

Help the Clerk and
Help Your Case

By Amanda E. Heitz

Although appellate practice articles often cover how to write briefs and motions for judges, we can forget that our audience also includes law clerks, and importantly, we need to help them focus on our arguments, too.

Keeping the Judicial Law Clerk on Your Side

Apart from the litigants and attorneys themselves, there likely is nobody who will spend more time poring over your briefs and the record than a judicial law clerk. At a minimum, the judges deciding your case will rely on their

clerks' analyses of the record and research of the issues—and many will also lean on these clerks to propose an outcome and craft language for written opinions.

The role of law clerks in the judicial process has been the subject of scholarly research and discussion for years. *See, e.g.*, Stephen L. Wasby, *The World of Law Clerks: Tasks, Utilization, Reliance, and Influence*, 98 Marq. L. Rev. 111 (2014); Todd C. Peppers *et al.*, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 Alb. L. Rev. 623 (2008); Todd C. Peppers, *Courtiers of the Marble Palace: The Rise of the Supreme Court Law Clerk* (2006). Debate over the influence that law clerks have (or should have) on the outcome of a case, and analyses of the differing roles that law clerks play in different courts and different chambers, are beyond the scope of this article. Though their roles and influence may vary from court to court, it is safe to conclude that law clerks at least have a judge's ear and a significant role in iden-

tifying the important legal issues and facts on which an opinion will rely. Making an enemy of the law clerk may not sink your case, but it certainly will never help you. And keeping the law clerk on your side will give you another voice in chambers who can remind the judge of strong facts or law that help your position.

Accordingly, this article intends to provide practical tips from former law clerk perspectives that can help make you a better advocate by giving the people spending the most time with your briefs the tools that they need to focus on your winning arguments. These tips are derived from conversations with former judicial law clerks across the country.

Tip 1: Remember Who We Are!

Especially in state and district courts, judicial law clerks are mainly new lawyers. Many find out whether they passed the bar while seated at a desk in a judge's chambers. They are generally highly qualified new lawyers—frequently pulled from the top tiers of law school graduating classes and law review editorial boards—but they are still new lawyers.

The law clerk is not likely a subject matter expert. (Hint: there is a good chance that your judge is not, either!) Take time



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to provide some context for the legal issue you are raising, particularly if it is not a subject in the required law school curriculum or on the bar exam. If there are relevant key principles that practitioners in your area generally know, say so—and include citations. Don't assume that the law clerk (or judge) knows which is the "leading" case or whether the applicable substantive law follows a minority or majority approach on an issue. Use your discretion about how much background is necessary. Reading a nuanced securities statute properly will likely require more background than understanding an argument about the scope of duty in a slip and fall case.

Relatedly, remember that recent law graduates have limited—if any—experience in many everyday activities of practicing attorneys. Discovery, for example, may be something the law clerk learned about for a couple of weeks during the first year of law school and never thought about again. Depending on law school course selection or summer work experiences, the law clerk assigned to your case may never have seen a discovery request, let alone sat in a deposition. You don't need to explain what a deposition is to cite one in your summary judgment motion, but if the main issue that you will raise with the court relates to discovery practice conventions, additional background could be helpful.

Jurisdiction-specific procedural rules are another area of potential limited knowledge. There is no guarantee that the law clerk attended law school or even sat for the bar in the jurisdiction in which he or she is now clerking. But even if the law clerk attended school in your jurisdiction and intends to practice there, it still does not guarantee that the clerk will know the local rules well. Many law schools do not require state-specific procedure courses, and a law clerk's knowledge may be based primarily on a civil procedure textbook geared to a national audience. When appropriate, consider whether comprehensively discussing a state rule of civil procedure—particularly if it differs significantly from a federal rule—would be useful.

Finally, don't assume that anyone reading an appellate brief has tried a case. Appellate law clerks have not usually seen a trial, much less participated in one. Occasionally, an appellate judge will not have tried a case,

either. Provide enough information and explanation so that someone who does not intimately know how trials work can understand the point you need to make. Repeating the word "prejudice," for example, won't have much value unless you explain how improper evidence, instructions, or argument harmed your case or client.

Tip 2: Trim Your "Fat" Briefs— and Proofread Them, Too!

