Cloaked wisdom: Nine tips from current and former federal clerks

Shane Delsman
414.287.9653
sdelsman@gklaw.com

One of the first steps any good litigator takes when beginning on a case assigned to an unfamiliar judge is to reach out to former clerks, local counsel or colleagues to learn about his or her peculiarities, predispositions or other prognostics. Sometimes the tips are substantive, for instance being prepared to discuss a damages demand at the scheduling conference. Other times they are more preferential, like using, or avoiding, a specific font type in your written communications.

I surveyed several current and former clerks from federal courts across the U.S. at both the district court and appellate levels. The following are nine tips shared by current and former federal court clerks that attorneys can to advance their cases as well as things attorneys should avoid doing to prevent impairing their case.

Tip one: Write simply and keep your audience in mind

While many of the tips clerks provided were related to writing, the most common suggestion: write simply. This is unsurprising, considering an attorney's pleadings are his or her most frequent communication with the court. "While many judges now have a career clerk who stays with them beyond a normal one- or two-year term, lots of judges have at least one position that rotates more frequently. Clerks in those rotating positions may be hired directly from law school, while other judges prefer clerks with a few years of experience. What's more, different judges use clerks in different ways. Some clerks are the first line for all reading and drafting, while some synthesize briefs and others perform administrative tasks. The key is knowing that clerk experience and expertise varies widely, so you should write with that in mind. Best practice is to write as if the first person reading your document just graduated from law school and started clerking yesterday."

Tip two: Avoid mischaracterization

"Although it is important to be persuasive in your communications, don't cherry pick quotes from the record or mischaracterize testimony. Always expect the record to be reviewed and that your credibility will suffer if the quoted testimony was taken out of context."

Further, attorneys are often told to avoid pejoratives or superfluous language because it can undermine his or her legal position. But, one clerk suggested another reason why an argumentative brief can be undesirable. "When parties focus too much on being argumentative and not enough on explaining a statutory scheme, or some complex area of law, courts can be left with trying to figure out new and complex areas of law with little guidance. Sometimes the most persuasive brief is the most helpful brief."

Tip three: Be thoughtful in your use of citations

Another frequent writing topic was citation. As one former clerk put it "ABC: Always Be Citing. The litigator may know where a legal proposition comes from or that a fact is in the record, but the court may not. Always tell the court the basis for your information." However, that doesn't mean that you need have the same level of precision as when you wrote on to the law school journal. "Strict Bluebook form isn't a huge deal. Our primary concern is being able to tell what you're citing and access it quickly."

But, here again it is important to keep your audience in mind. If the court has a high frequency of cases in a specific area of law, it may not be necessary to spend a lot of time explaining the legal basis for a hearing or motion. A clerk for a court that often hears patent cases suggested, "The parties don't need to give an overview of a *Markman* hearing or general patent law. The court is very familiar with patent law and will want to dive directly into the specific issues of the case."

Another clerk explained that merely citing cases that support your position is not enough. "Cite prior cases from the judge you are before and the district or circuit you are in." Often, they want to know what other judges in the court and circuit have decided. The same clerk said, "My judge doesn't care about another circuit's decision." The clerk also suggests that, "Precedent should be more than quoted. The brief should contain sufficient facts to explain why the cases are analogous and persuasive. And the reply brief should explain why the other party's case law is distinguishable. If it is a new legal issue, cite other relevant areas of law that may be instructive."

Tip four: Pay more attention to joint appendices

Attention to detail is critical when it comes to joint appendices, which are sometimes undervalued by attorneys. "The joint appendix index is referred to constantly and filings need to be clearly labeled. Previously used identifying labels like docket or exhibit numbers need to be included. While the entire record should not be part of the appendix, there should be sufficient context for the cited portions. If a document is part of the joint appendix that was previously submitted as an attachment to another filing, the attached document still needs a separate title in the index to be easily identifiable."

