

## Clerking for an Appellate Judge: A Close Look

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## I. INTRODUCTION

### *A. Background and First Thoughts*

We know much about how appellate judges decide cases—certainly the basics of how cases are decided (briefing and argument; conference and voting; opinion assignment, circulation, and release) and a considerable amount about appellate judges' voting patterns. Yet we know little about what goes on within judges' chambers; our knowledge of the work of law clerks that assist appellate judges is limited. As recently as 1999, political scientist Lawrence Baum observed, "Only to a limited degree have scholars engaged in systematic examination of clerks' participation in decision-making."<sup>1</sup>

We can list an appellate judge's clerks' basic tasks—research, including checking cases cited by lawyers, and drafting opinions—but we know little about judge-clerk interaction. Most judicial biographies are written with little mention of clerks' actual role, as if the judge

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<sup>1</sup> Lawrence Baum, Comments delivered at Midwest Political Science Association, (April 15, 1999) (notes on file with author).

operated without assistance, and, even when clerks are mentioned, the studies are judge-centered rather than clerk-centered. We have information on some aspects of clerks' involvement, like the Supreme Court's relatively new "cert pool," and we certainly know that clerks play *some* role in the preparation of opinions. This is seen in such instances as Louis Lusky's role in "Footnote 4" of *United States v. Carolene Products Co.*,<sup>2</sup> and William Rehnquist's memo to Justice Robert Jackson about *Brown v. Board of Education*.<sup>3</sup> However, mythology about clerks' power has been exacerbated by *The Brethren*<sup>4</sup> and *Closed Chambers*,<sup>5</sup> and complaints about clerks' influence often lack a firm basis, instead resting on anecdote or one clerk's experience.

More important, as most of these materials are about the Supreme Court of the United States, we venture onto dimly-lit terrain concerning clerking in other appellate courts. Among the limited materials we do have, frequently cited is Oakley and Thompson's 1980 examination of clerks in state and federal courts in California, which focuses narrowly on the relative benefits of individual law clerks serving for short periods and longer-tenured staff attorneys, who work for the court as an institution.<sup>6</sup>

Charles Sheldon's well-developed, systematic portrait of clerking at a state high court is among the most valuable relevant material.<sup>7</sup> Some material on clerks' work can also be found in a study of how appellate courts gather information.<sup>8</sup> The most recent significant contribution, by Jonathan Cohen, is a study of federal appellate courts as organizations held together by communication within and between chambers.<sup>9</sup> Beyond

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<sup>2</sup> *United States v. Carolene Products Co.*, 304 U.S. 144,153 n.4 (1938).

<sup>3</sup> Memorandum from William Rehnquist, Law Clerk, to Justice Robert Jackson (referencing *Brown v. Board of Education*, 347 U.S. 483 (1954)).

<sup>4</sup> Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon & Schuster) (1981).

<sup>5</sup> Edward Lazarus, *Close Chambers: The Rise, Fall and Future of the Modern Supreme Court* (Times Books) (1999).

<sup>6</sup> See John Bilyeu Oakley & Robert S. Thompson, *Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in American Courts* (University of California of Press) (1980); Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 Cal. L. Rev. 937 (1980).

<sup>7</sup> Charles H. Sheldon, *Law Clerking with a State Supreme Court: Views from the Perspective of the Personal Assistants to the Judges*, 6 JUST. SYS. J. 346 (1981); Sheldon, *The Evolution of Law Clerking with the Washington Supreme Court: From "Elbow Clerks" to "Puisne Judges"*, 24 GONZ. L.REV. 45 (1988/89).

<sup>8</sup> Thomas B. Marvell, *Appellate Courts and Lawyers: Information Gathering in the Adversary System* (Greenwood Press) (1978).

<sup>9</sup> Jonathan Matthew Cohen, *Inside Appellate Courts: the Impact of Court Organization of Judicial Decision Making in the United States Courts of Appeals* (University of Michigan Press) (2002).

that, existing accounts of clerks' work in particular chambers are generally recollections for a celebratory event like a judge's birthday, and thus tend to be accolades touting the judges' virtues;<sup>10</sup> they say relatively little about how the clerks' own work was conducted. That omission is reinforced by a "passion for anonymity" or a belief that in-chambers work should be kept confidential even long after the clerk's service has ended.

Withal, there is much more to be learned if we are to evaluate the mythology about the clerks' role in the production of appellate opinions. The analytical literature is limited, and most systematic studies, like those by Marvell, Oakley and Thompson, and Sheldon, are dated, having been undertaken before the number of clerks per judge increased and before new technologies began to affect communication within the courts.<sup>11</sup> We thus need to examine what clerks do and what actually happens in their interactions with "their" judges.<sup>12</sup>

Among the questions to which we need answers are these: Once clerks arrive on the scene, how do they learn to be a clerk and especially how to be one *for that judge*? How do they interact with each other and with the judge's secretaries? How are tasks sorted out and how is work assigned? Most important, what is the clerks' role in assisting the judge? Is their work limited to carrying out research on particular points of interest to the judge and reminding the judge of past activity in a case that now requires some action? When they do more, do judges issue clear "marching orders" or do clerks press their judges to accept a view? Do materials they prepare affect the judges and do they accept clerks' recommendations?<sup>13</sup>

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<sup>10</sup> See, e.g., Daniel William Fessler, *A Year with the Honorable James R. Browning*, 21 ARIZ. ST. L.J. 9 (1989); Price Marshall, contribution to *Tribute to the Honorable Richard S. Arnold*, 1 J. APP. PRACT. & PROCESS 199 (1999); David Simon Sokolow, *A Tribute to the Honorable Thomas Gibbs Fee: The Best Boss A Guy (or Gal) Ever Had*, 73 TEXAS L. REV. 471 (1995); James Weinstein, *Chief Judge James R. Browning: A Clerk's-Eye View*, 21 ARIZ. ST. L.J. 13 (1989).

<sup>11</sup> Interviews for Oakley and Thompson, *supra* note 6, for example, were conducted in 1975 and 1976.

<sup>12</sup> This possessive is usually used for identification or at times to denote affection, but at times it can mean much more.

<sup>13</sup> This topic has received considerable attention, most particularly in two recent thorough explorations of U.S. Supreme Court clerks. See ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (NYU Press) (2006); TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (Stanford University Press) (2006). For a recent examination of the views of state judges on this matter, see Rick A. Swanson and Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 34 (2008).

Examination of these matters and of the elements entailed in being a clerk for a court of appeals judge should begin to remedy the deficiency in our knowledge of these important actors in the appeals process, as well as help us learn more about appellate courts' work. The actual exchanges between clerk and judge noted in this article should help provide a clearer and perhaps more accurate picture about the part clerks play in appellate decision-making and also about how appellate courts work in general. In particular, what is presented here serves to raise some questions. Among them is the extent to which judges' actions are affected, even constrained, by clerks' presence, by their employment cycle, by their actions, and by their influence. This picture of judge-clerk interaction, in addition to conveying information about the inner workings of appellate courts, may also be helpful in understanding what happens in other situations in which there is a permanent (or relatively permanent) boss and temporary staff, as is found in legislatures.

It is also important to examine clerking in the courts of appeals because of differences between clerking there and clerking in the Supreme Court.<sup>14</sup> One obvious difference is that a Supreme Court clerk has already clerked; for some years, it has been true that one can obtain a Supreme Court clerkship only after a clerkship in another court, almost invariably the courts of appeals. This makes Supreme Court clerks far more seasoned than court of appeals clerks at the start of their first clerking experience. There is also a difference in the location of the clerks and the justices for whom they work. The chambers of all Supreme Court justices are in the same building and the clerks are also all in the same location, which makes formation of a "clerk network" much easier than it is with the dispersed chambers of the courts of appeals.

A particularly important difference relates to the processes of the respective courts. The courts of appeals are courts of mandatory jurisdiction and, therefore, do not choose which cases they hear. Court staff attorneys do play a role in screening or sorting cases into various tracks for limited or more complete treatment, but this is not a function in which the clerks for the individual judges are involved. By contrast, a major aspect of the Supreme Court's work is the granting or denying of review, in which the clerks play an important role, particularly with the adoption of the "cert pool," where clerks prepare for the entire Court the first memo on whether or not to grant certiorari.

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<sup>14</sup> Clerking in the latter has received considerable recent attention in the [above-noted] volumes by Ward and Weiden, and Peppers. *See supra* note 13.

This article may also tell us whether we can treat judges' chambers as unitary actors or whether we should be more careful to view a chambers as multiple-actor entities, as a loosely-coupled set of people often working toward a common goal but not always pulling together in harness. In addition to our immediate treatment of this matter, the discussion throughout the article of clerks' interactions with the judge and with each other speaks regularly to this question. However, the principal goal of this article is not to contribute to theory, nor to resolve any normative issues, although what is presented here bears on the question of the clerk's proper role in relation to the judge in whose chambers the clerk labors. The principal goal of this article is descriptive: to provide a picture of what clerks in the U.S. courts of appeals do, and their working relations with judges, in order to help repair the substantial lacunae that exist concerning the subject.

#### *B. This Study*

In this study, which is part of a larger biographical project,<sup>15</sup> the primary foci are, first, interaction in chambers; second, the basic elements of a clerk's job, including preparation of bench memoranda and draft dispositions, monitoring cases, briefing the judge, and preparing responses to communications from other judges; and, third, the clerks' working relations with the judge. This article is based on an examination of the chambers of Judge Alfred T. Goodwin of the U.S. Court of Appeals for the Ninth Circuit,<sup>16</sup> on which he has served since 1971. After serving as the court's chief judge from 1988 through early 1991,<sup>17</sup> he took senior status and continues to hear a substantial case load. His chambers were initially in Portland but he later moved to Pasadena. Some comparisons will also be made with the experience of Judge Goodwin's Oregon Supreme Court clerks (1960-1969), and the work of some other judges' clerks will also be noted.

One aspect of Judge Goodwin's activity that likely affected working relations in chambers and communication, and may serve to differentiate him somewhat from other judges, was his prolonged absences from chambers. Like almost all Ninth Circuit judges, he often

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<sup>15</sup> See Stephen L. Wasby, *Alfred T. Goodwin: A Special Judicial Career*, 15 W. LEGAL HIST. 9 (2002).

