PREDICTABILITY IN THE LAW, PRIZED YET NOT PROMOTED: A STUDY IN JUDICIAL PRIORITIES

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I. INTRODUCTION TO A STUDY IN JUDICIAL PRIORITIES[1]

Predictability is a defining feature of the rule of law. Achieving predictability of outcomes within a jurisdiction and uniformity in the law across parallel jurisdictions helps assure consistency in judicial decisions, giving people a greater sense of certainty in the way courts will resolve disputes. In this way, predictability lends strength and legitimacy to a rule-of-law system. Because American courts zealously endorse predictability in judicial decisions as a stabilizing force in our justice system, achieving predictability in the law is presumed to be an essential factor in judicial decision-making.[2] But, is this presumption valid?

How does the need for predictability in the law, or the potential loss of it, influence judicial decision-making? Courts praise the virtues of predictability in the law,[3] but do judges actually make judicial decisions that would promote it? If not, why not? These are the questions at the heart of this study in judicial priorities.

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[2] *See* Andrew T. Solomon, *A Simple Prescription for Texas's Ailing Court System: Stronger Stare Decisis*, 37 ST. MARY'S L.J. 417, 419 (2006) (noting that members of the Supreme Court of Texas have advocated for predictability in Texas rulings); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f) (1971) (listing "certainty, predictability, and uniformity of result" as a factor relevant to the choice of applicable rule of law when there is no statutory directive of a court's own state on choice of law).

[3] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f) cmt. i (1971) (noting that "[p]redictability and uniformity . . . . are important values in all areas of the law."); *see also* Michael M. Karayanni, *The Case for a State Forum Non Conveniens Standard*, 90 TEX. L. REV. 223, 224 (2012) (noting "the enduring concern about predictability, certainty, and uniformity in applying legal doctrines not only by courts that belong to one legal entity but by courts of different jurisdictions that are just as qualified for adjudication."); Michael Ena, *Choice of Law and Predictability of Decisions in Products Liability Cases*, 34 FORDHAM URB. L.J. 1417, 1450–51 (2007) (observing that "the consistency, uniformity, and predictability of choice of law decisions are especially important in the products liability context"); Timothy R. Holbrook, *The Supreme Court's Complicity in Federal Circuit Formalism*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (2003) (noting that Federal Circuit has emphasized the need for predictability and certainty in patent law).

Despite the high value courts place on attaining predictability in the law,[4] in deciding cases, judges sometimes subordinate predictability to other goals.[5] In particular, a judge not bound by precedent might vote to adopt a legal or procedural rule that the judge believes to be better than the one that would promote predictability in the law.[6] Though both objectives—promoting predictability as one option and choosing the better rule to apply as another—are recognized as beneficial to our justice system, at times, judges must choose between the two.[7] Each option would advance one judicial objective while compromising the other.[8] How judges choose between these competing values tells us much about the weight and influence of achieving predictability in the law as a consideration in judicial decision-making.

II. OBJECTIVE OF THE STUDY

The objective in studying how judges make the "predictability choice" is threefold: (1) to enhance the development of the law in subject areas in which predictability is especially valued; (2) to help lawyers and litigants better understand judicial priorities, so that they will be more effective in presenting arguments before appellate courts and in predicting appellate outcomes; and (3) to help judges become more effective by understanding their own judicial preferences and how their judicial priorities impact the delivery of justice.

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[4] *See, e.g.*, Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 111 (2010) (allowing uniformity and predictability in the law governing multimodal carriage of goods by not applying the Carmack Amendment to the United States inland portion of through carriage from China to various locations in the United States); Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1359 (Fed. Cir. 1999) ("[w]e apply Federal Circuit law to patent issues in order to serve one of the principal purposes for the creation of this court: to promote uniformity in the law with regard to subject matter within our exclusive appellate jurisdiction."); Weiner v. Wasson, 900 S.W.2d 316, 332 (Tex. 1995) (Owens, J., dissenting) ("[a] fundamental tenet in our jurisprudence is the recognition of the need for consistency and predictability in the decisions of our courts.").")

[5] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

[6] *See* Tex. Dep't of Mental Health & Mental Retardation v. Petty, 848 S.W.2d 680, 689 (Tex. 1992) (Cornyn, J. dissenting) ("On the one hand, the law must have stability and predictability so that people may order their conduct and affairs with some rationality. On the other hand, the judge must consider the harm of compounding error by reflexively applying a clearly erroneous decision . . . .").

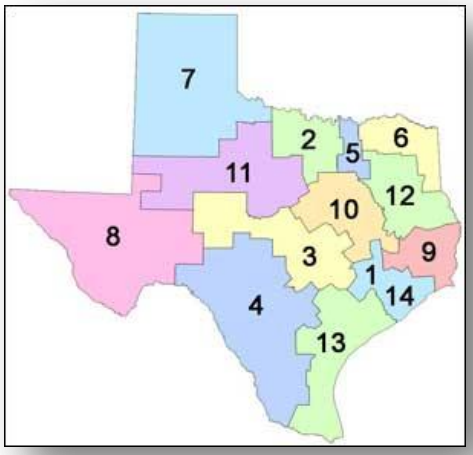
[7] *See id.*

[8] *See id.*

III. THE "PREDICTABILITY CHOICE"

Why judges choose the course that would promote predictability in a particular case is sometimes revealed in the text of judicial opinions.[9] Though, more often, it is difficult to discern unless the issue is isolated in a way that presents a clear choice between achieving predictability in the law on one hand and selecting what is perceived to be the better legal or procedural rule on the other. Finding a body of judicial opinions that would lend itself to empirical study of this focused inquiry would be a challenging task but for a pair of Texas appellate courts whose peculiar jurisdictional structure regularly places the two courts' collective eighteen members at this precise decision point.[10]

The Texas court structure mirrors the federal design in many respects.[11] Like its federal counterpart, the Texas system is a multi-tiered design with multiple intermediate courts of appeals that function much like the circuit courts of appeals in the federal system.[12] Under this framework, the state's fourteen intermediate courts of appeals decide civil and criminal cases within their districts;[13] and the decisions are binding in their respective jurisdictions unless and until those rulings are upset by one of the state's two courts of last resort (one for civil cases and one for criminal cases).[14] The



[9] *See id.*

[10] *See* Ray Blackwood, *Overlapping Jurisdiction in the Houston Courts of Appeals—Could a Special En Banc Procedure Alleviate Problems?*, 26 APP. ADVOC. 277, 279–80 (2013).

[11] *See* James T. Worthen, *The Organizational and Structural Development of Intermediate Appellate Courts in Texas, 1892–2003*, 46 S. TEX. L. REV. 33, 35 (2004).

[12] *Id.*

[13] Tex. Gov't Code Ann. § 22.220 (West 2004 & Supp. 2014); Tex. Code Crim. Pro. Ann. art. 4.03 (West 2005 & Supp. 2014).

[14] Gov't § 22.001(a); Crim. Pro. art. 4.04.

Texas court system, however, has a distinguishing feature: intermediate appellate courts with coterminous (shared) jurisdiction.[15]

For some of the state's fourteen appellate districts, the overlapping of jurisdictions is partial.[16] For two districts—the First and the Fourteenth—the geographic jurisdictions completely overlap,[17] as shown in the accompanying map.[18]

This curious layering of one jurisdiction on top of the other results in the sharing of judicial power between two equal and independent courts.[19] The coterminous-jurisdiction element of the Texas system has proved to be problematic for Texas,[20] but it makes these shared-jurisdiction courts the ideal laboratory to examine the "predictability choice."

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[15] *See* Gov't § 22.201.

[16] *See id.*

[17] *See id.*

[18] This map of the Texas courts-of-appeals districts is reprinted from *Texas Courts Online*, http://www.txcourts.gov/media/10872/COA05_map2012.pdf (last visited Jan. 9, 2015).

[19] *See* Gov't § 22.202(h), (i). The explanation for the peculiar court structure dates to the 1960's, when Houston's First Court of Appeals, which then consisted of a chief justice and two associate justices, faced a sizeable and expanding appellate caseload from a multi-county jurisdiction. The three-judge court was overloaded and needed relief but adding more judges was a problem because, at the time, the Texas Constitution limited the size of intermediate appellate courts to three judges. *See* Worthen, *supra* note 11, at 42. The Texas Legislature wanted to alleviate the strain on the court from the overcrowded appellate docket but it could not add more judges without an amendment to the state constitution. Rather than let the time-consuming amendment process run its course, the Texas Legislature created a new three-judge court for the Houston area—the Fourteenth Court of Appeals—with the same geographic jurisdiction as the First Court of Appeals. *Id.* at 63–64.

[20] *See* Miles v. Ford Motor Co., 914 S.W.2d 135, 137 n. 3, 139 (Tex. 1995) (noting the "manifest" problems created by overlaps in the state's appellate districts, observing that "[b]oth the bench and bar in counties served by multiple courts are subjected to uncertainty from conflicting legal authority," and adhering to the view that "overlaps in appellate districts are disfavored."); In re Reece, 341 S.W.3d 360, 383–84 (Tex. 2011) (J. Willett, dissenting and concurring) (noting problems created by the coterminous-jurisdiction design and mentioning that in 2002, the high court had "exhorted the Legislature that '[n]o county should be in more than one appellate district.'"); Scott Brister, *Is It Time to Reform Our Courts of Appeals?*, 40 HOUS. LAW. 22, 26 (Mar.–Apr. 2003) (detailing difficulties arising as a result of shared-jurisdiction courts in Houston appellate courts and describing the problem as "practicing law on a guess and a gamble."); David J. Schenck, *Are We Finally Ready to Reshape Texas Appellate Courts for the 21st Century?*, 41 TEX. TECH L. REV. 221, 227 (2009) (describing Texas intermediate court structure as "absurd, unnecessary, and unworthy of the many fine judges and lawyers working in both the lower courts and courts of appeals."); Andrew P. Morriss, *Opting for Change or*

The jurisdictional districts for the First Court of Appeals and the Fourteenth Court of Appeals, both based in Houston, are comprised of the same ten counties.[21] As a result of shared jurisdiction, trial courts in this region are bound by the precedents of both appellate courts.[22] But, neither appellate court is bound by the other.[23] Though each court is free to reject or embrace the other court's precedent, and each is free to revisit and change its own precedent, neither court can preempt or override the other.[24] Sometimes the two courts decide issues the same way; sometimes they do not.[25] When the two appellate courts come down on opposite sides of a

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Continuity? Thinking About 'Reforming' The Judicial Article of Montana's Constitution, 72 MONT. L. REV. 27, 36–37 (2013) (characterizing Texas's coterminous-jurisdiction courts as an example of "foolish [court structures]."); Solomon, *supra* note 22, at 417 (condemning Texas jurisdictional overlaps for creating uncertainty about controlling legal authority).

[21] *See* Gov't § 22.201(b), (o) (These ten counties are Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Waller, and Washington.).

[22] *See* Solomon, *supra* note 2, at 454.

[23] In Texas, no court of appeals is required to follow the decisions of any of the other thirteen intermediate courts of appeals. *See* Lambert v. Affiliated Foods, Inc., 20 S.W.3d 1, 8 (Tex. App.—Amarillo 1999, pet. granted), *aff'd*, Lawrence v. CDB Servs., Inc., 44 S.W.3d 544 (Tex. 2001); Solomon, *supra* note 2,3, at 441.

[24] *See, e.g.*, G.H. v. State, 96 S.W.3d 629, 635 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (noting "the recent decision from our sister court [Fourteenth] affirming a prior temporary commitment order concerning appellant," but disagreeing with the analysis and expressly declining to follow it because the Fourteenth had failed to follow an earlier First Court precedent, *K.T. v. State*, 68 S.W.3d 887, 889–90 (Tex. App.—Houston [1st Dist. 2002, no pet.) and the cases cited therein.).

[25] *See e.g.*, In re Reece, 341 S.W.3d 360, 383–84 (Tex. 2011) (J. Willett, dissenting and concurring) ("the two Houston-based courts of appeals have even reached polar-opposite outcomes on the same facts – allowing three passengers in a car accident to sue but not the fourth."); State v. Haley, 811 S.W.2d 597, 600 (Tex. Crim. App. 1991) (Clinton, J., dissenting) (involving two cases out of the First and Fourteenth concerning the same drug seizure with the two courts reaching opposite conclusions on the propriety of suppressing the seized evidence and observing that they "present an anomaly, the likes of which rarely confront this Court."); K.E.W. v. State, 276 S.W.3d 686, 707 (Tex. App.—Houston [1st Dist.] 2009) (Keyes, J., dissenting) (noting a pair of cases in which the two courts differed on the interpretation of the "clear and convincing" standard of proof in section 574.034 of the Texas Health & Safety Code, stating, "The panel in that case refused to follow our sister court *even with respect to the same patient. . . .*"); *see also* Brant E. Wischnewsky, *"Election" of Remedies: The City of Houston, the Sister Courts, and the Mission to Interpret the Tort Claims Act*, 50 HOU. L. REV. 1507, 1510 (2013) (noting pronounced differences between approaches taken by the First and Fourteenth and concluding: "There is perhaps no greater divide among the courts of appeals than that which has developed between the sister courts in Houston."); *see also* Solomon, *supra* note 2, at 454.

legal issue, people and trial courts ostensibly must comply with two equally binding yet opposite rules.[26]

The conflicts in the case law of the two courts and the lack of any adequate means to resolve them create jurisprudential challenges and practical difficulties. The biggest problem is the lack of uniformity in the law within the shared jurisdiction.[27] In split-of-authority cases, litigants in like circumstances are not treated alike and appellate outcomes are sometimes based on the luck of the draw—the random assignment of the appeal to one court or the other.[28] Justice in these cases is unpredictable because the binding precedent in the shared jurisdiction does not command a single result.[29]

Appellate judges in these shared-jurisdiction courts find themselves on the horns of a dilemma in adjudicating cases in which the Houston sister court already has set precedent.[30] If panel members of one court choose what they believe to be the better of two possible legal rules and the other court has made the opposite choice, they will create a split of authority in the region, effectively ensuring unpredictability in the law for some, often significant, period of time and fueling the unwelcome perception of random justice.[31] Yet, to achieve uniformity in the case law and thus foster predictability in the law within the shared jurisdiction, they instead must choose to adopt what they may believe to be an inferior legal or procedural rule. The choice often determines not only the outcome of the case under review but also whether there will be one or two rules going forward.

Though the Texas model is a one-of-a-kind design, the predictability problem it produces also arises in states whose regional appellate courts issue decisions that have statewide jurisprudential force. In Arizona and in Washington, for example, the holdings of regional divisions of an

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[26] *See* Solomon, *supra* note 2, at 454.

[27] *See* Montes v. City of Houston, 66 S.W.3d 267, 268–69 (Tex. 2001) (Hecht, J., concurring) (recognizing the unfairness to litigants in having the law depend "on what court they happen to be in" and the injustice that results from actors not knowing which of two possible rules is the one to follow); *see also* Solomon, *supra* note 2, at 452.

[28] *See* Solomon, *supra* note 2, at 453.

[29] *See* Solomon, *supra* note 2, at 453.

[30] *See* Solomon, *supra* note 2, at 453.

[31] *See* Blackwood, *supra* note 10, at 280.

intermediate court have equal precedential weight throughout the state.[32] When the opinions of divisions conflict, the split of authority creates a statewide predictability problem that persists until the State's highest court resolves the conflict.[33] Thus, the loss of predictability in the law due to the sharing of judicial power is not unique to Texas. Nor is the "predictability choice" unique to courts with this distinguishing feature.

The dilemma of choosing between the dueling goals of achieving predictability in the law and making what is perceived to be the better jurisprudential decision is a universal one that judges in all sectors face at one time or another.[34] But, unlike many courts that only face the "predictability choice" in the larger context of the aim of increasing uniformity across jurisdictions, courts like Texas's First and Fourteenth Courts of Appeals face a much starker choice in that a failure to choose uniformity would not just mean appellate outcomes in their shared jurisdiction might not be in uniformity with those of other jurisdictions but that there necessarily would be a lack of uniformity—and hence a lack of predictability—within their own jurisdiction.[35]

In making the "predictability choice" judges weigh the costs and benefits of a decision that would result in greater uniformity and certainty in the law against various other considerations.[36] Part of this function is considering the consequences of the decision. Because Texas's unusual shared-jurisdiction construct makes those consequences especially acute in

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[32] Scappaticci v. Sw. Sav. & Loan Ass'n, 662 P.2d 131, 136 (Ariz. 1983) ("A decision by the Arizona Court of Appeals has statewide application."); Mark DeForrest, *In the Groove or in a Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 GONZ. L. REV. 455, 488 (2013) ("Decisions of a division of the [Washington] court of appeals are binding on all state trial courts, but not on the other divisions of the court of appeals.").

[33] *See* State v. Patterson, 218 P.3d 1031 (App. 2009) (detailing history of the two divisions of Arizona Court of Appeals and case law governing the authority of both divisions); *see* DeForrest, *supra* note 32, at 488 (noting that the state's unitary court structure with multiple divisions within the intermediate court "births conflicts between the divisions of the single court of appeals, with trial courts often left to deal with those conflicted authorities as best they can.").

[34] *See* Allyson Ho & Eugene Volokh, Presentation at the Appellate Judges Education Institute 10th Annual AJEI Summit: Percolating Legal Conflicts: Challenges for Lawyers and Judges (Nov. 16, 2013) (analysis of federal constitutional and statutory questions on which federal courts are currently split).

[35] Blackwood, *supra* note 10, at 279.

[36] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

the state's First and Fourteenth Courts of Appeals, the factors that influence this value choice are more pronounced, and hence more detectable, in the decisions of these courts.[37] Simply stated, the "predictability stakes" are higher in Houston's shared-jurisdiction courts,[38] and that is precisely what makes them the perfect laboratory for the study.

Judges who serve on the Houston sister courts face a compelling need to promote predictability in the law.[39] Yet, despite the heightened judicial incentive to advance uniformity in appellate outcomes and a jurisprudence that professes the value of predictability in the law, judges on these two courts regularly choose the course that would diminish rather than foster predictability within their shared jurisdiction.[40]

IV. A THEORY OF JUDICIAL PRIORITIES

It seems that predictability in the law, though praised in court opinions and legal literature, is not promoted in fact, even in a locale where achieving predictability is extremely important. This study posits that judges value something even more than they value predictability in the law and that is a preferred rule. The theory is that, as a matter of judicial priorities, judges tend to rank the adoption or application of a preferred rule of law or procedure higher than achieving predictability in appellate outcomes, even when the loss of predictability has severe consequences. To test this theory, this study utilizes a simple strategic model of judicial decision-making designed to identify and then measure judicial preferences

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[37] Blackwood, *supra* note 10, at 279.

[38] Ray Blackwood, a member of the author's chambers staff at the Fourteenth Court of Appeals, independently wrote an article in which he explained the heightened dilemma for actors and judges in Houston's shared-jurisdiction courts in this way:

> A conflict between intermediate appellate courts whose jurisdiction does not overlap creates a lack of uniformity in the judicial system, which lasts until the conflict is resolved. . . . But a conflict between holdings of the First Court and the Fourteenth Court means that there is no mandatory precedent for the trial courts in the geographical jurisdiction of the Houston Appellate Courts. . . . This situation results in a significant lack of certainty and predictability . . . for parties, lawyers and the trial courts in this jurisdiction.

Blackwood, *supra* note 10, at 279.

[39] Blackwood, *supra* note 10, at 279; Brister, *supra* note 20, at 26; Solomon, *supra* note 2, at 419.

[40] Blackwood, *supra* note 10, at 278–79; Brister, *supra* note 20, at 26; Solomon, *supra* note 2, at 419.

driving (or at least impacting) a judge's decision to promote predictability in the law over a preferred rule or to tolerate unpredictability for the sake of one.

V. A STRATEGIC MODEL FOR ASSESSING JUDICIAL PREFERENCES

In considering judicial value choices that impact predictability in the law, the decision point is easier to conceptualize by classifying the judicial decision-makers as being in one of two categories: (1) those having a preference for the adoption or application of a given legal or procedural rule that is perceived to be better than the one that would promote predictability in the law and (2) those having a preference for achieving alignment with the precedent of the sister court as a means of fostering uniformity and certainty, and hence predictability, in the law within the jurisdiction.

A. Correctness Preference

For purposes of illustration, assume that a judge in the second court to decide the issue concludes that the first court did not make a sound legal judgment by selecting the best rule of law or procedure and that judge is unwilling to follow the first court's precedent even though doing so would foster uniformity and certainty, thereby enhancing predictability in appellate outcomes within the jurisdiction. This judge, who would forsake alignment for correctness, would fall under the first category and can be said to have a "correctness preference." Note that "correctness" in this context refers to the judge's *perception* of correctness rather than *actual* correctness. When a judge exercises a correctness preference, the judge is choosing the rule the judge *believes* to be the superior choice.

B. Alignment Preference

Another judge faced with this value choice instead might opt to follow or apply the precedent of the sister court for the sake of achieving consistency and uniformity in a given legal or procedural rule even though that judge might believe the sister court adopted or applied an inferior rule. A judge who would forgo adoption or application of the better rule to achieve alignment with the sister court's precedent would fall into the second category and can be said to have an "alignment preference."

C. Assessing Judicial Preferences for Alignment and Correctness

This strategic model offers a basis upon which to evaluate the role of predictability as a value choice in judicial decision-making by assessing judicial preferences for correctness or alignment in two ways: (1) examining decisions in split-of-authority cases issued by the two Houston sister courts of appeals and (2) surveying former members of those courts to determine their preferences, using a range of variables. The purpose of this study is to perform an empirical evaluation of the model using two data sets. The first data set consists of 48 pairs of conflicting judicial opinions in split-of-authority cases from the First and Fourteenth Courts of Appeals ("Split-of-Authority Pairs"), derived from the survey of cases described below. The second data set consists of direct judicial input in the form of survey questionnaire responses from 32 individuals who once served as judges on these courts ("Judicial Survey Responses").

By probing the judicial decisions in the Split-of-Authority Pairs and the judges' answers in the Judicial Survey Responses, it is possible to illuminate when and why judges choose to subordinate the goal of achieving predictability in the law in favor of exercising a correctness preference. The strength of these competing values (correctness and alignment), of course, varies according to the circumstances of a particular case. Thus, in a real sense they cannot be evaluated without taking into account the circumstances of the individual cases. Still, by examining when and under what circumstances judges place a higher or lower value on achieving predictability in the law, we can better understand judicial priorities and the role of predictability as a value choice in judicial decision-making.

VI. RESEARCH HYPOTHESES

In any given case a number of variables impact a judge's preference for correctness or alignment. Some factors that are likely to influence the decision include considerations such as the importance and nature of the legal issue being decided, whether the rule being considered is firmly established or still developing, the disparity in the possible rules under

consideration, whether a conflict, if created, is likely to be resolved in the near term, and whether the issue is likely to be a frequently recurring one.[41]

The variance in judicial preferences for alignment and correctness might well reflect the variance in judicial perspectives on stare decisis. Legal history shows that some judges hold steadfastly to principles of stare decisis and are unwilling to overrule prior decisions (even wrongly decided ones),[42] while other judges hold stare decisis with a looser grip.[43] At the outset of the study it was anticipated that while a judge's preferences for correctness or alignment would vary according to the particular circumstances of the case, certain variables were likely to play determinant roles in particular circumstances. It also was anticipated that, in most cases, judges would bend toward one preference or the other as a matter of judicial philosophy.

A. Hypotheses for Judicial Preferences in Particular Scenarios

The following hypotheses drove the study:

1. Correctness Preference When There Is a Significant Disparity in Choice of Legal Rules to Apply and Alignment Preference When There is Not

Given the strong need for uniformity and certainty in the shared-jurisdiction courts, one would expect to see an alignment preference in

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[41]These hypotheses are derived in part from factors courts consider in choice-of-law decision-making. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

[42]*See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 447–48 (1932) (Brandeis, J., dissenting) ("[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."); Deborah G. Hankinson, The Univ. of Tex. Sch. of Law 17th Annual Conference on State and Fed. Appeals: Stable, Predictable, and Faithful to Precedent: The Value of Precedent in Uncertain Times, at 6 (May 31, 2007) ("Justice O'Connor . . . believed that it was appropriate to follow even wrongly decided cases unless there were special circumstances that made it necessary to overrule a case.").

[43]*See* Hankinson, *supra* note 42, at 6 (noting that "some judges are willing to overrule a case they believe was wrongly decided as long as it has not become part of a body of settled law or been otherwise relied upon.").

close cases. In other words, when there is not a wide divergence in the possible options, one would expect to see a high level of alignment preferences among the judges on the second court to decide the issue. Conversely, when there is a significant difference in the possible legal or procedural rules to apply or in the policy considerations underlying those rules, it would seem that these differences likely would be sufficient to overcome whatever propensity the judge might otherwise have in choosing the course that would foster predictability in the law and instead drive the judge to make what the judge perceives to be the better-reasoned decision under a principled legal analysis.[44] Even a judge who professes to value predictability in the abstract might not choose the path that would promote predictability in the law if the choice necessarily would mean embracing what the judge believes to be an unsound, ineffective, or inefficient legal or procedural rule.[45] Thus, succinctly stated, the hypothesis is that the greater the disparity in the options under consideration, the greater the likelihood a judge will show a correctness preference; and the smaller the gap in the choices of potential rules to be applied in a given case, the greater the likelihood a judge will show an alignment preference.[46]

2. Correctness Preference When Choice Involves Rapidly Developing Area of the Law

One would expect to see the correctness preference exercised in greater measure in rapidly developing areas of the law, in which "it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules."[47] Thus, the hypothesis is that the research would show a correctness preference among judges when the choice involves a rapidly developing area of the law.

