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Choosing Law Clerks in Massachusetts

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"About the summer of 1875" Chief Justice Horace Gray of the Supreme Judicial Court of Massachusetts "began a practice, which he continued until the end of his judicial career, of employing a young graduate of the Harvard Law School as a secretary. At first he paid the expense of this from his own purse, but before he had been many years at Washington" as a Justice of the Supreme Court of the United States "the Government provided for the appointment of a clerk for each of the justices of the Supreme Court. His colleagues generally appointed as their clerks stenographers and typewriters, but Judge Gray continued his practice of securing each year a member of the graduating class from the Law School at Cambridge."[1]

In the ensuing 98 years, Justice Gray's practice has become an established and familiar feature of the American judicial scene.[2] Published accounts of the practice naturally have centered on the Supreme Court,[3] and much of what we know rests on reminiscences of particular law clerks who served that Court.[4] But the practice prevails as well in most other appellate courts and in many trial courts. In Massachusetts, law clerks are employed each year by the Supreme Judicial Court, the Appeals Court, and the Superior Court.

When I joined the Supreme Judicial Court in January, 1971, I was given the task of screening candidates for the eight law-clerk positions authorized for our court—two for the chief justice and one for each of the six associate justices. During the next two years, I

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1. Williston, *Horace Gray,* in 8 GREAT AMERICAN LAWYERS 139, 157-58 (1909).

2. Of course, most judges now have the benefit of stenographers and typewriters—not to mention copying machines—as well as law clerks, and the law school at Cambridge has no monopoly.

3. *See, e.g.,* Dorsen, *Law Clerks in Appellate Courts in the United States,* 26 MODERN L. REV. 265 (1963); Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks,* 40 ORE. L. REV. 299 (1961).

4. *See, e.g.,* Boskey, *Mr. Chief Justice Stone,* 59 HARV. L. REV. 1200 (1946); Brudney & Wolfson, *Mr. Justice Rutledge—Law Clerks' Reflections,* 25 IND. L.J. 455 (1950); McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes,* 63 HARV. L. REV. 5 (1959); Meador, *Justice Black and His Law Clerks,* 15 ALA. L. REV. 57 (1962).

explained the process to a considerable number of young men and women, and I am happy to accept the invitation to make that explanation more widely available through these pages.

At the outset, I must make it clear that I selected only my own law clerk. For the rest, I conceived my role to be merely that of reducing the burden of multiple interviews. My colleagues were told that there would be no objection on my part if they dealt directly with a candidate, and I informed each candidate whom I interviewed that my role was a preliminary one and that each justice would choose his own clerk. The pressures of our work were such, however, that in fact almost all the clerks were selected through the process I am about to describe.

The Process—We began in the spring by notifying placement officers at law schools from which we had had applicants in prior years. We asked the placement officers to make known the availability of the positions and to suggest that résumés be submitted during the summer, with a view to interviews in September and October and to final selection by mid-November for one year's employment beginning the following September 1. We aimed primarily at law students who had completed the second year at the time of the interview, but we also considered applications from law school graduates. Applications received from schools we had not solicited were considered on a par with the others. Some schools had clerkship selection committees, and we welcomed their recommendations but did not feel bound by them.

This process yielded applications—with résumés and commonly with law school transcripts—in a number on the order of 100. In 1971, I personally interviewed almost all the applicants. I found, however, that the interviews, necessarily brief, did not substantially change the impressions I had formed from the papers, and in 1972 I arranged personal interviews with less than half the applicants. I did not check references, law school records, or the like, leaving that to the justice making the final selection. By mid-October I was able to circulate with résumés and my brief evaluative comments a list of the fifteen to 25 applicants who looked most promising and to arrange interviews for my colleagues. If more than one justice wanted to talk to the same applicant, we tried to arrange the interviews on the same day; in these cases the senior justice made his choice first. In both years we completed the process by mid-November as planned, well ahead of the usual deadlines for employment by large, big-city law firms, government agencies, and other prospective employers.