<sup>16</sup> This is the same court to which Cohen, who clerked there and surveyed some other chambers, gave considerable attention in looking at clerks as an important element in an appellate court as an organization. See Cohen, *supra* note 9.

<sup>17</sup> See Stephen L. Wasby, *The Work of a Circuit's Chief Judge*, 24 JUST. SYS. J. 63 (2003).

sat elsewhere for oral argument.<sup>18</sup> There were also meetings of committees relating to the court's administration and of the court itself. Although other judges also had extra-judicial involvement, Judge Goodwin's seemed greater, particularly his involvement in American Bar Association legal education activities and in the Presbyterian Church. When he was chief judge, problems created by earthquake damage to the San Francisco headquarters courthouse occupied much of his time,<sup>19</sup> in addition to the considerable travel to Washington, D.C., required for meetings of the U.S. Judicial Conference and efforts to fend off proposals to divide the circuit. When he acquired property in Sisters, Oregon, and, as a senior judge, spent a half-year there, his absence from the chambers where his clerks were located was even longer, with greater effects.

That the judge was often away from chambers did not, however, mean that clerks lacked communication with him. He did not ignore the office, but regularly called in, kept in touch, and left assignments; secretaries repeatedly said that in a ten-minute phone call, he could provide several hours or more worth of work. He communicated regularly with the clerks through the secretaries, and they talked to him on the phone themselves. Even when the judge was in Guam on judicial business, there were fax communications with the clerks. Once the judge obtained a laptop computer, there was greater use of electric communication, which provided the judge in Oregon the same document the clerks had in Pasadena, and he could edit it as easily as when present in chambers.<sup>20</sup>

Even an intensive study of one judge's clerks cannot provide answers to all the questions noted above. Generalizability to other chambers is limited by, among other things, the likelihood that clerks of a particular style will be attracted to judges of a certain ideology (Judge Goodwin is a pragmatic moderate), temperament, and work style (he is thought to be easy to work for and to give his clerks considerable autonomy).<sup>21</sup>

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<sup>18</sup> The only exception would have been judges whose chambers were in San Francisco and Los Angeles in the days when there were few sittings of the court elsewhere.

<sup>19</sup> Stephen L. Wasby, *The Loma Prieta Earthquake and the Ninth Circuit Court of Appeals*, 11 W.LEGAL HISTORY 41 (1999).

<sup>20</sup> The judge talked of going to the computer in the morning and pulling up the clerks' work, and "mutilating" it. Or he could go horseback riding during the day and work on the clerks' drafts in the evening, so "they find it vandalized" when they came to chambers the next day and turned on their computers.

<sup>21</sup> A colleague who clerked for an appeals court judge in another circuit suggests that "considerable autonomy" typifies the modern clerking experience.

The ability to generalize is also affected by variability in judges' use of, and interaction with, their clerks<sup>22</sup> and by the effect of interaction between judge and clerk as the clerkship period continues. However, because a large number of clerks served the judge over the years, this study will provide a far richer picture of relationships between clerks and their judges than was previously available. The depth of information available with respect to this single judge provides a basis for assessing the validity of other studies which develop generalizations based on more limited exposure to a number of chambers.<sup>23</sup>

This is a picture of one judge and that judge's clerks, which undoubtedly affects the picture presented. However, the picture can be seen differently, as one of multiple chambers with one for each year of the judge's federal appellate judicial service; somewhat different relations take place for each different combination of the judge and his secretaries with a new set of several clerks. Probably greater than the variation, however, is the commonality in basic patterns across the years, because the judge's personality and basic working style remain stable; that most secretaries that served for long periods reinforced this stability. Somewhat different emphases in the relative roles of judge, secretaries, and clerks may be found in other judges' chambers, but the basic tasks performed by clerks in a U.S. court of appeals are likely to be quite similar to those seen here. If so, this description should advance our knowledge of judicial clerks' work—at least until similar portrayals of judge-clerk relationships in other chambers are provided.

The clerks whose views are reported in this article seemed, for the most part, to be comfortable with their relationship with their judge. This leaves the possible implication that the relationship they had is a preferred one. However, it is not the intent here to argue for a particular judge-clerk relationship as most desirable. Nor is it to suggest that certain other types of relationship are troubling, beyond saying that hiring clerks without using the skills they bring to the table, that is, hiring them without engaging them, is less than optimal, and that judges who do not consult with their clerks—who seem to ignore them—are foolhardy. Because it is unrealistic to expect judges to “do it all” in a period of substantial caseload, it is important to add to our meager knowledge of what clerks actually do and what they believe they do in relation to the work of their judge. On the whole, the presence and skills of clerks permit the judge to bring to bear on the court's judgments and opinions a range of research and perspective the judge alone could not produce.

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<sup>22</sup> See Cohen, *supra* note 9, at 85–121.

<sup>23</sup> *Id.*



Thus, that clerks are a “plus” is assumed, although they may not be without drawbacks such as the need to devote time to how they are treated.

The matter of clerks’ influence on judges, with which this article concludes, also has normative implications, and underlying much writing about clerks’ role in drafting opinions is a normative position that such involvement is improper as an encroachment on what is considered judges’ work. Here the intent is to provide empirical information so we can learn whether opinions that issue from chambers are indeed collaborative in being the conjoint product of judge and clerk, or are documents written by a clerk to which a judge has simply appended a signature; it is not enough to suggest that complaints about clerks working on opinions are red herrings because the judge signs the opinion and then takes responsibility at the end of the day.

### C. Sources

The primary sources for this article are a survey of Judge Goodwin’s clerks, materials in case files, and the judge’s correspondence. There were also casual conversations with a number of clerks during these periods and conversations with the judge during the author’s continuing research on the Ninth Circuit.<sup>24</sup> The reporting of survey and case file material is informed by observation of regular in-chambers interaction between judge, secretaries, and clerks when the author had an office in the same courthouse and was frequently in the judge’s chambers, and during individual weeks in other years when the author worked on materials there. The author also benefited from a week of luncheons with the judge and two of the clerks and, at a different time, attended a working session in which the judge and his clerks prepared for an argument calendar.

The survey, carried out in 1995, provided clerks’ descriptions and perceptions of their work. Their responses to open-ended questions allow us to capture the working relationship between judge and clerks in some

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<sup>24</sup> Unattributed quotations are used throughout this article. The material for those quotations is on file with the author. The unattributed quotations are drawn from several sources: the conversations mentioned in the text *supra*; responses to interviews of secretaries and some clerks and a mail survey of other clerks; and material from case files, which contains memoranda and other communications. The conversations and interviews were recorded as handwritten notes, which were converted to typed transcripts. Survey responses were returned to the author on standard hard copy forms, at times with accompanying letters. The interviews of secretaries and clerks and the mail survey of clerks were carried out on the basis that the participants’ names would not be used. Access to the case files was provided on the basis that judges’ names would not be used.

depth. A total of 75 clerks from the Oregon Supreme Court, District of Oregon, and Ninth Circuit were contacted for interviews or were mailed surveys. Of these, 31 (41.3%) participated. Only responses from the judge's Ninth Circuit clerks are used here, with responses from the judge's Oregon Supreme Court clerks summarized in notes.<sup>25</sup>

The casefiles, from closed cases, contain bench memoranda the clerks prepared for the judges deciding the case, other memos prepared for the judge, drafts of dispositions and revisions, and other written communications among panel members; many items in the files contain the judge's notations. Such materials allow us to deconstruct the judge's published opinions to learn whether a clerk has prepared a memorandum or drafted the opinion. Not available, of course, are unrecorded oral comments between clerk and judge, such as directions as to how an opinion should be written, although some may be inferred from written memoranda when a clerk writes, "[y]ou asked me to do some research on such-and-such an issue." Also not present in the case files is the judge's more recent on-line editing of clerks' draft documents and the editing by one clerk of another's draft dispositions. Although this information (including oral comments) is missing, it is hoped that such omissions are more than compensated for by what is provided by in-chambers documents, which are not usually available.

There is variation from one judge to the next in the mode of judge-to-clerk communication,<sup>26</sup> but, in many chambers, much of it takes place in writing whether the judge is in chambers or away, both because hard copy of a draft memorandum or disposition can be edited easily for subsequent use and written memoranda create an easily-accessible record for a clerk returning to work on a case or a later clerk coming to work on it. Written communication is also used because clerks, in chambers, often send material to the judge sitting in another city or at a court meeting. Not only were most memoranda related to the goal of producing a written disposition, whether the judge's own or one written by another judge, but written documents allowed the judge to examine materials at his own pace, as well as to have materials to take home or to read while traveling.

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<sup>25</sup> The survey incorporates results from the judge's clerks from his two years on the federal trial court because they either came with him from the Oregon Supreme Court or, having been selected to clerk on the district court, found themselves clerking for Judge Goodwin on the Ninth Circuit.

<sup>26</sup> Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179, 1183-87 (1973) (noting that "some judges prefer an intra-office communication system based almost entirely on memoranda, supplemented by only occasional personal contact," but "[o]thers deal almost always in the spoken word.")

*D. A Question of Perspective: Chambers as Unitary?*

Before proceeding to examine clerks and their role in an appellate judge's chambers, there is a matter of perspective to be explored. Judges are central in most writing about courts, with clerks generally forgotten or "part of the woodwork," and opinions are treated as if the judge was the sole author. In short, the work of a judge's chambers is treated as unitary, even if it is now impossible for any but the most exceptional judges to do all their own work; so, they must delegate some of their work—or some aspects of it—to clerks. Writers adopt the formal stance that all work comes from the judge even if aware that clerks do much of the work, perhaps because formal communication is almost invariably in the name of ("over the signature of") the judge. Thus, one finds a judge writing, "I have some difficulty" rather than "My clerk has some difficulty, and I agree."<sup>27</sup> Even when a document to be sent elsewhere begins as a memorandum from a clerk to the clerk's own judge, it usually leaves chambers as a communication from one judge to another, and, to facilitate transmission, a clerk may prepare it in the judge's name. The result is that outside of chambers, seldom is there evidence of involvement by anyone other than the judge, making it almost impossible to know whether communications are unedited or the judge has altered a clerk's draft and put a distinctive personal "stamp" on it.