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[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f) cmt. i (1971).

3. Correctness Preference When Choice Involves Statutory Interpretation or Jurisdiction

Anecdotally speaking, most judges tend to have well-developed philosophies for statutory interpretation, and presumably they would tend to be consistent in their methodological approach to interpreting statutory text. For this reason, one would expect that judges would be more likely to exercise a correctness preference in cases involving the interpretation of statutes and ordinances, rules of evidence or procedure, and the like. Given that jurisdictional issues almost always involve statutory interpretation, one likewise would expect to see a correctness preference among judges deciding jurisdictional issues.[48]

4. Alignment Preference When One Court Has Firmly Established Precedent and the Other Has None

One would expect to see the alignment preference exercised in greater measure in cases in which one of the two courts has longstanding or firmly established precedent on the subject and the other court has no precedent. This expectation is grounded in the stare decisis principle that judges are reluctant to disturb settled rules of law because the weight of precedent on a point of law tends to solidify it and make it more difficult to upend.[49] Thus, the hypothesis was that if one of the Houston sister courts had firmly established precedent and the other has none, the second court to decide the issue would be more likely to exercise an alignment preference.[50]

5. Correctness Preference When the Law is Not Well-Settled

Similarly, one would expect that judges would be more likely to demonstrate a correctness preference when the law with respect to a particular issue is not well-settled, in contrast to the alignment preference

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[48] *See, e.g.*, Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 222 (Tex. 2002) ("Determining if an agency has exclusive jurisdiction requires statutory construction and raises jurisdictional issues."); Hendee v. Dewhurst, 228 S.W.3d 354, 359 (Tex. App.—Austin 2007, pet. denied) ("Before turning to the jurisdictional issues presented by this appeal, it is helpful to consider the constitutional and statutory context in which they arise.").

[49] *See* James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 61 (1980) ("The more clearly the precedential court has created reliance interests by adopting rule stare decisis in its opinion, the more hesitant a decisional court would be to adopt a different theory in its opinion.").

[50] *See id.*

one would expect to see when the developmental state of the law is on the opposite end of that continuum.[51] The former expectation is rooted in the notion that judges generally seek to establish or follow what they perceive to be the best legal or procedural rule.[52] Thus, the hypothesis is that in unsettled areas of the law, judges are more likely to exercise a correctness preference.[53]

B. Predicted Dominant Correctness Approach

A key hypothesis is that although in some cases an individual judge may demonstrate a correctness preference and in other cases the same judge may demonstrate an alignment preference, an individual judge will show a marked preference for one approach or the other, thus demonstrating a dominant philosophical approach to the "predictability choice." The final hypothesis is that the dominant approach of most judges on intermediate courts of appeals will reflect a correctness preference.

VII. RESEARCH DESIGN AND METHODOLOGY

Judicial choices are evaluated using both an empirical component (a statistical analysis of judicial product—the survey of cases)[54] and a qualitative component (a statistical analysis of direct judicial input—the survey of judges).[55] The objective of both parts of the study is to identify the variables that shape and influence the "predictability choice." The dual-survey study emphasizes positive rather than normative analysis. The main objective was to examine what judges do, not what they should do, although the study includes some normative elements. Each of the two parts is a stand-alone model, but, when combined, they provide a richer understanding of how and why judges exercise preferences for alignment or correctness.

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[51] Hankinson, *supra* note 42, at 6.

[52] *Id.* ("some judges are willing to overrule a case they believe was wrongly decided as long as it has not become part of a body of settled law or been otherwise relied upon").

[53] *See id.*

[54] *See generally* Statistical Analysis of the Survey of Cases, *infra* app. 1.

[55] *See generally* Survey of Judges, *infra* app. 2.

A. A Tandem Approach to Research

The obvious challenge for anyone seeking to study judicial behavior is in measuring something that is exceedingly difficult to measure. Using a tandem approach that features both quantitative and qualitative components affords greater opportunity to validate observations. Because the dual-survey design produces a greater array of possible explanations for the observed behaviors, it is also apt to yield a more comprehensive analysis and give keener insight into the variables that shape the "predictability choice."

The empirical evidence from the survey of cases tells us what judges do in split-of-authority cases, where the courts tend to clash on the law, and when and under what circumstances the splits of authority tend to occur. But, the empirical research does not always reveal the "how" and "why" of the "predictability choice." Going to the source (the judicial decision-makers) can help explain the rationale for these choices. By considering the input of the two Houston courts' former members who, as sitting judges, regularly faced the "predictability choice," it is easier to identify the variables that come into play and understand how, why, when, and to what extent these variables tend to impact the decision.

Information gleaned from direct judicial input is often not available (or at least not easily discerned) from the face of the courts' opinions. If this data is not obtained from judges, it might not be obtainable at all. The direct judicial input is not intended to supplant the empirical research but to complement and illuminate it. Both dimensions—quantitative and qualitative—are important to achieving a better understanding of how and why judges make their choices.

Thus, in addition to its primary function, this study in judicial priorities also illustrates how using a tandem approach to research can give higher definition to empirical findings. The cross-validation of data gleaned from both sources is also likely to instill greater confidence in the conclusions.

B. Survey of Cases

The survey of cases draws data from public, observable information—the face of appellate opinions issued by the two Houston sister courts.[56]

[56] The main challenge in compiling the data set was identifying the split-of-authority cases. Some conflicts are facial, meaning that one or both sister courts (or another court taking notice of

This survey focuses on the decisions judges on those courts actually made during the 46-year survey period, which begins in 1968, months after the creation of the Fourteenth Court of Appeals in September 1967, and runs through the first quarter of 2014 (the "Survey Period").

C. Survey of Judges

The survey of judges draws data from individuals who once served on one or both of the Houston sister courts and who agreed to answer survey questions about the judge's general approach to making decisions in cases that force a choice between correctness and alignment.[57] The study, of necessity, features a relatively small pool of individuals. Only 36 of the former members of the two Houston-based courts of appeals were still alive at the time of the survey and, of them, 32 elected to participate. The questionnaire contained a variety of question types and invited participants to provide written comments in addition to selecting responses from a list of options.[58] The questions were designed to determine how participants believed judges make (and should make) the "predictability choice." Participants reported factors they considered in making these choices during their time as members of one or both of the Houston courts of appeals.[59]

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the conflict) have expressly identified the disagreement; other conflicts are non-facial, meaning that two or more cases reflect a split of authority, but the conflict is not mentioned on the face of the opinions. Facial conflicts are easily identified through electronic searches; non-facial conflicts are harder to detect. Though every effort was made to find all splits in authority, some may have gone undetected. Three categories of cases were intentionally excluded from the survey: (1) plurality opinions; (2) cases in which the second-to-decide court distinguished (rather than disagreed with) the first-to-decide court's precedent; and (3) cases in which the same issue already was the subject of a split of authority, unless a court sitting en banc considered the issue anew and elected to continue the conflict, in which event the en banc decision would be counted as well.

[57] Neither the questions nor the answers in the survey of judges were tied to any specific case or decision, and no sitting members of either court were asked to participate in the study.

[58] Given the relatively small number of survey participants, the reporting of demographic or other background information could have allowed for deductive disclosure of the participants' identities, so this information was not collected.

[59] *See generally* Survey of Judges, *infra* app. 2. Surveys that require participants to self-report behavior can sometimes present valid concerns about accuracy and candor of participant responses. Some researchers believe that what judges say about what judges do (judicial self-reporting) is not a reliable or valid source of data, even with anonymous surveys. Determining what role judicial input should play in a study of judicial decision-making is a matter of what weight to assign it rather than whether to consider it as part of the analysis. In any event, concerns about lack of candor among survey participants are greatly diminished when, as in this study, none

VIII. RESULTS AND ANALYSIS

A. Survey of Cases

The results of the survey of cases revealed a high level of fracturing in the precedent of the two sister courts, with disparate appellate outcomes in a wide array of fields in both civil and criminal cases.[60] Interestingly, the authors of the opinions, whether writing for the court in a majority opinion or voicing dissent or concurrence in a separate writing, occasionally lament the effect of judicial decisions that create or prolong a split of authority between the two sister courts[61] and implore the state's high courts to resolve the conflicts.[62] Though these judicial writings might suggest that judges in the shared-jurisdiction courts are likely to make choices in a way that would avoid creating or prolonging conflicts between the two courts, when faced with the opportunity to coalesce around single rule, both courts, on occasion, instead have opted to stand by existing precedent, sometimes noting in the opinion the regrettable fact that the decision will mean that the conflict will persist.[63] On a few occasions, one court sitting en banc has revisited existing precedent in split-of-authority cases and has elected to adopt the other court's rule, thereby eliminating a conflict in the shared jurisdiction.[64] On these occasions, the en banc court sometimes

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of the survey choices would bring public or professional disapproval. Choosing correctness over alignment or alignment over correctness might invite disagreement but not condemnation. Both choices promote values that are accepted within the legal community.

[60] *See* Statistical Analysis of Survey Questions 34–37, 39–42, 44, 54, *infra* app. 1, at 129–35.

[61] *See* Medina v. Tate, 438 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("Although we strive for uniformity with our sister Houston court to provide predictability for litigants, practitioners, and trial courts within our overlapping jurisdictional boundaries, we do not view the supreme court decisions cited by the Fourteenth Court—dealing with nonresidents—so broad as to overrule our prior interpretation of section 16.063 with regard to Texas residents.").

[62] *See* Tucker v. Thomas, 405 S.W.3d 694, 729 (Tex. App.—Houston [14th Dist.] 2011) (Christopher, J., en banc dissenting), *rev'd on other grounds*, 419 S.W.3d 292 (Tex. 2013) (urging Supreme Court of Texas to grant review to resolve the conflict between the two Houston courts of appeals).

[63] *See, e.g.*, *id.*; *see also* In re H.G.L., No. 14–08-00087–CV, 2009 WL 3817871, at *6 (Tex. App.—Houston [14th Dist.] Nov. 17, 2009, no pet.) ("To the extent that these cases apply estoppel principles to the confirmation of arrearages, they are from sister courts of appeals and conflict with this court's precedent in *Chenault*, and this court must follow *Chenault*.").

[64] *See, e.g.*, Glassman v. Goodfriend, 347 S.W.3d 772, 781–82 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (en banc) (noting that court granted en banc review on its own motion to

acknowledges in the text of the opinion that the change will bring the two courts into alignment, thereby ensuring greater predictability in appellate outcomes.[65] The decisions as a whole clearly show that appellate judges in the region are keenly aware of the critical need for uniformity, yet the continuation of conflicts in the region's case law was not enough to compel a change in all or even a significant percentage of the split-of-authority cases.

The results of the survey of the 48 Split-of-Authority Pairs bring brighter light to conflict creation and resolution, revealing the nature, frequency, and duration of the conflicts. Analyzed and illustrated below, the survey results show how these and other factors might impact the "predictability choice."[66]

1. Conflict Creation and Resolution

The second court to decide the issue creates the conflict by choosing not to follow or apply the precedent of the first court to decide the issue. In 60% of the Split-of-Authority Pairs, the Fourteenth was the second-to-decide court, the conflict creator; the First created the conflict in 38% of the splits. In 2% of the splits, the two courts issued their opinions on the same day.[67] One possible explanation for the disparity in conflict creation is the age of the courts.[68]

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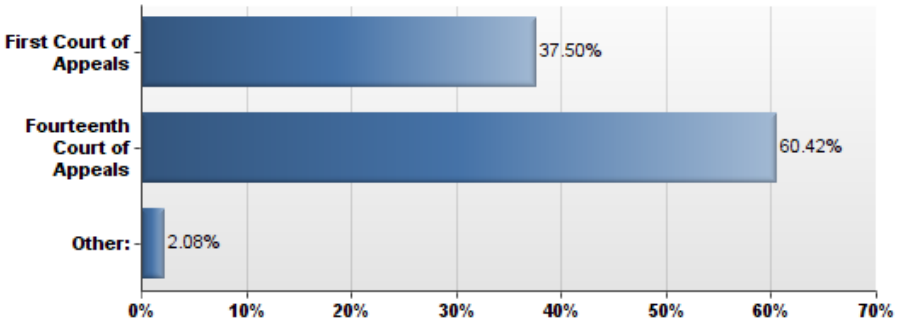
resolve conflict on sanctions issue under Texas Rule of Appellate Procedure 45; en banc court abandoned existing precedent, holding that no finding of bad faith is required before sanctions can be imposed, disapproved of all portions of prior opinions to the extent court concluded otherwise); *see also* Patrick J. Dyer & Jacalyn D. Scott, *Supersedeas: The Trials and Tribulations of Suspending Enforcement of a Money Judgment Under the New Rules*, HOUS. LAWYER, July/August 2009, *available at* http://thehoustonlawyer.com/aa_july09/page28.htm (explaining how after the Fourteenth issued its opinion in Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C., 171 S.W.3d 905 (Tex. App.—Houston [14th] 2005, no pet.), the First withdrew its panel opinion and issued its own en banc opinion following *Ramco*).

[65] *See* Glassman, 347 S.W.3d at 781–82.

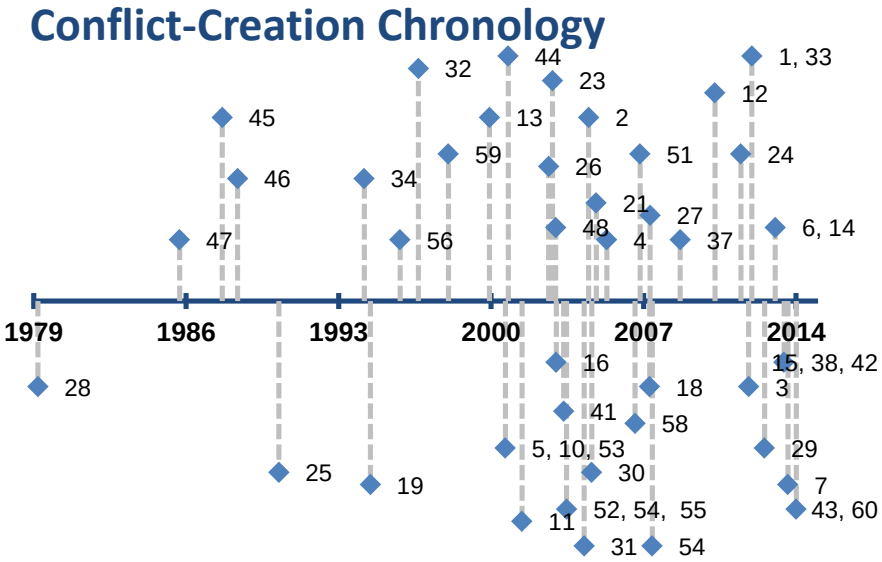
[66] Note that the margin of error varies across specific inquiries and increases for subgroups. Textual references to subgroup measures necessarily indicate a higher margin of error. The values, mean, variance, and standard deviation for each area of inquiry are set forth in Appendix 1.

[67] Statistical Analysis of Survey Question 23, *infra* app. 1, at 117.

[68] The First, created in 1892, has been in existence 75 years longer than the Fourteenth, created in 1967. Because the First has had substantially more time to generate precedent than the Fourteenth, the Fourteenth likely encounters questions of first impression (for the court) more frequently than the First. Thus, because the Fourteenth is likely put to the "predictability choice"



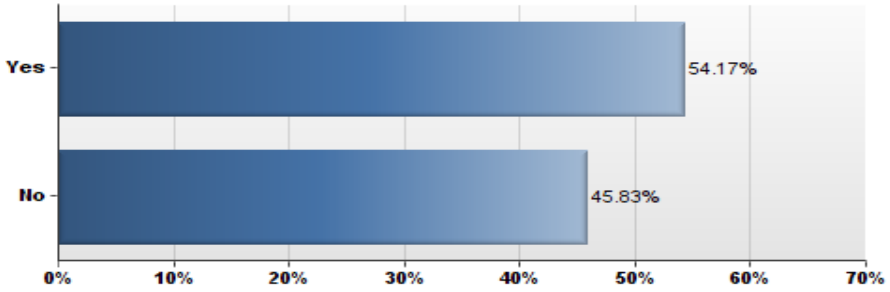
The pace and frequency of conflict creation increased over time, as reflected in the following graph depicting the conflict-creation chronology for the Split-of-Authority Pairs:



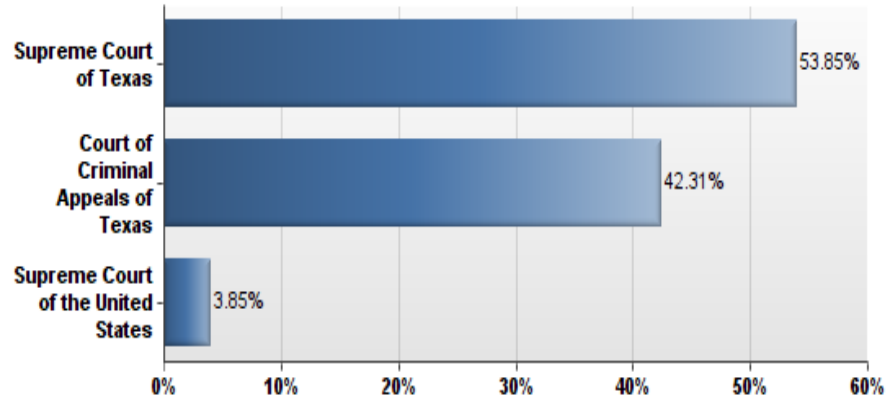
More than half the conflicts (54%) in the Split-of-Authority Pairs were resolved by a higher court; the remaining splits (46%) were not decided and

more often than the First, it is not surprising that the Fourteenth would be the conflict creator more often than the First.

remained unresolved at the close of the study, as depicted in the following graph:[69]



Where there was a resolution of the conflict by a higher court, the Supreme Court of Texas resolved the conflict in 54% of the Split-of-Authority Pairs; the Court of Criminal Appeals of Texas resolved the conflict in 42% of the survey pairs; and the Supreme Court of the United States resolved a single conflict, representing 4%,[70] as depicted in the following graph of conflicts resolved by a higher court:



Only 4.2% of the survey conflicts were resolved in a later case by en banc review in the first court to decide the issue.[71] The same percentage of

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[69] Statistical Analysis of Survey Question 27, *infra* app. 1, at 122.

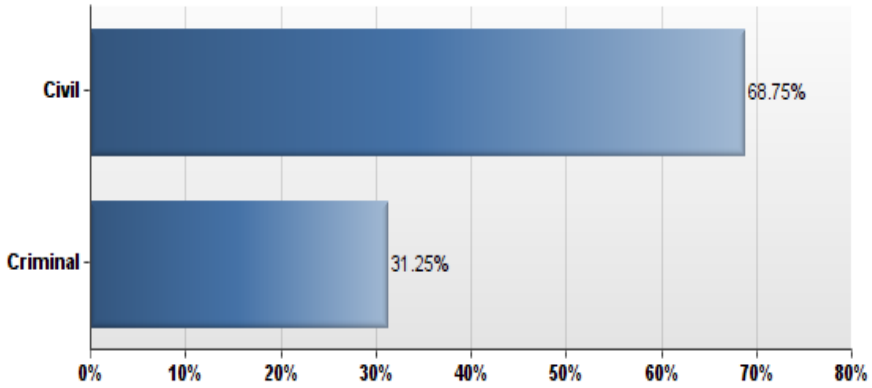
[70] Statistical Analysis of Survey Question 28, *infra* app. 1, at 28.

[71] *See* Statistical Analysis of Survey Question 30, *infra* app. 1, at 125. There might have been a different result had the cases in the survey been decided under the federal rather than the state rules of appellate procedure given the differences in the text of the respective rules governing the

conflicts (4.2%) were resolved by en banc review in a subsequent case by the second-to-decide court.[72] In both categories, it was the Fourteenth that took en banc action to resolve the conflict.[73] An even smaller percentage (2%) of the survey conflicts were resolved by legislative action.[74]

2. Nature of the Conflicts

Civil-Criminal Mix. The sample conflicts arose in both civil and criminal appeals but were more prevalent in civil cases. More than two-thirds of the appeals in the Split-of-Authority Pairs came from a civil trial court and less than one-third came from a criminal trial court,[75] as depicted in the following graph:



Jurisdiction. Nearly one-third (31%) of the splits in authority included in the sample involved a jurisdictional issue.[76] More than half of these conflicts (57%) related to the trial court's subject matter jurisdiction or

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criteria for en banc reconsideration. Under the Texas Rules of Appellate Procedure, a conflict in the case law of a sister court of appeals is not an explicit basis for en banc reconsideration. *See* Tex. R. App. P. 41.2(c). By contrast, Federal Rule of Appellate Procedure 35(b)(1)(B) explicitly defines an issue of exceptional importance warranting en banc review as including "an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue."

[72] Statistical Analysis of Survey Question 32, *infra* app. 1, at 126.

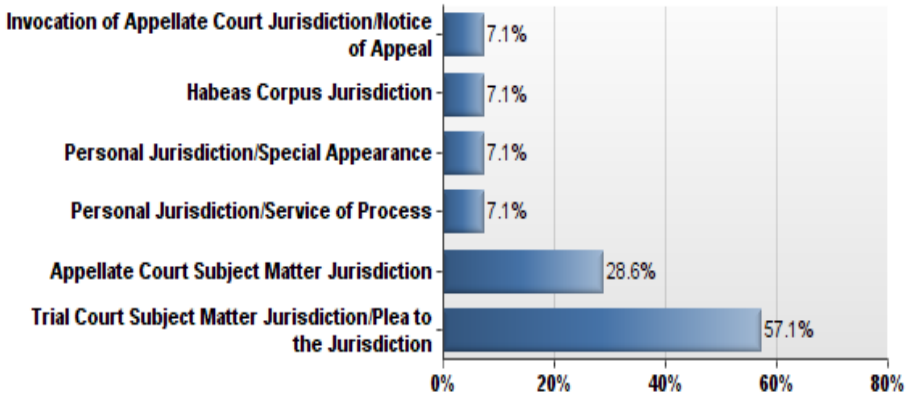
[73] Statistical Analysis of Survey Questions 31, 33, *infra* app. 1, at 126–27.

[74] Statistical Analysis of Survey Question 29, *infra* app. 1, at 124.

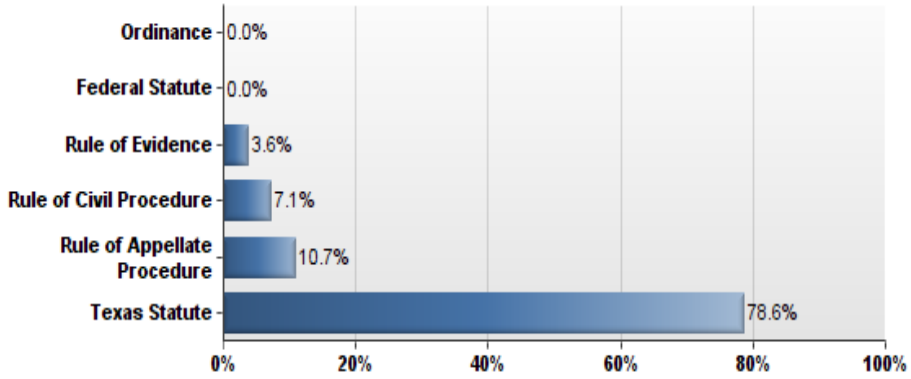
[75] Statistical Analysis of Survey Question 42, *infra* app. 1, at 128.

[76] Statistical Analysis of Survey Question 36, *infra* app. 1, at 131.

appeals of trial court rulings on pleas to the jurisdiction.[77] The nature of the jurisdictional issue involved in the remainder of the cases comprising this subgroup varied, as illustrated in the following graph:



Statutory Interpretation. Statutory interpretation was implicated to some degree in more than half (58%) of the Split-of-Authority Pairs.[78] None of them involved the interpretation of a federal statute;[79] 79% involved a Texas statute; and the remainder of this subgroup of conflicts involved rules of procedure or rules of evidence.[80] The following graph illustrates the survey results for the subgroup of sample pairs implicating statutory interpretation:



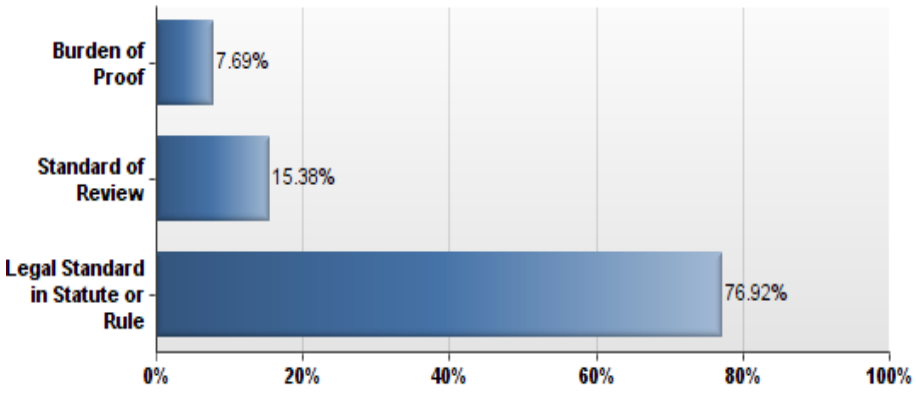
[77] Statistical Analysis of Survey Question 37, *infra* app. 1, at 132.

