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Observations of an Appellate Judge: The Use of Law Clerks

*Eugene A. Wright**

Despite the importance of law clerks, the role they play in the appellate process has received little serious attention in the literature of judicial administration.¹ Because the law clerk is such an integral component of today's appellate process, his role deserves the formal treatment of an academic enterprise. This Symposium issue and my contribution to it are meant to meet that challenge.

I. SKILLS AND LIMITATIONS OF NEW LAW CLERKS—AN INTRODUCTION

Appellate judges, indeed all judges, have one overriding responsibility: to decide cases. Chief Justice Burger has reminded the bench and bar:

We must constantly keep in mind that the duty of lawyers and the function of judges is to deliver the best quality of justice at the least cost in the shortest time.²

Time—judicial time—is our most valuable commodity. We must employ it effectively and efficiently if we are to keep abreast of new developments in the law, new areas of litigation, and modern procedural improvements and to dispose of increasing backlogs of appealed cases.³ Circuit judges, each authorized two law clerks,⁴

* Judge, United States Court of Appeals for the Ninth Circuit. B.A., 1934, J.D. 1937, University of Washington at Seattle.

1. There are exceptions. Among the best is Professor Bickel's treatment of law clerks in his book *POLITICS AND THE WARREN COURT* 139-45 (1955) and Chester Newland's excellent historical treatment in his article, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 *ORE. L. REV.* 299 (1961). The topic is a favorite of after-dinner speakers and some of these addresses are quite good. A lively address delivered after dinner by Dean Acheson at an annual meeting of the American Law Institute is undoubtedly the best in this category. Acheson, *Recollections of Service With the Federal Supreme Court*, 18 *ALA. LAW.* 355 (1957).

2. Burger, "Report on Problems of the Judiciary" I, Address to the Annual Meeting of the American Bar Association, San Francisco, Aug. 14, 1972, in 93 *S. Ct. supp.* page 3.

3. See Wright, *Some Thoughts on Judicially Caused Delay*, 11 *JUDGES' J.* 38 (1972).

4. The authorization is statutory. 28 U.S.C. § 712 (1968). Provision for law clerks for United States Court of Appeals judges was first made in 1930, Act of Jan. 17, 1930, ch. 509, § 118a, 46 Stat. 774. The number of law clerks for Supreme Court Justices, currently set at 3 each, is discretionary with the Chief Justice as the Court's administrative head. 28 U.S.C. § 675 (1968). The Justices have recently asked for funds to replace 3 of their 27 law clerks with older, career persons of experience. *Washington Star News*, April 22, 1973.

have become increasingly dependent upon the help of their staffs to meet the demands of their expanding workload.

The role of the law clerk is to aid the experienced judge in his ultimate task, decision-making. An appellate judge will have a varied background of skills and experience. Often he brings to his task the skills of an advocate, having used discovery procedures before trial, sought witnesses, examined and cross-examined, summed up, received favorable and unfavorable results and as a lawyer gone through the appellate process for himself. His background may include service as prosecutor, defense counsel, corporate executive, legislator, governor, community leader, military commander, law teacher, or trial judge.⁵

With such a background of knowledge and experience, the judge often can read the cold record with shrewd analysis. The judge questions, doubts, and searches for the truth. Between the lines he sees inferences that are missed by the novice and reaches conclusions that only an expert can find. It is not unusual for a judge in the common law tradition to have visceral reactions for which he can find no immediate reasons—what Karl Llewellyn liked to call a judge's "situation-sense."⁶ A judge's conclusions may be valid but the bases therefore obscure even to him.

Conversely, a judge's impressions of a case are not immune from error. There are times when an initial conviction, the "judgment intuitive"⁷ of a case, is erroneous, the error surfacing as such only upon later discussion, research and reflection—or upon writing.⁸ Occasionally a judge will experience the agony that comes when his draftsmanship fails and he must face his inability to set his original view into words. As his initial conviction begins to bend,

Whenever the question of increasing judicial production is raised, the proven effectiveness of law clerks is always noted and it is often suggested that their numbers with each judge be increased. *E.g.*, AMERICAN BAR FOUNDATION, ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS REPORT OF RECOMMENDATIONS 2 (1968); Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29, 36 (1968).

5. Justice Felix Frankfurter's perceptive historical survey, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781 (1957), undermines the usual assumption that prior judicial service is an indispensable qualification for appointment to the appellate bench, at least at the highest level.

6. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 121 (1960).

7. See J. HUTCHESON, *THE JUDGMENT INTUITIVE* (1938).

8. "Nevertheless, as a writer, a judge is under a pressure to produce and publish more severe than that felt by any college professor or journalist. The requisite research and study, the technical accuracy required, and the tremendous emotional strain and responsibility involved make this certainly among the most difficult types of writing." Johnson, *What Do Law Clerks Do?* 22 TEXAS B.J. 229, 230 (1959).

a judge is often thankful that judgments are required to be articulated in a written opinion.⁹

The law clerk is intended to work with and complement this complex decision-making organism that is an appellate judge. Indeed, Learned Hand characterized law clerks as "puisne judges,"¹⁰ and correctly so, for they are not just secretaries or mere assistants.¹¹ They are the extra hands and legs, which, when coupled with an inquiring mind, are indispensable to a judge in the performance of his most difficult obligation.