The judge-to-judge formalism is used even when a judge knows that a clerk developed another judge's memo with which the first judge disagrees; the judge's disagreement is nonetheless stated as being with that clerk's judge. We can see this in a conference memo that said that the judges "agreed that [the judge's] proposed memo missed the issue"—even though the proposed memorandum disposition had been sent out, un-reviewed by the judge, in lieu of a bench memo. Clerks also maintain the formalism by attributing to a judge the bench memoranda prepared by that judge's clerks, even when those documents have been sent in the clerk's name. This usage may at times be shorthand, but the reiteration of attribution to the judge serves to obscure who is really writing. Of course, to the extent that the judge bears responsibility for all communications from chambers, it matters not that the clerk rather than the judge composed the document, nor should it matter whether the judge has monitored the transmissions.

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<sup>27</sup> In using the former language, Judge Goodwin took a clerk's memo commenting on another judge's proposed opinion and sent a memorandum to the panel; that memo was the same as the law clerk's memorandum until the last two paragraphs. Memorandum from Judge Alfred T. Goodwin (hereinafter "ATG") to Panel (June 8, 1992) (referencing *In re Century Ctr. Partners Ltd.*, 969 F.2d 835 (9th Cir. 1992)).

In a sense, the clerk's memos are "work for hire," with the copyright or ownership belonging to the employer—which for these purposes is the judge. And so, the judge is "the author" even if the judge didn't pen (or "keyboard") the work personally. Indeed, a judge is likely to treat a clerk's error as his or her own rather than acknowledge it was the clerk's, perhaps because more attention on the judge's part might have caught it.<sup>28</sup>

Whether judges allow clerks to send out communications—other than bench memos—in their own name is an indication of what can be called the "culture" of a chambers and of the larger court. Although bench memoranda are sent to the panel in the clerk's name, perhaps with a covering note from the judge, there are occasions when judges cut through the formality. They may do so to commend a clerk. In one such instance, a judge had sent his law clerk's memo on harmless error and another member of the panel referred to the "fine memo prepared by [that] clerk." Such mention may also be used to disagree with the other judge's clerk. For example, in another case, a judge wrote to say that a judge's law clerk "has identified a substantial jurisdictional problem in this case, but I still question whether we should dismiss the case prior to hearing oral argument."

Although most judges invariably send out clerk memoranda only in their own name, some communication between chambers does reveal clerks' involvement. Such communications between judges acknowledging one another's clerks provide some evidence that a chambers is seen at times as a collection of individual actors rather than as a single unitary actor. Clerks' involvement is certainly revealed when, in communicating with colleagues, a judge sends a chambers memorandum, still in the clerk's name and addressed to the judge, or makes an explicit reference to the work of either his own or another judge's clerk. Such instances may come from different stages of a case. In one instance, a memorandum prepared as a response to another chambers' bench memo was transmitted as "another point of view for our consideration." As the case develops, the judges may mention research the clerk was asked to undertake: "I asked my law clerk to

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<sup>28</sup> See Memorandum from ATG to Panel (Feb. 25, 1994) (referencing United States *ex rel.* Familian Nw. v. RG & B Contractors, 21 F.3d 952 (9th Cir. 1994)(stating, in sending a revised disposition to the Panel, "I agree that due process should not have been discussed when finality was the real issue.").

research whether the court could dismiss the appeal as premature because the . . . claims against one defendant . . . have not yet been decided.”<sup>29</sup>

When, in response to a draft disposition, a concurring colleague sends editorial suggestions and “nits,” at times a judge, rather than sending a nit memo as his own, may note the clerk’s authorship by attaching a covering note that reads “a nits memorandum from my law clerk is attached” or says, “The following are some nits which my law clerk spotted” without actually including the clerk’s memo. In one situation, a judge sent along the clerk’s work but accompanied it with a somewhat apologetic note about the extensiveness of the clerk’s work: “My clerk has done a ‘nit’ job that at first I thought was ‘overkill,’ but it picks up, for example, a series of inadvertent number transpositions and odds-and-ends that needed correction.”<sup>30</sup> At a later stage of a case, when a petition for rehearing (“PFR”) was filed and the clerk had summarized the case and the petition, one judge “enclose[d] a memorandum from my law clerk” about a PFR, saying, “It seems to me that there is something in this request so I am calling for a response from the government.”

A judge’s mention of his clerks may entail telling colleagues the clerks’ position and whether the judge agrees with them or not. For example, a judge, communicating to panel colleagues his agreement “that we should stand by our original decision,” added, “My old law clerks also agreed that we should hang tough . . . .”<sup>31</sup> In another instance, the judge sent his law clerk’s memorandum about whether a screening or merits panel should decide a case but directly disagreed with it: “My law clerk . . . has some concern about the screening of this case as to which he has sent a memo.” The judge continued, “I have considered the memo . . . but in the interest of judicial economy I opt for disposition of this matter by my proposed disposition.” Another instance of revealing disagreement came when a judge told his panel colleagues that, “[u]pon receiving your good memos on this case, I asked my law clerk to go back to the drawing board and rethink it. He did.” The judge enclosed a memorandum from the clerk to the panel in which the clerk “fessed up,” saying that another judge, who believed the litigant raised a

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<sup>29</sup> Memorandum from ATG to Panel (Mar. 25, 1996) (referencing *Buckner v. County of Napa*, 83 F.3d 426 (9th Cir. 1996)). The remainder of the judge’s memo reads like a law clerk memo taken over by the judge.

<sup>30</sup> The clerk has also “done a red-line and clean copy, the latter to save a redo by Judge Goodwin’s chambers. He has also incorporated some very minor rewordings I suggested,” which the judge suggested could be rejected.

<sup>31</sup> Memorandum from ATG to Panel (Sept. 24, 1993) (referencing *U.S. v. Schram*, 9 F.3d 741 (9th Cir. 1993)).

constitutional claim, was correct. The judge concluded, “The bench memo . . . is in error on this point.”<sup>32</sup>

Treating chambers as unitary may have been accurate in the past, when judges had no clerk, and close to accurate when a judge had only one clerk who was quite likely to have a subordinate role more like that of a glorified secretary. Such treatment may also be appropriate for contemporary chambers which are highly cohesive, with strong interaction between judge and clerks, and it may apply as well when a clerk acts as the judge’s agent when the judge is unavoidably absent from chambers and has instructed the clerk.<sup>33</sup> However, although the amount of work done by the judge on clerk-drafted documents varies among and within chambers, the several clerks working for contemporary appellate judges contribute substantially to, and indeed draft, a high portion of all documents leaving a judge’s chambers. Thus the clerks’ imprints will be found no matter the thoroughness of the judge’s editing. This leads us to talk not of a judge alone “doing it all,” but of “judge and clerks.” Here we might note the importance of the distinction, like that between the president and the presidency, between the judge as a person and the judge as an institution—although any judge is both at the same time.

Nonetheless, evidence makes it clear that, although much that a clerk has written is used, some communications are largely the judge’s work. For example, in a long memo to other judges on a panel, Judge Goodwin began in his own manner, explaining where he agreed with his colleagues and where he “can’t agree with either of the proposed solutions,” and continued with a half-dozen paragraphs that are largely his own writing.<sup>34</sup> Much of the rest of the memo is directly in the clerk’s language.<sup>35</sup> The result is a real admixture of clerk writing and judge writing that is facilitated because Judge Goodwin, who edits as he reads, is more concise and to the point than many of his clerks. From this brief examination we can see that, despite the inclination to treat a judge’s chambers as unitary, we should understand the multi-actor nature of those chambers and recognize that clerks could be seen as multiple actors within a principal-agent relationship, which is one way of viewing the question of the clerks’ influence. This principal-agent relationship is explored later in this article.

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<sup>32</sup> The law clerk referred to Judge Goodwin by name although the memo from that judge’s chambers had been prepared by a law clerk.

<sup>33</sup> In one case, a district judge sitting by designation with the appeals court was out of the country lecturing at a university. That judge’s clerk wrote that the judge “has directed me to incorporate any changes in the . . . memorandum disposition.”

<sup>34</sup> Memorandum from ATG to Panel (Mar. 4, 1993) (referencing *Tellis v. Godinez*, 5 F.3d 1314 (9th Cir. 1993)).

<sup>35</sup> *Id.*

## II. CHAMBERS: BASIC ELEMENTS

*A. The One-Year Clerkship*

A one-year clerkship is the standard for those who serve “at the judge’s elbow.” Judge Goodwin used that arrangement, preferring to hire new clerks each year for a one-year stint, although some judges in the same court did keep one clerk for a second year and the court’s central staff attorneys had longer tenures.<sup>36</sup> Some years after he became a senior judge, Judge Goodwin began to contemplate moving toward having one of his clerks serve a longer tenure. This shift stemmed from his secretary’s lobbying that he should do what some other senior judges had done: recall a former law clerk not happy with the type of big firm law practice to which their clerkship had given them entree. This arrangement was thought to provide a more efficient work flow than if three “rookies” all started at the same time. The presence of a clerk on indefinite appointment, who would be the acknowledged team leader, would also help, especially during the judge’s frequent and sometimes prolonged absences from chambers. The judge did try this arrangement once, but after a short period, it was discontinued, so that chambers reverted to having a new set of clerks each year.

The judge has suggested that different lengths of clerks’ service create different institutional dynamics. For one thing, “You don’t get quite the same people applying for the two-year position,” and he wanted those who would work hard for a year and then go to a law firm.<sup>37</sup> The cases remain new for the clerks over one year, he observed, and, even with their third or fourth immigration cases there is still something new. However, in the second year, it would be “more of the same stuff” and a clerk would view a case as if they had seen it before, something he felt happens with judges. This is related to the idea, which supports having one-year clerks, that clerks’ freshness and zest may overcome any tendency on the judge’s part to be blasé and to see things in the same way, an inclination which increases with time. If the clerkship were to be longer than one year, there might also be clerk burnout, which one former clerk said was “a real phenomenon” caused by routine caseload, primarily routine criminal cases and diversity-of-jurisdiction cases. As to the best length of time for a clerkship, he stated the adage that “two years is six months too long and twelve months is six months too short,” but

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<sup>36</sup> The absence of data as to the proportion of appellate or trial, state or federal clerkships that are one-year, two-year, or of indefinite tenure (“permanent”) is one indication of how much remains to be learned about clerkships.