[78] Statistical Analysis of Survey Question 34, *infra* app. 1, at 129.

[79] Statistical Analysis of Survey Question 35, *infra* app. 1, at 130.

[80] Statistical Analysis of Survey Question 35, *infra* app. 1, at 130.

Legal Standard. Of the Split-of-Authority Pairs in the sample, more than a quarter (27%) involved conflicts implicating a legal standard.[81] Of this subgroup, 77% involved the legal standard in a statute and the remaining 23% involved either the standard of review on appeal or the burden of proof in the trial court,[82] as indicated in the following graph:



3. Rights Implicated in Split-of-Authority Cases

The survey revealed a range of party types whose rights were implicated in the conflicts.[83] Criminal defendants topped the list with nearly a third of the cases (31%) implicating the rights of the accused in a criminal prosecution.[84] The remaining cases involved a variety of party types, with results scattered in various categories,[85] as indicated in the following table:

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[81] Statistical Analysis of Survey Question 40, *infra* app. 1, at 133.

[82] Statistical Analysis of Survey Question 41, *infra* app. 1, at 134.

[83] Statistical Analysis of Survey Question 44, *infra* app. 1, at 136–37.

[84] Statistical Analysis of Survey Question 44, *infra* app. 1, at 136–37.

[85] Statistical Analysis of Survey Question 44, *infra* app. 1, at 136–37.

Answer	%
Criminal Defendant	31.3%
Spouses/Former Spouses	14.6%
Other: (Specify) Litigant Briefing in Courts of Appeals Litigant/Defendant in Tort Action Litigant/Claimant for Attorney's Fees Individual Claimant on Conversion Claim Litigant with Procedural Rights	12.5%
Personal Injury Plaintiff/Other Putative Tortfeasor	10.4%
Government Actor or Official/Complainant	8.3%
Parent-Child	8.3%
Private Property Owners	6.3%
Employer-Employee	6.3%
Government-Property Owner	4.2%
Putative Mentally or Emotionally Impaired Individual/ Mental Health Patient	4.2%
Contracting Parties	4.2%
Debtor-Creditor	4.2%
Lawyers/Law Firms Based on Conduct in Case (Sanctions)	2.1%
Financial Institution/Borrower	2.1%
Plaintiff asserting Malpractice or Professional Negligence (Medical Professional)	2.1%
Shareholder/Corporation	2.1%
Personal Injury Plaintiff/Medical or Healthcare Provider	2.1%

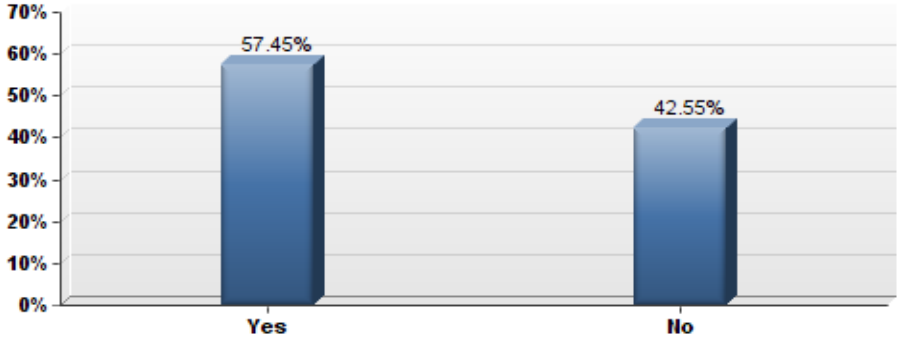
Notably, though statutory interpretation was at issue in a sizeable percentage of the conflicts (59%), 21% of cases in this subgroup involved the construction of rules of procedure or evidence.[86] Procedural or evidentiary rulings are less likely to shape people's behavior and therefore less likely to induce reliance, so a lack of uniformity in these areas of the law, while undesirable, is less troublesome than conflicts in areas that are more likely to trigger reliance interests, such as those involving contracts,

[86] Statistical Analysis of Survey Questions 34–35, *infra* app. 1, at 129–30.

property rights, shareholder rights, financial or business interests, or employment.[87] As indicated in the above table, aggregating percentages, rights in these categories were implicated in 29% of the Split-of-Authority Pairs.[88] Thus, the findings suggest that conflicts arise with significant frequency in fields with heightened reliance interests. Predictability in the law is especially desirable in these areas.

4. Recognition, Acknowledgement, and Discussion of Conflict by Sister Court

In the majority of the Split-of-Authority Pairs (57%), the second-to-decide court noted the conflict with the sister court on the face of the majority opinion,[89] as indicated in the "yes" column on the following graph:



In the remaining 43% of the splits, the conflict-creating court did not mention or discuss the sister court's conflicting opinion.[90] However, in some of these cases, panel members who wrote separately mentioned the split of authority with the Houston sister court on the face of the separate writing.[91]

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[87] *See* Hankinson, *supra* note 42, at 6.

[88] *See* Statistical Analysis of Survey Question 44, *infra* app. 1, at 136–37.

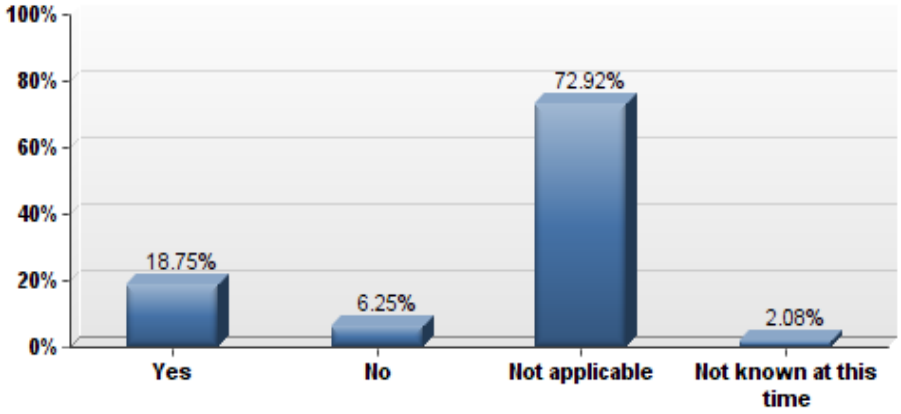
[89] *See* Statistical Analysis of Survey Question 24, *infra* app. 1, at 118.

[90] Statistical Analysis of Survey Question 24, *infra* app. 1, at 118.

[91] Statistical Analysis of Survey Questions 25–26, *infra* app. 1, at 119–20.

5. Separate Judicial Writings in Split-of-Authority Cases

In 73% of the Split-of-Authority Pairs, there was no separate writing (as indicated in the "not applicable" column of the accompanying graph).[92] But, in 19% percent of the splits, a dissenter mentioned the first-to-decide court's conflicting opinion,[93] as shown in the "yes" column below.

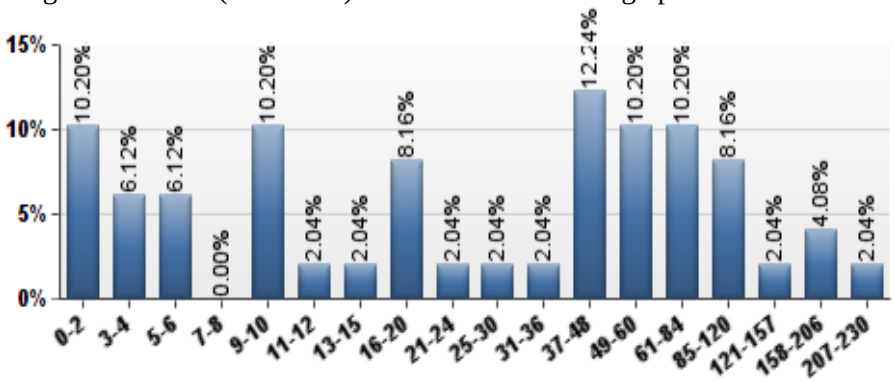


Likewise, when there was a concurring opinion, the concurring justice sometimes mentioned the split in authority with the Houston sister court on the face of the opinion, but this subgroup is too small to report the results for statistical purposes.[94] Within the small subgroup comprised of cases in which there was a separate writing in the second-to-decide court, the separate writers frequently mentioned the split of authority.[95] In some cases, the dissenting or concurring justice noted the conflict but the majority did not.[96] Though the sample size for these subgroups is too small to draw reliable conclusions, in cases that drew a concurring or dissenting opinion, the separate writer often mentioned the conflict with the sister court.[97]

[92] Statistical Analysis of Survey Question 25, *infra* app. 1, at 119.
[93] Statistical Analysis of Survey Question 25, *infra* app. 1, at 119.
[94] Statistical Analysis of Survey Question 26, *infra* app. 1, at 120.
[95] Statistical Analysis of Survey Question 26, *infra* app. 1, at 120.
[96] Statistical Analysis of Survey Questions 24–26, *infra* app. 1, at 118–20.
[97] Statistical Analysis of Survey Questions 25–26, *infra* app. 1, at 119–20.

6. Frequent Conflict Creation When Law is Rapidly Developing

As seen in the graph below, the intervals between the two courts' conflicting decisions ranged from the longest, at nearly nineteen years, to zero, for two conflicting opinions the Houston sister courts issued the same day. In 10% of the Split-of-Authority Pairs, the conflicting opinions were issued within two months of each other. The following graph shows the full range of intervals (in months) between the conflicting opinions:



In approximately 46% of the Split-of-Authority Pairs, the conflicts were created within two years of the issuance of the first-to-decide court's opinion, meaning the first-to-decide court's precedent was newly minted at the time the second-to-decide court exercised a correctness preference.[98] Cases falling into this category are classified as being in a rapidly developing area of the law.[99]

7. Very Little Conflict Creation When Law Is Firmly Established

Of the sample pairs represented in the graph above, only 2% revealed intervals between the conflicting opinions greater than seventeen years (the period used as a proxy for firmly-established precedent),[100] meaning that the

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[98] Statistical Analysis of Survey Question 39, *infra* app. 1, at 138.

[99] Statistical Analysis of Survey Question 39, *infra* app. 1, at 138.

[100] The Supreme Court of the United States, in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), overturned its precedent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in less than seventeen years, implicitly finding that precedent of that age was not so clearly established as to withstand upending. For purposes of this study, this seventeen-year interval was used as a proxy to establish a minimal threshold for "firmly established precedent" status. Cases within the Split-of-Authority Pairs were then coded to indicate if the first-to-decide court's precedent was seventeen years or

second-to-decide court exercised a correctness preference only very rarely when the law in the sister court was firmly established. This result confirms the hypothesis that judges are less likely to exercise a correctness preference when the sister court has firmly established precedent and the court on which the judge is sitting has no precedent on the issue under review.[101]

B. Survey of Judges

The survey achieved an overall response rate of 89%, with 32 of a possible 36 judges participating.[102] The results of the survey for questions for which all participants responded are statistically significant with a margin of error of ±2.55% percent. The margin of error increases when looking at differences in responses to the same question across subgroups. The margin of error also can vary across specific questions.[103]

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older at the time of conflict creation. Cases falling into this category were denominated "firmly established precedent" for purposes of this study.

[101] *See supra* note 100 and accompanying text.

[102] For a population of 36, a sample of 32 would be necessary to be 95% certain that the findings were within ± 2.55%. With this study's sample size of 32, there is a strong likelihood that the results reflect the views of the former members of these courts. But, the sample fields for various subgroups within this 32-participant sample may raise concerns that the sample size is too small. Small sample size is not an uncommon challenge for researchers studying judicial-decision-making, due in part to the limited pools of potential participants. *See, e.g.*, Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1764 n.13 (2005) ("[t]his problem of small sample size persists today, given the relatively small number of women on the bench."). With only three dozen former judges comprising the population, this study in judicial priorities falls into that category with respect to various subgroups that emerged from the participants' responses to certain areas of inquiry. Though a larger sample for these subgroups would have yielded greater power and provided greater confidence levels, the survey results for these subgroups nonetheless may be of interest and thus are included in Appendix 2. The value for these parts of the study lies not in quantifying general performance within the population of the appellate judges studied but rather in documenting the existence of certain effects within subgroups of that population.

[103] Textual references to subgroup responses necessarily indicate a higher margin of error for those responses. Note, too, that not all survey participants answered every question. The values, mean, variance, and standard deviation for each of the questionnaire responses are set forth in Appendix 2.

1. Clear Agreement on the Strong Need for Predictability of Outcomes and Uniformity in Rules in Shared-Jurisdiction Courts

Nearly all survey participants (90%) agreed that there is a strong need for predictability of outcomes in the shared jurisdiction.[104] Likewise, more than three-quarters (75.86%) agreed that there is strong need for uniformity and certainty in legal and procedural rules in shared-jurisdiction courts.[105] A smaller percentage, though still a large majority (65%), agreed that there was a strong need for uniformity and certainty in the shared-jurisdiction courts.[106]

2. Near-Even Division as to Whether Judges in Shared-Jurisdiction Courts Should Adopt a General Approach of Exercising an Alignment Preference to Achieve Predictability

Survey participants were almost evenly divided as to whether the second court to decide an issue generally should try to follow the first-to-decide court's precedent to avoid a split of authority in the shared jurisdiction, with 55% agreeing and 45% disagreeing.[107] Though no participants self-reported a dominant alignment approach, a majority reported that, in their experience, some judges in shared-jurisdiction courts (such as the First and Fourteenth) feel strongly that the second court to decide an issue should follow the first court's precedent to avoid a split of authority in the shared jurisdiction.[108]

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[104] Survey of Judges Question 36, *infra* app. 2, at 190.

[105] Survey of Judges Question 35, *infra* app. 2, at 189.

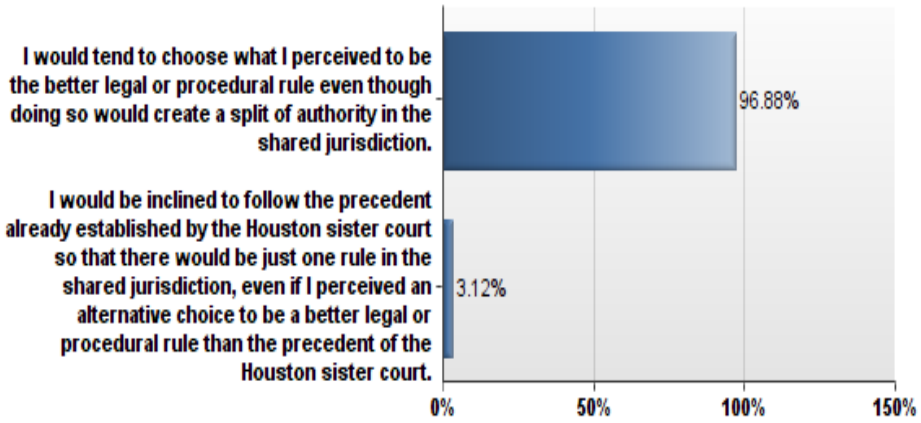
[106] Survey of Judges Question 24, *infra* app. 2, at 178.

[107] Survey of Judges Question 29, *infra* app. 2, at 183.

[108] Survey of Judges Question 26, *infra* app. 2, at 180 (With respect to the attribution of a dominant alignment approach to judicial colleagues, the anecdotal experience of the survey participants *vis a vis* other judges with whom they served does not seem to correlate very closely to the individual self-reported responses of survey participants or to the results from the survey of cases. One explanation for the discrepancy could be that the survey of cases is comprised entirely of split-of-authority decisions and does not include cases in which judges exercised an alignment preference. Likewise, the individual responses of judges commenting on their own preferences are not directed to individual cases in which they may have exercised an alignment preference but only to a general approach.).

3. Self-Identified Correctness Preference in Nearly All Survey Participants

When asked to identify their own general approach and philosophy when faced with the "predictability choice," an overwhelming majority of survey participants (97%) reported a dominant approach for correctness over alignment[109] as shown in the following graph:



In response to an application question asking which factors would "significantly influence" the exercise of a correctness preference, the same percentage (97%) identified a "strong preference for choosing the best legal or procedural rule."[110]

4. Clear Judicial Priority for Selecting the Better Rule Over Achieving Alignment

When asked which of two statements (one reflecting a correctness preference and the other reflecting an alignment preference) best described their observations and experiences from serving on a panel in one or both of Houston's shared-jurisdiction courts, a large majority of the survey participants (88%) reported that most judges tended to exercise a correctness preference,[111] as shown on the following graph:

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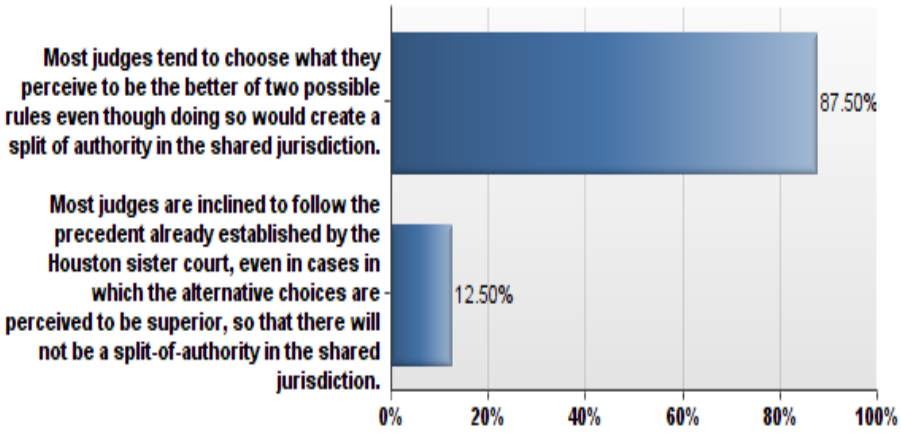
[109] Survey of Judges Question 2, *infra* app. 2, at 146.

[110] Survey of Judges Question 16, *infra* app. 2, at 166–67.

[111] Survey of Judges Question 1, *infra* app. 2, at 145.



Curiously, the survey participants perceived the alignment preference among their judicial colleagues to be more prevalent than other participants self-reported.[112] The survey participants also perceived the alignment preference to be exercised to a greater degree than the self-reported figures suggest.[113] More than 12% perceived that "most judges" generally demonstrated an alignment preference,[114] whereas 97% self-identified as generally demonstrating a correctness preference.[115]

All survey participants agreed that it is a good thing when the two Houston courts of appeals are aligned on a legal issue, but given a choice between achieving alignment and selecting the better legal rule, it is almost always more important to choose the better legal rule.[116] Given that response, it is not too surprising that all survey participants could conceive of a case in which they would exercise a correctness preference (*i.e.*, choose not to follow the precedent of the Houston sister court even though they knew it meant that a split of authority would be created in the shared jurisdiction).[117] Likewise, all survey participants answering the inquiry agreed that it is more important that good rules be developed than that predictability and uniformity of result should be assured (through choosing

[112] Survey of Judges Questions 1–2, *infra* app. 2, at 145–46.

[113] Survey of Judges Questions 1, 3, *infra* app. 2, at 145, 147–49.

[114] Survey of Judges Question 1, *infra* app. 2, at 145.

[115] Survey of Judges Question 2, *infra* app. 2, at 146.

[116] Survey of Judges Question 27, *infra* app. 2, at 181.

[117] Survey of Judges Question 20, *infra* app. 2, at 173.

to follow an existing rule of the Houston sister court).[118] Only a very small percentage (6%) agreed that while it is important to decide cases by applying sound legal principles and doctrine, given a choice, it is almost always more important to choose alignment.[119] Thus, it seems that though judges acknowledge the salutary benefits of achieving uniformity in the law within the shared jurisdiction, they do not choose the path that would advance it unless they believe that path is also the one that will lead to the best rule.

Significantly, when participants were asked how they generally chose between correctness and alignment, 84% responded that choosing the best legal or procedural rule is the most important consideration in most cases.[120] Thus, the survey results do not just show that judicial decision-makers on the shared-jurisdiction courts tend to exercise a correctness preference but that they also tend to share a dominant approach that favors correctness.[121] Yet, these same judges also give robust recognition to the importance of uniformity and certainty of outcomes in the shared jurisdiction.[122] Clear judicial acknowledgement of the need for predictability in the law and fervent adherence to correctness over alignment are dual themes that emerged in many parts of the survey.

Nearly two thirds (66%) of the survey participants indicated that a consideration likely to influence the decision to exercise a correctness preference was concern that the Houston sister court's precedent would lead to inefficiencies or other problems.[123] Other variables also could impact the decision for some judges,[124] as indicated in the following graph:

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[118] Survey of Judges Question 25, *infra* app. 2, at 179.

[119] Survey of Judges Question 28, *infra* app. 2, at 182.

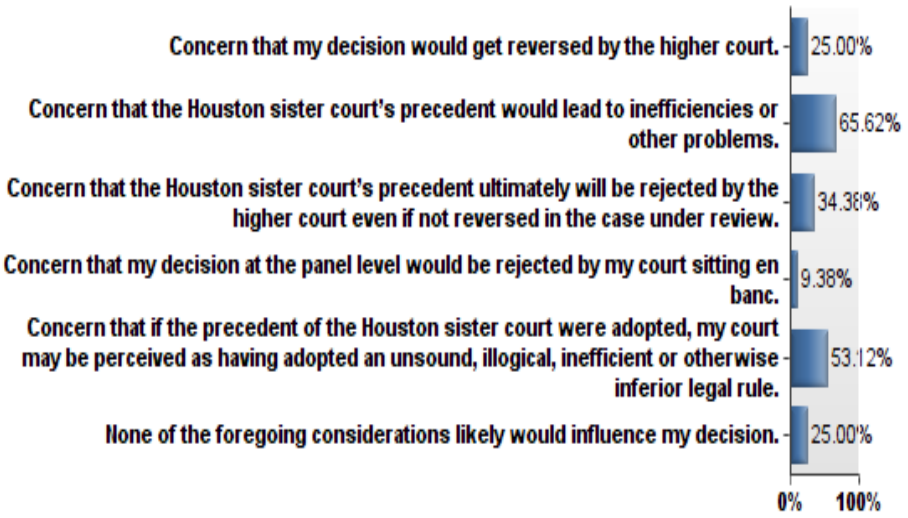
[120] Survey of Judges Question 3, *infra* app. 2, at 147–49.

[121] *See* Survey of Judges Question 27, *infra* app. 2, at 181; Survey of Judges Question 3, *infra* app. 2, at 147–49.

[122] Survey of Judges Questions 35–36, *infra* app. 2, at 189–90.

[123] Survey of Judges Question 21, *infra* app. 2, at 174–74.

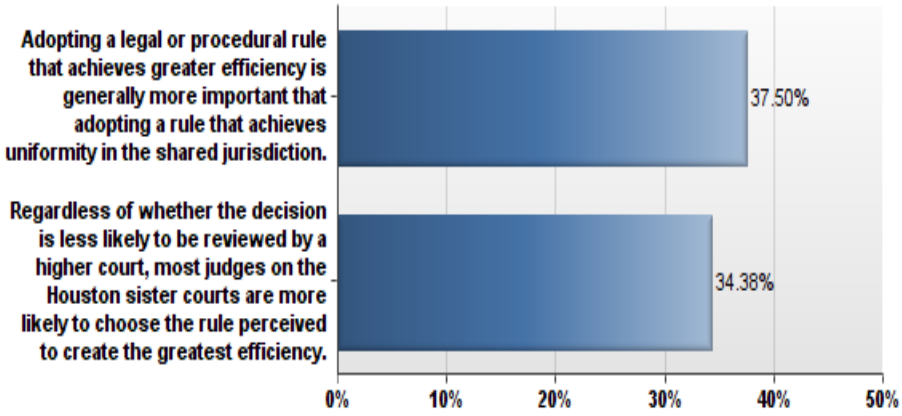
[124] Survey of Judges Question 21, *infra* app. 2, at 174–74.



Judges seem to believe that by exercising a correctness preference, they gain a larger measure of protection from these potential problems, at the cost of alignment, and, as demonstrated in various survey responses, it is a price they are willing to pay.

In prioritizing the competing goals of achieving greater efficiency on one hand and achieving uniformity in the law in the shared jurisdiction on the other, 38% agreed that adopting a legal or procedural rule that achieves greater efficiency is generally more important than adopting a rule that achieves uniformity in the shared jurisdiction.[125]

[125] Survey of Judges Question 9, *infra* app. 2, at 155–56.



As shown above, about a third of the participants (34%) believed most judges on the Houston sister courts are more likely to choose the rule perceived to create the greatest efficiency.[126] Given the high percentage of participants who are inclined to exercise a correctness preference and the large number who share a dominant correctness approach, the actual number of judges who would make that choice is likely even greater.

5. Exercise of Alignment Preference More Limited Than Exercise of Correctness Preference

There is a perception among 13% of the participants that most judges on the Houston sister courts tend to exercise an alignment preference.[127] But, as noted, this perception is somewhat belied by survey results that show nearly all participants self-identify as having a general preference for correctness.[128] A very large percentage of the survey participants (88%) reported that based on their observations and experiences on the appellate bench, most other judges also had a general preference for correctness.[129]

Nonetheless, survey participants identified one circumstance in which an alignment preference was more likely: close cases in which the choice between two rules was not materially different.[130] These results represent

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[126] Survey of Judges Question 9, *infra* app. 2, at 155–56.

[127] Survey of Judges Question 1, *infra* app. 2, at 145.

[128] Survey of Judges Question 2, *infra* app. 2, at 146.