The knowledge that a young graduate brings with him often surpasses that of his judge in some areas of the law, usually as a result of his having recently completed an in-depth seminar paper or *Review* article on a subject. In the appellate context, such a background is an immense aid to a clerk in enabling him to understand the broader picture in which his judge's decisions are being made. Unfortunately, the depth of knowledge that many clerks possess on substantive matters is rarely matched with a solid grasp of trial processes.

A recent experiment conducted in a law school classroom illustrates this point. The professor gave an unemotional reading of the trial record quoted by Mr. Justice Douglas in *Mayberry v. Pennsylvania*.¹² The quoted portions included egregious examples of criminal contempt, such as the following interchange between the petitioner, acting as his own counsel, and the judge:

Mr. Mayberry: You're a judge first. What are you working for?
the prison authorities, you bum?

The Court: I would suggest —

Mr. Mayberry: Go to hell. I don't give a good God damn what you suggest,
you stumbling dog.¹³

The class proved their lack of understanding of the trial process by

9. "In sixteen years I have not found a better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day." Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957).

10. See Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk*, 24 U. CHI. L. REV. 661, 663 (1957).

11. The term "secretary" was first used to describe the position of law clerk. Over the years the designation has varied and has included "research assistant," "legal assistant," "research attorney," and probably others as well. Johnson, *supra* note 8.

12. 400 U.S. 455 (1971).

13. *Id.* at 458.

laughing at the reading. The professor told me that he doubted whether his students read Justice Douglas's commentary as anything more than words.¹⁴ Trial proceedings come to the law clerk cold. The words are muted in the transcript; the trial environment is left far behind. Young law graduates, often having spent their last three years dealing only with hypotheticals, are ill-prepared to understand and appreciate what has gone on during the trials below.

Some attributes of the decision-making process that the new clerk finds difficult are institutional in nature. The scope of appellate review is an example. A clerk may see an issue lurking somewhere in the record but not raised by counsel. Yet a judge may choose to ignore it for reasons wholly unrelated to the merits; the integrity of the adversary system may be at stake, or the judge may simply decide not to allocate his limited judicial time to errors outside the purview of the "plain error" doctrine.¹⁵ And what of the clerk who for the first time confronts the riddle of harmless error? As an institutional matter that issue has troubled even the brightest of our judges.¹⁶

The law clerk is also hampered by his introduction to the appellate process in the procedure casebooks used in law schools. A check on such casebooks indicates that most leave the materials on appeals until the end, with the treatment given the subject coming almost as an afterthought.¹⁷ As a result, incoming law clerks must spend valuable time learning rudimentary aspects of appellate procedure.

Finally, young clerks are in the main untried cubs.¹⁸ Ripening takes time and exposure to the task at hand. "Disinterestedness and

14. "Petitioner's conduct at trial comes as a shock to those raised in the Western tradition that considers a courtroom a hallowed place of quiet dignity as far removed as possible from the emotions of the street." *Id.* at 456.

15. FED. R. CRIM. P. 52(b).

16. See R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970).

17. For instance, one of the leading casebooks in the procedure area, J. COUND, J. FRIEDENTHAL & A. MILLER, *CIVIL PROCEDURE CASES AND MATERIALS* (1968), treats appellate review in about 60 pages and over half of that is dedicated to the principle of finality; yet the book is over 1,000 pages long. Even Karlen and Joiner's excellent text, *TRIALS AND APPEALS* (1971), a significant improvement over most in its treatment of appeals, hardly gives the topic as much time as the title of the book indicates. As usual, the appeals materials conclude the book and are but one of 11 chapters.

Maybe the law schools should offer a specialty course on the appellate process, making appeals co-equal with the trial. Surely appeals are as important and often as dispositive, and there is much to be learned about the nature of the judicial process in such a course.

18. The phrase is Karl Llewellyn's. An entire section of his classic depiction of the appellate process, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960), is devoted to the trial judge's law clerk as extra manpower available to the court. *Id.* at 321-23.

deep humility,"¹⁹ qualities so necessary for the wise exercise of the judicial function, cannot be memorized. Also, a young clerk may have an inadequate sense of the long-range effect of his judge's decisions at either the trial or appellate level. And sometimes a new clerk may not see ". . . that other major duty of the court, unimplemented by much doctrinal or other verbal machinery, but there, live, throbbing like a heart: the felt duty to justice which twins with the duty to law."²⁰

As a result of these factors, it is often not until a clerk reaches midstream in his year with the court that he begins to have even a tentative feel for the nature of the appellate process and its institutional characteristics.²¹ Unfortunately, all too often an understanding of the trial process never comes during his tenure as a clerk, and his ability to participate in decision-making is thereby hampered. Perhaps as law intern programs²² become more popular, clerks will come to the court with some trial experience under their belts. Judges must accept the responsibility for searching out those students who combine a background in legal research and writing with on-the-job experience.

All too often participation on the *Review* is the *sine qua non* for clerkship selection.²³ *Review* experience is certainly valuable train-

19. "[J]udicial experience intrinsically fosters certain habits of mind and attitudes, serves to train the faculties of detachment, begets habits of aloofness from daily influences, in short, educates and reinforces those moral qualities—disinterestedness and deep humility—which are indeed preconditions for the wise exercise of the judicial function" Frankfurter, *supra* note 5, at 787.