<sup>37</sup> Interview with Judge Alfred T. Goodwin, Circuit Judge, U.S. Court of Appeals for the 9th Circuit, in Pasadena, Cal. (Feb. 18, 1998).

also pointed out that as the endpoint of a clerkship approaches, clerks tend to become anxious to move on—perhaps increasing the feeling of burnout.

The mention of a clerkship’s endpoint leads to some problems resulting from clerk changeover. In many, if not most, instances, a clerk’s involvement with a case is simple, straightforward, and relatively brief, so that only one clerk works on a case over its history in the court of appeals. However, the one-year clerkship without overlap of clerkship groups can mean that more than one clerk, in sequence, works on a case. If a case is argued just before the clerk turnover, one clerk will have prepared the bench memo while another will draft the disposition, or one clerk will have seen the case through to filing but a new clerk will deal with the petition for rehearing. However, involvement of more than one clerk is particularly likely when a case takes considerable time to resolve. Examples are when a draft opinion receives multiple revisions, submission of a case is vacated pending an en banc hearing on a related issue, or a new Supreme Court ruling affects the law applicable to the case.

Particularly because clerks know the cases on which they are working—and probably know them better than do the judges—the end of the clerk year, which comes at roughly the same time in all chambers in the court, affects the judges. It was quite likely a new set of clerks would be in place when the clerk’s office offered a case to a panel that had earlier been remanded for further action and now had been appealed anew. The judges would frequently decline to take back these “comeback” cases, perhaps because the issues posed were different from those decided earlier, but also because the clerks who had worked on the case had now departed.<sup>38</sup>

More generally, a new set of clerks requires time to “get up to speed” on cases that are in process and must do so just as they are beginning to write bench memos in new cases, which itself takes longer in their first months on the job. The result is delay in disposition of the carryover cases. In addition, a follow-on clerk, while attempting to proceed in the same direction as the previous clerk,<sup>39</sup> may raise issues different from those on which the previous clerk focused. This creates a

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<sup>38</sup> Judge Goodwin has commented that this is often the reason for panels declining “comeback” cases. *See also* Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153 (1990) (observing that at times judges may beg off from writing an opinion in a case because a particular clerk is not available).

<sup>39</sup> Noting that she had taken over the writing responsibility when the prior clerk left, a clerk said, “I attempted to follow the conference and bench memoranda.” Memorandum from Mary Rose Alexander to ATG (Oct. 10, 1989) (referencing *DiMartini v. Ferrin*, 889 F.2d 922 (9th Cir. 1989)).



new set of concerns with which the other panel members have to deal. For example, when a petition for rehearing arrived almost two months after the opinion had been filed, the second clerk to deal with a case wrote to the judge “to highlight one aspect of the panel’s decision” and to raise a question about a distinction made by them.<sup>40</sup> The new perspective the second clerk provides may, however, be helpful, and, indeed, a judge may take advantage of it by asking the new clerk to reexamine the case. In one such situation, where two panels were dealing with related issues, one judge wrote to his colleagues, “I asked one of my new clerks to take a fresh look at the matter. I am forwarding a copy of his memorandum. If you agree with his conclusions, as I do, I will prepare a response to [another judge’s] panel from the three of us.”

Judge Goodwin showed sensitivity to the situation when sets of clerks changed in other judges’ chambers at the end of the clerk year, when he said, “I realize that law clerks come and go and this may be dropping on your desk during a period of transition.” However, he also used this time to nudge his colleagues toward completing cases, prodding those who had not responded to opinions in circulation. For example, he said he wished “early warning” if the other judges had “major difficulties” with his proposed opinion because “I would like to get as much help as possible from my current law clerk who has spent about six months on this case before she goes off billable time.”<sup>41</sup> In another case for which Judge Goodwin had the writing assignment, a clerk sent an end-of-July note to the judge, saying that the secretary “told me you sometimes send a ‘prompter’ to judges as the law clerks’ year draws to a close” and asked whether the judge wished “to do so here, or let [the other judge] sit awhile longer?”<sup>42</sup> This led the judge to write to the panel, “If it would help get this off of my ‘under advisement list,’ before the annual migration of law clerks, I would be willing to convert my proposed opinion in which Judge King has already concurred to a unpublished memorandum. Please advise.”<sup>43</sup>

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<sup>40</sup> “Although I do not think that this distinction rises to the level of an intra-circuit split, the decision can be read as a significant expansion of the Section 3731 interlocutory appeal.” Memorandum from David Richter to ATG (Dec. 8, 1992) (referencing *United States v. Adrian*, 978 F.2d 486 (9th Cir.1992)).

<sup>41</sup> Memorandum from ATG to Panel (June 7, 1993) (referencing U.S. *ex rel.* *Richards v. De Leon Guerrero* 4 F.3d 749 (9th Cir. 1993)). The date of the note is well ahead of most clerks’ departure date, so the judge was clearly pressing his colleagues.

<sup>42</sup> Memorandum from Meg Keeley to ATG (July 24, 1996) (referencing *Gutierrez-Tavares v. INS*, 92 F.3d 1192 (9th Cir. 1996) (unpublished table decision)).

<sup>43</sup> Memorandum from ATG to Panel (July 25, 1996) (referencing *Gutierrez-Tavares v. INS*, 92 F.3d 1192 (9th Cir. 1996) (unpublished table decision)).

Even when not the writing judge, Judge Goodwin did not hesitate to suggest to the other judges on panels either that he wanted to clear up matters before his own clerks left or that the panel might wish to resolve a case before a new set of clerks arrived. In one case, which had already been through two clerks, he wrote, “This has been a tough case, and I think we’d all like to clear it from our active files before summer’s end” —a euphemism for the clerk’s impending departure; he suggested that if the writing judge “agrees to clarify the opinion along the lines suggested, I’ll be happy to concur in the proposed opinion.”<sup>44</sup> And in a complex municipal employment discrimination case, he asked “whether anything is happening on this case? My law clerks will be leaving shortly and I would hope to close out this before the new law clerks arrive.” That note prompted the writing judge to send a draft disposition “[b]ecause of the imminent departure of Judge Goodwin’s clerks.”<sup>45</sup>

### *B. Changes Over Time*

A judge’s chambers have been said to “consist of loosely organized relationships between judges and their staff and among the members of their staff.”<sup>46</sup> Despite its “bureaucratization,” discussed *infra*, the clerks’ environment remains one of work “in small, isolated chambers with a minimum of work contacts outside,” and the intense relationships within chambers have been called “the most intense and mutually dependent . . . outside of marriage, parenthood, or a love affair.”<sup>47</sup> Speaking of a larger number of appellate courts, Marvell said that “the judges and their clerks are normally very close, both in the sense that they have a great deal of contact and the sense that their personal relations are open and friendly.”<sup>48</sup> Even where a judge limits the personal aspect of the relationship with clerks, the situation of a small, compact, and isolated work environment remains.

Chambers have, however, changed over time. The growth in the size of a chambers contingent has not grown willy-nilly but has resulted from provisions in statutes and from budgetary allocations. In Judge Goodwin’s case, the change was from his initial Oregon Supreme Court

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<sup>44</sup> Memorandum from ATG to Panel (June 10, 1991) (referencing *Datagate v. Hewlett-Packard*, 941 F.3d 864 (9th Cir. 1991)).

<sup>45</sup> This exchange took place in June, but the opinion was not filed until early the following October, in the new clerk year.

<sup>46</sup> Cohen, *supra* note 9, at 87.

<sup>47</sup> Wald, *supra* note 38, at 153.

<sup>48</sup> Marvell, *supra* note 8, at 91.

service, through his long tenure on the Ninth Circuit.<sup>49</sup> On the former, he had one clerk and one secretary, and the clerk would write a memo, the judge would write the opinion, and they would talk about it. When the judge moved to the U.S. District Court, he started with one secretary and a clerk-bailiff in addition to his regular clerk but then added a second clerk. The two-clerk situation carried over when he joined the Ninth Circuit, but in due course the number of clerks grew to three, and there was even a brief period when there were four. The judge continued with three clerks when he took senior status, although in due course the number was reduced to two.<sup>50</sup>

In addition, staff attorneys from the court's central staff occasionally worked with the judge on cases as if they were elbow clerks. They came to the judge's chambers during their vacation time to obtain that experience, while at other times, a staff attorney who had worked on a case before the court earlier would help the writing judge when the case returned after remand. In addition, if a case came on an emergency basis to a civil motions panel which held argument and issued a decision that was more than a routine order, the motions attorneys, having already provided help including the rough equivalent of bench memoranda, would be likely to stay with the case. They were "up to speed" and were also experts on jurisdictional issues and procedural matters, and so, in that situation, the judge's elbow clerks would at most serve a secondary complementary role. Such arrangements were, however, not usual, and the judge preferred to have law clerks who were under his direct control all the time.

An example of a staff attorney, rather than one of the judge's elbow clerks, serving as a law clerk for a panel could be seen in some environmental cases. When the petitioner moved for discovery concerning *ex parte* communications between the staff of the "god squad" (the Endangered Species Committee) and the White House, a motion panel issued an opinion. The civil motions attorney working with the judges had initially informed them "there is very little law relevant to this novel question" and thus prepared a couple of memos—equivalent to

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<sup>49</sup> For an examination of why Judge Goodwin's clerks wished to clerk and to clerk for him, along with their evaluations of the experience, *see* Stephen L. Wasby, "Why Clerk? What Did I Get Out of It?" 56 J. LEGAL EDUC. 411 (2006).

<sup>50</sup> As he wrote to one of his clerks for 1991–1992, the first full clerk year after he had taken senior status, "My taking senior status will not significantly affect your working conditions because I will carry at least as many cases during your clerkship as I have been carrying, and probably a few more," and, moreover, he would not have "the administrative work which took a lot of my time and took me away from the office for substantial periods of time." Thus, he assured the clerk, "there will be plenty of work to do."

in-chambers bench memos—for the panel. They were an “attempt to cover issues raised by the panel at our last meeting.”<sup>51</sup> In another instance, the staff attorney even drafted an opinion while saying this was not usually that staff attorney’s task. This involvement by staff attorneys takes place because these are fast-moving cases, at times proceeding on appeal from an injunction against sales or on an appeal from a denied injunction. If they go to a motions panel, those judges may decide the matter completely, or if they go to a merits panel—like the Ninth Circuit’s “spotted owl” panel—they may require expedited treatment, for which the staff attorney is better equipped to provide support.