[129] Survey of Judges Question 1, *infra* app. 2, at 145.

[130] Survey of Judges Question 38, *infra* app. 2, at 192.

the strongest support for exercising an alignment preference.[131] They came in response to a question regarding the impact when a court is deciding which of two or more legal rules to adopt and one rule is better than the others but not materially so.[132] More than three-quarters of the survey participants (77%) agreed that in this scenario it is more important to achieve alignment with the sister court than to adopt a rule that would create a split of authority in the shared jurisdiction.[133]

With this noted exception, judges were overwhelmingly more likely to exercise a correctness preference, though many acknowledged alignment behavior among judicial colleagues and registered a belief that some judges followed an alignment approach.[134] More than half the survey participants (53%) reported that in deciding cases in the shared-jurisdiction, it was their experience that certain judges often opted to follow the precedent of the Houston sister court for the sake of achieving uniformity in law or procedure even when those judges believed the sister court to have chosen the inferior legal rule.[135] More than two-thirds of the survey participants indicated that, though they generally favor correctness over alignment, they could recall at least one instance in which they instead exercised an alignment preference to foster uniformity in legal or procedural rules and predictability of appellate outcomes in the shared jurisdiction.[136]

The percentage of participants indicating they would exercise an alignment preference also increased when the issue to be decided was viewed as a minor one.[137] Participants were given a scenario in which the Houston sister court and one other sister court had decided a minor issue the same way.[138] The participants were told that had the participant been deciding the issue in the first instance, the participant would have chosen a different rule, one the participant believed would provide greater efficiency, but, still, the issue was one the participant deemed to be of relatively little

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[131] Survey of Judges Question 38, *infra* app. 2, at 192.

[132] *See* Survey of Judges Question 38, *infra* app. 2, at 192.

[133] Survey of Judges Question 38, *infra* app. 2, at 192.

[134] *Compare* Survey of Judges Question 2, *infra* app. 2, at 146, *with* Survey of Judges Question 1, *infra* app. 2, at 145.

[135] Survey of Judges Question 40, *infra* app. 2, at 194.

[136] Survey of Judges Question 37, *infra* app. 2, at 191.

[137] *See* Survey of Judges Question 8, *infra* app. 2, at 154.

[138] Survey of Judges Question 8, *infra* app. 2, at 154.

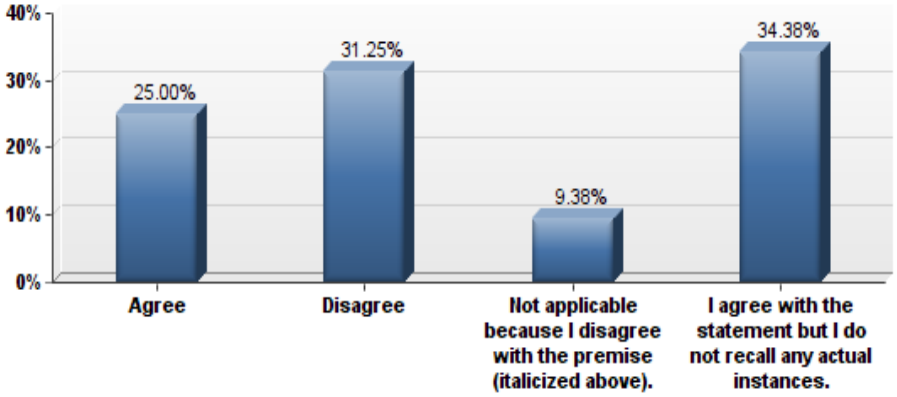
importance.[139] Even under these circumstances, 72% responded that they would exercise a correctness preference and select the rule that would achieve greater efficiency despite the resulting split in authority.[140] But, under these circumstances, 28% would exercise an alignment preference.[141] Nearly as many (22%) agreed that when the issue being decided is a relatively minor one, it is more important to achieve alignment so that there would be just one rule in the shared jurisdiction.[142]

Though 43% indicated that concerns about public perception would have little, if any, impact on the "predictability choice,"[143] when questioned specifically about this factor, nearly a third of the survey participants (32%) responded that the most compelling reason for exercising an alignment preference is to avoid the appearance of unfairness in our legal system that can arise when two courts with coterminous jurisdiction have equally binding yet opposite rules.[144]

Perhaps the most critical blow to the alignment preference came in response to a question asking participants if they could conceive of a case in which they would exercise an alignment preference.[145] An astounding 65% responded that they could not.[146] Essentially, for this subgroup, no circumstance imaginable—not even achieving uniformity and certainty within their own jurisdiction—could justify a decision to follow the sister court's precedent if the participant believed that court to have chosen an inferior rule.[147] When asked about the role of alignment in an application question, 20% of the participants reported that a strong preference for choosing the path that would avoid a split of authority in the shared jurisdiction would have little, if any, impact on their decision.[148] But, as depicted in the graph below, 25% reported that even though they had a dominant approach favoring correctness, there were occasions when they were willing instead to exercise an alignment preference to foster

[139] Survey of Judges Question 8, *infra* app. 2, at 154.
[140] Survey of Judges Question 8, *infra* app. 2, at 154.
[141] Survey of Judges Question 8, *infra* app. 2, at 154.
[142] Survey of Judges Question 9, *infra* app. 2, at 155–56.
[143] Survey of Judges Question 17, *infra* app. 2, at 168–69.
[144] Survey of Judges Question 51, *infra* app. 2, at 205.
[145] *See* Survey of Judges Question 18, *infra* app. 2, at 170.
[146] Survey of Judges Question 18, *infra* app. 2, at 170.
[147] Survey of Judges Question 18, *infra* app. 2, at 170.
[148] Survey of Judges Question 17, *infra* app. 2, at 168–69.

uniformity of appellate outcomes within the shared jurisdiction.[149] And, 34% agreed but could not recall any actual instances in which they exercised an alignment preference,[150] as illustrated in the following graph:



6. Variables That Operate as Influencing Factors and Considerations for Judges Making the "Predictability Choice"

When questioned specifically about considerations that would influence a decision to exercise a correctness preference or an alignment preference, survey participants indicated several factors likely would come into play.[151] In some cases, participants noted the consideration was a factor that would "significantly influence" the decision and in others participants indicated that these considerations played "some role;" and, in others, some identified a variable as the "most compelling" reason for exercising an alignment or correctness preference.[152]

a. Concern About Reversal by a Higher Court

Though potential reversal by a higher court was an important consideration for some survey participants, most reported it did not play a significant role. When asked whether avoiding reversal by a higher court was the "most compelling" reason for choosing to exercise a correctness preference over an alignment preference, nearly the entire field (87%)

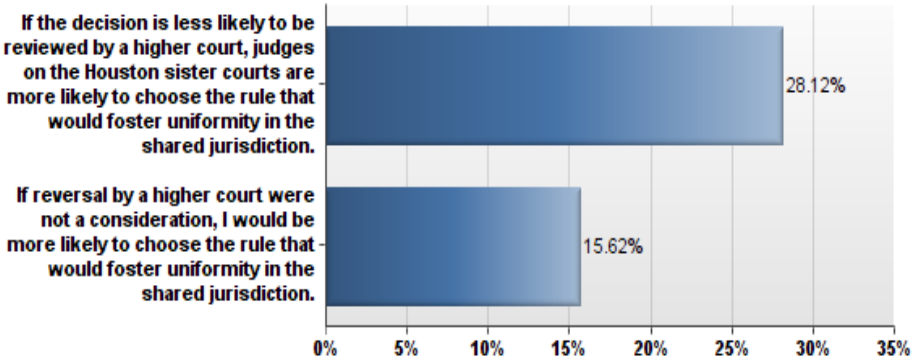
[149] Survey of Judges Question 44, *infra* app. 2, at 198.

[150] Survey of Judges Question 44, *infra* app. 2, at 198.

[151] *See* Survey of Judges Question 3, *infra* app. 2, at 147–49.

[152] *See* Survey of Judges Question 3, *infra* app. 2, at 147–49.

responded "no."[153] When questioned about the decision to exercise a correctness preference or an alignment preference, only 13% identified concerns that the higher court would reverse the decision as a factor that would "significantly influence" the decision.[154] A large majority reported that reversal by either of Texas's two high courts was not a significant consideration.[155] Specifically, 87% disagreed that the prospect of reversal by the Court of Criminal Appeals of Texas was a significant factor in deciding whether to adopt the precedent of the Houston sister court.[156] A slightly smaller percentage (81%) answered the same way with respect to the prospect of reversal by the Supreme Court of Texas.[157] More than half of the survey participants (52%) agreed that the reason they generally take a correctness approach is that the higher court reviewing the ruling presumably will choose the better rule; 36% disagreed and 10% indicated the question was not applicable because they disagreed with the premise (that they took the correctness approach).[158] But, 16% agreed that if reversal by a higher court were not a consideration, they would be more likely to exercise an alignment preference, as indicated in the following graph:[159]



Thus, for the vast majority, the potential for reversal is not a significant factor in choosing to exercise a correctness preference, but it is the "most

[153] Survey of Judges Question 47, *infra* app. 2, at 201.

[154] *See* Survey of Judges Question 16, *infra* app. 2, at 166–67.

[155] *See* Survey of Judges Question 41, *infra* app. 2, at 195; Survey of Judges Question 42, *infra* app. 2, at 196.

[156] Survey of Judges Question 41, *infra* app. 2, at 195.

[157] Survey of Judges Question 42, *infra* app. 2, at 196.

[158] Survey of Judges Question 46, *infra* app. 2, at 200.

[159] Survey of Judges Question 9, *infra* app. 2, at 155–56.

compelling" reason for 10%, and, but for the prospect of reversal, those participants (and others) would be prone to exercise an alignment preference.[160]

The importance of the particular legal or procedural issue being decided may impact the weight of this variable, because a quarter of the survey participants believed that when the issue is relatively insignificant, it is less likely to be reviewed by a higher court and a decision to follow an inferior legal rule is less likely to be reversed.[161] Thus, when judges do not view the issue as significant, it seems that they would be more likely to exercise an alignment preference, and this premise would seem especially true for the 10% who believe that the potential for reversal is the most compelling reason to favor correctness over alignment.[162]

When questioned about the consequences of actually exercising an alignment preference, a very small percentage (6%) indicated that while they were on the appellate bench, there was an instance in which they followed the precedent of the Houston sister court to achieve uniformity and later were reversed by a higher court;[163] 13% were aware of an instance in which a judicial colleague who chose to exercise an alignment preference to achieve uniformity was later reversed by a higher court.[164]

More than a third of the participants (34%) who could conceive of a case in which they would exercise a correctness preference reported a consideration likely influencing the decision was concern that the Houston sister court's precedent ultimately would be rejected by the higher court even if not reversed in the case under review.[165] A quarter indicated that the potential for reversal by a higher court would be a consideration likely to influence the decision.[166]

These indicators have implications for both practitioners and trial courts. Based on survey responses, intermediate appellate judges are not nearly as concerned with avoiding reversal by a higher court as they are with adopting what they believe to be the superior legal or procedural rule, and

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[160] Survey of Judges Question 9, *infra* app. 2, at 155–56.

[161] *See* Survey of Judges Question 9, *infra* app. 2, at 155–56.

[162] Survey of Judges Question 9, *infra* app. 2, at 155–56.

[163] Survey of Judges Question 56, *infra* app. 2, at 210.

[164] Survey of Judges Question 58, *infra* app. 2, at 212.

[165] Survey of Judges Question 21, *infra* app. 2, at 174–74.

[166] Survey of Judges Question 21, *infra* app. 2, at 174–174.

they choose that option over one that would bring stability of precedent to their own jurisdiction. Of course, most survey participants acknowledged that the higher court ostensibly would be more likely to choose what is perceived to be the superior rule and, in this sense, the intermediate judges' choice would be the same as the higher court's choice, resulting in affirmance rather than reversal. These findings suggest that while "predictability arguments" resonate with intermediate court judges, judges at the intermediate level are more likely to respond to arguments that would support the selection of what is perceived to be the sounder or more efficient rule.

b. Concern About Adverse Action by the En Banc Court

Only a small percentage (9%) of survey participants who could conceive of a case in which they would exercise a correctness preference, said a consideration likely to influence the decision was concern that the decision at the panel level would be rejected by the participant's court sitting en banc.[167] This result generally correlates to the finding in the survey of cases that only a small fraction of split-of-authority cases result in en banc opinions that resolve a split of authority created at the panel level.[168]

c. Concern About Adverse Perception of Panel or Court

More than half of survey participants (52%) who could conceive of a case in which they would choose to exercise a correctness preference said a consideration likely to influence the decision was concern that if the precedent of the sister court were adopted, the participant's court may be perceived as having adopted an unsound, illogical, inefficient or otherwise inferior rule.[169] This finding is a reflection of the judicial priority of adopting the "best rule" seen in other survey responses. It also reflects, and bolsters, the survey results that indicate judges are more likely to exercise an alignment preference in cases in which there are not material differences in the possible rules under consideration.

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[167] Survey of Judges Question 21, *infra* app. 2, at 174–74.

[168] *See* Statistical Analysis of Survey Question 30, *infra* app. 1, at 125; Statistical Analysis of Survey Question 32, *infra* app. 1, at 126.

[169] Survey of Judges Question 21, *infra* app. 2, at 174–74.

d. Likelihood the Sister Court Will Change Its Precedent

Nearly half of the survey participants (45%) responded that their decision would be significantly influenced by the likelihood the Houston sister court might change its precedent by adopting the rule of the participant's court if the participant's court issued a persuasive opinion.[170] Again, this response reflects the primacy of the judicial goal of choosing the best legal or procedural rule and weighing that consideration against the prospect of eliminating the conflict that otherwise would be created by the opposite decision in the case under review. It also correlates to the finding in the survey of cases that the sister court rarely resolves a split of authority through en banc review.[171]

e. Concerns About Fairness to Litigants, Lawyers, and Trial Courts

When survey participants were asked whether they could conceive of a case in which they would choose to exercise an alignment preference, 35% responded "yes" and 65% responded "no."[172] Those who responded in the affirmative (the "Alignment Preference Subgroup") then were asked which of several considerations likely would influence the decision.[173] As shown in the table that follows, nearly two-thirds (63%) responded one factor would be a concern that similarly situated individuals would not be treated the same as a result of a split of authority in the shared jurisdiction.[174] The same percentage (63%) indicated that a consideration likely to influence their decision was concern about unfairness to citizens in the shared jurisdiction who would have to comply with two equally binding yet opposite rules.[175] Nearly as many (56%) indicated that their decision likely would be influenced by concern about unfairness for lawyers who would have to counsel clients and make strategic decisions in the face of equally binding yet opposite rules.[176] More than a third of the Alignment Preference

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[170] Survey of Judges Question 16, *infra* app. 2, at 166–67.

[171] *See* Statistical Analysis of Survey Question 30, *infra* app. 1, at 125; Statistical Analysis of Survey Question 32, *infra* app. 1, at 126.

[172] Survey of Judges Question 18, *infra* app. 2, at 170.

[173] *See* Survey of Judges Question 19, *infra* app. 2, at 171–72.

[174] Survey of Judges Question 19, *infra* app. 2, at 171–72.

[175] Survey of Judges Question 19, *infra* app. 2, at 171–72.

[176] Survey of Judges Question 19, *infra* app. 2, at 171–72.

Subgroup (38%) indicated that the decision likely would be influenced by concern about public perception of the legal system when people of the shared jurisdiction are bound by two conflicting rules.[177] In sum, the following percentages of survey participants in the Alignment Preference Subgroup indicated the listed concerns were likely to influence an alignment preference:[178]

Unfairness for **trial judges** who would have to comply with two conflicting rules.	50.0%
Unfairness to **citizens** who would have to comply with two equally binding yet opposite rules.	62.5%
Unfairness for **lawyers** who would have to counsel clients and make strategic decisions in the face of equally binding yet opposite rules.	56.3%
Similarly situated **individuals** would not be treated the same (i.e., different appellate outcomes based solely on the appellate court in which their appeal happened to fall.)	62.5%
Public perception of our legal system when people of the shared jurisdiction are bound by two conflicting rules.	37.5%

f. Concerns About Public Perception of the Legal System and Court Legitimacy

A significant percentage of the survey participants (41%) agreed that while they were on the appellate bench, concerns about the public's perception of unfairness in the justice system, stemming from having two equally binding yet opposite rules, played some role when it came to choosing whether to exercise an alignment preference.[179] Almost all

[177] Survey of Judges Question 19, *infra* app. 2, at 171–72.

[178] Survey of Judges Question 19, *infra* app. 2, at 171–72.

[179] Survey of Judges Question 43, *infra* app. 2, at 197.

participants (90%) believed that though it is true that in split-of-authority cases in the Houston courts of appeals litigants in like circumstances are not treated alike, these cases are relatively few in number and do not arise with such frequency that they create a general appearance or perception of unfairness in our legal system.[180] A healthy majority (84%) also responded that if disparate outcomes in split-of-authority cases in the Houston courts of appeals occurred with greater frequency, there would be greater cause for concern over negative perceptions about the fairness of our legal system.[181] Only a very small percentage (3%) believed that the disparate outcomes occurred with sufficient frequency to justify a concern that the public would perceive our legal system as unfair;[182] and, only a slightly higher percentage (6%) identified as a factor that would "significantly influence" the "predictability choice" concerns about public perception when the two courts with coterminous jurisdiction issue equally binding yet opposite results.[183] Nearly three times as many (16%) indicated that the decision would be "significantly influenced" by concerns of unfairness for trial courts and litigants in the shared jurisdiction who would have to comply with two conflicting rules.[184] Notably, however, 32% believed the "most compelling" reason for exercising an alignment preference would be to avoid the appearance or perception of unfairness that can arise when two courts with coterminous jurisdiction have equally binding yet opposite rules.[185]

The survey participants seemed to have a well-developed understanding of their preferences but may have lacked an appreciation for the frequency of conflict creation within the shared jurisdiction. One explanation for the perception that splits in authority are very infrequent occurrences may be that the survey participants are former members of the Houston sister courts and, for many, the trend may have increased since they left the bench. The survey of cases revealed an upward trendline in splits of authority, compared to relatively few conflicts in the early years following the

[180] Survey of Judges Question 48, *infra* app. 2, at 202.

[181] Survey of Judges Question 49, *infra* app. 2, at 203.

[182] Survey of Judges Question 50, *infra* app. 2, at 204.

[183] Survey of Judges Question 16, *infra* app. 2, at 166–67.

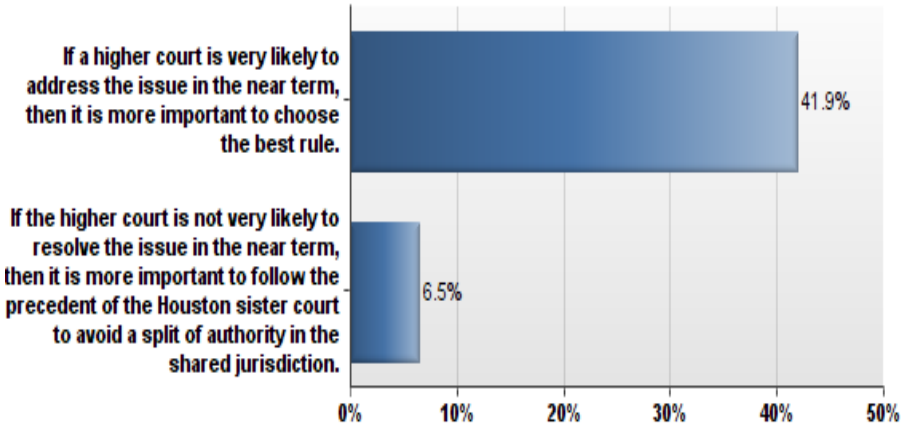
[184] Survey of Judges Question 16, *infra* app. 2, at 166–67.

[185] Survey of Judges Question 51, *infra* app. 2, at 205.

creation of the shared jurisdiction.[186] The rising incidents of splits in authority in more recent years might explain the belief among some survey participants that the problem is smaller and more contained than the empirical research indicates.

g. Concern That the Conflict Will Go Unresolved Indefinitely

The uncertainty of whether and when a conflict might be resolved plays some role in the "predictability choice" for a sizeable percentage of the survey participants.[187] The likelihood that a higher court would grant review in the case was a significant consideration for many.[188] As shown in the following graph, 42% responded that if the higher court is very likely to address the issue in the near term, then it is more important to choose the best rule, i.e., exercise a correctness preference:[189]



Likewise, if the issue concerned a matter of first impression in the participant's court, 60% indicated they probably would conclude that the higher court likely would grant review and that the conflict being created likely would be resolved sooner rather than later.[190] More than a quarter

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[186] *See supra* Part VIII.A.1 (graph illustrating the conflict-creation chronology for the Split-of-Authority Pairs in the survey of cases).

[187] *See* Survey of Judges Question 3, *infra* app. 2, at 147–49; Survey of Judges Question 22, *infra* app. 2, at 174–76.

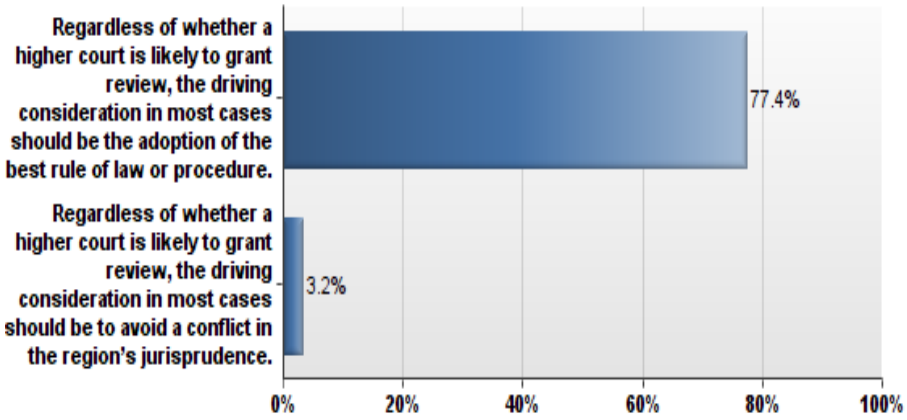
[188] *See* Survey of Judges Question 9, *infra* app. 2, at 155–56.

[189] Survey of Judges Question 3, *infra* app. 2, at 147–49.

[190] Survey of Judges Question 22, *infra* app. 2, at 174–76.

(28%) of the survey participants believed that if the decision is less likely to be reviewed by a higher court, judges on the Houston sister courts are more likely to exercise an alignment preference.[191]

As shown in the following graph, a large majority (77%) believed that regardless of whether a higher court is likely to grant review, the driving consideration in most cases should be the adoption of the best rule of law or procedure.[192] Only 3% believed the driving consideration should be to avoid a conflict in the region's jurisprudence.[193]



Similarly, only 7% believed it is more important to exercise an alignment prefernce if the higher court is not likely to resolve the issue in the near term.[194] When questioned about cases in which they likely would do so, 15% indicated that if the issue concerned a matter not likely to be reviewed by the higher court, they probably would conclude that if a conflict were created, it would persist for some time and so it would be better to choose the path that would result in uniformity in the shared jurisdiction.[195]

Slightly more than a third of the participants in the Alignment Preference Subgroup (38%) indicated the decision to exercise an alignment preference likely would be influenced by concern that if a conflict is created, the parties might not seek review in the higher court or the higher

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[191] Survey of Judges Question 9, *infra* app. 2, at 155–56.

[192] Survey of Judges Question 3, *infra* app. 2, at 147–49.

[193] Survey of Judges Question 3, *infra* app. 2, at 147–49.

[194] Survey of Judges Question 3, *infra* app. 2, at 147–49.

[195] Survey of Judges Question 23, *infra* app. 2, at 177–78.

court might not grant review and the split of authority might continue for some time.[196] Conversely, when the full sample considered the impact if review was likely to be granted, a clear majority indicated they nevertheless would exercise a correctness preference.[197] For example, if the issue concerned a matter of first impression in the participant's court, a majority (60%) indicated they probably would conclude that the higher court likely would grant review and that the conflict being created likely would be resolved sooner rather than later.[198] Thus, for most, concerns about lack of conflict resolution would not deter the exercise of a correctness preference.

These findings suggest that the preference for correctness over alignment among intermediate appellate court judges is not exclusively dependent on their awareness that the state's highest court might ultimately resolve any conflict they create. Some may suppose that these judges do not view themselves (or the intermediate courts on which they serve) as the judicial institutions best suited to promote predictability. So, one possible explanation for judges preferring correctness to alignment is that their concerns about unpredictability in the law are allayed by their anticipation that the state's high courts will resolve the conflicts the intermediate courts create.

Though resolution of splits in authority is a defining role of the state's high courts, high-court review is discretionary, sometimes not even sought by the parties,[199] and often not granted even in the face of a split of authority.[200] Intermediate court judges are keenly aware that many conflicts go unresolved, frequently for significant periods of time. This reality is reflected in the survey of cases, which shows that nearly half of the conflicts in civil cases and more than half of the conflicts in criminal cases

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[196] Survey of Judges Question 19, *infra* app. 2, at 171–72.

[197] *See* Survey of Judges Question 22, *infra* app. 2, at 174–76.

[198] Survey of Judges Question 22, *infra* app. 2, at 174–16.

[199] *See* Blackwood, *supra* note 10, at 282 (observing that in 19 cases involving one split in authority the parties petitioned for review in only two of them and, in those, the high court would not have been able to address the issue; thus the Supreme Court of Texas was powerless to resolve the split of authority for many years despite prevalence of conflicting cases on the issue).