None of the law clerks consulted for this article reported that if a court granted a motion to exceed word count, they felt glad or that the extra verbiage helped them do their jobs. Likewise, none had ever heard a judge express happiness about an extra-long brief. As an advocate, think carefully whether yours qualifies as one of the extremely rare cases that justifies a request to exceed court-imposed page or word counts.

Though a court may grant your motion to exceed length, it doesn't mean that anyone is happy about it—least of all the law clerk. If your request proved unwarranted, and you have thoroughly annoyed the court with pointless, fat briefing, a law clerk will be only too pleased to help the judge find blistering case law to chastise you in a written opinion. And there is plenty of it out there. *See, e.g., Mobile Shelter Sys. USA, Inc. v. Grate Pallet Solutions, LLC*, 845 F.Supp.2d 1241, 1253 (M.D. Fla. 2012) ("The Court's page limit requirement is not imposed to burden the parties. It is intended to focus the parties' attention on the most pressing matters and winnow the issues placed before the Court, thereby conserving judicial resources."); *State v. Johnson*, 447 P.3d 783, 828–29 (Ariz. 2019) (noting that the defendant was "entitled to a meaningful opportunity to be heard, but that does not mean that he may decline to comply with this Court's requirements and orders or that he is excused from the obligation to edit his work").

As one former clerk put it, "the operative part of 'briefing' is 'brief.'" Aside from potentially irritating law clerks and judges with overlength briefs, remember the practical risk that fat briefing could also dilute your arguments. In a standard-length filing, the reader will likely remember the third of three strong arguments. But if you file an oversized document containing three strong arguments, four ok points, two fairly

weak claims, and one Hail Mary pass, you will have buried those three strong arguments in seven additional arguments that probably won't win the day. Keep the court focused on what matters and what realistically stands a chance of making a difference for your case and client.

Another caution on this topic: don't even think about trying to circumvent page limits

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with improper appendices, margin manipulation, footnotes, or word-processing tricks. As the U.S. District Court for the Northern District of Illinois put it, "Resort to these tactics is embarrassing[.]" *Malec v. Sanford*, 191 F.R.D. 581, 586 (N.D. Ill. 2000). *See also Northbrook Digital, LLC v. Vendio Servs. Inc.*, 625 F. Supp. 2d 729, 733–34 (D. Minn. 2008) (criticizing a party for "violat[ing] the spirit, if not the letter" of word limit by "manipulat[ing] the word-counting feature of its word-processing program through improper hyphenation" and disrespectfully referring to the magistrate judge by her last name only). You will get caught. People working in the courts stare at correctly formatted documents all day long; it's not hard for them to pick out a non-conforming one.

Finally, proofreading and editing go hand in hand. While you edit, make sure you proofread your work, too. Spellcheck and grammar check will not catch everything. Though law clerks may get a chuckle when you accidentally refer to "trail courts," "the farmers of the Constitution," "chile abuse," and "doe snot," such errors distract from your arguments and paint you as careless. Read your work out loud and ask someone else to read it out loud, too.



Bottom line: edit your briefs. If you can't do it yourself, find someone who can. There are gleeful slashers in almost every law office who will take pleasure in helping you trim the fat.

Tip 3: Craft Helpful Fact Sections

Legal writing and advocacy experts will remind you never to underestimate the power

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of telling a good story. And there are plenty of great resources available to help you hone that skill. *See, e.g.*, Philip N. Meyer, *Storytelling for Lawyers* (2014). Remember, however, to tell the story that propels the argument you are making right now. There may be several important stories in your case, and the important stories may change with the subject of a motion. They likewise might change radically on appeal.

An anecdote from a former state appellate clerk consulted for this piece underscores the necessity of telling the right story at the right time. The clerk was assigned a new criminal appeal and began reading the opening brief. She glanced at the issues presented and moved on to the fact section to find out what the case was about. The fact section was somewhat disjointed because the authoring attorney had elected to present the facts by summarizing the trial testimony of several witnesses instead of creating a narrative. Each paragraph in the fact section ended by emphasizing that the witness did not recall whether a particular man was wearing pants. This repeated detail seemed important, and the clerk made a note of it. After she finished reading the entire brief, however, she was surprised to learn that whether the man had worn pants was not relevant to any issue

on appeal. Indeed, the detail was not even mentioned again after the fact section. Witness identification was an issue at trial, but it wasn't raised on appeal. The appellate attorney had failed to tell the right story for her appellate arguments. Instead, she distracted the law clerk from the point of her brief and created the impression that nothing in her brief would be particularly well reasoned or carefully analyzed.