Well into his court of appeals service, when he was the court’s en banc coordinator, the judge obtained a half secretary line to assist with that work. When he retained the en banc coordinator function while chief judge, for a short period he had one clerk take particular responsibility for en banc matters; that work was subsequently carried out by the senior secretary. The judge did not add a specific staff person to assist with the duties of the chief judgeship. Sometime after giving up the chief judgeship, Judge Goodwin had only one secretary, particularly as use of computers by the judge himself and by all the clerks diminished the need for secretarial assistance in preparation of many documents.

The growth in the number of staff, which illustrates the development the late Fifth Circuit Judge Alvin Rubin characterized as the “bureaucratization of the federal courts,”<sup>52</sup> certainly affected work patterns in chambers. One secretary noted, for example, that with multiple clerks, the judge did less writing—he was less likely to put a piece of paper in the typewriter to develop a thought. However, that was also affected by technology, because, as the judge explained, with a word processor, he might do the first draft of a disposition, giving it to the clerks to fill in citations, and he also found it easier to draft an opinion “by mutilating the clerk’s bench memos” so that he was not delayed when the clerks might be busy. “The law clerk may have other priorities, such as bench memo deadlines,” he observed.

Judge Goodwin, as chief judge, also had “the services of staff law clerks, the staff of the circuit clerk’s office and the circuit executive,” so that he had “a small appellate enterprise.”<sup>53</sup> However, he never seemed to have “appropriated” them as his staff and, apart from using his lead secretary for some administrative work related to being chief judge,

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<sup>51</sup> The case is *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1524 (9th Cir. 1993).

<sup>52</sup> Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAWYER 648 (1980).

<sup>53</sup> *Id.* at 651–52.

maintained the separation between his own and the court's and circuit's staffs, which were located in San Francisco while he and his chamber's staff remained in Pasadena.

*C. A Note on Secretaries*

One cannot examine a judge's clerks without also looking at the secretaries, who are almost totally invisible in discussion of judges' chambers.<sup>54</sup> The judge's secretaries perform many functions and engage in a wide variety of activities themselves, or assure that someone else does them. The clerks often interact more frequently with the secretaries than with the judge, and the secretaries often supervise them. This makes the distinction between secretary and clerk less clear than the titles might suggest, at least in small chambers.

The judge's secretaries did far more than basic "secretarial services." The secretary was the key player who served as the "administrative officer" who organized the judge's calendar, managed his workflow, "kept information moving around," "ran the chambers," and "organized things the judge didn't want to deal with," which in Judge Goodwin's chambers meant being in charge of personnel. The secretary's work included responsibility for certain aspects of cases; however, as the volume of cases increased—and with it the number of law clerks—the secretaries would see less of the cases beyond performing the key role of moving case documents. And the secretaries might do ministerial work on motions after a clerk talked to the judge or might compose and send orders granting or denying rehearing and rehearing en banc.

Judge Goodwin's chambers exemplified the situation in which the distinction between "secretary" and "law clerk" could be at best artificial. In the days before advanced word processing technology, the judge would let the secretary edit a law clerk's convoluted writing. When computer use began, a secretary might put opinions, drafted by clerks on the computer, into final form. The judge, a former reporter accustomed to doing his own typing, expected his law clerks, regardless of gender, to be able to type.<sup>55</sup> Particularly when there was only one secretary and no more than two clerks, the secretary also did "a fair amount of editing of everyone's work"; this made the secretary the functional equivalent of a

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<sup>54</sup> For further discussion, see Stephen L. Wasby, *Judges, Secretaries, and Clerks*, 7 J. APP PRAC & PROC. 151 (2005).

<sup>55</sup> He regularly chuckled at the reactions he would receive when he would ask female potential clerks whether they could type; when they exhibited annoyance at what they thought was a sexist question, he would tell them, "I ask the two-ball kind the same question."

clerk. While some clerks were clear that the secretary “didn’t try to control the substance of opinions” when editing as she typed, the clerk might think the secretary had crossed the line to deal with substance; and one spoke of that editing as having “created a small amount of tension.”<sup>56</sup> If there was to be any consistency in style over time, the secretary would have to enforce it; thus one long-time secretary was the “arbiter of style” for new clerks each year.

The case secretary was to perform the key function of monitoring the movement of cases and of seeing that relevant documents went to the appropriate clerks, that necessary tasks were undertaken, and that material from the clerks reached the judge. A memo from another judge usually went to the clerks via the case secretary, who, performing a “traffic cop” function, would route it to the clerk with responsibility for the case. The secretary, who tended to watch for e-mail and fax transmissions, would give a message about a case to the clerk monitoring it; the clerk would then obtain the casefile and prepare a memo for the judge. The secretary would write notes—often a question—in the upper-right-hand corner of an item in a case file, “Waiting for [X’s] vote” or “D - for the file” or “Circulated [w/ date],” and would often add instructions for the clerk working on the case and transmitting a request from the judge, like one about an appeal from a remand by a panel in which the judge had participated: “ATG says please ck to see if we need to take this case—are they truly the same issues?”<sup>57</sup> The case secretary’s monitoring of cases is part of more general monitoring of clerks and externs. The latter required closer watch because their education and training have not progressed as far as the clerks’ and they are in chambers for only one semester.

Clerks may have closer relations with at least some secretaries than with the judge. Certainly secretary-clerk interaction is likely to be more frequent than clerk-judge interaction. In survey responses, only one clerk said that the secretary assigned work, with one pointedly saying that the secretary “never” did so.<sup>58</sup> However, secretaries, “a critical link in the

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<sup>56</sup> Indeed, a former clerk for another judge, on reading this, said that if his judge’s secretary had edited any of the clerk’s writing, “the clerk would have been very put off.”

<sup>57</sup> Note on face of inquiry from Calendaring Clerk to Panel (Sept. 18, 1995) (referencing *Gray v. First Winthrop Corp.*, No. 989 F.2d 1564 (9th Cir. 1993); *Cope v. Price Waterhouse*, 990 F.2d 1256 (9th Cir. 1993) (unpublished table decision); *Simon v. Orsi*, 990 F.2d 126 (9th Cir. 1993)).

<sup>58</sup> Twice as many—a majority of those responding —said that the judge assigned work, referring primarily to instructions to write opinions, with a half-dozen saying that the other clerks occasionally did so. All but one of Judge Goodwin’s Oregon Supreme Court clerks said that the judge assigned work to them; the other mentioned the secretary. One Oregon Supreme Court clerk said that the secretary “often gave me marching orders from the judge. I usually left written materials with her for delivery to the judge in

system,” provided procedures for caseload, and then monitored and enforced them. One clerk said that delegation in chambers “functions pretty smoothly, particularly because of [the secretary].” For example, the case secretary delegated case-allocation (discussed *infra*) to the law clerks, but if they didn’t choose cases on which to do bench memos, she assigned the cases. The secretaries played an important role in training the clerks, in part because the judge was never in chambers when the clerks started their year, particularly when he began to spend May through October in Oregon. Because the judge now does not sit on August or September calendars, the clerks start working on the October calendar and are well into it before the judge starts working with them; the secretary would “load them” for that calendar. Secretaries also oriented clerks to understand office procedure. This was necessary because the court orientation for new clerks was said not to be sufficient for chambers work, and it did not come until the clerks had been on the job for up to two months. The need to have proper procedures led by one secretary, with the judge’s approval, to prepare an official manual for law clerks, and some senior secretaries provided continuity from one clerk group to another as the embodiment of knowledge and experience, the chambers’ institutional memory.

According to the clerks, the secretary, as “much more than a gatekeeper,” served as “a guide and advisor on how things functioned,” as well as a “day-to-day administrative officer for all logistical needs,” and thus was “a great resource.”<sup>59</sup> That the secretary might be and was “boss” was particularly clear from the remark that the secretary’s role “certainly was *not* to work for the clerks.” The secretary would also orient new clerks to the best way to deal with the judge. One secretary describes her advice as being that when the judge asks a clerk to do something, the clerk should use his or her common sense, and then ask one of the secretaries. The further advice that the clerk not do anything without questioning it was effective particularly when the judge was out of the chambers and thus not immediately on top of a case, because the clerk could also go back and ask the judge if he really meant what he had requested.

Secretaries also found that clerks asked them about sending out messages or whether they should first show them to Judge Goodwin.

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chambers. She was the judge’s full-time representative with whom I dealt. She relayed instructions and messages.” But, at the same time, Justice Goodwin was “very accessible to his clerks” and “friendly with all the clerks working for the court.”

<sup>59</sup> One Oregon Supreme Court clerk spoke of Justice Goodwin’s secretary as “really my mentor in many ways, as she was there and knew all of the day-to-day ropes intimately.”

Because the secretaries worked closely with the judge and had the judge's ear—with the lead secretary almost his alter ego—they could know what he would have done, and thus could answer. At times the secretary would even be the person to whom the clerks would come to with a question about what the judge might accept—which one characterized as of the sort, “Do you think Dad will go for this?”

The judge's dislike of dealing with personnel problems also meant, however, that the secretary became the person who had to keep the clerks in line. One secretary observed that every year there was someone who would have to be brought into line; thus secretaries also bear the brunt of less-than-optimal clerk habits. Some clerks would abuse the relaxed atmosphere in the office or would take advantage of it by submitting bench memos late. “Some are accustomed to doing things on their own good time,” one secretary observed. That the judge did not “chew” on clerks meant that the senior secretary might have to be the one to give them a “dressing-down.” However, the secretaries' willingness to reprimand clerks has varied, as has their deference to the clerks. Observers have said that a couple of the secretaries “ordered the clerks around” and were obeyed, while another secretary was “more deferential,” a reflection of differences in work styles and personalities. One secretary, with whom relations were said to be “easy,” doted on the clerks, acting like a “mother hen”—a role others adopted, although perhaps not as successfully—while another “had a dominant personality” so that “some didn't get along with her.” In short, there would be tensions from time to time as a result of personality.