[200] *See* Wagner & Brown, Ltd. v. Horwood, 53 S.W.3d 347, 350 (Tex. 2001) (Hecht, J., dissenting) (noting infrequency of high court's acceptance of conflicts jurisdiction over interlocutory appeals and stating, "This Court's exercise of conflicts jurisdiction is thus more rare than a blue moon (5 in the last 10 years), a total eclipse of the sun (6 in the past decade), or the birth of a Giant Panda in captivity (18 in 1999 alone, 15 of which survived).").

remained unresolved at the end of the survey period.[201] And, even when conflicts are settled by higher courts or through legislative action, often there are substantial periods of unpredictability in the interim between conflict creation and conflict resolution.[202] The Judicial Survey Responses show that intermediate-court judges take account of these possibilities in exercising their preferences. Thus, while their concerns about lack of predictability in the law might be assuaged to some degree by the hope or expectation that the conflict will be resolved or at least short-lived, these judges understand that often the conflict will continue. This reality is part of their calculus in making the "predictability choice."

IX. SUMMARY OF FINDINGS

The results of the study validate the stated theory of judicial priorities. Both the survey of cases and the survey of judges reveal that most judges have a dominant approach favoring their perception of correctness. The expectation was that the Judicial Survey Responses would show alignment preferences in some scenarios and correctness preferences in others among the judges on the second court to decide the issue. While these responses revealed an alignment preference among some judges in some circumstances, they showed a pronounced and widely-held correctness preference among most judges in nearly all circumstances. These findings indicate that judges tend to exercise a correctness preference even in the face of the heightened judicial incentives to foster uniformity and predictability inherent in Houston's shared-jurisdiction courts.

Beyond substantiating the hypothesis that judges value preferred rules more than they value predictability in the law, the results from the survey of judges also reveal an intensity for the correctness preference and a strong normative belief favoring it that are not reflected in the empirical research alone. In concert, the quantitative and qualitative results lead to a single set of reasonable conclusions about the "predictability choice" and the variables that shape it.

Of special note, given the tandem approach utilized for this study, is a clear dovetailing effect in the data gleaned from the two surveys. The results of one survey confirm the results of the other, and together, they produce a synergistic effect that not only checks and ratifies but also

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[201] *See* Statistical Analysis of Survey Question 28, *infra* app. 1, at 123.

[202] *See* Blackwood, *supra* note 10, at 282.

amplifies and refines, as illustrated in various particulars in the observations that follow.

Take, as an initial example, the empirical findings showing notable percentages of the conflicts involved issues of statutory interpretation, jurisdiction, and legal standards. Conflicts in these areas tend to arise on a frequently recurring basis. The qualitative findings synergistically showed that judges are more likely to exercise a correctness preference in cases in which they believe the issue will be a frequently recurring one.[203]

Another example of the dovetailing between the quantitative and qualitative is in the findings relating to en banc cases. The empirical results from the survey of cases revealed that only a tiny percentage of split-of-authority cases resulted in en banc opinions that resolved a conflict at the panel level.[204] The Judicial Survey Responses showed that concern that the panel's decision would be rejected by the en banc court is not a consideration likely to influence the decision.[205] Such harmonizing interconnections between the quantitative and qualitative results are seen across many categories and in relation to several variables.

The findings from both surveys point to the twin themes of strong judicial recognition of the need for predictability in the law and strong adherence to correctness over alignment. The tension between the two is especially evident in the Judicial Survey Responses. In answering various application questions, the survey participants identified a number of factors that would "significantly influence" the "predictability choice:"[206]

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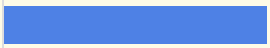
[203] *See* Survey of Judges Question 3, *infra* app. 2, at 147–49; Survey of Judges Question 22, *infra* app. 2, at 174–76.

[204] *See* Statistical Analysis of Survey Question 30, *infra* app. 1, at 125; Statistical Analysis of Survey Question 32, *infra* app. 1, at 126.

[205] *See* Survey of Judges Question 19, *infra* app. 2, at 171–72; Survey of Judges Question 21, *infra* app. 2, at 174–74.

[206] *See* Survey of Judges Question 16, *infra* app. 2, at 166–67.

Answer		%
Concerns about public perception when two courts with coterminous jurisdiction issue equally binding yet opposite rules.		6.5%
[Alignment Preference] Strong preference for choosing path that would avoid a conflict or split of authority in shared jurisdiction.		9.7%
Concerns that a higher court would reverse decision.		12.9%
Concerns of unfairness for trial courts and litigants who would have to comply with two conflicting rules.		16.1%
Likelihood that if court issued persuasive opinion, sister court might change its precedent.		45.2%
Importance of issue to the jurisprudence of the state.		54.8%
[Correctness Preference] Strong preference for choosing the best legal or procedural rule.		96.8%

Roughly a fifth of the survey participants responded that a strong preference to avoid a split of authority in the shared jurisdiction would have little, if any, impact on their decision.[207] Other variables that likewise would have little, if any, impact registered at higher levels for some judges, as summarized in the following table:[208]

[207] Survey of Judges Question 17, *infra* app. 2, at 168–69.

[208] Survey of Judges Question 17, *infra* app. 2, at 168–69.

Answer		%
Concerns that the higher court would reverse the decision.		57%
Concerns of unfairness for trial courts and litigants in the shared jurisdiction who would have to comply with two conflicting rules.		23%
The likelihood that if the court issued a persuasive opinion, the Houston sister court might change its precedent by adopting your rule.		40%
A strong preference for choosing the path that would avoid a conflict or split of authority in the shared jurisdiction. **[Alignment Preference]**		20%
Concerns about public perception when two courts with coterminous jurisdiction issue equally binding yet opposite rules.		43%
All of the foregoing factors would have some impact on my decision.		33%

A third of the participants indicated that all of the listed factors—potential for reversal, unfairness for trial courts and litigants, potential for persuading the sister court to change its precedent, and public perception—would have "some impact" on the "predictability choice."[209]

Individual summaries follow for each of the hypotheses identified at the outset of the study.

A. Dominant Philosophical Approach to the "Predictability Choice"

Addressing the final hypothesis first, recall that the expectation was that even though an individual judge might demonstrate a correctness preference in one case and an alignment preference in another, judges would have a dominant philosophical approach to the "predictability choice" and most would demonstrate a dominant approach favoring correctness. They did.

[209] Survey of Judges Question 17, *infra* app. 2, at 168–69.

When asked about their observations and experiences from serving on a panel of one or both of the Houston sister courts, an overwhelming majority of survey participants (88%) responded that most judges tend to have a dominant correctness approach.[210] A small minority believed that most judges are inclined to exercise an alignment preference.[211] Only a tiny percentage self-identified as having a dominant alignment approach.[212] Most notably, when asked to identify their individual preferences, an astounding 97% self-identified as having a dominant correctness approach.[213] These judges identified a number of factors likely to influence the exercise of this preference, including the following:[214]

[210] Survey of Judges Question 1, *infra* app. 2, at 145.

[211] Survey of Judges Question 1, *infra* app. 2, at 145.

[212] Survey of Judges Question 2, *infra* app. 2, at 146.

[213] Survey of Judges Question 2, *infra* app. 2, at 146.

[214] Survey of Judges Question 22, *infra* app. 2, at 174–76.

Answer		%
If the issue concerned a **matter of first impression** in my court, I probably would conclude that the higher court likely would grant review and that the conflict being created **likely would be resolved sooner** rather than later.		60.0%
If the precedent of the Houston sister court were a recent holding rather than a **longstanding rule**, I probably would conclude that it is better to go ahead and choose the better rule even though doing so would create a split of authority because the holding of the Houston sister court, though binding on that court, is **not yet a firmly established rule.**		76.7%
If the precedent of the Houston sister court concerned an **important issue**, I probably would conclude that it is better to choose the superior legal or procedural rule even though doing so would create a conflict and I would make this choice because of the **significance of the matter in issue.**		93.3%
If the precedent of the Houston sister court concerned an issue that was likely to become a **frequently recurring issue**, I probably would conclude that it would be better to choose the superior rule even though doing so would create a conflict.		90.0%

B. Correctness Preference When Options Differ Substantially and Alignment Preference When the Choices Are Close

Recall the first hypothesis was that when the issue being decided presented significant differences in the possible legal rules to apply or in the policy underlying those rules, most judges would be more likely to exercise a correctness preference. Inversely, in cases in which there is little difference in the potential rules to be applied, most judges would be more likely to exercise an alignment preference. The survey results confirmed both hypotheses.

Survey participants identified very few circumstances in which they would exercise an alignment preference. The only one identified by a majority of participants was when one rule is not materially better than the other(s).[215] More than two-thirds of survey participants agreed that in these close cases, it is more important to exercise an alignment preference.[216] More than three-quarters agreed that when the Houston sister court already has adopted a legal or procedural rule and there is not a substantial difference between that rule and other possible options, a judge should choose to follow the precedent of the Houston sister court to avoid creating a split of authority in the shared jurisdiction.[217]

C. Correctness Preference in Rapidly Developing Areas of the Law

An additional hypothesis was that judges in the second-to-decide court would be more likely to exercise a correctness preference in rapidly developing areas of the law and an alignment preference in cases in which the sister court already had well-developed precedent on the subject. The empirical research from the survey of cases showed that nearly half of the conflicts were created in rapidly developing areas of the law by judges exercising a correctness preference.[218] The Judicial Survey Responses validated this finding. When asked about the impact of exercising preferences in a rapidly developing area of the law, nearly two-thirds of the survey participants responded it is more important to exercise a correctness

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[215] *See* Survey of Judges Question 33, *infra* app. 2, at 187.

[216] Survey of Judges Question 33, *infra* app. 2, at 187.

[217] Survey of Judges Question 38, *infra* app. 2, at 192.

[218] *See* Statistical Analysis of Survey Question 39, *infra* app. 1, at 138.

preference in this circumstance.[219] Similarly, most survey participants (94%) agreed that when deciding an issue in a rapidly developing area of the law, it is more important to cultivate and develop good rules than to achieve alignment with the Houston sister court (i.e., exercise a correctness preference).[220]

D. Preferences When One Court Has Firmly Established Precedent and the Other Has None

The expectation was that judges would be more likely to exercise an alignment preference when the first court to decide the issue already had firmly established precedent. The hypothesis is based on the notion that when well-settled law changes, reliance interests tend to be adversely impacted. When relatively new precedent is overturned, the destabilizing effects tend to be less severe but nonetheless problematic. One scholar has described the phenomena as creating a "whiplash effect" that "injects a degree of instability and uncertainty in the law."[221] In gauging the impact, if any, of the exercise of correctness and alignment preferences in circumstances in which one court has firmly-established or well-developed precedent and the other has none, the empirical research showed that only a tiny percentage of conflicts (2%) were created when the sister court had firmly established precedent.[222] The Judicial Survey Responses ratify and illuminate this finding.[223]

When questioned about cases in which they would opt to exercise an alignment preference, 11% of survey participants responded that if the precedent of the Houston sister court had existed for many years, they probably would conclude that it is a firmly established rule and it would be better to follow it than to create a split of authority in the shared jurisdiction.[224] Though this is a low percentage in absolute terms, it

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[219] Survey of Judges Question 3, *infra* app. 2, at 147–49.

[220] Survey of Judges Question 32, *infra* app. 2, at 186.

[221] Stefanie A. Lindquist and Frank C. Cross, *Stability, Predictability and the Rule of Law: Stare Decisis as Reciprocity Norm*, The University of Texas School of Law, at 10, http://www.utexas.edu/law/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf. (last visited Feb. 26, 2015). "[*S*]*tare decisis* has developed as an informal norm that may occasionally bend to changing circumstances." *Id.* at 1.

[222] Statistical Analysis of Survey Question 23, *infra* app. 1, at 117.

[223] *See* Survey of Judges Question 2, *infra* app. 2, at 146.

[224] Survey of Judges Question 23, *infra* app. 2, at 177.

represents a greater likelihood of exercising an alignment preference than exists in most other contexts.[225] It may be that a longstanding rule is more likely to be a good rule, because if it were not a good rule, even within the same court, the holding might be limited or expanded over time by the judges applying it. When questioned specifically about considerations that likely would influence a decision to exercise a correctness preference, nearly three-quarters of the survey participants indicated that if the precedent of the Houston sister court were a recent holding rather than a longstanding rule, they probably would conclude that it is better to go ahead and choose the better rule even though doing so would create a split of authority because the holding of the Houston sister court, though binding on that court, is not yet a firmly established rule.[226]

E. Correctness Preference for Most Judges Whether Issue Is Perceived as Important or Minor

More than half (55%) of the survey participants indicated that the importance of the issue to the jurisprudence of the state was a factor that would significantly influence their decision.[227] When questioned specifically about considerations likely influencing a decision to exercise a correctness preference, nearly the entire field (93%) indicated that if the precedent of the Houston sister court concerned an important issue, they would exercise a correctness preference because of the significance of the matter.[228] Similarly, a large majority (81%) responded that if the issue is of great importance, then the key consideration in most cases should be which of the possibilities is the soundest choice.[229]

Even when the issue being decided is a matter the judge deems relatively unimportant, a very large majority (81%) still would exercise a correctness preference.[230] Only 19% responded that because the issue is a minor one, they most likely would exercise an alignment preference.[231] Yet, a quarter of the survey participants agreed that in deciding a relatively

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[225] *See* Survey of Judges Question 23, *infra* app. 2, at 177.

[226] Survey of Judges Question 22, *infra* app. 2, at 174–76.

[227] Survey of Judges Question 16, *infra* app. 2, at 166–67.

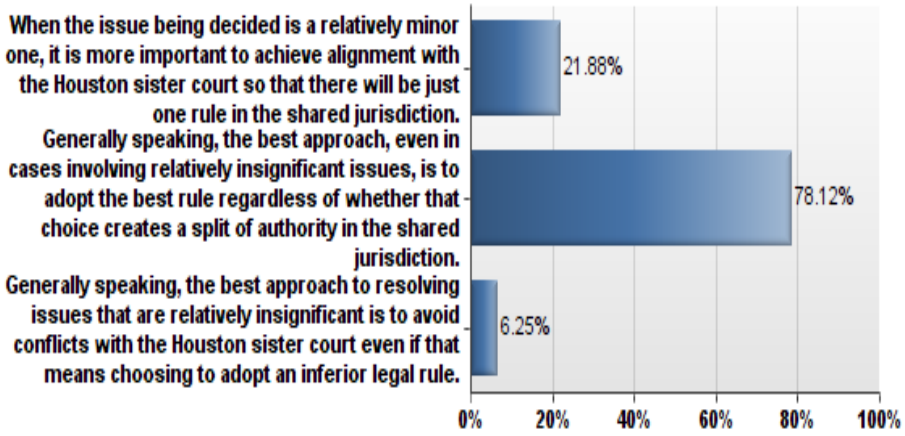
[228] Survey of Judges Question 22, *infra* app. 2, at 174–76.

[229] Survey of Judges Question 3, *infra* app. 2, at 147–49.

[230] Survey of Judges Question 6, *infra* app. 2, at 152.

[231] Survey of Judges Question 6, *infra* app. 2, at 152.

insignificant issue, it is more important to exercise an alignment preference.[232] In responding to a similar inquiry, nearly the same percentage (22%) agreed that when the issue being decided is a minor one, it is more important to achieve alignment so that there will be just one rule in the shared jurisdiction.[233]



A small percentage (6%) believed that, generally speaking, the best approach to resolving issues that are relatively insignificant is to avoid conflicts with the sister court, even if that means choosing to adopt an inferior legal rule.[234] And, a sizeable majority (78%) believed the best approach, even in cases involving relatively insignificant issues, is to adopt the best rule regardless of whether that choice creates a split of authority.[235]

The empirical research from the survey of cases indicates that sizeable percentages of the conflicts at issue in the Split-of-Authority Pairs involved matters of statutory interpretation[236] and jurisdiction,[237] areas of the law most would not consider likely to produce minor or insignificant issues. Likewise, nearly one-third of the cases implicated the rights of a criminal defendant, which similarly are not generally considered to spawn issues likely to be deemed minor or insignificant.[238] Although no effort was made

[232] Survey of Judges Question 34, *infra* app. 2, at 188.

[233] Survey of Judges Question 9, *infra* app. 2, at 155–56.

[234] Survey of Judges Question 9, *infra* app. 2, at 155–56.

[235] Survey of Judges Question 9, *infra* app. 2, at 155–56.

[236] *See* Statistical Analysis of Survey Question 34, *infra* app. 1, at 129.

[237] *See* Statistical Analysis of Survey Question 36, *infra* app. 1, at 131.

[238] Statistical Analysis of Survey Question 44, *infra* app. 1, at 136.

to classify the issues in the Split-of-Authority Pairs as "minor" or "important," the subject matter, nature of the conflicts, and rights implicated in those conflicts reveal what many might deem to be a mixture of both and, in this sense, correlate loosely with the finding in the Judicial Survey Responses that a majority of the judges tend to exercise a correctness preference, regardless of the importance of the issue under consideration.[239]

F. Preferences When Issue Being Decided Is Likely to Be a Frequently Recurring One

Recall that conflicts in statutory interpretation and jurisdictional issues tend to be particularly problematic because these issues tend to arise frequently.[240] The same is true for legal standards because they tend to be applied with great regularity.[241] The empirical research revealed 58% of the conflicts involved statutory interpretation,[242] 31% involved jurisdiction,[243] and 27% involved legal standards,[244] meaning that sizeable percentages of the conflicts are likely to be frequently recurring issues. The Judicial Survey Responses confirmed the very strong tendency of judges to select correctness over alignment in deciding these kinds of matters.[245] Specifically, no participants indicated an alignment preference for the resolution of frequently recurring issues, and a large majority of the survey participants (65%) agreed that if the issue is likely to be a frequently recurring one, then it is more important to exercise a correctness preference:[246]

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[239] *See* Survey of Judges Question 9, *infra* app. 2, at 155–56.

[240] *See supra* Part IX.

[241] *See supra* Part IX.

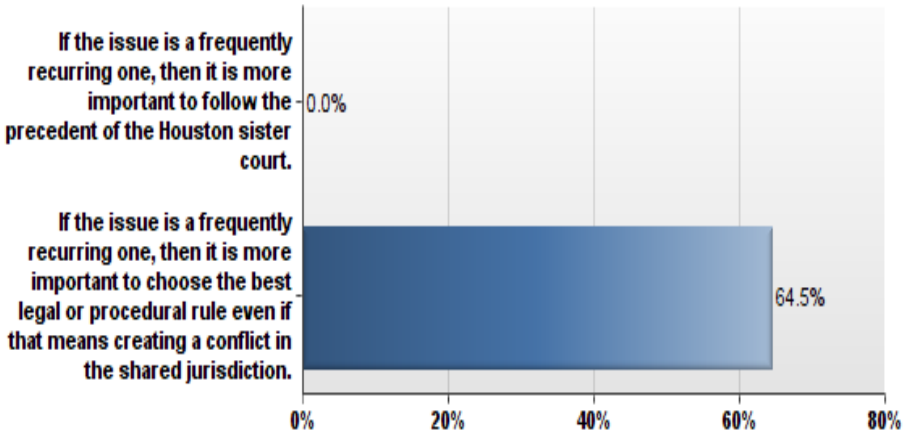
[242] Statistical Analysis of Survey Question 34, *infra* app. 1, at 129.

[243] Statistical Analysis of Survey Question 36, *infra* app. 1, at 131.

[244] Statistical Analysis of Survey Question 40, *infra* app. 1, at 133.

[245] *See* Survey of Judges Question 2, *infra* app. 2, at 146.

[246] Survey of Judges Question 3, *infra* app. 2, at 147–49.



When questioned specifically about considerations that likely would influence a decision to exercise a correctness preference, 90% of the survey participants indicated that if the precedent of the Houston sister court concerned an issue that was likely to become a frequently recurring one, they probably would exercise a correctness preference.[247] When questioned about cases in which they would exercise an alignment preference, only a small percentage of survey participants (7%) responded that if the precedent of the Houston sister court concerned an issue that already was a frequently recurring one, they probably would conclude that it is better to reach alignment with the sister court rather than to create a conflict on an issue that arises frequently in both courts.[248]

X. OBSERVATIONS AND REFLECTIONS

Even in a place where predictability in the law is crucial and the loss of predictability is problematic, on almost every index of inquiry, judges place greater importance on correctness than alignment.[249] How should litigants and the legal community respond to this judicial priority? This question is best answered in the context of the stated objectives identified at the outset of the study.

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[247] Survey of Judges Question 22, *infra* app. 2, at 174–76.

[248] Survey of Judges Question 23, *infra* app. 2, at 177.

[249] *See* Survey of Judges Question 2, *infra* app. 2, at 146.

A. Enhancing the Development of the Law and Legal Education in Areas of the Law in Which Predictability Is Especially Valued

Given that choosing the best rule is the most important consideration for most judges in most cases,[250] legal educators and academicians may wish to consider whether the aspects of existing multi-factor tests that emphasize predictability in the law, such as the one contained in the Restatement (Second) of Conflict of Laws, adequately reflect this judicial priority.[251] If, as this study shows, judicial decision-makers tend to share a dominant philosophical approach that favors correctness over alignment, are factors that stress the need for predictability in the law accurate reflections of judicial concern and focus? Or, should these factors be given greater attention and emphasis in an effort to provoke a shift in judicial priorities?

At least some of the various considerations will point in different directions in all but the simplest case. Consequently, anytime a judge considers the "predictability choice," the decision will be an accommodation of conflicting values, but, in most scenarios, the judge is apt to exercise a correctness preference.[252] Should the Restatement factors or the relative weight assigned to them be modified to take better account of the reality that most judges give correctness a significantly higher priority than alignment?

The academic community performs a watchdog function for the legal community as a whole. Given this study's findings, perhaps watchdogs will be prompted to initiate new dialogues about which philosophical approach—correctness or alignment—is more likely to lead to just outcomes when those approaches come in conflict. Because, in such cases, one goal comes at the cost of the other, we all should ask what steps, if any,

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[250] *See* Survey of Judges Question 2, *infra* app. 2, at 146.

[251] *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f) (1971) (listing "certainty, predictability, and uniformity of result" as a factor relevant to the choice of applicable rule of law when there is no statutory directive of a court's own state on choice of law). The Comments to the Restatement (Second) of Conflict of Laws note that predictability and uniformity "are important values in all fields of law." *Id.* § 6(2)(f) cmt. i (1971). The same is true for the protection of justified expectations, a closely related concept. *See id.* § 6(2)(g) cmt. g (1971) (explaining rationale of factor relevant to the choice of applicable rule of law when there is no statutory directive of a court's own state on choice of law and stating that it would be unfair to hold a person liable under the law of one jurisdiction when he had justifiably conformed his conduct to the law of another jurisdiction).

[252] *See* Survey of Judges Question 2, *infra* app. 2, at 146.

can be taken to improve the delivery of justice when courts must choose between those competing values.

B. Increasing Effectiveness of Lawyers and Litigants in Appellate Courts

Understanding the judicial motivation for the "predictability choice" will help lawyers become more effective advocates in cases that compel a judicial choice between correctness and alignment. What is the judicial impetus for exercising a correctness preference? Is it to adopt and apply what the judge believes to be the soundest or most efficient rule? Is the judge's choice based on the judge's handicapping the higher court's likely decision should the higher court grant review? Or, is the judge's decision simply a manifestation of the judge's considered judgment that not having a uniform rule is a lesser evil than not having a sound rule?

The study showed that when faced with the choice of exercising an alignment preference or a correctness preference, nearly all judges tend to exercise a correctness preference.[253] The explanation for this choice might be more nuanced than the strong numbers indicate. It could be that, by exercising the correctness preference, the judge is simply following the rule that the judge is convinced would be adopted by the higher court if and when the higher court should reach the issue. Or, it could be that in exercising a correctness preference, the judge is simply doing what the judge believes to be right, hoping that decision will be affirmed on review but making the choice regardless. Whatever the motivation for the choice, it is clear that most judges choose correctness over alignment in most circumstances.[254] When lawyers and litigants better understand this judicial priority, they will be more effective in presenting arguments before appellate courts.

For example, by taking account of the judicial preference for correctness, lawyers and litigants will be better equipped to prioritize their issues and appellate points. Knowing that, for most judges, alignment has a lower judicial priority than correctness can help lawyers develop strategies for presenting arguments in the two categories of cases most likely to be impacted in favor of an alignment preference: (1) cases in which the

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[253] *See* Survey of Judges Question 2, *infra* app. 2, at 146.

[254] *See* Survey of Judges Question 2, *infra* app. 2, at 146.

difference in possible legal rules to be applied is relatively insignificant[255] and, to a lesser extent, (2) cases in which the issue is a relatively minor one.[256] A winning combination in the first category might be to stress the similarities and minimize the differences in the possible choices while also emphasizing the benefits of promoting uniformity in the law.

When only minor differences exist between the relevant components of the rules under consideration, lawyers may want to urge judges to consider whether alignment would achieve the better outcome. Likewise, when the issue is a minor one, the best course may be to stress the importance of achieving uniformity and to explain why this consideration should prevail given the relative insignificance of the particular issue being decided.