Although not usually as egregious as this example, including superfluous facts is a common appellate mistake. Law clerks and judges appreciate background, but they do not usually require a blow-by-blow of every day's trial testimony. Similarly, a detailed chronology of the event giving rise to the case are often distracting. Consider whether details such as the day of the week, time of day, distances, or exact time between events matter for your appellate issue. If they don't, general words such as "later," "nearby," and "then" are great ways to advance the story. Remember who your law clerk audience is: usually, they earned top grades and spots on law reviews by being detail oriented. Give them your important case details and the facts they need to follow your arguments. Don't distract them with details that don't matter.

Also, fact sections that include unverifiable "facts" are unhelpful and counterproductive. If the judge called counsel to the bench during trial and warned your opponent about inappropriate arguments, that might be a great fact to support your trial misconduct argument on appeal. But if your trial transcript says, "bench conference held" and nothing more, it is not a fact for your appellate brief. A cardinal rule of appellate practice is that if it is not in the record, it did not happen. Referring to something not in the record threatens your credibility.

Finally, though brevity is important and excessive detail is distracting, do be wary of taking brevity too far. Be thoughtful about providing a robust enough background to set up your arguments and ensure a factually correct written disposition from the court. Provide concise and accurate procedural backgrounds where appropriate. Identify and define terms of art that are relevant to the subject matter. If your client provides a product or service, explain that product or service in a way that your client would be comfortable seeing in a

published opinion. Anticipate and correct potential misconceptions about your client's business—for example, the relationships between franchisors and franchisees, or the roles of various subsidiary entities. The law clerks drafting an opinion or disposition will appreciate the clarity, and your client will appreciate not having to pay for motion practice to correct factual details in the decision.

Tip 4: Cite Frequently, Cite Thoroughly, and Cite Accurately

Briefs containing facts without record cites and propositions of law without authority are among judicial law clerks' top pet peeves. Judges frequently note in written opinions that the court will not search the record or for authority to support a party's position. But that statement is often only partially true. Courts have no obligation to search the record for the facts or to hunt for relevant case law, but frequently they do because they want to do a good job and reach the right conclusions. Independent research and review of the record is commonplace.

Generally, the people doing this independent research and review are the law clerks. It should be obvious, then, that to keep the law clerk on your side, you should do everything you can to make this job easier. Don't make a law clerk hunt for a single quote in a trial transcript. If you say, "seven witnesses testified..." provide a record cite for each time this testimony occurs. Similarly, if you refer to a fact on page 2 of a brief, and then again refer to it on page 25, it is helpful to provide a record cite in each location. If the law clerk isn't spending all his or her time fact-checking the record, he or she will have more time to analyze the substantive issues and your argument.

Additionally, supplying thorough citations to authority and the record are important. You don't have to be a master of the Bluebook, but you should make your citations easy to follow. "Jones, at 125" is not a correct short cite because it is not helpful. The reader must glance back to find the previous time you cited *Jones* to determine the reporter and locate the case. Also, be cautious with Lexis or Westlaw citations for unpublished cases or opinions that are too new to be in a reporter. A Lexis cite is useless to a court that has only a Westlaw subscription. Review court rules and deter-

mine how it wants citations to unpublished or not-yet-reported decisions; if permissible, consider attaching a courtesy copy as an exhibit or appendix.

Law clerks will thank you if you do everything you can to make your citation as specific as possible. If permissible, use paragraph cites, not just page cites, for case law, and cite transcripts by page and line. Where allowed, use technology to make your cites direct. If you are before a court that permits embedded hyperlinks, take the time to include them. Your reader can focus on your arguments when he or she can reference your authority and record cites with a single click.

Last, be accurate and honest with your record and case cites. Law clerks really do read what you cite. If the witness said, “It didn’t happen that way. I’m not going to tell you that Bob ran the red light,” you absolutely will get caught if your brief says that the witness testified, “Bob ran the red light.” It should be obvious that outright lies and misrepresentation of the record are inappropriate. But you should also make sure that you provide a court with necessary information about the weight of authority that you cite. Don’t cite a dissent without conspicuously labeling it as such; include subsequent history if the case has been abrogated in the jurisdiction that produced it; and never cite a vacated opinion as authority. Law clerks check all these things, and if you appear to be hiding something, you will lose credibility.