Tip five: Use discretion when contacting chambers

Many current and former clerks also mentioned contacting chambers. While there are certainly judges that are open to resolving disputes on the spot, not all judges are as inclined. As one clerk put it, "If there is something the court can and is willing to help with, call chambers, but don't abuse the process." It is also important to be thoughtful about how often you do this. "Even judges who are generally willing to engage probably don't want several calls in a day, nor do they want to resolve every dispute that arises. You are not the judge's only set of litigants." But, keep in mind that there are some judges that do not want to be contacted directly because of the "compromising position" it puts the court in. "Clerks and chambers . . . have to walk a delicate balance when speaking to [only] one party." One clerk suggested that "if it is procedural, you should be able to figure out or call the clerk's office. If it's substantive, it goes in a filing."

Tip six: Seek judicial relief sparingly

Be mindful when seeking judicial relief for minor violations or missed discovery deadlines. "Courts generally want to rule on the merits and have been instructed to do so by appellate courts, so only the most egregious errors are likely to get you a dismissal." However, that doesn't excuse you from knowing and following the rules. Although unfamiliarity with a local rule or federal rule may not be dispositive, it certainly runs the risk of annoying chambers.

Tip seven: Be smart about demonstratives

When it comes to trial and oral arguments, one clerk suggested avoiding an extensive slide deck. "If you choose to make slides, keep them clear and simple." Being wedded to a slide deck sometimes inhibits being able to directly respond to questions from the judge. Another suggestion was, "Figure out early on what information and/or exhibits will be used only for demonstrative purposes during trial. If the exhibit does not need to be admitted into evidence because it is being used for demonstrative purposes only, the parties can narrow disputes and significantly streamline the pretrial process."

Tip eight: Know the basics

Review the court's website to see if there are any judge-specific procedures or rules. For example, some courts require prior approval before being able to use live expert testimony for a *Markman* hearing. This tip applies to scheduling orders. It seems obvious, but if a scheduling order comes out, read it – all of it. Sometimes, scheduling orders contain instructional information. One clerk cited an example of a judge providing detailed instructions for expert reports. Attorneys who did not follow the instructions were a source of frustration for the judge, which often resulted in reports having to be significantly revised on a short deadline. Another clerk reminded that, "Even experienced practitioners sometimes forget that each judge is the king or queen of their own kingdom, and have a lot of leeway to set rules of practice within their courtroom. Knowing not only the local rules of your jurisdiction but also the individual rules of your judge will go a long way to avoiding procedural problems, especially when you're trying to move a case along quickly."

Such instructions may not just be a potential pitfall, they can be an opportunity. For example, one judge offered an early damages hearing at the scheduling conference. "The procedure, if implemented, consists of an exchange of early expert reports, and a hearing with the experts present. Both the parties and the judge will be allowed to examine the expert during the course of the hearing. The result of the hearing is often guidance from the judge and/or rulings on a party's damages case. The hearings will occur prior to *Daubert* briefing to help identify the potential issues."

Tip nine: Treat everyone respectfully

It is fitting that the last piece of advice from current and former clerks is to treat all staff with respect. "When you appear in court or call chambers, make sure you're being kind to the clerks and especially the judicial assistants. Aside from just basic human decency, this is best for your case. Chambers are tight-knit groups of anywhere from three to six people and everyone knows when an attorney is disrespectful. Being nice to the judge in court is not likely to get you anywhere if you've treated his or her other staff poorly in private." On the topic of respect, another clerk brought up the importance of titles saying, "…always refer to judges by their titles—when in doubt, 'Judge' or 'Your Honor' is always the way to go."

This suggestion further applies to respecting opposing counsel. Professionalism, civility and kindness is not a sign of weakness, it is a sign of strength. You cannot control opposing counsel, but you can control your actions and responses to opposing counsel. If you let opposing counsel affect your conduct, you've lost control and may jeopardize your client's case.

Do your homework

When preparing for a case with an unfamiliar judge, it's critical to do your homework before you step into the courtroom. By following these nine tips, you'll be well on your way to success. At a minimum, this preparation will make the litigation process smoother, while in other situations it can have a meaningful impact on your ability to advance the case. But always remember, conventional wisdom still applies. As one clerk put it, "If you are unfamiliar with the judge, a court or the local rules, hiring local counsel may be advantageous. Often, they can be your best asset to navigate the court and the judge's preferences."

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