In all other cases, lawyers might make strategic choices to turn their attention and energy to arguments that have a better chance for success, such as persuading the court of the superiority of the rule being advocated. Appellate briefing rules typically impose word or page limitations.[257] To comply, lawyers often must eliminate or cut short some of their arguments. In making these necessary assessments, lawyers may want to rethink emphasis and placement of "alignment" arguments and adjust the briefing allocation accordingly. Most intermediate court judges are more likely to be persuaded by the soundness of a legal rule or the greater efficiency of a procedural rule than by the need to achieve uniformity of outcomes.[258]

Still, even in cases in which judges are more likely to exercise a correctness preference, the importance of fostering uniformity, certainty, and predictability in the law is worth mentioning because the findings show that these arguments resonate with all judges at some level.[259] The findings also show that in cases in which the panel is divided and the majority of panel members has exercised a correctness preference, a dissenting or concurring judge sometimes makes the failure to reach alignment a basis for the separate writing or at least mentions the conflict in the concurring or dissenting opinion.[260] A higher court may be more persuaded by the need

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[255] *See* Survey of Judges Question 33, *infra* app. 2, at 187.

[256] *See* Survey of Judges Question 6, *infra* app. 2, at 152.

[257] *See* TEX. R. APP. P. 9.4(i)(2).

[258] *See* Survey of Judges Question 2, *infra* app. 2, at 146.

[259] *See* Survey of Judges Question 24, *infra* app. 2, at 178; Survey of Judges Question 36, *infra* app. 2, at 190.

[260] *See* Statistical Analysis of Survey Question 25, *infra* app. 1, at 119; Statistical Analysis of Survey Question 26, *infra* app. 1, at 120.

for predictability in the law, so the best strategy may be to adjust emphasis and word allocation for the "predictability" argument rather than eliminate it altogether.

C. Increasing Judicial Awareness and Effectiveness

Judges can become more effective by understanding the consequences of exercising their judicial preferences. Weighing the cost of choosing correctness over alignment is part of the judicial function. If judges believed the consequences of their choices to be greater, they might evaluate the cost of exercising a correctness preference differently.

On the whole, judges recognize the balancing of interests the "predictability choice" commands.[261] They understand that the judicial role is not only to mete out justice in individual cases but also to meet the public's expectations by applying the law uniformly, so that the law will be predictable and the public will view the judicial process as fair.[262] Being consistent is part of being fair. Consistency produces predictability. Predictability fuels certainty. And, certainty inspires public confidence.

The public is confident in an umpire who calls pitches the same way for both teams. If the calls are predictable, the players and the fans see the game as fair. Because the public tends to measure fairness by predictability, the public expects the calls to be predictable. And, the public expects umpires to value predictability.

Judges value predictability.[263] Yet, valuing predictability is not the same as promoting it. Competing values force hard choices. Even more than they value predictability, judges value the quality of the rules that define the law.

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[261] *See, e.g.*, Resurgence Fin., L.L.C. v. Lawrence, No. 01-08-00341-CV, 2009 WL 3248285, at *3 (Tex. App.—Houston [1st Dist.] Oct. 8, 2009, no pet.) (noting that court generally does not "overrule precedent absent a compelling reason, especially when, as here, doing so would cause a split of authority between our sister court with which we exercise concurrent appellate jurisdiction"); Howeth Invs., Inc. v. City of Hedwig Vill., 259 S.W.3d 877, 901 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (declining to overturn 33-year old precedent interpreting statute that would result in split with the Fourteenth Court of Appeals, when no compelling reason existed to do so); *see also* Tucker v. Thomas, 405 S.W.3d 694, 717 (Tex. App.—Houston [14th Dist.] 2011), *rev'd on other grounds*, 419 S.W.3d 292 (Tex. 2013) (Frost, J., concurring and joined by two other justices in en banc decision) (observing that "it is in the best interest of all concerned that, whenever possible, the two Houston-based courts of appeals achieve alignment").

[262] *See* Survey of Judges Question 36, *infra* app. 2, at 190.

[263] *See* Survey of Judges Question 36, *infra* app. 2, at 190.

It is a matter of priorities. One goal comes at the price of the other. When the best rules are not the ones that would promote predictability in the law, even judges who value predictability choose not to promote it.

What can and should judges do to avoid frustrating the public's legitimate expectations?[264] What is the answer to the confusion, uncertainty, and loss of predictability that sometimes result from the exercise of a correctness preference? These questions bring the relationship between predictability and the rule of law into sharper focus. As we unpack the "predictability choice," we see more clearly both the value of predictability in a rule-of-law system and the cost of its loss.

Judges, whether in Texas or elsewhere, are not going to rule in a way that will eliminate all conflicts in the law. Because most intermediate court judges are prone to exercise a correctness preference in most circumstances,[265] the reality is that they tend to create rather than eliminate splits in authority. Even so, these judges can take measures to help preserve and restore predictability in the law. Through the power of separate writing, intermediate court judges can enhance the possibility of conflict resolution by a higher court.

At times, a separate writing can become a surrogate for a correctness preference, without creating a split of authority, so that a judge can meet "correctness" objectives while exercising an alignment preference. About half of the judges surveyed reported that a consideration likely to influence a correctness preference was concern that if they chose alignment instead, the judge or the court might be perceived as having adopted an inferior rule.[266] One option for these judges would be to choose alignment, agreeing that the sister court's existing precedent should control the outcome, but also write separately to suggest why that precedent may be anchored in an inferior rule. The concurring judge could explain the benefits of a different, better rule, making the case for a change but not creating a conflict. The separate writing is more likely to spur the higher court to consider the issue. In some cases, this long-term approach could address judicial concerns about existing precedent while also preserving predictability in the law.

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[264] *See* Lindquist & Cross, *supra* note 221, at 1 ("When judges dispense with prevailing doctrine in favor of a new rule, it has the potential to throw citizens' expectations into disarray. If judges frequently choose to do so, it creates a less predictable legal environment for the development of economic and other human relations.").

[265] *See* Survey of Judges Question 2, *infra* app. 2, at 146.

[266] Survey of Judges Question 21, *infra* app. 2, at 174.

Because this alternate path offers the potential to ultimately achieve the goals of both alignment and correctness, some judges might find it more appealing than creating a conflict in the law.

Even judges who are unwilling to choose alignment can utilize separate writings to further the cause of predictability. For example, a judge on a panel whose members are opting for correctness might concur in the judgment, agreeing that the court is rightly adopting the better rule, yet write separately to explain the dilemma and to lament the loss of predictability in the law that will result from the court's decision not to follow existing precedent. A dissenter could make the same point advocating alignment. In these separate-writing scenarios, a concurring or dissenting opinion is apt to capture the attention of a higher court (or a legislative body) and lay the groundwork for it to consider the adoption of a new rule that would bring uniformity to the state's jurisprudence.

Whether writing separately or for the court, when parting with a sister court it is especially important for judges to write with clarity and precision. In opting for correctness over alignment, judges sometimes gingerly undertake to distinguish rather than outright reject another court's precedent. At times, diplomacy swallows lucidity, leaving the illusion that there is some semblance of alignment or acceptance despite the refusal to apply the sister court's precedent. Dubious conflicts can be even more problematic than clear-cut ones.

Legitimate distinctions push the development of the law. False or immaterial distinctions muddle the law and tend to mask splits in authority, often creating confusion and leaving the jurisprudence in a mangled mess. And, because today's empty distinctions are tomorrow's binding precedents, they make it harder for judges to grapple with the split of authority in future cases.

Fuzzy differences hinder conflict resolution. Clear disagreement invites it. Thus, judicial acknowledgement of differences in the interpretation of the law is a crucial first step to settling clashes in the jurisprudence. For judges choosing correctness over alignment, the best course is to be transparent in rejecting the other court's precedent. By stating plainly that the court is choosing not to follow another court's precedent, judges can ensure that the conflict will be well-defined and ripe for resolution.

Finally, in facing the "predictability choice," appellate judges need to be especially mindful that if they exercise a correctness preference, the

resulting doctrinal ambiguity will likely create interpretive problems for trial court judges in jurisdictions that have yet to set precedent.[267] Likewise, the lack of consistency and coherence in the law might make it harder for trial and appellate courts to meet the public's legitimate expectations,[268] and public reliance on judicial opinions might suffer. The resulting lack of clarity in the law is also likely to vex practitioners[269] and litigants alike and bring greater costs and uncertainty to a process that is already costly and uncertain.[270] In a larger context, judges must acknowledge that the loss of predictability in the law weakens the judicial process. Still, the message is not that judges should change their preferences or priorities, only that they should count the costs in making their choices.

XI. CONCLUSION

Judges readily acknowledge the value of predictability in the law and recognize its virtue as a stabilizing force in our legal system.[271] Yet, in cases that force a choice between correctness and alignment, they seldom choose

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[267] *See generally* DeForrest, *supra* note 32 (discussing difficulties for trial courts when faced with the prospect of deciding issues for which there are conflicting authorities from divisions within the intermediate court of appeals in state of Washington); Solomon, *supra* note 22 (condemning Texas jurisdictional overlaps for creating uncertainty about controlling legal authority).

[268] *See* Douglas Glen Whitman, *The Role of Panels in Enhancing Legal Predictability*, 25 INT'L REV. L. & ECON. 541, 542 (2005) ("If potential litigants cannot easily predict what rule a court will apply in their particular case, they will find it more difficult to choose their actions so as to avoid legal sanction and to coordinate their actions with each other. In other words, it is important for agents to be able to predict which rules the legal system will apply to them, regardless of whether those rules are deemed 'correct.'").

[269] *See* J. Thomas Sullivan, *Justice White's Principled Passion for Consistency*, 4. J. APP. PRAC. & PROCESS 79, 81 (2002) ("Uncertainty in doctrine, while undoubtedly of interest to academics and theoreticians, is an anathema to the practitioner whose sound counsel is dependent upon the stability that doctrinal certainty affords.").

[270] *See* John Y. Gotanda, *Consistently Inconsistent: The Need for Predictability in Awarding Costs and Fees in Investment Treaty Arbitrations*, 28 ICSID REVIEW 420, 421 (2013) (The lack of predictability is problematic because there is "uncertainty in evaluating the economic cost of pursuing or defending an action and it ultimately hinders the parties' ability to settle actions"); Hardisty, *supra* note 49, at 55 ("[I]ncreased predictability tends to reduce litigation and increase the efficient operation of the judicial system").

[271] *See* Survey of Judges Question 36, *infra* app. 2, at 190.

to promote predictability.[272] Instead, they choose to tolerate unpredictability for the sake of a preferred rule.

An overwhelming majority of judges who participated in the study concluded that correctness should not be set aside to further the goal of predictability in the law even though predictability is crucial to the justice system as a whole.[273] Essentially, judges believe that if the price to be paid for predictability in the law is the adoption of an inferior legal or procedural rule, then that price is too high.[274] For most judges, the only exception is when the difference in the possible rules is slight or immaterial.[275] Otherwise, when the path divides before a judge and the judge must choose between the one that promotes predictability in the law and the one that promotes better legal reasoning or greater efficiency, for most judges, predictability is the road not taken.[276]

In the final analysis, though judges prize predictability in the law, they share a widely-held belief that in balancing these competing judicial priorities, the right choice is the "best rule."[277] It is not an easy or appealing choice for judges in shared-jurisdiction courts, where the consequences of forsaking alignment are troubling. These judges understand that by opting for correctness, they necessarily must sacrifice predictability, a value they prize and a loss they mourn. The judicial angst is palpable. If, in the shared-jurisdiction courts, where the judicial incentive for alignment is the greatest, judges do not choose the path that would promote predictability in the law by bringing uniformity to the shared jurisdiction, what can we expect from judicial decision-makers in other places, who would be far less incentivized to choose alignment? They are unlikely to make predictability in the law a higher judicial priority.

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[272] *See* Survey of Judges Question 2, *infra* app. 2, at 146.

[273] *See* Survey of Judges Question 28, *infra* app. 2, at 182.

[274] *See* Survey of Judges Question 28, *infra* app. 2, at 182.

[275] *See* Survey of Judges Question 33, *infra* app. 2, at 187.

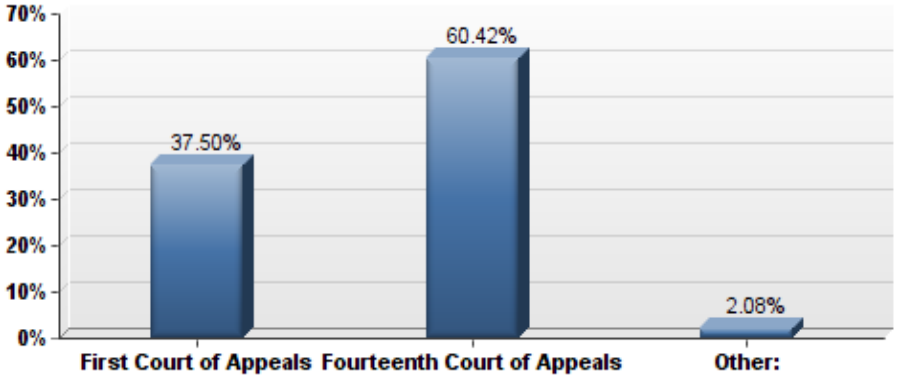
[276] *See* Survey of Judges Question 28, *infra* app. 2, at 182.

[277] *See* Survey of Judges Question 3, *infra* app. 2, at 147–49.

APPENDIX 1: EXCERPTS FROM STATISTICAL ANALYSIS OF THE SURVEY OF CASES (SPLIT-OF-AUTHORITY PAIRS)

CONFLICT CREATION

23. Which court was the second to decide the issue?

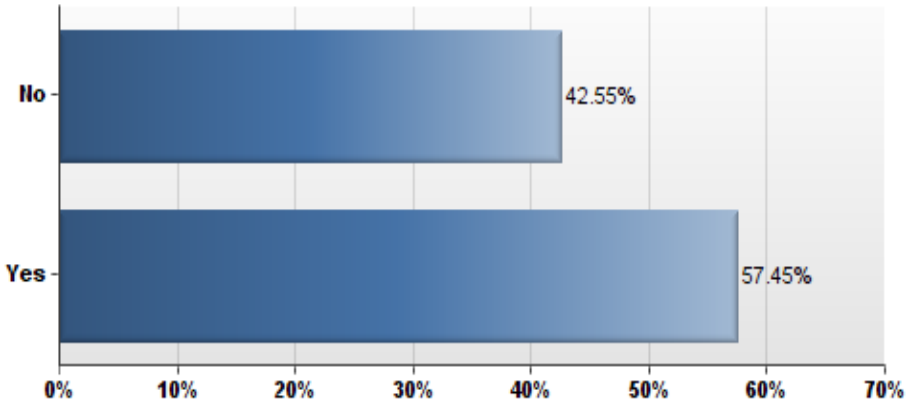


Answer		%
First Court of Appeals		37.5%
Fourteenth Court of Appeals		60.4%
Other (Opinions Issued the Same Day)		2.1%
Total		100.0%

Statistic	Value
Min Value	1
Max Value	4
Mean	1.67
Variance	0.35
Standard Deviation	0.60
Total Responses	48

RECOGNITION OF CONFLICT ON FACE OF OPINION(S)

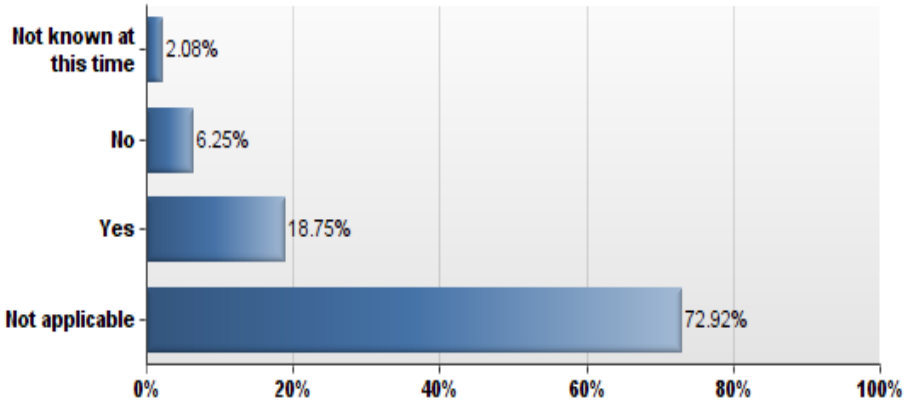
24. Was the conflict noted on the face of the second-to-decide court's majority opinion?



Answer		Response	%
No		20	42.6%
Yes		27	57.4%
Total		47	100.0%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.43
Variance	0.25
Standard Deviation	0.50
Total Responses	47

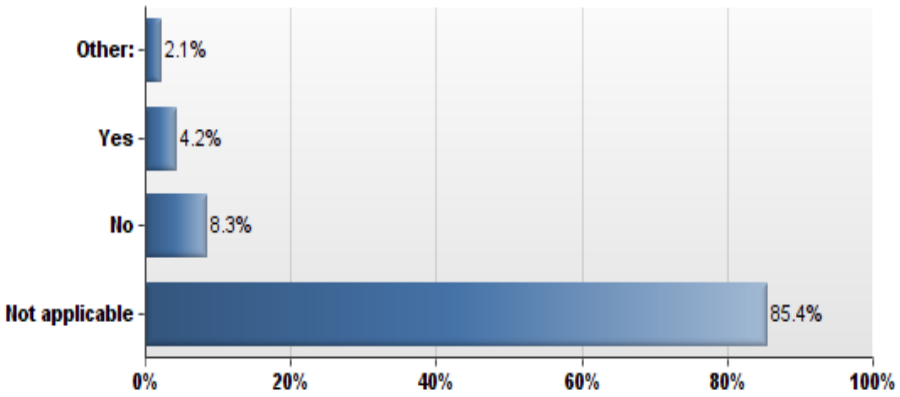
25. Was the conflict noted on the face of the dissenting opinion in the second-to-decide court, if applicable?



Answer		Response	%
Not known at this time		1	2.1%
No		3	6.3%
Yes		9	18.8%
Not applicable		35	72.9%
Total		48	100.0 %

Statistic	Value
Min Value	1
Max Value	4
Mean	2.58
Variance	0.67
Standard Deviation	0.82
Total Responses	48

26. Was the conflict noted on the face of the concurring opinion in the second-to-decide court, if applicable?



Answer		Response	%
Other (Concurred in Result Only)		1	2.1%
Yes		2	4.2%
No		4	8.3%
Not applicable		41	85.4%
Total		48	100.0%

Statistic	Value
Min Value	1
Max Value	5
Mean	2.88
Variance	0.32
Standard Deviation	0.57
Total Responses	48

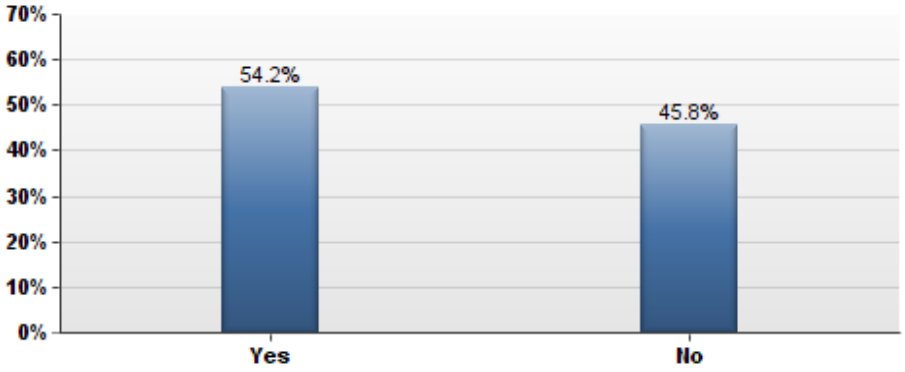
45. Did any of the opinions issued by the second-to-decide court contain an expression of regret or dissatisfaction due to the creation of a split of authority in the shared jurisdiction?

Answer		Response	%
Yes		3	6.3%
Not known at this time		4	8.3%
No		41	85.4%
Total		48	100.0%

Statistic	Value
Min Value	1
Max Value	3
Mean	2.02
Variance	0.15
Standard Deviation	0.39
Total Responses	48

CONFLICT RESOLUTION

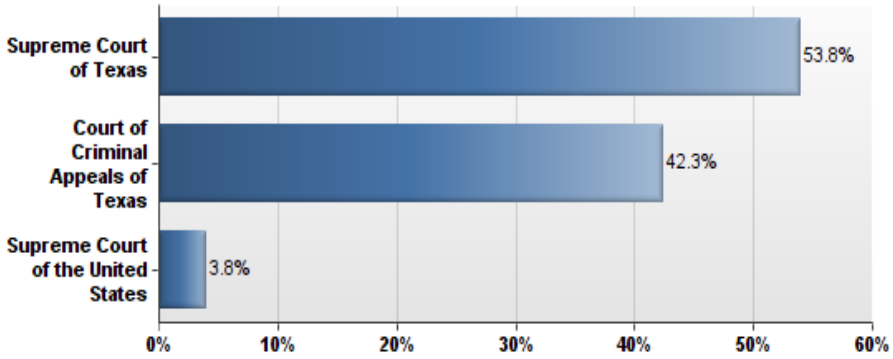
27. Was the conflict later resolved by a higher court?



Answer		Response	%
Yes		26	54%
No		22	46%
Total		48	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.46
Variance	0.25
Standard Deviation	0.50
Total Responses	48

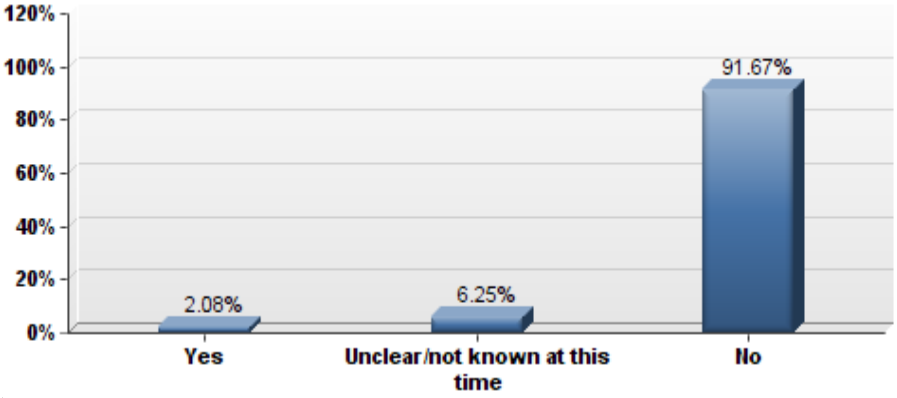
28. If you answered the preceding question "yes," indicate which higher court resolved the conflict?



Answer		Response	%
Supreme Court of Texas		14	53.8%
Court of Criminal Appeals of Texas		11	42.3%
Supreme Court of the United States		1	3.8%
Total		26	100.0%

Statistic	Value
Min Value	1
Max Value	3
Mean	1.50
Variance	0.34
Standard Deviation	0.58
Total Responses	26

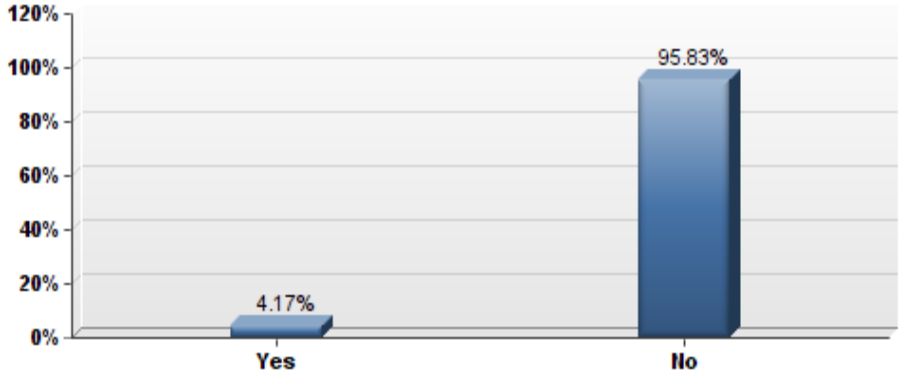
29. Was the conflict later resolved through legislative action?