Tip 5: Avoid Unwarranted Bravado

A former Ninth Circuit clerk reported that her least favorite word in any brief is “clearly.” If the issue or the authority is so very clear, why is the case in front of the Ninth Circuit? Whenever checking the case law proved that the issue described as “clear” was anything less than clear, it caused her to doubt every argument the litigant made.

Other clerks reported similar problems with representations of factual records. One former district court clerk noted that sometimes it seemed as if the lawyers didn’t realize that the other party would get to respond to a motion—with exhibits. There, a defendant filed an over-the-top discovery motion, filled with invective, claiming that its opponent was unreason-

able and refused to cooperate, though, the defendant assured the court, it had attempted to meet and confer in good faith. When the other party responded, it attached documents showing that the meet and confer request was an after-hours email demanding a substantive response by noon the next day. It became obvious who the truly unreasonable party was, and this perception lingered through discovery.

Courts understand that attorneys are advocates and need to present the case in a way that is favorable to their clients. But this can be done without overstating the strength of the authority or misrepresenting critical facts. If the law is not “clearly” on your side—or reasonable minds could differ whether it is—don’t say that it is unquestionable. Argue that cases supporting your desired outcome are applicable and better reasoned. Point out how cases that go against you are not factually applicable or how their reasoning is faulty. You lose no credibility with the judge or law clerks by being honest about the law; spend your time explaining *why* the court should take a particular action rather than trying to pretend that there is no alternate viewpoint.

Tip 6: Ditch the Playground Antics

Few practitioners need to be reminded not to insult opposing counsel, opposing parties, or judges in written motions overtly. Slightly more need to be reminded that they should assume that all microphones are “hot” at all times and refrain from making disparaging remarks inside a courthouse even if court is not in session.

The more common problem is when attorneys use fighting words that they do not fully appreciate are fighting words. Misuse of the word “disingenuous” is a common offense. Some attorneys use the word “disingenuous” as a synonym for “inaccurate” or “incorrect.” That is not what it means. “Disingenuous” is a fancy way of calling someone a liar. Don’t use it unless you mean it. And even then, reconsider.

As a rule of thumb, double check your adjectives. Using words such as “crafty” or “sly” to describe your opponents or their arguments will not help your case. Also, watch out for words with loaded meanings that evoke ethnic or gender biases. For example, do not refer to an argument

as “shrill,” particularly if it was made by a female attorney or party.

You should also watch out for sharply worded language from case law. Sometimes judges have reason to chastise a litigant or their counsel in written dispositions. Sometimes they aggressively poke at their colleagues’ opinions in dissents and concurrences. When the language is colorful, it is memorable and a bit fun—just do a quick internet search for “bench slaps”

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if you need proof—but remember, you are a litigant trying to persuade a court. You are not the judge. Just because language is contained in a citable opinion does not mean that quoting it will help your argument. Unless the language you quote is on precisely the matter at issue and substantively advances your position, you would do well to leave your “applesauce” out of it and stick to compelling legal analysis. *King v. Burwell*, 135 S. Ct. 2480, 2501 (2015) (describing majority argument as “Pure applesauce.”) (Scalia, J., dissenting).

Tip 7: Don’t Forget the Analysis

Analysis is the hard work of legal writing, yet some attorneys simply fail to perform this critical task in their written motions and briefs. As an appellate clerk, my least favorite brief format was what I called a “fact-fact-fact-law-law-law, therefore I win” brief. The attorney presented facts,

cited case law, and then demanded relief without explaining how the law applied to those facts. Unless the case you cite controls in your jurisdiction and governs the exact issue in front of the court, it is usually not enough to cite a case's holding without applying it to your facts. Similarly, stating that a case "is directly on point," then reciting the case's facts or stating its holding, does not qualify as analysis unless you explain it in the context of your case.

Clerks expressed annoyance with other analytical shortcuts, too. One noted that overuse of block quotations was a good sign that a brief lacked any serious analytical strength. If your brief is nothing but quotations from case law, where is the argument? Another lamented the use of font as a substitute for analysis. An occasional bold or italic word can be good to draw attention to a critical word. But briefing riddled with font changes to denote emphasis no longer really emphasizes anything and takes away from the substantive analysis.