20. K. LLEWELLYN, *supra* note 6, at 121.

21. The hardest discovery is the realization that most appeals are routine.

Most appellate judges would agree that the result in about seventy-five percent of appeals is clearly foreseeable after argument, regardless of which judges sit on those cases. . . . The courts of appeals thus spend the great bulk of their time on only twenty-five percent of the appeals they hear.

Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29, 36 (1968).

22. Some form of law intern program has now been adopted in 41 states and the District of Columbia. INSTITUTE OF JUDICIAL ADMINISTRATION, STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISON AND COMMENTS (2d ed. 1973).

23. Since an improperly selected clerk can render his judge virtually paraplegic, the selection process should ensure that only the most qualified are chosen. As important as is the task of picking a law clerk, however, it should not be allowed to distract the judge for long from his main task of decision-making. As applications for clerkships continue to increase in number, judges must begin to employ new techniques to achieve the selection of the best person for the job. An extensive discussion of the selection process has been elsewhere presented. Address by E. Wright, *Selection, Training and Use of Law Clerks in United States Court of Appeals*, Circuit Judges' Seminar, Federal Judicial Center, Washington, D.C., Nov., 1972 (unpublished).

ing for a clerkship, and generally does insure that a clerk is qualified to do the kind of analysis of trial records, research and writing—either memoranda or draft opinions—that will be required of him. But *Review* participation can leave a student suffering from the “classroom syndrome”—a tremendous knowledge of substantive law with little appreciation of how it is to be applied. Judges must begin to select as their clerks those who have actually participated in the legal process, whether as interns, legal aid assistants, or whatever. This is not to denigrate the importance of the scholarship and research skills usually instilled by the *Review* experience. Indeed, participation on the *Review* remains the most reliable indicator of scholarship, writing ability and good work habits;²⁴ but, if clerks are to contribute meaningfully to the appellate decision-making process, a broader background is essential.

Having selected his clerk, a judge must be conscious of the need for training; but he cannot allow the training effort to divert him from his main task—deciding cases.²⁵ While experience has established that a good law clerk so increases the judge’s working capacity as to far outweigh the loss in judicial time that must be given to training a new clerk each year,²⁶ perhaps there are more efficient ways to train our clerks than are presently being utilized. Rather than training by an individual judge or by an outgoing clerk, a number of clerks can be trained at one time in a central location. The Court of Appeals for the Ninth Circuit has had such a program of clerkship instruction for four years and the circuit judges favor its continuation as an annual event.²⁷ At the national level, Louisiana State University’s Law Clerk Institute is also fulfilling the need for adequate preparation of the law clerk at the start of the job,

24. The work habits of some of my clerks have amazed me, but I have not commented or complained if they continued to do their work well and on time. On the more industrious side, I had one clerk who became so engrossed in his work that he often forgot lunch entirely, realizing as he was leaving at night that he had not eaten! The ability to get into a subject, not leaving it until it has been conquered, is indispensable in a clerk. Often when I have left the office at six a clerk will still be at his desk, refusing to quit until the task at hand is completed.

25. See E. Wright, *supra* note 23, at 16.

26. See, e.g., K. LEWELLYN, *supra* note 6, at 121.

27. The clerks who have attended have noted that one great benefit is the opportunity to meet the clerks for other judges. This often ripens into a close working relationship, though the judges may have offices in separate cities. A puzzling problem coming up for argument or the draft of an opinion in circulation may cause one clerk to call another for an exchange of ideas. I have seen this technique used frequently and successfully by my clerks. Additional authorities have been uncovered and legal treatises available in one library, not in another, have been referred to. The several judges may be unaware of these discussions but they gain the benefit of the research efforts of clerks other than their own.

before he reaches his judge.²⁸

With this presentation of some of the skills and limitations that newly arriving clerks bring to their jobs, it should be apparent that while clerks can exert, and should exert,²⁹ a significant influence in the decision-making process, that influence is tempered by the clerks' unfamiliarity with trial processes, appellate procedure, and institutional needs. This suggests that law clerks should be utilized mainly to do what their background has prepared them for: legal research,³⁰ analysis of specific issues, and rough drafting.

II. USE OF LAW CLERKS IN THE APPELLATE PROCESS

The intra-office institutional structure of the judge-clerk relationship is probably the most important factor in efficiently using the law clerk's talents. Since all appellate courts perform roughly the same tasks, it would be instructive to analyze in general the various steps in the appellate process and the use of clerks in each.

A. *Screening of Briefs, Files and Transcripts of Cases Scheduled for Argument*

Most appellate courts schedule oral argument³¹ several weeks in

28. See generally Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1123 (1973) (invocation address at Law Clerk Institute, Louisiana State University Law Center, Aug. 30, 1972). A description of the Law Clerk Institute appears in an Appendix to Professor Baier's article, 26 VAND. L. REV. at 1171-77.

