

Do You Know Your Reader?

By Mark Cooney and Julie Clement

When you write a brief, for whom are you writing it? What reader do you have in mind while you slave away, piecing together legal arguments and explaining how sophisticated principles of law, applied to the facts of your case, dictate a favorable result for your client?

If you don't have anyone particular in mind, you should put more thought into who your audience is. Perhaps now more than ever, your clients' fates rest largely on the quality of your briefs and how effectively they persuade your readers.

Who are your readers? This is an easy one. If you're a litigator, then judges are your readers, right? Well, sort of. You're probably aware that in most courts, your initial reader is a judicial clerk or a court research attorney. But knowing this in a general sense is vastly different from keeping it in the front of your mind when you write.

Judicial clerks and court research attorneys are usually among the brightest graduates in their law school classes. They're intelligent and diligent. But they're often inexperienced—typically having less than

two years of legal work experience. Most haven't practiced law at all. In fact, some judicial clerks are still law students.

These clerks and research attorneys may have a variety of work duties, but their primary function, whatever the court, is to read attorneys' briefs carefully, conduct their own research, and recommend how cases should be resolved. The recommendation often takes the form of a memorandum to the judge—or even a draft opinion.

In other words, whether you're filing briefs in trial or appellate courts, your first readers are typically inexperienced lawyers or law students, not veteran judges. They're arguably your primary readers because their impressions often create presumptions about how cases should be decided before the judges even read the briefs.

Individual practices differ, of course, but when a judge gets a case file, often the first thing he or she reads is the clerk's recommendation. And why wouldn't judges do that? They know that their clerks have excellent credentials and have been hired to make objective recommendations. So when opening a file, many judges prefer to first read their clerk's unbiased analysis of the case.

The upshot is that if you don't convince the clerk that your client should win, by the

time the judge gets the case file, there will already be an objective recommendation on file saying that your client should lose. It's no longer your brief against your opponent's brief. It's your brief against your opponent's brief *and* “judicial counsel's” recommendation that you should lose.

Therefore, as strange as it may sound, litigators need to write their briefs for judicial clerks and research attorneys. Their needs should be at the forefront of your mind as you write.

What Do Clerks Need?

To find an answer to this question, we asked several clerks working for both trial and appellate judges what briefing techniques were most helpful to them—and what flaws made their jobs most difficult. Here's what appeared most often in the “flaws” column:

- incomprehensible briefs (disorganized, illogical, irrelevant)
- underdeveloped arguments (written as if from memory rather than based on thorough research)
- missing or incorrect citations to authority
- appellate briefs that are simply rehashed, cut-and-pasted trial briefs

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- poorly organized and blatantly biased statements of fact

Here's what the clerks found most helpful:

- clarity
- briefs that teach the law (To quote one clerk, "[T]he good ones do not assume that the court already knows a particular area of law; they take the time to educate the court before going into the argument.")
- plain English; minimal legalese
- strong organization with instructive point headings

This paints a vivid picture of what all judicial clerks need from you. They need you to write your brief in a way that makes it easy for them to understand what your case is about, what the law is, and how the law applies to the facts of your case. To produce briefs that accomplish this, you should keep several things in mind.

First, remember that your briefs often present completely unfamiliar legal issues to law clerks and research attorneys. Don't presume expertise and experience that those readers simply don't have. You must *teach* them the law and how it applies to the facts of your case. Don't write your briefs as if they're inside jokes for those who are already "in the know." What may be old hat to you is often brand new to your reader.

Your job is to make the complicated law that you've mastered over the years feel uncomplicated to your reader. Break it down. Be succinct, but take it step by step. Don't ignore fundamental points of law that, although obvious to you, will not be obvious to the clerks and research attorneys who are reading your brief. Don't belabor these points, but don't skip them, either. Provide appropriate citations to authority along the way.

Your goal is to make your readers feel like experts. Empower them. Make them comfortable enough to recommend how the case should be decided. Make it easy for them to agree that your client should win.

Second, remember that your briefs always present your readers with something

new, even if the legal issue is familiar. You may have lived with your case for months—possibly years—but they haven't. The court's staff didn't attend the depositions, interview your client, visit the scene of the accident, or review the stacks of discovery materials. Just as you introduce your spouse to new coworkers at your firm's holiday party, you need to introduce your case to your reader. They're usually complete strangers.

Third, keep your briefs as brief as they can be without sacrificing essential information. Forget the notion that court employees have unlimited time to scrutinize briefs in a leisurely fashion. They're busy people who have deadlines, just as you do. Sometimes they're downright pressured and hurried. Keep that in mind when you write.

What's Good for the Clerk...

Will your briefs seem too elementary and unsophisticated to a veteran judge if you write them in a manner that allows relative novices to understand them with ease? No.

Remember, like the law clerk, your judge is also new to your case. And more often than you'd probably think, your judge will be new to—or at least a bit foggy on—the area of the law that you're writing about.

Put yourself in your judge's shoes. For instance, imagine yourself sitting as judge for a motion call in any given trial court. You have 30 motions to decide that morning. One deals with the public-building exception to governmental immunity; one deals with judicial estoppel in a legal malpractice case; one deals with ERISA preemption; one deals with the economic-loss doctrine in a case concerning a warehouse fire; one deals with a municipal land-use issue; and the list goes on.

Are you an expert on all of those issues? Even if you've dealt with them before, do you have instant recall of the pertinent legal rules—the details and the nuances? Do you know if the law has changed since you last dealt with it? If not, why would you expect that from your judge?

Perhaps your judge has handled all these issues before, but it may have been years ago. If you were facing 30 motions every Wednesday, you'd need to brush up on each area of the law a bit—and you'd probably be

impressed with those sharp attorneys who wrote clearly and made your task a breeze.

In short, the same things that please judicial clerks will undoubtedly please judges. Judges are human. They're busy people with deadlines. On a daily basis, they're bombarded with every legal issue you can imagine. They get frustrated when reading unclear, disorganized, and excessively long briefs—just as you do. Make their jobs easy.

Whether your readers are judges or law clerks, think about them when you write. Your readers will benefit—and if your case has any merit at all, so will your clients. After all, the most effective brief is the one that quickly and easily brings the law clerk and judge to the right result: yours. ■

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