Answer		Response	%
Yes		1	2.1%
Unclear/not known at this time		3	6.3%
No		44	91.7%
Total		48	100.0%

Statistic	Value
Min Value	1
Max Value	3
Mean	2.04
Variance	0.08
Standard Deviation	0.29
Total Responses	48

30. Was the conflict later resolved by en banc review (in a later case) in the first court to decide?



Answer		Response	%
Yes		2	4.2%
No		46	95.8%
Total		48	100.0%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.96
Variance	0.04
Standard Deviation	0.20
Total Responses	48

31. If you answered the preceding question "yes," indicate which court resolved the question en banc:

Answer		Response	%
First Court of Appeals		0	0.0%
Fourteenth Court of Appeals		2	100.0%
Total		2	100.0%

Statistic	Value
Min Value	2
Max Value	2
Mean	2.00
Variance	0.00
Standard Deviation	0.00
Total Responses	2

32. Was the conflict later resolved by en banc review (in a later case) in the second court to decide?

Answer		Response	%
Yes		1	2%
No		47	98%
Total		48	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.98
Variance	0.02
Standard Deviation	0.14
Total Responses	48

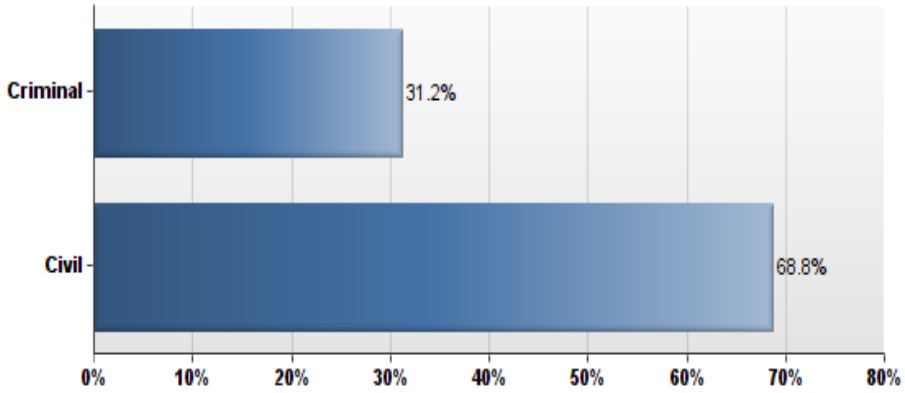
33. If the answer to the preceding question is "yes," indicate which court resolved the conflict en banc:

Answer		Response	%
First Court of Appeals		0	0%
Fourteenth Court of Appeals		1	100%
Unclear/not known at this time		0	0%
Total		1	100%

Statistic	Value
Min Value	2
Max Value	2
Mean	2.00
Variance	0.00
Standard Deviation	0.00
Total Responses	1

NATURE OF CONFLICTS - CIVIL/CRIMINAL

42. Were the appeals in the Split-of-Authority Pair from a criminal or civil trial court?

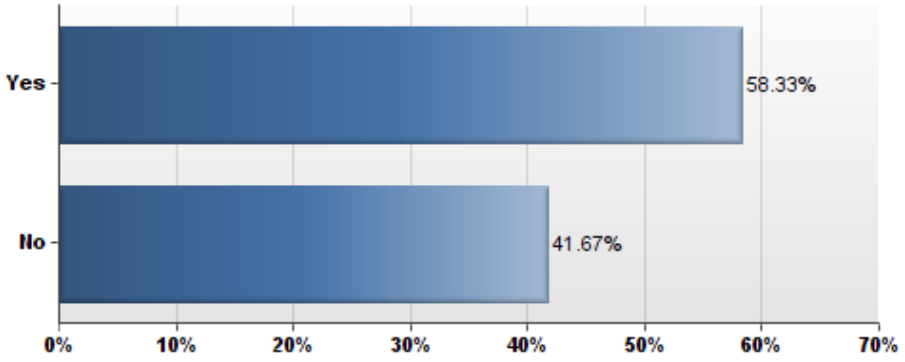


Answer		Response	%
Criminal		15	31.3%
Civil		33	68.8%
Total		48	100.0%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.31
Variance	0.22
Standard Deviation	0.47
Total Responses	48

NATURE OF CONFLICTS - SUBJECT MATTER

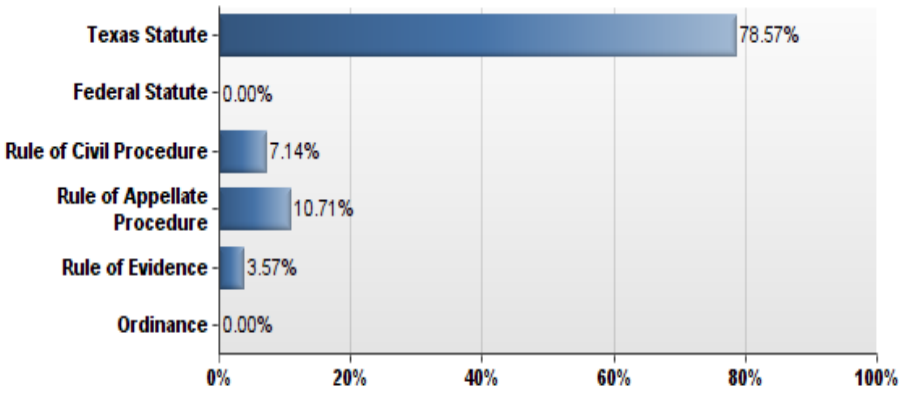
34. Was statutory interpretation implicated to some degree?



Answer		Response	%
No		20	41.7%
Yes		28	58.3%
Total		48	100.0%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.42
Variance	0.25
Standard Deviation	0.50
Total Responses	48

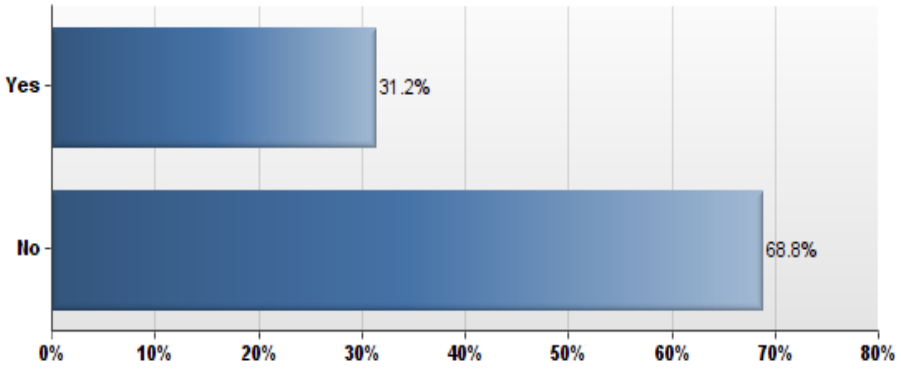
35. If "yes," indicate which of the following type (statute, rule, etc.) was involved in the conflict:



Answer		Response	%
Texas Statute		22	78.6%
Rule of Appellate Procedure		3	10.7%
Rule of Civil Procedure		2	7.1%
Rule of Evidence		1	3.6%
Ordinance		0	0.0%
Federal Statute		0	0.0%

Statistic	Value
Min Value	1
Max Value	5
Total Responses	28

36. Did the conflict involve a jurisdictional issue?



Answer		Response	%
Yes		15	31.3%
No		33	68.8%
Total		48	100.0%

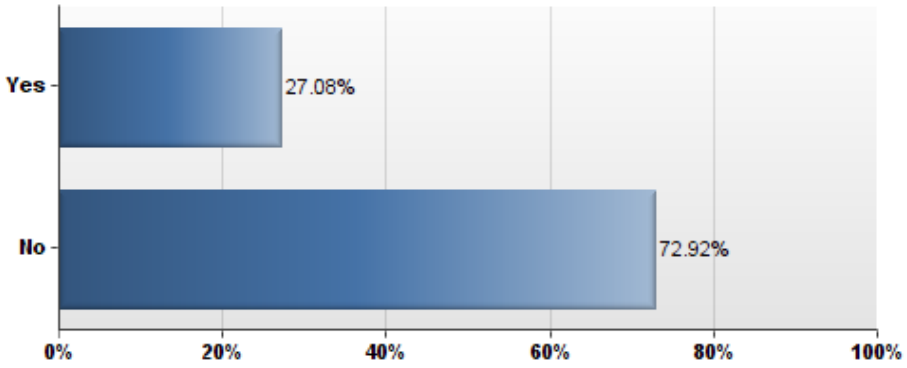
Statistic	Value
Min Value	1
Max Value	2
Mean	1.69
Variance	0.22
Standard Deviation	0.47
Total Responses	48

37. If "yes," indicate which of the following type of jurisdiction was involved in the conflict.

Answer		%
Trial Court Subject Matter Jurisdiction/Plea to the Jurisdiction		57.1%
Appellate Court Subject Matter Jurisdiction		28.6%
Personal Jurisdiction/Special Appearance		7.1%
Personal Jurisdiction/Service of Process		7.1%
Invocation of Appellate Court Jurisdiction/Notice of Appeal		7.1%
Habeas Corpus Jurisdiction		7.1%

Statistic	Value
Min Value	1
Max Value	8
Total Responses	14

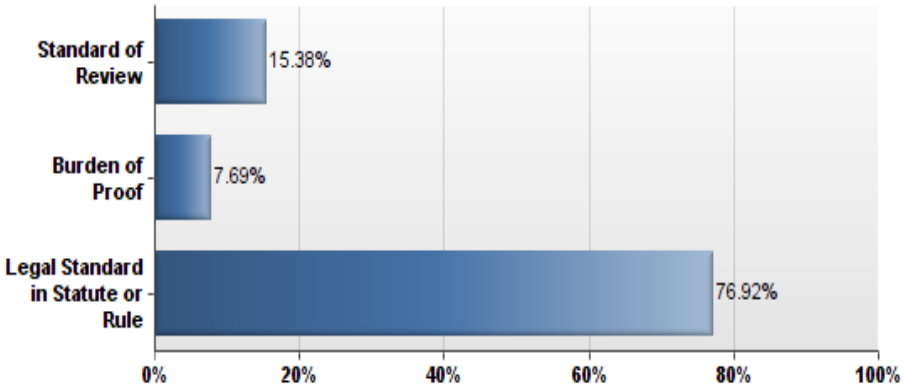
40. Did the conflict involve the determination/adoption of a legal standard?



Answer		Response	%
Yes		13	27.1%
No		35	72.9%
Total		48	100.0%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.73
Variance	0.20
Standard Deviation	0.45
Total Responses	48

41. If "yes," identify the type of legal standard involved?



Answer		Response	%
Standard of Review		2	15.4%
Burden of Proof		1	7.7%
Legal Standard in Statute or Rule		10	76.9%
Total		13	100.0%

Statistic	Value
Min Value	1
Max Value	5
Mean	4.15
Variance	2.64
Standard Deviation	1.63
Total Responses	13

54. Did the conflict in the Split-of-Authority Pair involve attorney's fees?

Answer		%
Yes		6.3%
No		93.8%
Total		100.0%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.94
Variance	0.06
Standard Deviation	0.24
Total Responses	48

RIGHTS IMPLICATED

44. Whose rights were implicated?

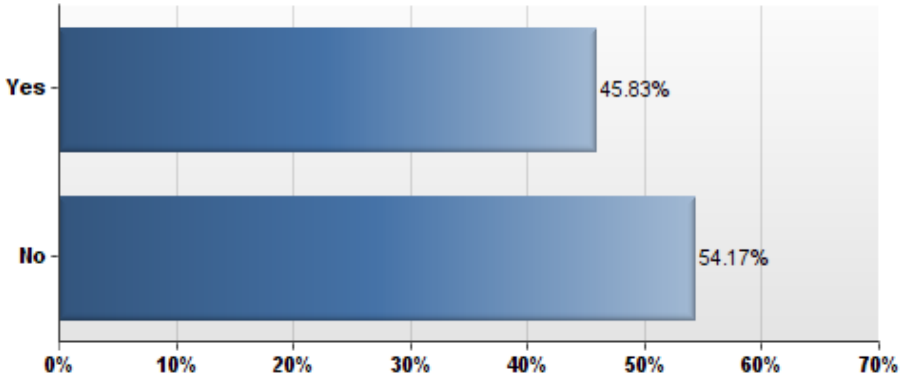
Answer		%
Criminal Defendant		31.3%
Spouses/Former Spouses		14.6%
Other: (Specify)		12.5%
Personal Injury Plaintiff/Other Putative Tortfeasor		10.4%
Government Actor or Official/Complainant		8.3%
Parent-Child		8.3%
Employer-Employee		6.3%
Private Property Owners		6.3%
Contracting Parties		4.2%
Debtor-Creditor		4.2%
Government-Property Owner		4.2%
Mentally or Emotionally Impaired/Mental Health Patient or Person Sought to be Committed		4.2%
Financial Institution/Borrower		2.1%
Lawyers/Law Firms Based on Conduct in Case (Sanctions)		2.1%
Personal Injury Plaintiff/Medical or Healthcare Provider		2.1%
Plaintiff asserting Malpractice or Professional Negligence/Medical Professional		2.1%
Shareholder/Corporation		2.1%

Other: (Specify)
Litigant/Party to Case/Claimant
Individual Litigants on Conversion Claim
Litigant/appellant in court (procedural rights)
Litigant/defendant in tort action
Litigant/Claimant for Attorney's Fees
Litigant briefing in courts of appeals

Statistic	Value
Min Value	1
Max Value	27
Total Responses	48

CIRCUMSTANCES SURROUNDING CONFLICTS

39. Was this conflict in a rapidly developing area of the law [24 months or less between the two conflicting opinions]?



Answer		Response	%
Yes		22	45.8%
No		26	54.2%
Total		48	100.0%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.54
Variance	0.25
Standard Deviation	0.50
Total Responses	48

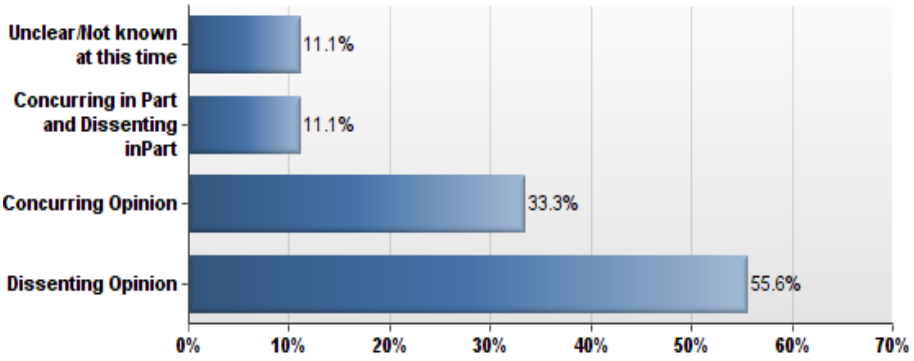
SEPARATE WRITING (CONCURRING AND DISSENTING OPINIONS)

5. Was there a separate writing (dissenting or concurring opinion) in the First Court of Appeals?

Answer		Response	%
Unclear/Not known		1	2.1%
Yes		8	16.7%
No		39	81.3%
Total		48	100.0%

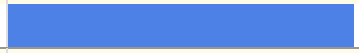
Statistic	Value
Min Value	1
Max Value	3
Mean	1.85
Variance	0.17
Standard Deviation	0.41
Total Responses	48

6. Indicate the nature of the separate writing?



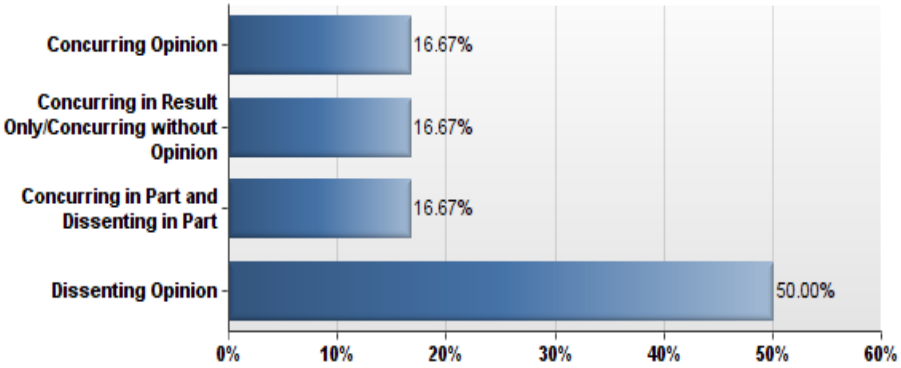
Statistic	Value
Min Value	1
Max Value	8
Total Responses	9

15. Was there a separate writing (dissenting or concurring opinion) in the Fourteenth Court of Appeals?

Answer		Response	%
Yes		13	27.1%
No		35	72.9%
Total		48	100.0%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.73
Variance	0.20
Standard Deviation	0.45
Total Responses	48

16. Indicate the nature of the separate writing?



Statistic	Value
Min Value	1
Max Value	4
Mean	3.00
Variance	1.45
Standard Deviation	1.21
Total Responses	12

TYPES OF OPINIONS IN SPLIT-OF-AUTHORITY PAIRS

12. What was the type of the First Court's opinion?

Answer		Response	%
Per Curiam Opinion		0	0.0%
En Banc Opinion		0	0.0%
Not known at this time		1	2.1%
Regular Panel Opinion		47	97.9%
Total		48	100.0%

Statistic	Value
Min Value	1
Max Value	4
Mean	1.06
Variance	0.19
Standard Deviation	0.43
Total Responses	48

22. What was the type of the Fourteenth Court's opinion?

Answer		Response	%
Per Curiam Opinion		1	2.1%
En Banc Opinion		2	4.2%
Regular Panel Opinion		45	93.8%
Total		48	100.0%

Statistic	Value
Min Value	1
Max Value	3
Mean	1.10
Variance	0.18
Standard Deviation	0.42
Total Responses	48

APPENDIX 2: SUMMARY AND STATISTICAL ANALYSIS OF RESPONSES TO JUDICIAL SURVEY QUESTIONNAIRE

The Courts of Appeals for the First and Fourteenth Districts of Texas, both based in Houston, share jurisdiction over civil and criminal appeals and original proceedings in the same ten counties. Judges serving on these shared-jurisdiction courts sometimes face the choice of adopting the precedent of the Houston sister court, thereby assuring uniformity in the shared jurisdiction, or choosing to adopt a different rule, which instead would create a conflict in the law of the shared jurisdiction.

I. For example, consider this scenario:

The Houston sister court already has set precedent on the issue in question. If panel members of one court choose what they perceive to be the better of two possible legal rules and the other Houston court already has gone the other way, they will create a split of authority in the shared jurisdiction. But, to achieve alignment with the Houston sister court and thus foster uniformity in the case law and predictability in the region, they instead must choose to adopt what they may perceive to be an inferior legal or procedural rule. A judge might choose to follow the Houston sister court's precedent in one case and choose not to do so in another case.

1. Which of the following statements best describes your observations and experiences from serving on a panel in one of both of the Houston shared-jurisdiction courts?

Answer		Response	%
[Correctness Preference] Most judges tend to choose what they perceive to be the better of two possible rules even though doing so would create a split of authority in the shared jurisdiction.		28	88%
[Alignment Preference] Most judges are inclined to follow the precedent already established by the Houston sister court, even in cases in which the alternative choices are perceived to be superior, so that there will not be a split-of-authority in the shared jurisdiction.		4	13%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.13
Variance	0.11
Standard Deviation	0.34
Total Responses	32

2. When faced with the choice described in the above scenario, some judges have a general preference for achieving alignment with the Houston sister-court for the sake of fostering uniformity, certainty, and predictability within the shared jurisdiction, even though that might mean choosing what they perceive to be an inferior legal rule. Other judges, when faced with the same choice, instead tend to choose what they consider to be the better legal rule even if that means creating or continuing a conflict with the Houston sister court. **Though a judge's choice might well vary from case to case or issue to issue, generally speaking, which of the following statements best describes your approach?**

Answer		Response	%
[Correctness Preference] I would tend to choose what I perceived to be the better legal or procedural rule even though doing so would create a split of authority in the shared jurisdiction.		31	97%
[Alignment Preference] I would be inclined to follow the precedent already established by the Houston sister court so that there would be just one rule in the shared jurisdiction, even if I perceived an alternative choice to be a better legal or procedural rule than the precedent of the Houston sister court.		1	3%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.03
Variance	0.03
Standard Deviation	0.18
Total Responses	32

3. Promoting predictability, as one option, and choosing the best legal rule to apply, as another are both recognized as beneficial to our legal system but, at times, judges must choose between the two. Either choice would advance one judicial objective while seemingly compromising the other. While you were on the bench, how did you generally choose between these competing values? [Check all that apply.]

Answer		Response	%
[Correctness Preference] Choosing the best legal or procedural rule is the most important consideration in most cases.		26	84%
[Alignment Preference] Ensuring that the people of the region do not have to choose between two equally binding yet opposite rules is the most important consideration in most cases.		0	0%
[Correctness Preference] If the issue is one of great importance, then the key consideration in most cases should be which of the possible legal or procedural rules is the soundest choice.		25	81%
The likelihood that a higher court will grant review in the case is a significant consideration.		15	48%
[Correctness Preference] If a higher court is very likely to address the issue in the near term, then it is more important to choose the best rule.		13	42%

[Alignment Preference] If the higher court is not very likely to resolve the issue in the near term, then it is more important to follow the precedent of the Houston sister court to avoid a split of authority in the shared jurisdiction.		2	6%
[Correctness Preference] Regardless of whether a higher court is likely to grant review, the driving consideration in most cases should be the adoption of the best rule of law or procedure.		24	77%
[Alignment Preference] Regardless of whether a higher court is likely to grant review, the driving consideration in most cases should be to avoid a conflict in the region's jurisprudence.		1	3%
[Alignment Preference] If the Houston sister court has well-established precedent that has been the rule for a long time and our court has no binding precedent, then it is more important to follow the precedent of the Houston sister court.		3	10%
[Correctness Preference] If the issue is in a rapidly developing area of the law, then it is more important to choose the best legal or procedural issue than to follow the precedent of the Houston sister court.		20	65%
[Alignment Preference]		0	0%

If the issue is a frequently recurring one, then it is more important to follow the precedent of the Houston sister court.			
[Correctness Preference] If the issue is a frequently recurring one, then it is more important to choose the best legal or procedural rule even if that means creating a conflict in the shared jurisdiction.		20	65%
Other considerations. Please explain:		1	3%

Statistic	Value
Min Value	1
Max Value	13
Total Responses	31

II. Please consider the following scenario and answer the questions that follow:

You are deciding a question that the Supreme Court of Texas has not addressed. The sister court in Houston already has addressed the issue in a published opinion that is a binding precedent of that court. Another Texas intermediate court of appeals also has addressed the issue and adopted a different rule.

4. Which of the following statements best describes how you most likely would decide the issue?

Answer		Response	%
[Alignment Preference] I would choose the precedent of the Houston sister court as a means of fostering uniformity and predictability within the shared jurisdiction.		0	0%
[Correctness Preference] I would choose the precedent of the Houston sister court only if I believed its precedent to be the best legal rule.		32	100%
Total		32	100%

Statistic	Value
Min Value	2
Max Value	2
Mean	2.00
Variance	0.00
Standard Deviation	0.00
Total Responses	32

5. Would your answer to Question 4 change if the issue concerned a matter that would be reviewed by the **Court of Criminal Appeals of Texas** rather than the **Supreme Court of Texas**?

Answer		Response	%
Yes		0	0%
No		32	100%
Total		32	100%

Statistic	Value
Min Value	2
Max Value	2
Mean	2.00
Variance	0.00
Standard Deviation	0.00
Total Responses	32

6. Assume that the issue being decided was a matter you deemed relatively unimportant—**a minor issue**. Which of the following statements best describes how you most likely would decide the issue?

Answer		Response	%
[Alignment Preference] Because the issue is a minor one, I would choose to follow the precedent of the Houston sister court for the sake of achieving uniformity in the region even though I believed that the Houston sister court chose the inferior legal or procedural rule.		6	19%
[Correctness Preference] Though the issue is a minor one, I still would be unwilling to choose what I considered to be an inferior legal or procedural rule even if it meant creating a conflict with the Houston sister court.		25	81%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.81
Variance	0.16
Standard Deviation	0.40
Total Responses	31

7. Would your answer to question 6 change if the issue concerned a matter that would be reviewed by the **Court of Criminal Appeals of Texas** rather than the **Supreme Court of Texas**?

Answer		Response	%
Yes.		2	6%
No		29	94%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.94
Variance	0.06
Standard Deviation	0.25
Total Responses	31

III. Please consider the following scenario and answer the questions that follow.

You are deciding a procedural issue that has not been addressed by the higher court or your court. The sister court in Houston and another Texas intermediate court already have addressed the issue in published opinions that are binding precedent of those respective courts. Both courts decided the issue the same way. Had you been deciding the issue in the first instance, you would have chosen a different rule, one you believed would provide greater efficiency. Still, the issue is one you deem to be minor (one of relatively little importance).