29. See generally Bickel, *The Court: An Indictment Analyzed*, N.Y. Times, Apr. 27, 1958, § 6 (Magazine), at 16.

30. Conservation of time in legal research will require that clerks be familiar with new research techniques and equipment as they are developed. Research by computer is no longer in the experimental stage. Some court decisions are available on microfilm and microfiche (a measured, transparent sheet of film containing multiple rows of micro images).

Law clerks in the future may be listening to audio reports of trials, rather than reading the traditional court reporter's typed transcripts. Some state and federal courts have already begun to install multiple-track recorders. See REPORT OF THE SPECIAL COMMITTEE OF THE APPELLATE JUDGES' CONFERENCE ON INCREASING ADMINISTRATION EFFICIENCY THROUGH TECHNOLOGY 6-27 (Aug. 12, 1972) [hereinafter cited as REPORT ON INCREASING EFFICIENCY THROUGH TECHNOLOGY].

And new standard of judicial ethics contemplate that trial judges may authorize "electronic or photographic means for the presentation of evidence." ABA CODE OF JUDICIAL CONDUCT, Canon 3, A(7)(a) (1972).

Law clerks and judges' secretaries will soon be using automatic typewriters for initial research to final copy. This equipment should materially accelerate the decision-making process, as memoranda and preliminary drafts are stored on magnetic or paper tapes, available for rapid incorporation into final opinions. See generally REPORT ON INCREASING EFFICIENCY THROUGH TECHNOLOGY 53-55.

31. Some appellate courts have employed a screening procedure in recent years, under which law clerks select cases for disposition without oral argument. The clerks write a memo-

advance and each judge will have the printed briefs at least two weeks early. If he customarily reads the briefs before oral argument,³² the judge can use his law clerk's assistance in a number of ways: (1) to check the accuracy of cases cited in support of each argument; (2) to look for later cases in point (appellate briefs are sometimes as much as two years old!); (3) to pinpoint those issues which are likely to be dispositive; (4) to suggest areas where the need for questioning at oral argument is apparent; (5) to recommend alternative approaches to the decision on each issue, with reasons for each; and (6) to raise with the judge any issues not mentioned by the parties, including broader policy considerations.

Armed with this pre-argument preparation by his clerk, a judge can delve into the briefs with a good deal of the necessary legwork already completed. In some cases, the clerk will have substantially shortened the amount of judicial time necessary for a decision,³³ especially if he has looked for later cases in point, or has recognized accurately the issue that is likely to be dispositive of the appeal.

During this initial contact with the case, it may appear to the clerk that the issues are complicated, or that there is little precedent in the area and the outcome is in considerable doubt. He may be of the opinion that some research in depth is required, and at this point he should confer with the judge, spelling out the problem as he sees it. Often a clerk will be surprised to see an appeal that seemed to him to be of considerable moment dismissed out of hand as frivolous by the judge. There is no substitute for judicial experience, so in such cases the judge should instruct the clerk that no further research is necessary.

In other situations, the judge and clerk may determine that

random on such cases for the panel of judges, together with a suggested disposition. Usually the judges adopt the recommendations and the systems in several of the federal circuits have permitted hundreds of short dispositions in an accelerated manner. See generally Bell, *Expediting the Disposition of Litigation*, 10 TRIAL JUDGES' J. 1 (1971); Bell, *Toward a More Efficient Federal Appeals System*, 54 JUDICATURE 237 (1971). Judge Bell notes that, in its first year of operation, the Fifth Circuit screening procedure and the summary opinions thereunder accounted for 34.7% of that court's dispositions.

32. Most judges today are prepared in advance of the orals, at least in a so-called "hot court," and the practice is recommended as a means to improve the quality of the oral argument. See generally B. WITKIN, APPELLATE COURT OPINIONS, SYLLABUS 22-24 (1966) (prepared for ABA Judicial Administration Section); ABA JUDICIAL ADMINISTRATION SECTION, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 1-3 (1961).

33. The value of a clerk's pre-argument study is amply illustrated by one case. At oral argument, 2 of the 3 judges had memoranda prepared by their clerks and were aware of a late case not cited by either party. They considered it dispositive. The third judge had read only the briefs and was unaware of the recent decision. He was at a loss to follow the colloquy between his colleagues and counsel. Two alert clerks had saved the day.

some research in depth must be done and that a comprehensive bench memorandum is required. If this is the judge's decision, the clerk should follow some prescribed format. The memorandum should probably include some brief reference to the facts, the way in which the case comes to the court, the jurisdiction of the appellate court, the issues and arguments presented, the holdings of significant cases, and any areas of uncertainty that remain. Some judges will want a conclusion or recommendation, others will not. In any event, the clerk must be objective, not an advocate for one side, and must present both sides of the appealed case with equal fairness.

In those cases where the clerk has prepared only a brief pre-argument summary, study by the judge may have convinced him that some further in-depth research is necessary. A precise and brief memorandum to the clerk specifying what is required of him may be all that is necessary, or the judge may prefer to instruct his clerk orally. The office structure should be styled to accommodate interaction initiated by either the judge or the clerk. The judge's chambers should always be open to his clerk, but the clerk must be encouraged to utilize his entrance rights sparingly to minimize time consuming interruptions. Some judges prefer an intra-office communications system based almost entirely on memoranda, supplemented by only occasional personal contact. Others deal almost always in the spoken word. Whatever arrangement is considered desirable, the clerk should early be made aware of its contours. Once a communications pattern is established, the judge and clerk can efficiently get down to the task at hand—judicial decision-making.

