 52 justices responded that they primarily read briefs on paper. Yet in Q4 only 49 responded that they do not use hyperlinks if available. It is difficult to analyze precisely what this means, and we admit it is likely a question drafting error.

Q5 Do you independently conduct research for cases other than those cited in the briefs

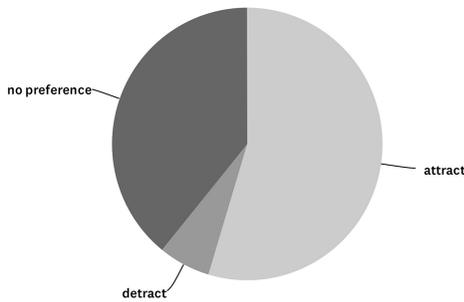
Answered: 97 Skipped: 0



ANSWER CHOICES	RESPONSES	
Always	44.33%	43
Usually	34.02%	33
Sometimes	18.56%	18
Rarely	2.06%	2
Never	1.03%	1
TOTAL		97

Q6 Do photos, charts, or diagrams within a brief attract or detract from the brief

Answered: 97 Skipped: 0

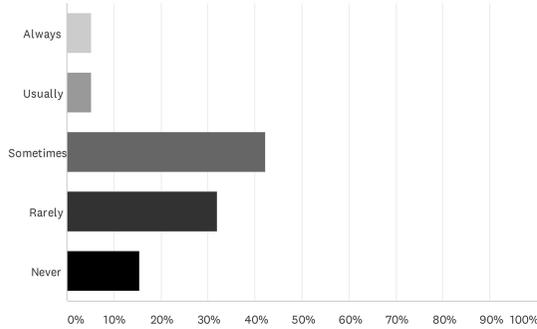


ANSWER CHOICES	RESPONSES	
attract	54.64%	53
detract	6.19%	6
no preference	39.18%	38
TOTAL		97

## See How We Read

Q7 Do you use a non-legal search engine for research (other than Westlaw, Lexis, etc) Do you google?

Answered: 97 Skipped: 0



ANSWER CHOICES	RESPONSES
Always	5.15% 5
Usually	5.15% 5
Sometimes	42.27% 41
Rarely	31.96% 31
Never	15.46% 15
TOTAL	97

Q5 indicates that about 75% of justices either always or usually conduct additional research. It is easy blame this on the quality of the briefing. But is it possible for a brief to comprehensively cover a legal issue in the space permitted? Should justices use “endogenous” cases as authority, especially when a party hasn’t had an ability to address or rebut uncited cases?<sup>4</sup>

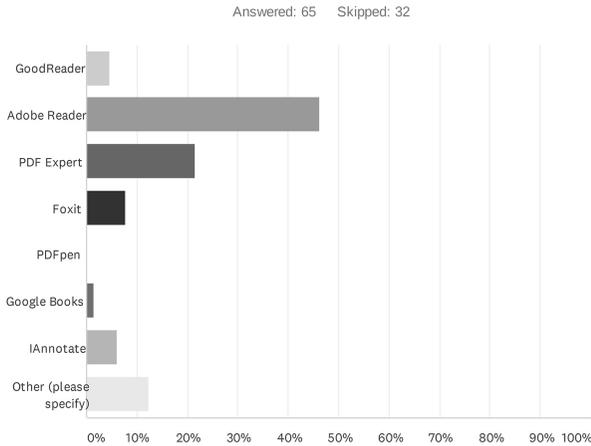
Q6 shows that a very small number of justices think graphs and charts detract from a brief. Over 90% think these help a brief or have no preference. It could be that the “no preference” response is due to lack of exposure. While legal counsel often use diagrams at the trial court level, there seems to be reticence at the appellate court level. We contend these results suggest advocates should employ these tools in appropriate circumstances.<sup>5</sup>

Q7 is somewhat related to Q5. Over 50% of judges always, usually, or sometimes use Google-type searches. Does this practice implicate ethical

<sup>4</sup> An interesting article delves further into this issue. See Kevin Bennardo & Alexa Z. Chew, *Citation Stickiness*, 20 J. App. Prac. & Process 61 (2019).

<sup>5</sup> See Michael D. Murray, *Diagrammatics and the Proactive Visualization of Legal Information*, 43 U. Ark. Little Rock L. Rev. 1 (2021).

Q8 If you use an IPAD or Tablet to read appellate materials, what software/app do you use



ANSWER CHOICES	RESPONSES	
GoodReader	4.62%	3
Adobe Reader	46.15%	30
PDF Expert	21.54%	14
Foxit	7.69%	5
PDFpen	0.00%	0
Google Books	1.54%	1
IAnnotate	6.15%	4
Other (please specify)	12.31%	8
TOTAL		65

rules?<sup>6</sup> What kind of information may a justice glean from online sources? We presume background information is appropriate, but “fact-finding,” which we doubt many judges actually conduct through Google, would be prohibited. Are all these searches about “legislative facts,” of which a court may take notice even without notifying the parties?<sup>7</sup>

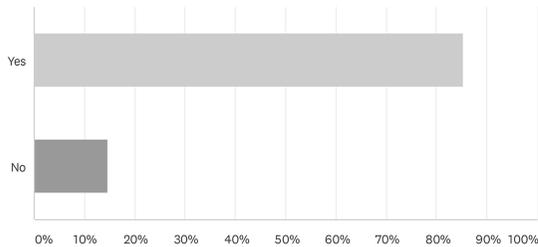
<sup>6</sup> See ABA Model Code of Judicial Conduct, Rule 2.9(C) (“A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.”).

