

Welcome to the Law.com network. [Click here](#) to register and get started.

[Sign Out](#) | [My Account](#)


 This Website

HOME	ADVERTISE	CONTACT US	SUBSCRIBE	DIGITAL EDITION	BOOKS	EVENTS	PRODUCTS	RSS FEEDS
------	-----------	------------	-----------	-----------------	-------	--------	----------	-----------

Home > This Week's Issue > **Commentary: Write Briefs With Law Clerks in Mind**

LEGAL WRITING

Font Size:

ADVERTISEMENT

Commentary: Write Briefs With Law Clerks in Mind

By **Wyatt Dowling** [All Articles](#)

Texas Lawyer | November 19, 2012

[Like](#) 0 [Tweet](#) 1 [Share](#)

"It is essential in any form of writing," wrote 7th U.S. Circuit Court of Appeals Judge Richard A. Posner in "The Federal Courts: Challenge and Reform," "to know who your audience is." The audience of a litigation brief includes the judge, the client and opposing counsel, plus other lawyers at one's own firm and possibly the media.

An often overlooked audience member, however, is the law clerk. Thousands of them serve judges across the country. Clerks not only draft opinions, they prepare jury instructions and may influence judicial decisions in discovery and evidentiary disputes. Given the important role clerks play, overlooking them in crafting litigation briefs puts the client's interests at unnecessary risk.

What are the characteristics of law clerks? And what bearing should these have on the process of drafting effective briefs? Unlike other members of the audience of a brief, law clerks are greenhorns. Fresh out of law school, they are unfamiliar with the nuts and bolts of lawyering. They possess only a bird's-eye knowledge of the core areas of the law. Clerks may encounter, over the course of their clerkships, an area of substantive law only once, before turning to another with which they're equally unfamiliar.

For attorneys, this means briefs should be accessible to the non-specialist. For attorneys tasked with writing the first version of a brief, this may not be easy. The most vocal readers of a draft brief, such as a supervising partner and the client, may have decades of experience in the area of the law covered by the brief.

The danger of that specialized knowledge is that the brief can become inaccessible to non-experts, when the document needs to educate the clerk about the relevant legal principles. This is why lawyers should consider replacing dense standards of review, packed with head-scratching quotations from leading cases, with simpler prose that lays out the principles of decisions in ordinary language. While it may be impossible to avoid referencing certain key cases, it's wise to place a premium on cases containing extended discussion, in accessible language, of the relevant legal principles. An explanatory parenthetical can highlight such cases for the clerk.

Where possible, writers should replace strings of case citations with a single citation to a treatise or other helpful source clerks can find easily on Lexis or Westlaw. This may be particularly useful in complex areas of the law, such as antitrust or bankruptcy, where the clerk may have little background knowledge. Laying out the details of the law in a logical way and in plain language will pay dividends in terms of educating the clerk and making the brief a helpful resource rather than a source of frustration.

Lacking substantive legal experience, clerks focus on what they know: spelling, grammar and citation. Many clerks were members of a journal during law school. They proofread articles, checked sources and corrected citation errors. On alert for such errors, clerks will find them easily in hastily prepared briefs. Also, since clerks have less experience with the professional realities that often conspire against attorneys hoping to produce a polished document, they may be less forgiving of such errors. Most importantly, the clerk may interpret such errors as weaknesses in a party's argument. Minor errors can affect the client's major interests.

Accordingly, producing error-free briefs is particularly important given that clerks are in the audience. Sole reliance on computer spell-checkers is a clear no-no, guaranteeing errors of a kind that only confirm that the author paid no serious attention to basic writing issues. Setting aside time for proofreading is a must, as is obtaining the assistance of a second pair of eyes to find errors the author can no longer see. This can go a long way toward improving the client's standing with a law clerk.

Clerks are not only inexperienced in substantive legal issues and overly miffed by spelling and grammatical errors, but they are young, often in their mid-twenties. They came of age in a different political, cultural and

click here for more info

TEXASLAWYERBOOKS
An ALM Publication

Find similar content

Companies, agencies mentioned

Most viewed stories

Ten Phrases Lawyers Hear That Portend Disaster

Gusher of Work Has Midland Firms Hiring Laterals

Social Media Savvy for General Counsel

A Lawyer's Life Cut Short

Whose Data Is It, Anyway? BYOD Policies at Work

ADVERTISEMENT

Trial Technology: When an Upgrade Is a Downgrade
Click Here for Full Story

LTN LAW TECHNOLOGY NEWS

lawjobs.com

TOP JOBS
PUBLIC-SECTOR LABOR AND EMPLOYMENT
C.L.E.A.T.
El Paso, TX

technological environment than most of the lawyers whose writing they are evaluating. This does not mean attorneys should replace pop culture references from the '70s and '80s with references to Kanye West and "The Twilight Saga." Such efforts almost always fall flat.

The most important consequence of clerks' relative youth is their lifelong experience with computers and the Internet. Attorneys should write briefs knowing that clerks will read them on a computer with easy access to Lexis, Westlaw, the court's electronic docketing system and the rest of the Internet. When citing the record in pleadings, motions and evidence, lawyers should consider including the court's unique number for that document, such as the ECF number in federal district courts. Such numbers provide far easier access to electronic documents than the other citation elements. Likewise, when citing to treatises and other materials available on Lexis or Westlaw, include their unique numbers. It is far easier for a clerk to paste them into a search box than to hunt through folders or perform a search.

While implementing these suggestions may go a long way toward advancing the client's interests with law clerks, clerks are only one part of the audience. Legal writing should always attend to the other members, especially judges. Judges are more likely than law clerks to have developed specific preferences that it would be unwise to ignore. Knowing these judicial preferences will always be of paramount importance. However, adapting one's writing to an audience of law clerks is unlikely to interfere with the effort to persuade judges, while enhancing the prospects for a successful outcome.

Wyatt Dowling is an associate with Yetter Coleman in Houston. He recently finished clerking for Chief Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia.

Associate Attorney
Confidential
Houston, Texas

MORE JOBS

POST A JOB

ADVERTISEMENT

ADVERTISEMENT

Need CLE?



Subscribe to Texas Lawyer

COMMENT ON THIS ARTICLE

[Terms & Conditions](#)

Display Name:

Your e-mail (not displayed with comment)

pyetter@yettercoleman.com

My Comment:

Comments are not moderated.

For more information, please see our [terms and conditions](#).

To report offensive comments, [Click Here](#).

REVIEW

POST

From the Law.com Network

os.com



: Isn't It About

: Hoot About

TEXAS LAWYER



Litigator of the Week:
Victory, at Long Last

Job-Hunting New Lawyers:

DAILY REPORT



Counties sue over
foreclosures

Persons leaves Burr &

Connecticut
LawTribune



UConn Law Adopts 'Hands-
On' Learning Requirement

Intervention Business Helps

CORPORATE COUNSEL



Ending the Holiday
Tradition of Outside Counsel
Rate-Increase Letters