B. Pre-argument Conference with the Judge

After the judge has studied the briefs and the pre-argument preparation of his clerk, and has had the benefit of his own research and any that he may have required of his clerk, he will often have arrived at fairly definite conclusions about many of the cases before him. Many others, however, will pose difficult questions and the judge's preferred disposition will remain tentative. Before these cases are argued, the judge will often find it profitable to confer at length with his clerk. In order to test his tentative conclusions, the judge may require the clerk to defend the opposing position, or the judge himself may reverse roles, attacking his own opinions. The interchange is often quite beneficial to the judge, enabling him to look at an issue from an entirely different angle. At times the clerk will have arrived at a conclusion quite contrary to that of his judge

and will defend his position passionately. Such advocacy is often helpful and should be encouraged.³⁴ While these conferences will only occasionally shed new light on a subject, they will often help the judge to understand better his own position, and at the very least they should enable him to listen more attentively and with better comprehension to the oral arguments of counsel soon to follow.³⁵

C. Clerk's Attendance at Oral Argument

Judges agree that many arguments are unnecessary and not helpful,³⁶ but in some an effective argument by counsel will aid the judges in their decision-making. If possible, the judge should determine in advance of a day's calendar those cases in which oral argument is likely to be influential, and he should relieve the clerk of sitting through all others. When the clerk does attend orals,³⁷ he should be responsible for noting any new citations of authority not referred to in the briefs, the substance of any new argument not well articulated in the briefs, and any concessions made by counsel.

D. Post-argument Conference with the Judge

The judges on an appellate court or panel usually confer among themselves soon after the conclusion of oral argument. Tentative views may be expressed, and the result may be clearly indicated and unanimous or it may be uncertain. The writing of an opinion, memorandum or order may be assigned at that time or deferred until a later time.

Whichever happens, the judge and his clerk will want to have

34. My clerks have been generous in their comments and criticisms and enthusiastic in their advocacy of opposing views. But after these had been debated and considered, and a different result was indicated, they always were as diligent in their research in support of the result reached by the court.

35. "Discussion of a case serves to clarify a man's thoughts, and a clerk can be of great value to a judge by asking pointed questions, posing alternatives, and generally acting as a devil's advocate." Braden, *The Value of Law Clerks*, 24 Miss. L.J. 295, 296 (1953).

36. The question of the importance of oral argument and the need for it in every case is a popular topic among judges and the debate about the matter continues. See B. WIRKIN, *supra* note 32, at 24-25. It is generally felt that if the quality of appellate advocacy were to improve, the answer to the question would be easier.

37. Hearing oral arguments is a valuable supplement to law school education. The clerk can identify the effective advocates, observe their style, demeanor and flexibility in responding to questions from the court. The failings of the less effective will be equally apparent. One of my clerks said after his first experience in open court, "I never realized how poorly prepared some lawyers are and how boring it must be to listen to a lawyer reading his brief."

a subsequent conference to discuss in confidence³⁸ the disparate views of the judges, if any, the opinion which is likely to be produced, and the nature of additional research required. This process would occur both when opinions are assigned to the judge and when they are assigned to his colleagues. Although a particular draft in a case may not be prepared and circulated for several weeks by the judge assigned to write the case, the other judges will want to reach their decisions and perform any further research while the points are fresh.

Judges and clerks may hold some of their pre-argument and post-argument discussions in the course of travel. A well-disciplined clerk will be ready to travel with his judge on short notice, always equipped with pad and pencil for note taking and opinion drafting. Many an opinion has been cast in rough form as the two return from court sessions in other cities.

Judge Henry Friendly's description of his use of law clerks represents a typical pattern and it summarizes what has been said so far about the role of the law clerk in the appellate process:

Each afternoon, I will sit down with my law clerk and discuss rather briefly the cases that were argued that morning. These fall into three groups: The first is a group where I have practically arrived at a decision, subject, possibly, to verifying one or two small matters of fact or looking up a reference which can be expeditiously done; the second group involves cases where I have not yet made up my mind but where it is apparent that the field requiring investigation is fairly limited; and the third group consists of the cases where it is apparent that a fair amount of added research will be needed before I can come to any conclusion. I reserve my law clerk almost entirely for this third group. I endeavor to get rid of the first group currently and then use whatever time remains during the week of argument to make as much progress as I can

38. Confidentiality of the work of a judge is an honored tradition among law clerks as well as a strict rule of court. Any breach would seriously undermine the institution of law clerking as a respected adjunct of the appellate process. A judge must be able to discuss matters pending before the court freely with his clerk, without fear of disclosure. It is imperative that a clerk not discuss any aspect of any case under consideration by the court with outsiders. One former clerk for a United States Circuit Judge has written:

As a trusted subordinate of the court, it would be improper for a law clerk to disclose particular information as to how or why judicial decisions are made. For to reveal information beyond that of the public record would violate both the trust and tradition of the court.