<sup>7</sup> See Federal Rule of Evidence 201, Advisory Notes (“No rule deals with judicial notice of ‘legislative facts’ [which] are those which have relevance to legal reasoning and the law-making process.”).

## See How We Read

### Q9 Do you use multiple screens when reviewing appellate materials

Answered: 96 Skipped: 1



ANSWER CHOICES	RESPONSES	
Yes	85.42%	82
No	14.58%	14
Total Respondents: 96		

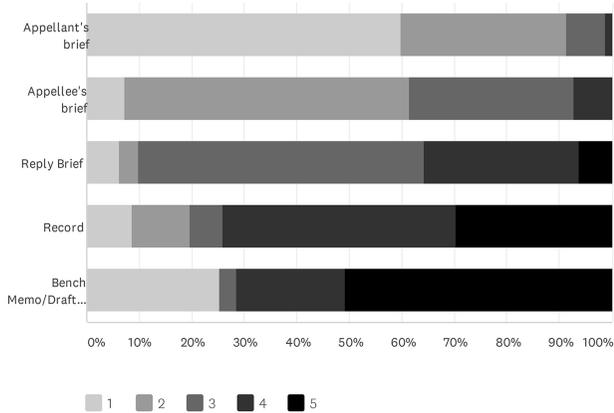
One might look at the Q8 results and think Adobe is the leader in reading software. But we think the most interesting fact is that over half of justices don't use Adobe Reader software, even though no clear secondary option stands out. This also could be device driven. For example, 22 justices reported primarily reading on a desktop, so it might make sense that they are using software that is suitable for that device. The justices using tablets would necessarily primarily use app-based software like PDFExpert or GoodReader.

In Q9, it is interesting that 82 respondent-justices report using multiple screens, yet 52 primarily read briefs on paper. This suggests those who still prefer paper briefs eventually turn to technology and multiple screens as they work through cases.

Q10 (next page) provided the most interesting survey results from a substantive point of view. They illuminate how justices decide a case. A quarter read the bench memo first. Does this practice give a law clerk or staff attorney disproportionate influence over a justice's thinking? On the other hand, almost half of the justices read the bench memo last. A significant majority read an appellant's brief first, highlighting that document's ability to frame the case.

Q10 What order do you read the appellate materials

Answered: 83 Skipped: 14



	1	2	3	4	5	TOTAL	SCORE
Appellant's brief	59.76% 49	31.71% 26	7.32% 6	1.22% 1	0.00% 0	82	4.50
Appellee's brief	7.23% 6	54.22% 45	31.33% 26	7.23% 6	0.00% 0	83	3.61
Reply Brief	6.17% 5	3.70% 3	54.32% 44	29.63% 24	6.17% 5	81	2.74
Record	8.64% 7	11.11% 9	6.17% 5	44.44% 36	29.63% 24	81	2.25
Bench Memo/Draft Opinion from law clerk or staff attorney	25.40% 16	0.00% 0	3.17% 2	20.63% 13	50.79% 32	63	2.29

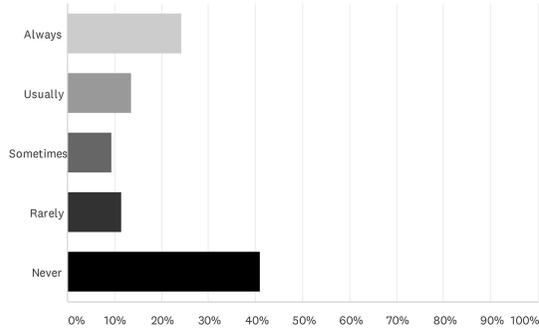
Q11 and Q12 are similar questions that produced similar results. Around half of the justices won't see a draft opinion until after the case conference or oral argument. Appellate attorneys have long lamented that some courts determine the outcome before oral argument. These results show a minority of justices have entrenched views. And certainly the attorney still has an opportunity to change a justice's mind at oral argument, which is better than no opportunity apart from briefing.

In conclusion, this survey may prompt more questions than answers. As one chamber, we found it useful to compare the results with our own practice. Other chambers and courts may take a similar approach, and many take a different course. We hope you find it useful to see how we read. We would love to hear your thoughts. Yes, we are on #appellatetwitter.

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### Q11 Does your court circulate a draft opinion/memo before conferencing a case

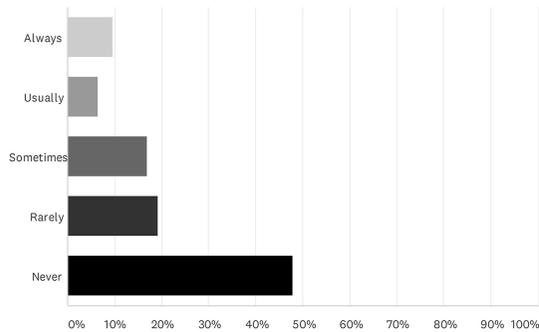
Answered: 95 Skipped: 2



ANSWER CHOICES	RESPONSES	
Always	24.21%	23
Usually	13.68%	13
Sometimes	9.47%	9
Rarely	11.58%	11
Never	41.05%	39
<b>TOTAL</b>		<b>95</b>

### Q12 Does your court circulate a draft opinion prior to oral argument

Answered: 94 Skipped: 3



ANSWER CHOICES	RESPONSES	
Always	9.57%	9
Usually	6.38%	6
Sometimes	17.02%	16
Rarely	19.15%	18
Never	47.87%	45
<b>TOTAL</b>		<b>94</b>