Criteria—Inevitably a major criterion was the applicant's aca-

demic standing at his law school. Grading has been a controversial subject at many law schools in recent years, and many applicants had not received grades, or did not disclose those they had received, or presented only "discursive" evaluations. We did not disqualify applicants in such cases, but I am afraid that the difficulty of evaluation resulted in some prejudice to them. My practice was to match applicants from the same school against each other, limiting the number I recommended from any one school.

A second criterion in the preliminary screening was extracurricular experience, with particular attention to legal writing and research. I did not attempt close analysis of writing samples submitted by many applicants, but law review experience was a definite asset and the president of a law review had a distinct advantage, particularly if he had been elected by his contemporaries.

Other criteria were multifarious and doubtless had more influence in final choices than in the preliminary screening. I made it clear in each interview that each justice was his own master of criteria and that none of us was willing to be bound by any rigid categories. I will mention three items. First, three of us are graduates of Harvard Law School, two of Boston University Law School, and one each of Northeastern and Columbia. The old school tie has some pull, but we have employed several clerks from other schools. Secondly, at least one justice, who lives in the western part of our State, has a preference for a law clerk who has a home in that area. Thirdly, recommendations are helpful, particularly if made by someone known to the selecting justice.

Self-selection—Some items that might well be criteria for selection seem to be more appropriate for consideration by the applicant himself. Thus a young lawyer who has definite plans for a career in federal taxation, labor law, or antitrust law is probably marking time as a law clerk in a state appellate court. Similarly, a young lawyer from Tennessee or Idaho who plans to return there to practice law ordinarily would derive more benefit from a year there or in Washington, D.C., than from a year in Massachusetts. One who dislikes library work, or who is unhappy unless agitating for a cause, or who is addicted to the telephone or cannot stand solitude, might find the work unrewarding.

On the other hand, one who looks forward to a career teaching law or in government service, or who plans to engage in a general law practice in Massachusetts, can hardly spend a better first year. Many of our clerks have spent a summer in a Boston law office and have liked it, and probably the most popular next step for our clerks after their year with us is to such a firm. We try to help this process,

and we see our former law clerks arguing cases before us with some regularity. A substantial number of applicants are women, and two of the eight serving during 1972-1973 were women.

Many of our applicants have offers from more than one court, and I have often discussed the resulting problem of choice. At the moment our salary is slightly more than 14,000 dollars, a reasonably competitive figure. Apart from money, I think a clerkship with a seven-judge court of last resort offers a more varied and interesting experience than clerking with an intermediate appellate court sitting in panels of three or with a single trial judge. Moreover, I think one gets a broader and more representative sample of the body of the law in a state court than in a federal court. We cannot, of course, compete with the Supreme Court of the United States, and I rejoice that Mr. Chief Justice Burger now makes it a practice to hire as one of his clerks a state-court law clerk. The choice between other clerkships depends so much on the clerk and on the judge that general discussion is not very helpful.

Duties—The process of self-selection is aided by an understanding of the nature of the work, which varies widely from court to court and from judge to judge. Most judges want memoranda on some or all of the cases assigned to them; many ask for memoranda on applications for discretionary review or on cases not yet argued or assigned. Some judges try never to use a clerk's words in an opinion;[5] others invite draft opinions and use substantial parts of them. My own experience is that a law clerk's draft is more likely to be useful in discussing a legal issue than in presenting facts, but I keep trying to get my clerk to do a better job on the facts. Many of us find the most useful service the clerk can render is oral discussion of the case.

All is not fun and frolic. The law clerk is expected to find precedents and secondary authorities not supplied by counsel. He must check citations and the subsequent history of the case cited. He must learn to be a skilled proofreader. Nonetheless, if all works well, I subscribe to Professor Williston's comment on service as law clerk to Judge Gray: "Nothing more delightful than this association and work for a young lawyer interested in the intellectual side of his profession can be imagined. The secretary was asked to do the highest work demanded of a member of the legal profession—that is the

5. *See* Edwards, *Exorcising the Devil of Appellate Court Delay*, 58 A.B.A.J. 149, 153-54 (1972); Williston, *supra* note 1, at 159-60; Address by Wilmot R. Hastings, Memorial for Chief Justice Wilkins, April 1972 (to be printed in the Massachusetts Reports).

same work which a judge of the Supreme Court is called upon to perform."[6]

6. Williston, *supra* note 1, at 158.