Sweeney, *Law Clerkships—Three Inside Views: In the United States Court of Appeals*, 33 ALA. LAW. 171, 172 (1972). What matters is that the judge's work product must be kept exclusively within the court's family; it should not be shared even with the family of the clerk. Inquiries which may appear innocent should go unanswered if they pertain to any court business, the judge's whereabouts, or an opinion that might be forthcoming.

Research discloses only one alleged breach of confidence, the "1919 leak case." See Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 ORE. L. REV. 299, 310 (1961).

on the second. The result is that out of a clutch of, say, 18 appeals, I will probably produce memoranda on 6 or 8 before the week is out.

By the end of the week or the beginning of the next, I should be getting memos or oral reports from my law clerk on the more difficult cases which have been assigned to him for study. Working in this manner, I can just about manage to get out all my memos in time for a conference toward the end of the second week.³⁹

E. Drafting of Opinions and Memoranda

Most law clerks will spend more than half their office time preparing memoranda that will assist the judge in drafting his opinions. At the least, these memoranda are expected to communicate a clerk's research findings to his judge. Speaking generally, the time saved by this research is probably the greatest contribution of the clerk toward the end of the best quality of justice at the least cost in the shortest time.⁴⁰

The writing assignment varies from judge to judge. Sometimes a judge will instruct his clerk very broadly: "See what you can do with this one." The clerk is expected to work the case out for himself and submit a memorandum for the judge's use in drafting an opinion. Often a judge is quite loose with his instructions to his clerk at the start of the term. After a few weeks, a judge is in a better position to evaluate the capacity of his new clerk, and the breadth of later writing assignments will turn on his evaluation of the clerk's skills. If a judge chooses, he may rely on talented clerks for even more writing.⁴¹ Indeed, he may have to because of the press of time;⁴² the case load of the eleven federal courts of appeals has increased massively from 4,200 appeals in 1962 to 14,500 in 1972.⁴³

Some judges prefer narrower instructions. The clerk is told, perhaps, to prepare a memorandum on the "consent" aspect of airport passenger searches. Or the demand can be the narrowest of all: "Give me a synopsis of all significant cases defining 'dangerous weapon.'" Here the clerk is expected to sift through every reporting

39. Friendly, "How a Judge of the United States Court of Appeals Works," mimeographed (New York: Institute of Judicial Administration, 1962), p. 1, *quoted in* M. SCHICK, *LEARNED HAND'S COURT* 99 (1970).

40. "A law clerk is a time-saver for a judge, and the greatest time-savings is in research. If the appellate judge is at all pressed for time, the presence of a competent clerk may spell the difference between sloppy and workmanlike opinions." Braden, *supra* note 35, at 296. *See also* text accompanying note 2 *supra*.

41. Considerations of pride of authorship and judicial style may tend toward the judge's writing exclusively for himself, however.

42. *See* note 40 *supra*.

43. Burger, *supra* note 2, at 9.

service in the library.⁴⁴ Sometime soon computerized research will put the cases responsive to this type of question at the clerk's fingertips.⁴⁵

There are judges who want their clerks to play devil's advocate: "Write the strongest possible argument you can against the result I intend to reach in this case." Judge Jerome Frank even pitched his law clerks against Hand: "[T]he law clerk, barely out of law school, was encouraged by Frank to say why and where Judge Learned Hand, the dean of the federal judiciary, had erred."⁴⁶ Occasionally, a clerk's memo will cause the judge to consider a change of position. However rare the occasion, the law clerk is obliged to "fail in the attempt."⁴⁷

Clerks with prior experience in legal writing who measure up to their judges' expectations will, at this stage, have the opportunity to produce material which can be used verbatim in an opinion.⁴⁸ If the memorandum is to serve its purpose, it must be thorough, accurate, and must follow a logical course; it should also be grammatical, professional, and timely. These six essential characteristics are discussed below.

1. *Thoroughness*: One circuit judge has written that he has a standing rule for his clerks: run the citator on every case that he cites.⁴⁹ A memorandum which misses a recent case, or fails to distinguish a prior opinion of the same court or a higher court is not worthy of a lawyer of competence.

2. *Accuracy*: The spelling of case names and citations to case reports, treatises, or other authorities must be perfect before the

44. Necessary research may take a law clerk out of the judge's library to the nearest public or private source available. Often, my clerks have gone across town to the law school library at the state university or to the county courthouse, there to study or borrow materials not in the federal building.

45. See note 30 *supra*.

46. Kurland, *supra* note 10, at 663.

47. The thought is really Holmes's. He said the same thing for all men of law: "Those of us to whom it is not given to 'live greatly in the law' are surely called upon to fail in the attempt." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 35 (1959).

48. There are judges on record, however, who are wholly against the incorporation of any of the clerk's memorandum in their final opinions. See, e.g., Edwards, *The Avoidance of Appellate Delay*, Panel Discussion before the Section of Judicial Administration, Appellate Judges Conference, Proceedings of the American Bar Association Annual Meeting, St. Louis, Aug. 8, 1970, printed in 52 F.R.D. 61, 68. The reasons given for rejecting the clerk's draftsmanship generally involve a judge's pride of authorship or stem from the view that delegation of any of the writing function would be inconsistent with judicial duty.

