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LEGAL CITATIONS: A FOUNDATION OF WRITTEN ADVOCACY

DOUGLAS E. ABRAMS¹

IN THE JOURNAL OF THE MISSOURI BAR THREE DECADES AGO, JUDGE HUGH R. JONES, OF THE NEW YORK STATE COURT OF APPEALS, WROTE, “APPELLATE ADVOCACY, WRITTEN AND ORAL.”²

The article advanced this formula for achieving effective appellate advocacy: “First, you seek to persuade the court of the merit of the client’s case, to create an emotional empathy for your position. Then you assist the court to reach a conclusion favorable to the client’s interest in terms of the analysis of the law and the procedural posture of the case.”³

In the adversary civil and criminal justice systems shaped by precedent, persuading and assisting the appellate court depends heavily on the advocates’ citation and application of case law, statutes, administrative rules and regulations, and other binding and persuasive authority potentially relevant to the court’s disposition. Together with the advocates’ presentations of the facts, this legal authority lays a foundation for the adversary argument that marks both systems. This Journal of The Missouri Bar article discusses some basic guidelines for strengthening the foundation that the advocate’s legal citations can provide.

Accuracy

Thorough legal research is essential to effective advocacy, but thorough legal research is not necessarily sufficient. The force of legal research can be compromised if the advocate fails to cite an authority accurately. A citation can persuade and assist the court only if the court can locate the cited authority to weigh its influence.

Before Westlaw, Lexis, and similar electronic data retrieval systems, an advocate’s mis-citation sometimes imposed a formidable barrier for the court to overcome. For example, the advocate might have misidentified a

reporter or might have cited an incorrect volume. The judge or a law clerk seeking to examine or verify the misidentified or misnumbered citation might have been sufficiently hardy to search by turning the pages of multiple volumes on the shelves. Or else the court might have questioned the advocate about the correct citation at oral argument (if oral argument were available at all); the question would potentially embarrass the advocate if the client attended the proceeding and watched the advocate fumble and acknowledge the error which was important enough for the court to ask about it. Sometimes, however, the mis-cited authority resisted time-consuming search and thus failed to persuade the court, assist the court’s decision making, or otherwise serve the client’s cause.

Today, electronic word searches often enable judges or their clerks, sitting at their keyboards, to locate a mis-cited authority with modest effort, at least if the spelling is correct or nearly correct. Inaccurate citations may still harm the advocate’s effort to persuade, however, by arousing the court’s suspicions that an advocate who advances erroneous or misspelled cites may also be careless about arguments and other statements advanced elsewhere in the brief.⁴

While still at the keyboard, an advocate should assume that the court will inspect every cited authority for its meaning and relevance to the decision. In advocacy, credibility must be earned and may be lost by inattention or miscue.

The “ABA Model Rules of Professional Conduct” recite that an advocate “zealously asserts the client’s position under the rules of the adversary system.”⁵ To fulfill this obligation, an advocate retains considerable latitude to cast binding and persuasive authority in a light favorable to the client. But once the advocate has researched an authority’s place in the fabric of the law, the advocate serves the client best when the court respects that the argument says what the advocate means and means what the advocate says. Accurate legal citations, readily capable of the court’s review and verification, can help win and hold this judicial respect.



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Proofreading

Accuracy in written advocacy depends on careful proofreading, first by the writer during the drafting process and then, if time constraints permit, by a colleague of the writer or by a third party who can bring fresh perspectives.

Third-party proofreaders of a draft brief or other submission can perform multiple roles. These proofreaders can flag and remedy shortcomings of spelling, grammar, style, syntax, and the like. Proofreaders with legal experience might also test for logical argument considering the facts and the law presented.


But proofreaders may also help the advocate persuade and assist the court (and maintain the court's respect) by ascertaining that legal authorities, spelled correctly, are accurately cited so the court can readily locate them for examination. Before submitting the brief or other document to the court, the writer or editor should open the appropriate volumes to the cited pages or should verify the volumes, pages, and quotes electronically.

Using the court's citation style

Missouri lawyers frequently file briefs and other submissions in courts of other states. Whether or not the court's rules address citation style, an advocate persuades and assists by using the citation style that the court uses in its opinions. The court may use "The Bluebook: A Uniform System of Citation," a distinctive style, or both.⁶ By conforming to the court's practice, the advocate

demonstrates respect for the court, familiarity with its conventions, and appreciation for its position and authority. Conforming can also help win and hold the court's confidence in the advocate's professionalism and attention to detail.

Conclusion: A lawyer's valuable asset

Win or lose, a reputation for competence is a lawyer's valuable asset. Thorough research, careful proofreading, and close adherence to the court's citation style help maintain this reputation as part of the lawyer's total package. 

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books, which have appeared in a total of 22 editions. Four U.S. Supreme Court decisions have cited his law review articles. His writings have been downloaded more than 45,000 times worldwide (in 153 countries). His latest book is *EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS* (West Academic 2d ed. 2021).

2 Judge Hugh R. Jones, *Appellate Advocacy, Written and Oral*, 47 J. Mo. BAR 297 (June 1991).

3 *Id.* at 298.

4 See, e.g., Washington Ct. App., Div. 1 CLE, "Briefly Speaking": *Brief Writing – Best Practices*, Washington Courts (Sept. 22, 2022), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.display_divs&folderID=div1&fileID=briefWriting ("[S]everal spelling or grammatical errors in an otherwise competent brief ... [make] the judge go back to square one in evaluating the counsel.").

5 Model Rules of Pro. Conduct, Preamble: A Lawyer's Responsibilities [2] (AM. BAR ASS'N 2020).

6 The Bluebook: A Uniform System of Citation (Columbia L. Rev. Ass'n et al. eds, 21st ed. 2020).