#### *D. Interaction among Clerks*

In thinking about the work a clerk performs for the judge, we usually think of, and seldom go beyond, the judge-clerk dyad, even with greater recognition that chambers is a small enterprise or organization. Yet interaction among clerks is very important, particularly in small offices where people must share workload while operating with relative autonomy. We can focus on the judge-clerk dyad, as that is the principal working relationship most of the time: clerks are hired to work for the judge. As just noted, generally, only one clerk at a time works on a case. Yet there are some situations when more than one clerk does so, and the interactions among the clerks are also crucial, not least because they affect work output and the atmosphere in chambers.

The most obvious situation in which more than one clerk works on a case is when one checks another's work by reading, commenting on, and editing that clerk's memoranda and draft dispositions. While one clerk has the primary responsibility for a case, another may be a “second



reader,” although use of “second-clerk-checking” is usually reserved for published opinions and not felt necessary for memorandum dispositions. A clerk transmitting a draft opinion to the judge reported that the revised version of a disposition “has now been thoroughly ‘second-clerk-checked’ . . . and is in final form,” and indicated that the second clerk “had some good suggestions on how to make the language flow more smoothly,” and had also made “helpful comments” on another section.<sup>60</sup> A clerk said, “Clerks would cross-review one another’s work,” which was “pretty collaborative” as they exchanged ideas, while “lots of schmoozing” was said to take place, although its extent would obviously be a function of the general personal “fit” among a set of clerks. In addition, when a judge employs an extern, a clerk may be assigned to check on the extern’s work, and may serve as a supervisor and mentor.<sup>61</sup>

Far less frequent is two or more clerks working on a case conjointly. Although they might do so when a case is complex, collaboration was more likely when their conversations led them to a common position, and they wished to “gang up” on their judge, even if good-naturedly. In a 1992 case, all three of Judge Goodwin’s clerks worked on a case, sending joint memos to the judge. In writing to the panel, the judge acknowledged their participation.<sup>62</sup> When they received the revised proposed opinion, all three clerks then prepared for the judge a severely critical memo responding to and questioning that proposal. This resulted in a memo from the judge to the panel, indicating that he was only concurring in the result because he was “troubled by some of the language in the opinion which appears to discuss matters that are unnecessary to the decision.”<sup>63</sup> When the writing judge made further changes, two of Judge Goodwin’s new clerks sent him a short memo suggesting how he might deal with changes.<sup>64</sup> There were thus five clerks working on this case in one chambers over two clerk years.

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<sup>60</sup> Memorandum from David Litt to ATG (Aug. 28, 1989) (referencing *Harper House v. Thomas Nelson*, 889 F.2d 197 (9th Cir. 1989)). In one case, a member of the panel, knowing that the writing judge used such a system, felt no need to send editorial corrections.

<sup>61</sup> In one case, the secretary’s note to an extern read, “John wants to see this opin before it is sent out.”

<sup>62</sup> Memorandum from Peter Hammer, Peter Savich, and A.J. Thomas to ATG (May 1, 1992) and Memorandum from ATG to Panel (May 1, 1992) (“I have discussed this case with my law clerks. At my request they have prepared the enclosed 11-page memorandum with which I am in general agreement.”) (referencing *Chandler v. McMinnville School Dist.*, 978 F.2d 524 (9th Cir. 1992)).

<sup>63</sup> Memorandum from Clerks to ATG (July 31, 1992); Memorandum from ATG to panel (Aug. 11, 1992).

<sup>64</sup> Memorandum from Steven Bennett Weisburd and Edith Ramirez to ATG (Oct. 12, 1992).

There is one other situation in which more than one clerk works on a case: when a central staff attorney prepares an initial memorandum and the judge's elbow clerk writes only a shorter, follow-up memo analyzing it or makes a short note (via a "post-it") on the staff attorney's memo. This is not unlike memos that judges' clerks write in response to bench memos from another judge's chambers. For example, when a case was initially before a screening panel—a situation in which a staff attorney usually prepares a bench memo or draft memorandum disposition—and the panel had rejected the case from the screening process and sent it to a regular panel, the staff attorney memo would accompany the case. This lessens the need for an elbow clerk to do more than prepare such a short follow-up document. Thus, after receiving a staff attorney's fifty-page bench memo with recommendations, the judge's clerk, who agreed with the staff attorney's "ultimate conclusion" but disagreed with the reading of some cases, prepared a six-page memo discussing two key cases.<sup>65</sup> When the judge sat in the Second Circuit and a motions law clerk had written a memo recommending dismissal, Judge Goodwin's clerk prepared a follow-up memo for him about the difficulty of trying to determine the facts.<sup>66</sup>

When we turn to clerk-to-clerk interaction, we see that clerks working for the same judge in a small space may compete for his time and attention. For example, their interactions may be affected by their interests, capabilities, and work habits. If those interests don't mesh or aren't complementary, there can be problems with allocating work, as discussed *infra*. More important are matches of capabilities and work habits, where a major question is whether the clerks perform equally or at least do a roughly equal amount of work. As D.C. Circuit Judge Patricia Wald has observed, "If for any reason one of her clerks proves significantly deficient, she, or the other clerks, must take up the slack."<sup>67</sup>

If all clerks are "up to speed" and focused on their work, the chances for good working relations are high. However, that does not always happen. For example, one clerk, although noting that perhaps he was engaging in "sibling rivalry," observed that a co-clerk had "seemed to be relatively uninterested in working or in the business of crafting opinions" and spending a lot of time on the phone talking to her friends. In another year, difficulty arose when a clerk who had failed the bar

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<sup>65</sup> Memorandum from Karen Hughes to Panel (Dec. 29, 1994); Memorandum from Craig Grossman to ATG (Jan. 3, 1995) (referencing *U.S. v. Noriega-Lopez*, 47 F.3d 1177 (9th Cir.1995) (unpublished table decision)).

<sup>66</sup> Memorandum from Jenny Horne to ATG (Nov. 5, 1993) (referencing *Tabachnik v. Hillman Hous. Corp.*, 14 F.3d 591 (2d Cir. 1993)).

<sup>67</sup> Wald, *supra* note 38, at 153.

examination was preoccupied with that problem and studied for the exam on “company time” although that was said to be outside the scope of allowable work. Chambers can continue to function reasonably well if one clerk is not fully effective, but if two are “off their feed,” there is likely to be “a real problem.” A good example was when two clerks “dogged it” out of annoyance at the judge’s criticism of one for treatment of a case and the third was “passive-aggressive.” Some clerks speak of enjoying their fellow clerks, with one clerk saying the judge “must have picked clerks he felt he would work with and the result was that we worked well together and became close friends.” On the other hand, clerks may not get along and it is well-known that often a set of three produces a situation of two-against-one. This is reflected in the comment that relations with one clerk were fine, something that was “fundamentally different” from relations with the third clerk. One secretary observed that teams of clerks varied in the extent to which they worked as a team, while another said that in a seven-year period, there had been only one year in which the clerks were “really collegial.” Thus, it was likely in most years that there would be a problem. For example, two clerks did not speak to the third for much of another year for failing to consult them before making a recommendation to the judge over the use of externs.

If the clerks are not of equal capability, and particularly if one regularly produces better work, the judge might turn to that clerk more frequently. Indeed, the judge observed, “There is usually one clerk of each bunch from whom you get the best work—to whom you can give the toughest questions,” and whose drafts one could almost file as a disposition. However, clerks suggested that with multiple clerks, the judge did not always know who was doing the most work for him. This would be true even if, as happened on occasion, two clerks in one year were “goof-offers,” leaving the third clerk with all the work. The judge has been said to have been aware of unequal output but not to have acknowledged it, “which leads to a hard situation” when “no one is criticized for not working or praised for doing it.” Clerks, however, will be quite aware of differential treatment and it will likely affect their relations. Although sixteen of twenty clerks responding to the survey agreed that their relations with the judge were the same as those of their co-clerks, one clerk reported that “equal treatment was not true” although he admits he may have been the reason because he “tested the relationship” with the judge.

## IV. WORK IN CHAMBERS

We now finally reach the core of the article. After discussing briefly what others have said about the tasks that clerks perform, we turn attention to the specifics of Judge Goodwin's clerks. Here, we first look at the orientation his clerks receive to their work. Then, we begin the more extensive examination of the clerks' tasks and how work was organized in these chambers, including how cases are allocated: bench memorandum preparation and other work prior to calendar; post-argument work; and tasks involved when the judge sits elsewhere, followed by clerks' interaction with other chambers.

*A. A First Look at Clerk's Tasks*

Those who have written about clerks have identified variation in judges' use of clerks and the tasks they perform, or, as an observer has remarked, "The specific duties of the law clerk vary with the court and the particular judge served."<sup>68</sup> There is variation on several dimensions: among chambers, from one clerk to another within the same chambers, and from case to case. Cohen notes that "judges choose to use the services of their clerks in widely diverse ways,"<sup>69</sup> and Marvell observes, "The clerks' duties vary enormously, since each judge controls his clerk and has his own ideas about how a clerk can best help him. Judges, moreover, often use clerks differently from case to case."<sup>70</sup> There may also be differences related to the specific court's functions. Thus, we see differences in what court of appeals judges and Supreme Court justices expect their clerk to do. For instance, while the former have expected their clerks to provide a fresh perspective, to keep the judges abreast of new developments in the law, and to play devil's advocate about positions the judge has taken, Supreme Court clerks have reported that the justices do not want them to do that and, in fact, they do not.<sup>71</sup>

There is general agreement on basic tasks. These "include research, drafting, editing, cite checking, proof reading, document assembly, conference attendance, reading and indexing slip opinions, errands, library maintenance, and discussions with the judge."<sup>72</sup> Cohen notes the "four important ways" in which clerks and judges prepare to make

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<sup>68</sup> Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1234 (1981).

<sup>69</sup> Cohen, *supra* note 9, at 88.

<sup>70</sup> Marvell, *supra* note 10, at 88.

<sup>71</sup> Ward *supra* note 13, at 48–52. Also personal communication to author from Artemus Ward (on file with author).