49. *Id.* at 69.

memorandum goes to the judge.⁵⁰ A clerk should not assume that he will have another opportunity to check for accuracy before the opinion is in final form. The judge may have other ideas; he may want to dictate a note to his judicial colleagues, based on the clerk's memorandum, and he must be able to rely on its accuracy.

The worst error of all is misstatement of the facts. A clerk must see that each factual assertion in his memorandum has support in the record. References to the trial transcript should accompany any statement of the case contained in a clerk's memorandum. Inevitably, some factual inaccuracy appears.⁵¹ Although understandable because of the press of time, inaccuracy is still inexcusable. The law clerk is—to use Justice Brandeis's apt description—supposed “to correct [his judge's] errors and not introduce errors of [his] own.”⁵²

3. *Logical Course*: A memorandum must flow smoothly, read easily, and pass from one point to another without difficulty. It need not follow a set pattern or be stereotyped so long as it is logical and makes sense to the reader. In more difficult cases or in memoranda which are quite long, the direction will be more apparent if the clerk uses paragraph headings, subheadings, and varied typography.

The clerk must test each of the judge's opinions for clarity and readability. The two of them together may understand well enough what is meant by the opinion, but will other readers who are unfamiliar with the intricacies of patent law, for instance, or building construction, or the rules of the road at sea? While the opinion is, in the first instance, addressed to parties familiar with the case, its publication in the reports enables countless lawyers, law students, and legal scholars to read it.⁵³ They, too, must be able to understand what the court meant.

Both a judge and his clerk might well sleep on a draft, scanning it again another day, if there is any doubt about its readability and meaning.

50. Dean Acheson recounts one of his mistakes working for Justice Brandeis in *Recollections of Service with the Federal Supreme Court*, 18 ALA. LAW. 355, 365 (1957). The tale is humorous only as a reminiscence, however.

51. Sometimes this proves quite embarrassing. See *Townsend v. Sain*, 372 U.S. 293, 304 (1963).

52. Acheson, *supra* note 50, at 366.

53. “[T]he test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems of everyday life and of the thousands of judges who have to handle the great mass of the litigation which ultimately develops.” Hart, *The Supreme Court 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 85, 96 (1959).

4. *Grammar*: A common complaint of judges and older lawyers is that many recent law graduates cannot spell or use proper grammar. Perhaps we are too impatient with those who do not have abundant training in grammar, syntax, rhetoric, punctuation, and good spelling. But a judicial opinion is no place for poor English. There may be many ways to say it properly, but the simple, straightforward sentence is likely to be the best.

Discussion of rough drafts between a judge and his clerk can be enlightening for both. As they debate the use of words and phrases, the clerk realizes how important grammatical precision is to the bench and bar. Good opinions have no loose language, no awkward phrases, no dictum capable of misapplication, no quotations out of context. Some judges even encourage their clerks to review the style of their drafts. This is part of the clerk's responsibility, too, for opinions should not become stereotyped or be written to fit a single pattern.

Drafting memoranda requires a precision that comes only through frequent use of the dictionary, a thesaurus, and handbooks. In the Ninth Circuit the law clerks are advised that they can find help in this regard in the various texts especially prepared to aid legal writing.⁵⁴

5. *Professionalism*: Law clerks, whether or not admitted to the bar, are expected to meet professional standards. Appellate court opinions should reflect that professionalism. They should set the standard of fidelity to law. If our opinions are meticulously prepared, and if they read well, the public and the bar who study them will have increased respect for the court that produced them and the administration of justice in general. How well we all can recall reading some older opinions in law school that did not meet that standard.

Our law will always remain only as good as we make it, and the first measure of its worth will continue to lie in its expression, our opinions. Perhaps it is the process of reasoned articulation itself which comes closer to Law in its grand sense than does whatever substance we are fortunate enough to pen.

6. *Timeliness*: Every day that an appellate court opinion is delayed causes another day of injustice to some litigant. A well-disciplined judge will have set a time schedule for himself to meet. In turn, he should pass this practice along to the clerks who work

54. See, e.g., R. FLESCHE, *THE ART OF READABLE WRITING* (1949); M. LAMBUTH, *THE GOLDEN BOOK ON WRITING* (1963); and H. WEIHOFEN, *LEGAL WRITING STYLE* (1961).

for him. This is one of the hardest self-disciplines for the young graduate to acquire. Yet it is essential for the clerk to realize that in the business of the appellate courts, time *is* of the essence. Almost always research proves interminable; still—and this is inexorable—there always comes a time to cut it short and begin to write. Sometimes this is much earlier than the law graduate would expect. He must learn to live that way, though. A clerk must know when his work product⁵⁵ is to reach his judge in order to meet the court's deadline. If he fails, the clerk has wasted his time and embarrassed the judge and his court.

There is no excuse for wasting time. There can be little excuse for not meeting a deadline when the court is dealing with public business or a litigant's rights. Perhaps Gladstone said it best: "Justice delayed is justice denied."⁵⁶

F. *Non-case Time*

Not all of a clerk's time is taken up by his participation in the decision-making process, but all of his time must be directed toward that end. An appellate judge assumes that his clerk keeps current on the law, that he reads all recent decisions of the judge's court and of higher courts, and that he follows legal periodicals and most of the important decisions of other courts. In this way, the clerk often can perform a screening function for the judge, pointing out to the judge those opinions and articles of special interest. Often a brief written summary will suffice for the judge—again, minimization of the loss of judicial time is one of the primary functions of the appellate clerk.

