

What Appellate Law Clerks Wish Lawyers Knew

By Martha Ayres



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I used to be a law clerk at the Arkansas Court of Appeals. In private practice, I frequently reflect on that formative experience. Being a law clerk is like having a backstage pass to appellate decision-making. An appellate opinion may list only one judge's name at the top, but it is the product of a collaborative, thoughtful, and highly-structured team process. Behind every written decision are multiple conversations—and often a debate.

Here is what appellate law clerks wish lawyers knew:

1. Finality First

One of the first questions a law clerk will ask when a case comes in is: *Does the appealed order dispose of all claims and all parties in the action?* There are some exceptions, but in Arkansas, a final order is almost always the starting point for appellate jurisdiction. Determining finality is not always easy. (See related article by Judge Brandon Harrison and Amber Davis on page 20). You may need to consult the rules and a decent amount of case law.¹ It is also a good idea to review jurisdictional filing deadlines, like those for filing a record or a notice of appeal.

And if you're the appellee and you see a jurisdictional problem—shout it from the rooftop. File a motion to dismiss and attach to the motion as an exhibit all the record materials needed to support the motion. Judges and clerks will quietly thank you for saving everyone the time. Jurisdiction cannot be waived and may be raised for the first time in an appeal. The court would rather resolve a threshold issue quickly than spend substantial time working up a case that it has no power to decide.

2. Preservation is Key

Even if you have a final order and the court has jurisdiction, your key appellate argument won't go anywhere if it wasn't preserved below. You have to show court hawks where you raised the important issue in the record, that you raised it at the right time, and that the circuit court expressly ruled on this issue. Missing any of these key steps will likely kill your appeal before it even starts.

While the preservation doctrine can feel like it's all about technicalities, it is rooted in principles of fairness. It gives everyone a chance to fix mistakes or problems before these errors can become a basis for a reversal in an appeal.

3. Tell a Story That Makes Sense

A clean and chronological Statement of the Case and the Facts is your best shot at setting the stage. Start at the beginning and walk the court through what happened—clearly and simply. Clerks are not looking for advocacy in this section. They are just trying to get their brains wrapped around the case initially. If you confuse the clerk here, everything that follows is on shakier ground. Worse, frustrate them with a distorted or disorganized version of the

facts, and the whole stage begins to buckle before the argument even starts.

One of a law clerk's least favorite tasks is going on a scavenger hunt through the record to collect facts. Put them all here, in one place, with proper record citations—it builds a lot of credibility. Most attorneys do not include enough material facts early on in their briefs.

So ask yourself early on: What are the material facts that will influence a decision when applied to the law? Law clerks read hundreds, if not thousands, of electronic record pages every week since the abstract requirement was abolished. Help them help you (and your client). Tell them a story that makes sense and where to find it in the record.

4. Make Your Argument Clear and Easy to Follow

A good appellate argument section has a strong hierarchical structure and a logical flow. Too many briefs use a stream-of-consciousness where a clerk must stop, reread, and then guess what the lawyer is even trying to argue. Sometimes the heading does not match the argument that follows it. That's no joke.

Be kind to the reader. If your point can be said in one sentence, don't take a paragraph. If your theory has three parts, say so. If there's a roadmap to reversal, show it. Appellate judges have dozens of briefs to get through in a month—make yours the one they remember because it was so clear and easy to follow.

5. Appellate Courts Are Generalists By Design

As a law clerk, one of the more common missteps I saw lawyers make was when they presumed that the court already knew and understood a specialized or nuanced area of the law. Arkansas appellate courts are, by design, generalists—handling every kind of case that comes through the door from all 75 counties across the state. So if you are briefing a UCC Article 4 case or a complex trust matter, for example, you need to assume that you are starting from scratch. Brief the case like it's day one of law school and no one has read the book yet. Clerks are far more familiar with issues in custody disputes, boundary lines, or criminal

cases than they are with bank deposits or trust accounting. Unless a judge or clerk happened to work in that niche area in a prior career, it's unlikely they know it as well as you do—so take the time to walk them through the law step by step. Teach first; advocate second.

6. Law Clerks Go By The Brief

Most law clerks genuinely enjoy the anonymity of the job. They are professional ghostwriters to one degree or another. Their job is to make the judge's job easier—to get them what they need to make the best decision possible. Law clerks are not googling you. They are reading the brief in front of them and evaluating it on its merit. You may be a local legend, but the brief must do the work to persuade here.

Law clerks also have a strong preference—call it a bias—for Arkansas cases. Citing other jurisdictions is fine, but it shouldn't come before a thorough discussion of what Arkansas appellate courts have said about an issue, even if the issue is still developing. But if you are briefing a federal constitutional issue, don't leave the Supreme Court of the United States out of the conversation.

7. Law Clerks Strive To Get It Right

Law clerks take the job seriously—more seriously than most people probably realize and credit. There's an unspoken code of honor in chambers: get it right, be fair, don't cut corners. The work touches real people and real outcomes, whether a clerk agrees with a particular outcome or not.

That said, there are strict internal deadlines that a law clerk must follow. Some cases are harder than others. Some records are messier. Some issues are brand new; some are well-settled. When a reply or appellee brief tackles the tough questions raised by the opposing party head on, it can be a gift to a clerk caught between a rock and a hard place in figuring out where a case should go. Don't be afraid to answer the tough questions—lean in and help the court get to the result you want.

8. There is a Team, Not a Machine

I imagine that a lot of lawyers picture a judge reading briefs alone and then issuing a ruling. That is not how it works at the

appellate level. Cases are first reviewed and sorted by a team at the clerk's office. Each case is then worked up by a team of judges, law clerks, and possibly staff attorneys. They read, talk, debate (even in the halls), write, rewrite, edit, and rewrite some more. I once helped draft a dissent, a concurrence, and a majority opinion in the same case before the court decided what direction to go.²

Beyond substance, a final opinion passes through many capable hands. Every office reads the circulated opinions. Excellent proofreading and quiet attention to detail also come from the Reporter's office. The Court of Appeals isn't perfect, but it takes its responsibility seriously. Take heart. It's all part of a team process.

Different people see different things. One of the best parts of being a law clerk, for me, was talking cases with colleagues. Often when I was stuck, I would seek out someone who often saw things the opposite way I did—because those conversations pushed me to see the case from a different angle and brought me closer to clarity. As a law clerk, I had no vote. My job was to understand how my boss or another member of the panel reasoned through a decision—and to write that view with integrity.

And sometimes, I missed the mark. A senior clerk would leave me handwritten yellow sticky notes on a draft. They were, at times, mortifying, but also helpful. That kind of mentoring and careful attention to what the law requires is something I've come to appreciate even more in solo private practice.

I hope this article was helpful. A thoughtful brief won't guarantee you a win, but it will make a difference behind the scenes. If you start by making a law clerk's job easier, you're already making the judge's job easier. That's the first step toward an appellate victory—and a curtain call you can be proud of.

It's what appellate law clerks wish lawyers knew.

Endnotes:

1. For example, ARK. R. APP. P.—CIV. RULE 2, 3, & 5; ARK. SUP. CT. RULE 4-2, 6-9.
2. See, e.g., *Davis v. State*, 2019 Ark. App. 303, 577 S.W.3d 714. ■