<sup>72</sup> *The Law Clerk's Duty of Confidentiality*, *supra* note 70, at 1234. See also Sheldon, *supra* note 7, for a number of roles that clerks play.

decisions: “(1) researching the legal issues in a case and writing bench memoranda to summarize their findings; (2) preparing case materials into a bench book; (3) serving as a sounding board for a judge’s thoughts and arguments; and (4) assisting judges in writing opinions.”<sup>73</sup> Some judges may limit their clerks to “research, bench memos, editing, cite-checking, and commenting on the judge’s drafts” and to preparing “first drafts in routine cases only.”<sup>74</sup> However, First Circuit Judge Frank Coffin has said that, because of caseload demands, most judges find they must have clerks go beyond that to such tasks as “rewriting the judge’s first draft before final polishing” and even writing first drafts “in even the most complex cases.”<sup>75</sup> As workload has become heavier, the case-preparation work that tends to fall particularly to the clerks is reading of the record; while the judge will read the parts of the record appended to the brief (the ER, or Excerpts of Record). Further exploration of the larger record becomes the clerk’s domain.

A central function clerks perform, and always one of their major duties, is conducting research.<sup>76</sup> This includes “checking the legal authorities and facts in the briefs and searching for information missed by counsel,” as “judges and law clerks are often left to do substantial research to supplement the poor legal analysis provided by the parties” when lawyers have not adequately pointed out where the lower court erred or did not err.<sup>77</sup> Clerks also “check the facts and citations in their judges’ draft opinions,”<sup>78</sup> which entails reading cases and examining the trial record. Clerks’ reading of cases can greatly facilitate the judge’s work by “substantially shorten[ing] the amount of judicial time necessary for a decision.”<sup>79</sup>

Sheldon went beyond lists of specifics to clusters of tasks, placing them in four general categories: prefatory and conclusive (the latter including opinion-drafting, circulation, and editing), support and administrative (not a major component), advisory (such as providing pre-hearing memoranda), and corrective (a minor element).<sup>80</sup> In recent years, there was greater performance of prefatory tasks, “although conclusive responsibilities have remained the leading assignments.”<sup>81</sup>

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<sup>73</sup> Cohen, *supra* note 9, at 90–91.

<sup>74</sup> Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 73 (W.W. Norton) (1994).

<sup>75</sup> *Id.*

<sup>76</sup> Marvell, *supra* note 8, at 88.

<sup>77</sup> Cohen, *supra* note 9, at 63.

<sup>78</sup> Marvell, *supra* note 8, at 88, 90.

<sup>79</sup> Wright, *supra* note 26, at 1183.

<sup>80</sup> Sheldon, *Evolution*, *supra* note 7, at 92.

<sup>81</sup> *Id.* at 63.

Looking at roles rather than groupings of tasks, Sheldon first specified four: preparatory, assistant, attendant, and extra-legal.<sup>82</sup> In the “assistant” role, the clerk takes conference results and, to assist the judge, engages in research, documentation, and rationalization of the result.<sup>83</sup> As “attendant,” the clerk aids the judge in subsidiary or clerical areas, and the “extra-legal” role entails attending to the judge’s personal needs. Although these four roles were available, factor analysis revealed clustering of tasks so that “only two significantly *distinct* roles are assumed by the clerks during their short tenures;” the attendant and assistant roles; Sheldon did not find the preparatory and extra-legal roles to be sufficiently concentrated to be distinct roles.<sup>84</sup>

Later, Sheldon somewhat altered his categories, designating roles as preparatory, adjunct (“those chores which are generated by, but tangential to, the decisional process”), assistant (“aids the judge in crucial decisional matters”), and extra-legal or non-decisional.<sup>85</sup> In the Washington State Supreme Court, he found a change over time “from a major, if not exclusive, emphasis on the assistant role to a sharing of emphasis within the preparatory orientation.”<sup>86</sup> Although “consultant and adjunct orientations” had “gained some importance in the intervening years,” they had “returned . . . to their earlier relatively unimportant positions.”<sup>87</sup> The “extra-legal role” was “never very important.”<sup>88</sup>

What tasks are performed in Judge Goodwin’s chambers and how are they handled? One clerk provided the following list of tasks:

- (1) writing bench memoranda
- (2) commenting upon other clerks’ bench memos
- (3) doing independent research
- (4) drafting opinions and memo dispositions
- (5) reviewing draft opinions from other judges
- (6) drafting dissents or concurring opinions, if necessary
- (7) responding to the judge’s questions.

Another, shorter list included:

- (1) reading briefs
- (2) drafting bench memos
- (3) attending oral argument

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<sup>82</sup> Sheldon, *Law Clerks*, *supra* note 7, at 354.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (emphasis in original).

<sup>85</sup> Sheldon, *Evolution*, *supra* note 9, at 67, 68.

<sup>86</sup> *Id.* at 73.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

## (4) drafting opinions/memos/dissents.

At any one time, several different tasks proceed concurrently as clerks prepare for the next calendar while dealing with work from the most recently concluded calendar, and with cases from earlier times where work is still needed.<sup>89</sup> However, a memorandum from past clerks to new ones indicated a sequence of tasks that was to start with assignment of bench memos and continue with preparing the bench memos themselves, preparing for oral argument, writing the disposition, examining opinions by other judges, and dealing with petitions for rehearing, with priorities being bench memos and responding to other judges.

Activities not related to “moving cases,” including administrative tasks, are no longer a major component of a clerk’s work, because the judge’s principal secretary attended to most administrative matters. However, clerks might assist in keeping up the library or “showing visitors to the cupola” in Portland’s Pioneer Courthouse,<sup>90</sup> and there provide some infrequent and ad hoc assistance with administrative matters related to the judge’s service as en banc coordinator or chief judge. This can be seen in a clerk’s memorandum to the judge, sent immediately after a court Executive Committee meeting, listing “reminders on things for which you may be responsible per discussions at the meeting,” and, for each item, asking who should follow up or making suggestions as to who might do so.<sup>91</sup> In addition, a clerk who had the task of assisting in preparation of summary statistics about the court’s en banc activity prepared a “recap” of requests for en banc votes for the previous year and communicated with the Clerk of Court about other en banc statistics which another judge needed for the court of appeals’ Symposium.

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<sup>89</sup> The process to be explored with respect to clerking in the U.S. court of appeals is more involved than it was in the Oregon Supreme Court. There, with chambers of one secretary and one clerk, “the judge decided what role I would play in the process once a case was assigned to him,” and, with “the clerk and the judge as a team, some cases were handled entirely by the judge.”

<sup>90</sup> A clerk who began service when Judge Goodwin was on the district court talked of being “crier to convene court, acting to help usher the jury, making sure to get whatever books the judge needed on the bench, and assisting the deputy clerk of court,” in addition to examining issues that arose and observing the trial.

<sup>91</sup> Memorandum from Jaye Letson to ATG (Jan. 23, 1989). For most items, the judge indicated that the Clerk of Court “is doing this.”

### B. Orientation

How do clerks learn about these tasks as they begin their work? Their learning curve is estimated to be about eight weeks—the time covered by the work for two months’ argument calendars—for procedural elements. Here, we look at who orients the clerks, what if any formal training is provided, and whether the clerks feel they received sufficient guidance. All of these aspects are very important because, as one clerk noted, “It is a very delicate structure coming in, staff who’s been there, the judge trying to keep all on an even keel.”

Virtually all clerks responding to the survey said they received orientation from the judge, from other clerks, and from the secretaries,<sup>92</sup> all of whom “helped us find our way around.” Although the judge’s written policies were said to provide some help, several clerks indicated that the judge was not involved in orientation, primarily because he was away from chambers. Moreover, even when a judge is in chambers and recognizes that training new clerks is necessary, the judge may not be fully available to conduct the training because of the need to decide cases and tend to administrative matters and extra-judicial obligations.<sup>93</sup> Judge Goodwin concedes that his clerks do not have “much adult supervision” from him during their first three months, but his absence at the beginning of the clerkship was not thought to be a particular problem in this regard, particularly with information available and other sources through which clerks could be socialized.

Although a couple of clerks said that the secretaries had not provided any orientation or had done so “only on the most mechanical ‘here’s how the docket works’ sense,” others felt secretaries had provided more—for example, explaining about writing bench memos. Some clerks said the primary orientation came from a secretary and there was also legal research and computer training from the court librarians. While in some situations, other clerks did not provide any orientation because there was no overlap with their successors, a little might come from a co-clerk who had arrived somewhat earlier. One clerk noted that a one- or two-week orientation from the outgoing clerks was very helpful, and still another commented that orientation was “really from the predecessor clerks,” who served to connect them to the computer system and to the judge’s system of operating.

Even with no overlap in the schedules of the two clerk groups, one set of clerks may leave a detailed memorandum for the newcomers,

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<sup>92</sup> This was also true for those who clerked at the Oregon Supreme Court.

<sup>93</sup> See, e.g., Wright, *supra* note 26, at 1192. (“[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.”).



which they see as very important.<sup>94</sup> One such list dealt with office procedure and indicated the sequence of tasks to be undertaken, plus advice on which libraries could most easily produce additional necessary material (not the one in the Pasadena courthouse where the clerks worked) and suggestions on what to wear to work (“Casual, except when judge is in office or during court week”) and on other personal matters, such as areas in which there was less likely to be burglary of an apartment, where to get refrigerators, and how to find a membership department store for federal employees.

Over half the clerks responding said they had not received any formal training at the beginning of their clerkship. Those who did indicate receiving in-chambers training referred to “basic procedural things” like how the office functioned—written instructions on this being passed to them through the secretary—and their basic duties. Several mentioned the seminar held at circuit headquarters in San Francisco for the clerks sometime after their arrival (usually in October) at which several judges spoke and the Clerk’s Office made a presentation. However, this appears to have made little lasting impression on most clerks, as a number couldn’t remember anything about it or mentioned it only in passing.

The general view thus was that training, at least of the formal sort, was “minimal” or “none apart from on-going work.” Training came “in the monthly rhythm of the court” and in writing dispositions. Others observed that the judge’s comments on changes to a bench memo or draft opinion were in themselves a form of training, which came “on a case-by-case basis, through discussion and the editing process.” Another made the telling remark that he had received “coaching” from the judge, not “training.” As one clerk observed, doing research and writing opinions “were things I picked up as I went along” to the extent they were not already known. Another clerk said that training had been “of the best kind: sink or swim,” a view echoed by others who said orientation from the judge was more of the “implicit ‘learn it on the fly’ fashion” or “OJT” (on-the-job training) every day the judge was there.<sup>95</sup> The clerks found their way “pretty much learning by doing,” as when the judge had

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<sup>94</sup> This memorandum was entitled “Advice to Judge Goodwin’s Clerks (Compiled from conversations with the sages.)” If clerks learn only from their predecessors what is expected in bench memos, over time the bench memos may diverge further from what the judge might actually want.