III. SOME FINAL OBSERVATIONS

The law clerk has an enviable job.⁵⁷ He has the opportunity to

55. The clerk's work should come to the judge in the form of "completed staff work." The term is an old military one and, applied to court work, means that any submission to the judge should be in final form, complete and ready for judicial consideration and possible adoption without further effort. Things are more likely to get done that way.

56. J. BRADLEY, L. DANIELS & T. JONES, *THE INTERNATIONAL DICTIONARY OF THOUGHTS* 451 (1969).

57. I understand that it is not an uncommon rumor that a law clerk's family life suffers as a result of the burdens of his job. Several of my clerks have found ingenious ways of being together with their families. One, often forced to come in on a weekend, would bring his wife along. She would read, do needlepoint, or catch up on her letter writing, but they were not about to let the rigors of his job separate them all week. Another clerk, perhaps for lack of a competent baby sitter or maybe out of a love for the task, used to bring his young baby into the office whenever his wife was making her visits to the doctor. I recall seeing the young child

absorb the philosophy of a senior lawyer with extensive experience, to draw upon the judge's background, his successes, even his failings and shortcomings, and to arrive at conclusions that can make him a better lawyer. The profound effect that an outstanding judge can have on a clerk is perhaps best put by one of Learned Hand's former clerks, now Professor Gerald Gunther of Stanford:

Hand and I established an extraordinary man-to-man relationship, and in comparison to him any other experience would have paled.

He was 81 that year, but he was still remarkably self-questioning and open minded. It was just an extraordinary personal experience for me to talk over the tough issues with him, especially realizing that he had been dealing with these questions for 50 years. And yet he was always teaching and probing, trying to reexamine the issues, never assuming he knew the answer.

In my entire year with Hand, I never wrote one word for him. Instead, on a difficult issue he would ask me to read up and then call me in to talk about it. If he was writing the opinion, we would intensively go through every paragraph with an extremely close analysis. His openness of mind toward his work product was just amazing.⁵⁸

Law clerking on an appellate court can be the culmination of a great period of schooling for the young graduate. The experience is excellent preparation for a professional career ahead as a lawyer, professor, or judge. Having seen the judicial process firsthand, the clerk will be a better lawyer for it.⁵⁹ Even more important, he will have a sense of how fragile some judgments really are. But he will realize that they are, nonetheless, our only promise. In this discovery lies the beginning of his wisdom.

As a clerk, the young lawyer has a tremendous opportunity to observe at first hand the actual operation of the judicial process.

sleeping on the credenza behind his desk as he was briskly typing away. I also remember a few loud cries coming from his office, but as he was completing his assignments, I condoned the practice.

58. Rutzick, *Gerald Gunther: A Man Who Enjoys a Brief Constitutional*, 56 HARV. L. RECORD 8 (1973).

59. Among themselves, judges often speak with pride and enthusiasm of the great work done by their clerks, past and present. I have heard some of them acknowledge that, but for the extra hours of research on a case by their clerk, they might have come to oral argument ill prepared or entrapped by a poor or misleading brief.

I surmise, though, that we judges do not pass this recognition and praise along to the young people who work for us. The intense concentration, the long hours of hard work, and the loyalty and dedication of our clerks are overdue for a few words of appreciation. These should come, not just at the end of the term with a letter of thanks, but throughout the year and as each task is performed well.

If we will recall our early years at the bar, we can remember how it spurred us on to have a senior colleague praise us for work well done. And a kind word from a judge, especially in open court, sent us into orbit for a week. If it is a judicial responsibility to help to improve the quality of advocacy and the standards of professional conduct, and I believe that it is, we ought to start with our own staffs.

Although not yet an expert in any field of law, the clerk is expected to bring to the court his own visceral reaction, his own view of justice and how it is achieved, and his feelings about the correctness or long range effect of the decision below.⁶⁰ Where he has done special research or participated in discussions with law teachers and fellow students, he may have collected thoughts on new developments of the law. This exposure is especially useful in the areas of social change, civil rights, consumer protection, poverty problems, and space law, on which courses have been added to law school curricula in the past decade.

We in the appellate judiciary look forward with genuine enthusiasm to having new clerks on duty each year. We need the imaginative inclinations that they bring from the nation's law schools and their questions, doubts, and disagreements. Most of all, the fresh perspectives of these "puisne judges" keep and develop our contacts with the changing currents of newer generations. This we need if we are to find and stay on the path which leads to "equal and exact justice to all men, of whatever state or persuasion, religious or political."⁶¹

60. "A recent graduate from law school is, to be sure, innocent in the practical way of the law, but he is also likely to be learned in what may be called the frontiers of the law, the new ideas being evolved in the halls of the scholars of the law. The law develops, as it must if it is to meet the needs of a changing society, and the judges who pronounce the law need all the help that they can get in keeping the law abreast of the times." Braden, *supra* note 35, at 297.

61. Thomas Jefferson, from his first Inaugural Address, Mar. 4, 1801.