

A Peek Behind the Curtain: Practice Tips From Those Who Read Your Briefs

Caitlin Boland Aarab

*Boland Aarab PLLP
Great Falls, MT*

Samir Aarab

*Boland Aarab PLLP
Great Falls, MT*

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Caitlin Boland Aarab & Samir Aarab, Great Falls
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“If you can't explain it simply, you don't understand it well enough.”

Help the law clerk help you

- When law clerks see one side complicating matters, they assume it is because that side wants the clerk to do the hard work
- The judge and the law clerk see all briefs filed by all attorneys; they can easily compare your work to the work of others
- The law clerk is new to the law; he or she may not know things you think are obvious
- Be sure of your citations: the law clerk will read the cases you cite because he or she may not have read those cases yet
- Squarely address any authority not supportive of your position and give reasons to find in your favor in spite of contrary law
- Snark is more fun to write than read; avoid ad hominem attacks
- Candidly acknowledge your losing arguments but explain why they're not dispositive
- It helps the law clerk if you explain the applicable legal structure before getting to the analysis
- Cite Rule 1 and other policy statements
- To the extent possible, refrain from relying on stock language
- Update your stock language whenever there is a rule change
- Call and ask the JA or law clerk how you can be helpful (*e.g.* by e-mailing Word copies of briefs to the clerk)

Help the judge help you

- Your credibility with the judge matters as much as the law you cite
- Read the local rules
- Judges are sensitive to appeal: give them assurances that a ruling in your favor is likely to be upheld
- If you are given oral argument, you should assume the judge has read your brief
- In oral argument, start with the remedy and a roadmap of your argument
- The more specific you are about the remedy you seek, the more specific the judge's order will be
- If it matters, put it in writing; do not rely on "gentleman's agreements"
- Preserve your record by filing a motion
- Pay attention to detail: the judge has no formal means of addressing small matters (*e.g.* errors in proposed orders), but he or she notices them