8. Which of the following statements best describes what you most likely would do?

Answer		Response	%
[Alignment Preference] I would choose the precedent already established by the Houston sister court even though that court did not choose the rule that would achieve the greatest efficiency.		9	28%
[Correctness Preference] I would choose the rule I believed would achieve the greatest efficiency even though doing so would create a split of authority in the shared jurisdiction.		23	72%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.72
Variance	0.21
Standard Deviation	0.46
Total Responses	32

9. With which of the following statements, if any, do you agree? [Check all that apply.]

Answer		Response	%
[Alignment Preference] When the issue being decided is a relatively minor one, it is more important to achieve alignment with the Houston sister court so that there will be just one rule in the shared jurisdiction.		7	22%
[Alignment Preference] When the issue being decided is relatively insignificant, it is less likely to be reviewed by a higher court and a decision to follow the inferior legal rule is less likely to be reversed.		8	25%
[Correctness Preference] Adopting a legal or procedural rule that achieves greater efficiency is generally more important that adopting a rule that achieves uniformity in the shared jurisdiction.		12	38%
[Correctness Preference] Generally speaking, the best approach, even in cases involving relatively insignificant issues, is to adopt the best rule regardless of whether that choice creates a split of authority in the shared jurisdiction.		25	78%

[Alignment Preference] Generally speaking, the best approach to resolving issues that are relatively insignificant is to avoid conflicts with the Houston sister court even if that means choosing to adopt an inferior legal rule.		2	6%
[Alignment Preference] If the decision is less likely to be reviewed by a higher court, judges on the Houston sister courts are more likely to choose the rule that would foster uniformity in the shared jurisdiction.		9	28%
[Correctness Preference] Regardless of whether the decision is less likely to be reviewed by a higher court, most judges on the Houston sister courts are more likely to choose the rule perceived to create the greatest efficiency.		11	34%
[Alignment Preference] If reversal by a higher court were not a consideration, I would be more likely to choose the rule that would foster uniformity in the shared jurisdiction.		5	16%

Statistic	Value
Min Value	1
Max Value	8
Total Responses	32

10. Which of the following statements best describes what you most likely would do?

Answer		Response	%
[Alignment Preference] I would choose to follow the precedent of the Houston sister court.		3	10%
[Correctness Preference] I would choose to follow the precedent of the Houston sister court only if I believed its precedent to be the best legal rule.		28	90%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.90
Variance	0.09
Standard Deviation	0.30
Total Responses	31

11. Which, if any, of the following statements describes why you would make this choice? [Check all that apply.]

Answer		Response	%
[Alignment Preference] I would choose the precedent already established by the Houston sister court because even though it seems likely the higher court will grant review, there is no guarantee that the conflict will be resolved and it is more important to achieve alignment with the Houston sister court for the sake of uniformity and predictability in the shared jurisdiction.		2	6%
[Alignment Preference] Even though the Houston sister court's rule has been criticized, I would choose to follow that precedent because it is unfair for trial courts and litigants in the shared jurisdiction to have to comply with two conflicting rules.		3	10%
[Correctness Preference] I would not choose to follow the precedent of the Houston sister court if I did not believe that precedent to be the best choice because the conflict in the case law of the shared-jurisdiction courts likely would be resolved in a relatively short time (2-3 years).		13	42%
[Correctness Preference] I would choose what I believed to be the best legal rule because the higher court is likely to grant review and I do not want our court's decision to be reversed.		8	26%

[Correctness Preference] The best approach is to choose the best legal rule regardless of what the Houston sister court has done, especially when two other courts already have declined to follow the precedent of the Houston sister court.		23	74%
Other. Please explain:		7	23%

Statistic	Value
Min Value	1
Max Value	6
Total Responses	31

IV. Assume that the issue being decided in the scenario described in the preceding question is not an important issue but a matter you deem relatively unimportant—a minor issue—but one that the higher court is likely to address in the near future.

12. Which of the following statements describes what you most likely would do? [Check all that apply.]

Answer		Response	%
[Alignment Preference] Because the issue is a minor one, I would choose to follow the precedent of the Houston sister court for the sake of achieving uniformity in the shared jurisdiction even though I believed the sister court chose the inferior rule.		5	16%
[Alignment Preference] When the issue being decided is a minor one, the best approach is to seek uniformity in the shared-jurisdiction so I would choose the rule that would bring the court into alignment with the Houston sister court even if I believed the higher court was likely to grant review.		1	3%
[Correctness Preference] I would be unwilling to choose what I considered		25	78%

to be an inferior legal or procedural rule even if the issue being decided was a minor one and even if it meant creating a conflict with the Houston sister court.			
[Correctness Preference] I would choose what I believed to be the best legal rule regardless of what the Houston sister court had done because the higher court is likely to grant review and I would not want our court's decision to be reversed.		10	31%

Statistic	Value
Min Value	1
Max Value	4
Total Responses	32

13. Which, if any, of the following factors would influence your decision? [Check all that apply.]

Answer		Response	%
Concerns that the higher court would reverse your decision.		8	25%
Concerns of unfairness for trial courts and litigants in the shared jurisdiction who would have to comply with two conflicting rules.		6	19%
Lack of justification for creating a split of authority when the issue is a minor one.		4	13%
The likelihood that if your court issued a persuasive opinion, the Houston sister court might change its precedent by adopting your rule.		8	25%
[Alignment Preference] A strong preference for choosing the path that would avoid a conflict or split of authority in the shared jurisdiction.		1	3%
[Correctness Preference] A strong preference for choosing the best legal or procedural rule.		28	88%

Statistic	Value
Min Value	1
Max Value	6
Total Responses	32

14. Which of the following statements describes what you most likely would do? [Check all that apply.]

Answer		Response	%
[Alignment Preference] Because the issue is a minor one, I would choose to follow the precedent of the Houston sister court for the sake of achieving uniformity in the shared jurisdiction even though I believed the sister court chose the inferior rule.		6	19%
[Correctness Preference] I would be unwilling to choose what I considered to be an inferior legal or procedural rule even if the issue being decided were a minor one and even though my decision were not likely to be reviewed by the higher court.		26	81%

Statistic	Value
Min Value	1
Max Value	2
Total Responses	32

V. Please consider the following scenario and answer the questions that follow:

You are deciding a question that neither the Supreme Court of Texas nor your court has addressed. The sister court in Houston already has addressed the issue in a published opinion that is binding precedent of that court. You have concluded that the Houston sister court got it wrong, (i.e., the court did not make the correct decision on the law). No other Texas intermediate court of appeals has addressed the issue and it appears to be an issue of first impression.

15. What would you do?

Answer		Response	%
[Alignment Preference] I most likely would choose to follow the precedent of the sister court in Houston for the sake of achieving uniformity even though I believed the sister court got it wrong on the law.		0	0%
[Correctness Preference] I would be unwilling to follow a precedent of the Houston sister court if I believed that precedent to have been wrongly decided even if it meant creating a conflict with the Houston sister court.		31	97%
Neither, Explain:		1	3%
Total		32	100%

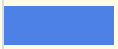
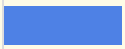
Statistic	Value
Min Value	2
Max Value	3
Mean	2.03
Variance	0.03
Standard Deviation	0.18
Total Responses	32

16. Which, if any, of the following factors would significantly influence your decision? [Check all that apply.]

Answer		Response	%
Concerns that the higher court would **reverse** your decision.		4	13%
Concerns of **unfairness** for trial courts and litigants in the shared jurisdiction who would have to comply with two conflicting rules.		5	16%
Concerns about **public perception** when two courts with coterminous jurisdiction issue equally binding yet opposite rules.		2	6%
The likelihood that if your court issued a persuasive opinion, the Houston **sister court might change its precedent** by adopting your rule.		14	45%
[Alignment Preference] A strong preference for choosing the path that would avoid a conflict or split of authority in the shared jurisdiction.		3	10%
[Correctness Preference] A strong preference for choosing the best legal or procedural rule.		30	97%
The importance of the issue to the jurisprudence of the state.		17	55%
None of the foregoing factors would significantly impact my decision.		0	0%

Statistic	Value
Min Value	1
Max Value	7
Total Responses	31

17. Which of the following factors would have little, if any, impact on your decision? [Check all that apply.]

Answer		Response	%
Concerns that the higher court would **reverse** your decision.		17	57%
Concerns of **unfairness** for trial courts and litigants in the shared jurisdiction who would have to comply with two conflicting rules.		7	23%
The likelihood that if your court issued a persuasive opinion, the Houston **sister court might change its precedent** by adopting your rule.		12	40%
[Alignment Preference] A strong preference for choosing the path that would avoid a conflict or split of authority in the shared jurisdiction.		6	20%
[Correctness Preference] Concerns about public perception when two courts with coterminous jurisdiction issue equally binding yet opposite rules.		13	43%
All of the foregoing factors would have some impact on my decision.		10	33%

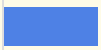
Statistic	Value
Min Value	1
Max Value	6
Total Responses	30

18. Can you conceive of a case in which you would choose to follow the precedent of the Houston sister court even though you believed the sister court to have chosen an inferior legal rule?

Answer		Response	%
Yes		11	35%
No		20	65%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.65
Variance	0.24
Standard Deviation	0.49
Total Responses	31

19. If you answered "yes," which of the following considerations, if any, likely would influence your decision? [Check all that apply.]

Answer		Response	%
Concern about **unfairness** for trial judges in the shared jurisdiction who would have to comply with two conflicting rules.		8	50%
Concern about **unfairness** to citizens in the shared jurisdiction who would have to comply with two equally binding yet opposite rules.		10	63%
Concern about **unfairness** for lawyers in the shared jurisdiction who would have to counsel clients and make strategic decisions in the face of equally binding yet opposite rules.		9	56%
Concern that similarly situated individuals would not be treated the same as a result of a split of authority in the shared jurisdiction (i.e., two similarly situated individuals in the same jurisdiction could have different appellate outcomes based solely on the appellate court in which their appeal happened to fall.)		10	63%
Concern about **public perception** of our legal system when people of the shared jurisdiction are bound by two conflicting rules.		6	38%

Concern that if a conflict is created, the parties might not seek review in the higher court or the higher court might not grant review and the split in authority in the Houston appellate courts might continue for some time.		6	38%
Concern that my decision at the panel level would be rejected by my court sitting en banc.		0	0%
None of the foregoing considerations likely would influence my decision.		4	25%

Statistic	Value
Min Value	1
Max Value	8
Total Responses	16

20. Can you conceive of a case in which you would choose not to follow the precedent of the Houston sister court even though you knew it meant that a split of authority would be created in the shared jurisdiction?

Answer		Response	%
Yes		32	100%
No		0	0%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	1
Mean	1.00
Variance	0.00
Standard Deviation	0.00
Total Responses	32

21. If you answered "yes," which of the following considerations, if any, likely would influence your decision? [Check all that apply.]

Answer		Response	%
Concern that my decision would get **reversed** by the higher court.		8	25%
Concern that the Houston sister court's precedent would lead to inefficiencies or other problems.		21	66%
Concern that the Houston sister court's precedent ultimately will be rejected by the higher court even if not reversed in the case under review.		11	34%
Concern that my decision at the panel level would be rejected by my court sitting en banc.		3	9%
Concern that if the precedent of the Houston sister court were adopted, my court may be perceived as having adopted an unsound, illogical, inefficient or otherwise inferior legal rule.		17	53%
None of the foregoing considerations likely would influence my decision.		8	25%

Statistic	Value
Min Value	1
Max Value	6
Total Responses	32

22. In cases in which you would choose not to follow the precedent of the Houston sister court even though it meant that a split of authority would be created, which of the following considerations (if any) likely would influence your decision? [Check all that apply.]

Answer		Response	%
If the issue concerned a **matter of first impression** in my court (i.e., my court had not yet addressed the issue being decided), I probably would conclude that the higher court likely would grant review and that the conflict being created likely would be resolved sooner rather than later.		18	60%
[Correctness Preference] If the precedent of the Houston sister court were a **recent holding rather than a longstanding rule**, I probably would conclude that it is better to go ahead and choose the better rule even though doing so would create a split of authority because the holding of the Houston sister court, though binding on that court, is **not yet a firmly established rule.**		23	77%
[Correctness Preference] If the precedent of the Houston sister court concerned an **important issue**, I probably would conclude that it is better to choose the superior legal or procedural rule even though doing so would create a conflict and I would make this choice because of the significance of the matter in issue.		28	93%

[Correctness Preference] If the precedent of the Houston sister court concerned an issue that was likely to become a **frequently recurring issue**, I probably would conclude that it would be better to choose the superior rule even though doing so would create a conflict.		27	90%
[Alignment Preference] Not applicable. I would choose to follow the precedent of the Houston sister court in order to achieve alignment in the shared jurisdiction even if I believed that court had not chosen the best legal or procedural rule.		0	0%

Statistic	Value
Min Value	1
Max Value	4
Total Responses	30

23. In cases in which you would choose to follow the precedent of the Houston sister court even though you did not believe that court had chosen the best legal or procedural rule, which of the following considerations (if any) likely would influence your decision? [Check all that apply.]

Answer		Response	%
[Alignment Preference] If the issue concerned a matter that was **not likely to be reviewed by the higher court**, I probably would conclude that if a conflict were created, it would persist for some time and so it would be better to choose the path that would result in uniformity in the shared jurisdiction.		4	15%
[Alignment Preference] If the precedent of the Houston sister court had existed for many years, I probably would conclude that it is a **firmly established rule** and it would be better to follow it than to create a split of authority in the shared jurisdiction.		3	11%
[Alignment Preference] If the precedent of the Houston sister court concerned an issue that already was a **frequently recurring** one, I probably would conclude that it is better to reach alignment with the sister court rather than to create a conflict on an issue that arises frequently in both courts.		2	7%
[Correctness Preference] Not applicable. I would not choose to follow the precedent of the Houston sister court unless I believed that court had chosen the best legal or procedural rule.		22	81%

Statistic	Value
Min Value	1
Max Value	4
Total Responses	27

VI. For each of the following statements, indicate whether you generally **agree** or generally **disagree:**

24. There is a strong need for uniformity and certainty in shared-jurisdiction courts such as the First and Fourteenth in Houston.

Answer		Response	%
Agree		20	65%
Disagree		11	35%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.35
Variance	0.24
Standard Deviation	0.49
Total Responses	31

25. It is more important that good rules be developed than that predictability and uniformity of result should be assured (through choosing to follow an existing rule of the Houston sister court).

Answer		Response	%
Agree		31	100%
Disagree		0	0%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	1
Mean	1.00
Variance	0.00
Standard Deviation	0.00
Total Responses	31

26. In my experience, some judges in shared-jurisdiction courts (such as the First and Fourteenth in Houston) feel strongly that the second court to decide an issue should follow the first court's precedent to avoid a split-of-authority in the shared jurisdiction.

Answer		Response	%
Agree		17	57%
Disagree		13	43%
Total		30	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.43
Variance	0.25
Standard Deviation	0.50
Total Responses	30

27. It is a good thing when the two Houston courts of appeals are aligned on a legal issue, but given a choice between achieving alignment and selecting the better legal rule, it is almost always more important to choose the better legal rule.

Answer		Response	%
Agree		32	100%
Disagree		0	0%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	1
Mean	1.00
Variance	0.00
Standard Deviation	0.00
Total Responses	32

28. It is important to decide cases by applying sound legal principles and doctrines, but given a choice between applying the better legal rule and achieving uniformity and predictability in a shared jurisdiction, it is almost always more important to choose the path that would foster uniformity and predictability.

Answer		Response	%
[Alignment Preference] Agree		2	6%
[Correctness Preference] Disagree		29	94%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.94
Variance	0.06
Standard Deviation	0.25
Total Responses	31

29. In a shared-jurisdiction system (such as currently exists in the First and Fourteenth) the second court to decide an issue generally should try to follow the first-court-to-decide's precedent to avoid a split-of-authority in the shared jurisdiction.

Answer		Response	%
Agree		17	55%
Disagree		14	45%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.45
Variance	0.26
Standard Deviation	0.51
Total Responses	31

30. Unlike the Court of Criminal Appeals of Texas, which has the power to review a court-of-appeals decision in a criminal case on its own motion, the Supreme Court of Texas may review an intermediate court's decision only if a party timely files a petition for review. This difference tends to impact whether I would choose to follow the precedent of the Houston sister court in a given case.

Answer		Response	%
Agree		0	0%
Disagree		32	100%
Total		32	100%

Statistic	Value
Min Value	2
Max Value	2
Mean	2.00
Variance	0.00
Standard Deviation	0.00
Total Responses	32

31. As a general proposition, it is more important to get the decision right than to achieve alignment with the Houston sister court.

Answer		Response	%
Agree		32	100%
Disagree		0	0%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	1
Mean	1.00
Variance	0.00
Standard Deviation	0.00
Total Responses	32

32. When deciding an issue in a **rapidly developing area of the law**, it is more important to cultivate and develop good rules than to achieve alignment with the Houston sister court.

Answer		Response	%
Agree		30	94%
Disagree		2	6%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.06
Variance	0.06
Standard Deviation	0.25
Total Responses	32

33. In deciding which of two or more legal rules to adopt, in cases in which one **rule is not materially better** than the other(s), it is more important to achieve alignment with the Houston sister court than to adopt a rule that would create a split of authority in the shared jurisdiction.

Answer		Response	%
[Alignment Preference] Agree		22	69%
[Correctness Preference] Disagree		10	31%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.31
Variance	0.22
Standard Deviation	0.47
Total Responses	32

34. In deciding a **minor issue**—one that is relatively insignificant—it is more important to achieve alignment with the Houston sister court than to choose what is perceived to be the superior legal or procedural rule.

Answer		Response	%
[Alignment Preference] Agree		8	25%
[Correctness Preference] Disagree		24	75%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.75
Variance	0.19
Standard Deviation	0.44
Total Responses	32

35. In shared-jurisdiction appellate courts (such as the First and Fourteenth), there is a strong need for uniformity in legal and procedural rules.

Answer		Response	%
Agree		22	76%
Disagree		7	24%
Total		29	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.24
Variance	0.19
Standard Deviation	0.44
Total Responses	29

36. In shared-jurisdictions (such as the ten-county jurisdiction that comprises the First and Fourteenth Districts of Texas), there is a strong need for predictability of outcomes.

Answer		Response	%
Agree		28	90%
Disagree		3	10%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.10
Variance	0.09
Standard Deviation	0.30
Total Responses	31

37. Though I generally believe it is more important to adopt the best legal rule than to achieve alignment with the Houston sister court, I can recall at least one instance in which I instead followed the Houston sister court's precedent to foster uniformity in legal rules and predictability of appellate outcomes in the shared jurisdiction.

Answer		Response	%
Agree		10	31%
Disagree		22	69%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.69
Variance	0.22
Standard Deviation	0.47
Total Responses	32

38. When the Houston sister court already has adopted a legal or procedural rule and there is **not a substantial difference between that rule and other possible options**, a judge on the other Houston sister court should choose to follow the precedent of the sister court to avoid creating a split of authority in the shared jurisdiction.

Answer		Response	%
[Alignment Preference] Agree		24	77%
[Correctness Preference] Disagree		7	23%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.23
Variance	0.18
Standard Deviation	0.43
Total Responses	31

39. In deciding cases in a shared-jurisdiction court (such as the First or Fourteenth in Houston), it makes more sense to follow the precedent of the Houston sister court for the sake of achieving uniformity in law or procedure even though the sister court may not have decided its precedent correctly.

Answer		Response	%
[Alignment Preference] Agree		1	3%
[Correctness Preference] Disagree		31	97%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.97
Variance	0.03
Standard Deviation	0.18
Total Responses	32

40. In deciding cases in a shared-jurisdiction court (such as the First or Fourteenth in Houston), it has been my experience that certain judges often opt to follow the precedent of the Houston sister court for the sake of achieving uniformity in law or procedure even when those judges believe the sister court to have chosen the inferior legal rule.

Answer		Response	%
Agree		17	53%
Disagree		15	47%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.47
Variance	0.26
Standard Deviation	0.51
Total Responses	32

41. While I was on the appellate bench, I viewed the **prospect of reversal** by the **Court of Criminal Appeals of Texas** as a significant factor in deciding whether to adopt the precedent of the Houston sister court.

Answer		Response	%
Agree		4	13%
Disagree		27	87%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.87
Variance	0.12
Standard Deviation	0.34
Total Responses	31

42. While I was on the appellate bench, I viewed the **prospect of reversal** by the **Supreme Court of Texas** as a significant factor in deciding whether to adopt the precedent of the Houston sister court.

Answer		Response	%
Agree		6	19%
Disagree		26	81%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.81
Variance	0.16
Standard Deviation	0.40
Total Responses	32

43. While I was on the appellate bench, concerns about the **public's perception of unfairness** in our justice system stemming from having two equally binding yet opposite rules in the Houston shared-jurisdiction courts played some role when it came to choosing whether to adopt the precedent of the Houston sister court.

Answer		Response	%
Agree		13	41%
Disagree		19	59%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.59
Variance	0.25
Standard Deviation	0.50
Total Responses	32

44. ***Though I generally believe it is more important to adopt the best legal rule than to achieve alignment with the Houston sister court***, there were occasions when I was willing to instead follow the Houston sister court's precedent to foster uniformity and predictability of appellate outcomes in the shared jurisdiction.

Answer		Response	%
Agree		8	25%
Disagree		10	31%
Not applicable because I disagree with the premise (italicized above).		3	9%
I agree with the statement but I do not recall any actual instances.		11	34%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	4
Mean	2.53
Variance	1.48
Standard Deviation	1.22
Total Responses	32

45. ***Although I generally am inclined to choose the path that would achieve alignment between the Houston sister courts even if that means choosing an inferior legal rule***, a significant difference in the possible legal rules to apply or in the policy underlying those rules likely would be enough to overcome my general preference for achieving alignment with the Houston sister court.

Answer		Response	%
Agree		3	9%
Disagree		1	3%
Not applicable because I disagree with the premise (italicized above).		28	88%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	3
Mean	2.78
Variance	0.37
Standard Deviation	0.61
Total Responses	32

46. ***The main reason I take this approach (opting for the better legal rule)*** is that the higher court reviewing the ruling presumably will choose the better rule.

Answer		Response	%
Agree		16	52%
Disagree		12	39%
Not applicable because I disagree with the premise (italicized above).		3	10%
Total		31	100%

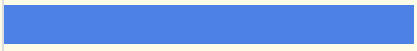
Statistic	Value
Min Value	1
Max Value	3
Mean	1.58
Variance	0.45
Standard Deviation	0.67
Total Responses	31

47. The most compelling reason for choosing to follow what is perceived to be the better legal or procedural rule rather than the precedent of the Houston sister court is to **avoid reversal** by a higher court.

Answer		Response	%
Agree. Comments:		4	13%
Disagree. Comments:		27	87%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.87
Variance	0.12
Standard Deviation	0.34
Total Responses	31

48. Though it is true that in split-of-authority cases in the Houston courts of appeals, litigants in like circumstances are not treated alike, these cases are relatively few in number and do not arise with such frequency that they create a general appearance or perception of unfairness in our legal system.

Answer		Response	%
Agree. Comments:		28	90%
Disagree. Comments:		3	10%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.10
Variance	0.09
Standard Deviation	0.30
Total Responses	31

49. If disparate outcomes in split-of-authority cases in the Houston courts of appeals occurred with greater frequency, there would be greater cause for concern about the public's negative perceptions about the fairness of our legal system.

Answer		Response	%
Agree. Comments:		26	84%
Disagree. Comments:		5	16%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.16
Variance	0.14
Standard Deviation	0.37
Total Responses	31

50. Disparate outcomes in split-of-authority cases in Houston's shared-jurisdiction courts of appeals occur with sufficient frequency to justify a concern that the public will perceive our legal system as unfair.

Answer		Response	%
Agree. Comments:		1	3%
Disagree. Comments:		30	97%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.97
Variance	0.03
Standard Deviation	0.18
Total Responses	31

51. The most compelling reason for choosing to follow the precedent of the Houston sister court is to avoid the appearance or perception of unfairness in our legal system that arises when two courts with coterminous jurisdiction have equally binding yet opposite rules.

Answer		Response	%
Agree. Comments:		10	32%
Disagree. Comments:		21	68%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.68
Variance	0.23
Standard Deviation	0.48
Total Responses	31

52. Before you became a judge, while you were practicing as an attorney, did you ever work on a matter in which a split of authority in Houston's shared-jurisdiction appellate courts impacted a decision or strategic choice you made as a lawyer (e.g., in advising a client, pursuing a claim, offering a plea deal, settling a case, etc.)?

Answer		Response	%
Yes. If you answer "yes," please state the approximate number of times.		7	22%
No		25	78%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.78
Variance	0.18
Standard Deviation	0.42
Total Responses	32

53. If you answered "yes" to the preceding question, do you believe this experience impacted your decision-making as a judge in any choice you may have made to follow the precedent of the Houston sister court to achieve alignment in the shared jurisdiction?

Answer		Response	%
Yes		1	17%
No		5	83%
Total		6	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.83
Variance	0.17
Standard Deviation	0.41
Total Responses	6

54. Before taking the bench, while you were practicing as an attorney, were you aware of a colleague, associate, or law partner who worked on a matter in which a split of authority in Houston's shared-jurisdiction appellate courts impacted a decision or strategic choice he or she had to make as a lawyer (e.g., in advising a client, pursuing a claim, offering a plea deal, settling a case, etc.)?

Answer		Response	%
Yes		5	16%
No		27	84%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.84
Variance	0.14
Standard Deviation	0.37
Total Responses	32

55. If you answered "yes" to the preceding question, do you believe your knowledge or observation of this experience impacted your decision-making as a judge in choosing to follow the precedent of the Houston sister court to achieve alignment in the shared jurisdiction?

Answer		Response	%
Yes		1	25%
No		3	75%
Total		4	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.75
Variance	0.25
Standard Deviation	0.50
Total Responses	4

56. While you were on the appellate bench, was there ever an instance in which you chose to follow the precedent of the other Houston sister court to achieve uniformity in the shared jurisdiction and were later reversed by a higher court?

Answer		Response	%
Yes		2	6%
No		29	94%
Total		31	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.94
Variance	0.06
Standard Deviation	0.25
Total Responses	31

57. If you answered "yes" to the preceding question, do you believe your knowledge or observation of this experience impacted your decision-making as a judge in choosing to follow the precedent of the Houston sister court to achieve alignment in the shared jurisdiction?

Answer		Response	%
Yes		1	50%
No		1	50%
Total		2	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.50
Variance	0.50
Standard Deviation	0.71
Total Responses	2

58. Are you aware of an instance in which a judicial colleague who chose to follow the precedent of the Houston sister court to achieve uniformity in the shared-jurisdiction appellate courts was later reversed by a higher court?

Answer		Response	%
Yes		4	13%
No		28	88%
Total		32	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.88
Variance	0.11
Standard Deviation	0.34
Total Responses	32

59. If you answered "yes" to the preceding question, do you believe your knowledge or observation of this experience impacted your decision-making as a judge in choosing to follow the precedent of the Houston sister court to achieve alignment in the shared jurisdiction?

Answer		Response	%
Yes		1	25%
No		3	75%
Total		4	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.75
Variance	0.25
Standard Deviation	0.50
Total Responses	4