And do not rely on the law clerk to do your analysis for you. Similar to failing to provide accurate citations to the record or substantive law, it's lazy and won't make you any friends with the court or clerks. Moreover, you may not like the result of delegating your analysis to the law clerk. If the clerk disagrees that the case you blithely proclaimed (without analysis) "directly on point" is, in fact, on point, you have provided no reason why the court should follow it. Without a rationale from you, you have neutralized a strong authority that could have favored your client. The cases you cite may seem obviously applicable to you after being immersed in your case for months or years. Law clerks and the judges for whom they work may not see that obvious connection and you may need to explain it to them.

Tip 8: Learn the Rules and Follow Them

Failing to follow court rules creates a headache for judges, law clerks, and court staff. Nearly every aspect of written advocacy is governed by rules. Learn the rules for the court in which you will appear and abide by them. Failing to do so could have adverse consequences for your clients, and at a minimum, it will make you appear inexperienced and unprofessional.

Make sure that you know the rules that create procedural prerequisites for obtaining relief. Rule 37 of the Federal Rules of Civil Procedure requires a "meet and confer" before filing a motion to compel. Some state and district court local rules have extended this idea to other motion practice. In some courts, there is a meet and confer requirement for dispositive motions or motions in limine as well as discovery motions. You don't want to lose your motion because you failed to meet and confer.

A misunderstanding about citable authority poses problems for many litigants. With the broad availability of unpublished dispositions, many courts have created rules for when and how an unpublished opinion may be cited. Some courts permit citations to unpublished authority as if they were published. Other courts create more byzantine rules, permitting citations to cases issued after a specific date only and cited solely for certain purposes. If you do not learn the rules governing when or why your jurisdiction will allow you to cite unpublished cases, you can end up wasting your time and opportunity arguing that the court should follow a case that you were not allowed to cite.

Also identify which appellate courts' opinions are binding. According to the clerks consulted for this article, a surprising number of practitioners forget that federal district and circuit court decisions are not binding on state courts on matters of state law. Federalism issues aside, other practitioners become confused when intermediate state appellate courts are divided into divisions or districts. Learn whether an appellate court's decision is binding statewide or merely over one geographic region. For example, the Arizona Court of Appeals is considered a single court sitting in two divisions, and every opinion issued is binding on trial courts statewide, regardless of which division issues it. Nevertheless, some lawyers erroneously claim that a case from Division 2, which sits in Tucson, is not binding on trial court in Phoenix (which is overseen by Division 1).

Not every rule infraction will substantively hurt your case in terms of a denied motion or rejected briefing. But repeated errors signal to the court and the law clerks that you do not know what you are doing.

Or worse, that you do not care about following the rules.

Tip 9: Tell the Court Exactly What You Want and Why You Should Get It

Otherwise compelling briefs that fail to tell the court precisely the relief a party wants and why it is the correct remedy are a perennial annoyance to law clerks. Don't just tell the court that you're right. Tell the court specifically what to do about it and why.

Sometimes telling the court precisely what relief you seek can be as simple as identifying the specific claims or paragraphs of a complaint on which you seek relief. Tell the court in your conclusion, for example, "All claims must be dismissed under Rule 12(b)(6), and claims 1 and 3 should be dismissed with prejudice because amendment would be futile." In your appellate brief, tell the court whether it should remand for a new trial (and on which issues), or whether it should remand with instructions to enter judgment in your client's favor. And end your motion for summary judgment by telling a court on which counts in a complaint it should enter judgment.

Other times, identifying the relief requested is a valuable, but overlooked, portion of legal analysis. For example, in the appellate context, not all findings of trial error will mandate reversal for a new trial. Attorneys who identify a legal error in the admission of evidence or a jury instruction but who fail to explain why the error warrants a new trial have done only half the job. Cite to and argue from the correct legal standard. When is this kind of error reversible error? What are the rules about harmless error? Did someone fail to object at trial and now must prove fundamental error?

Tip 10: Hire Them!

If you really want to get a law clerk on your side, hire one! Former law clerks are a terrific investment in the future of your firm. They've spent a year or more learning from judges how to write for judges: that's on-the-job training that didn't cost you a dime. They know the ins and outs of how the court works—the things that are not included in the rules of procedure. And every year, there are lots of them looking for jobs when their clerkships end. As you look to expand your firm, consider hiring a judicial law clerk. 