<sup>95</sup> Those who clerked in the Oregon Supreme Court also spoke of the “sink or swim” experience, and of “informal orientation,” “on the job training,” or “training [that] arose out the clerkship experience.” One specific clerk stated that instead of training, “he simply set out his expectations and set me to work.”

left briefs and a tape of oral argument on which to work or gave the clerk the analysis he wanted done on holdover cases.

Despite the relative absence of training, the clerks, at least as they later saw it, did not lack sufficient guidance as they started their clerk year. One whose view probably represents the majority said that a clerk could catch on pretty quickly: “you look at bench memos, and past opinions, and go through a month of bench memos from other chambers,” with “only a month or so of having to scramble to meet expectations before you catch on.” Another clerk observed that the limited informal means used to introduce clerks to their work was acceptable because “being a clerk is a pretty intuitive job” and “there is no mystery in writing bench memos or drafting opinions.”<sup>96</sup> Indeed, some clerks who “chafed at micro-management” and were “much happier if given a project and told to do it,” did not wish more guidance. And, as still another put it, the judge’s “way of leading was to use stuff: if he decided to mark it up, you knew you had to work on it.”

Of the seventeen clerks responding, only two said they had not received sufficient guidance, with the negative captured in the comment that “I didn’t really know what was expected of me.” However, one who found guidance sufficient noted that a relatively insecure person might have found the lack of guidance unsatisfactory, and another, although he believed his two co-clerks found it adequate, noted that whether the guidance was sufficient “varies from clerk to clerk” and he found it insufficient because he liked “to have things more spelled out.” Important deficiencies in the guidance do appear in the observation that a clerk “might have had more training in the implications of my opinions,” because the clerk felt “completely unprepared to determine the right result, knowing so little about the world” immediately on graduation from law school.

### *C. Allocation of Cases*

The Ninth Circuit Court of Appeals is one court in which bench memoranda are shared among chambers. This practice is thought by some to allow each chambers to “give a highly concentrated degree of attention and effort to one third of the cases,” which “can have an exceptional depth of review,” something “impossible or impracticable if applied to all . . . the cases.”<sup>97</sup> Because, when the practice is to use shared bench memos, each chambers prepares an equal portion of them, the

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<sup>96</sup> This despite a report of asking a secretary for sample opinions and never receiving any.

<sup>97</sup> Memorandum from Ninth Circuit Judge to all judges (Nov. 15, 1999).

clerks' first task when the set of cases for a month's calendar arrives in chambers is to divide them. If Judge Goodwin was the presiding judge—as he often was for many years after developing some seniority, and invariably was when chief judge—the clerks, operating under the judge's instructions, divided the caseload among the chambers of the panel members and then further divided Judge Goodwin's allocation among themselves. When Judge Goodwin did not preside—in his early years on the court and particularly after he took senior status—the presiding judge's clerks would allocate cases and Judge Goodwin's clerks' only decision was to distribute those cases among themselves.

Only infrequently was the distribution between chambers worked out between those chambers. However, one clerk did say they “coordinate[d] preparation of bench memoranda with clerks in other chambers” and another said that “whenever possible,” Judge Goodwin's clerks would “work with other judges' clerks so that there was only one memorandum per case.” Clerks also spoke of an instruction from the judge “to let any judge who had a particular interest in a case, take that case,” and another reported that “Judge Goodwin instructed that if another judge's chambers really wanted a case, we should assign it there.”<sup>98</sup> However, there was apparently a limit to the judge's deference. When a more senior judge, in allocating cases, “would assign all Fourth Amendment cases to his chambers,” Judge Goodwin was set to call the judge on it. Even after the judge had taken senior status, his clerks could negotiate with at least some other chambers about the cases they would get for bench memo preparation.

The clerks' distribution of cases within chambers, which involved the choice of cases on which to write and those to monitor,<sup>99</sup> was generally straight-forward and went smoothly. The clerks “would sort them into three categories: ones we'd love to brief, those it would be OK if we had to brief, and those we would have to be paid to brief.” Clerks' remarks suggest that on the whole they had complementary rather than conflicting interests which facilitated within-chambers distribution and allowed specialization to function effectively. For example, one year a clerk was said to want all the criminal work, which the others didn't want; another wanted commercial matters, including securities litigation;

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<sup>98</sup> Another clerk observed that “one of [the judge's] rules” was “do not keep all the good cases for yourselves and give the dogs to others.”

<sup>99</sup> A decision would be made as to which clerk should “monitor” a case for which another chambers had the bench memorandum and disposition-writing assignment. However, particularly earlier, the judge might determine which clerk had more time to “monitor,” and the clerks divided these assignments just as they did the “writing” assignments.

and the third was interested in environmental cases and discrimination. Another spoke of liking the more business-oriented cases and “weird specialties like admiralty.” However, one could see potential allocation problems when a clerk preferred not to work on criminal cases because the judge was more conservative than the clerk on them.

As problems would quickly arise if the clerks’ allocation did not work out smoothly, for example, if they “had overlapping preferences,” the case secretary had to be sure the allocation was accomplished. One secretary said the clerks “knew what to do to divide casework,” but a clerk observed, “The clerks ran the process, but the secretaries kept things organized.” Some problems led one secretary to implement a system used in another judge’s chambers. In that system, one clerk was in charge of the calendar one month—assigning bench memos and following all cases through—and the next month another clerk would be in charge. This was modified so that other judges’ decisions were rotated chronologically as they came in, and, if the clerks traded cases by subject interest and expertise, the next case would be substituted.

The judge’s involvement in case-allocation was relatively minimal. As he had delegated to the clerks the assignment of initial responsibility for each case on the calendar, the judge had “virtually no involvement,” said one clerk. However, another said that the clerks, after talking among themselves about division of cases, would show the judge the division, and another spoke of using the judge to decide the allocation if there were problems in the clerks’ own distribution. The judge was also said to put in a word if he wanted a case, particularly in some earlier years when he kept some cases for himself. Indeed, the judge did write some friends that he would take the most interesting cases on which to concentrate while leaving the others to the clerks. As he put it, “I exploit my law clerks by letting them work on most of the cases while I concentrate on the more interesting ones.”<sup>100</sup>

#### *D. Bench Memoranda and Other Pre-Argument Work*

After allocation is completed, a clerk’s first task with a case is to prepare the bench memo or, when the case is not to be argued and the result is plain, to propose a draft memorandum disposition to be circulated to the other chambers. While most bench memoranda relate to a specific case, the clerk may write one covering two or more closely-related cases, perhaps distinguishing them; there might instead be a bench memorandum for each of the cases with cross-references. The different procedures of other circuits in which the judge sits may result in

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<sup>100</sup> Letter from ATG to Will and Bobbie Lorry (Jan. 27, 1993).

somewhat different tasks for the clerks. Thus, as shared bench memoranda were not the norm in the Second Circuit, for cases there, Judge Goodwin's clerk would prepare a "chambers memo," with a recommendation, that could be converted to the voting memo each judge there prepared.<sup>101</sup> If another circuit's staff attorney had prepared a chambers memo, the clerk prepared a draft "order" that served as a case memo for the judge. When Judge Goodwin sat in the Tenth Circuit, his clerk prepared a brief memo, less extensive than a Ninth Circuit bench memo.

In bench memoranda, clerks, after reading briefs and perhaps also examining the excerpts of record and carrying out some additional research, basically state the issues, lay out the material bearing on them, and state conclusions as to those issues. However, because judges vary in how they use bench memoranda—some ("back loaders") rely on completed bench memoranda from which to prepare, while others ("front loaders") are "characterized by high involvement in the bench memorandum preparation"<sup>102</sup>—they differ in what they want in them. Some wish points from the briefs recounted, while others want "surgical" memos, attending to focused issues; in some chambers, on the theory that the judge has read the briefs, memos are expected to represent additional research. One judge who does not participate in the bench memo process feels that the memos "covered a lot of issues that were of no interest to me" and that when his clerks write for him alone, their work "focuses on my needs and interests rather than what other judges hypothetically want." His clerks could dispense with some basic elements of the standard bench memo, such as discussion of the standard of review, and "can—and often do—give short shrift to issues they think are not dispositive."<sup>103</sup> However, the judge's non-participation meant that chambers of the other two panel members bear a heavier burden, as each must prepare bench memos in half the cases rather than only one-third; this causes those clerks to grumble.

During preparation of the bench memo, the clerk may recommend to the judge whether the court should hear oral argument. On the one hand, the clerk may find from the briefs that the case is an elementary one that can easily be handled by memorandum disposition or the briefs may indicate that oral argument would not assist the judges, while, on the other hand, the briefs' inadequacy may make argument necessary if the

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<sup>101</sup> Post-It Note from Clerk to ATG (stating "I tried to write this so you could easily convert it into a voting memo if you agree.") (referencing *U.S. v. Rock*, 93-144 (8th Cir. 1993)(order)).

<sup>102</sup> Cohen, *supra* note 9, at 98–99.

<sup>103</sup> Memorandum from Judge to Associates (Nov. 17, 1999).

judges were to get at a particular issue.<sup>104</sup> In a case before a screening panel, a clerk said that if the judges thought that a pro se appellant had made “a potentially relevant distinction, then I would advise the panel to remove the case from screening status, and that it be assigned to the regular calendar for oral argument,” and that counsel be appointed for that appellant.

As to not holding argument, in one case, a clerk recommended that the case be submitted on the briefs and prepared a short unpublished memorandum in lieu of a bench memo while offering to do more, and, in another, a clerk recommended against argument.<sup>105</sup> Another clerk questioned a judge’s suggestion for submitting a case on the briefs, “given the limited time before argument.” Although “see[ing] no reason not to submit and affirm,” the clerk thought the time constraints meant the case should simply go to argument.<sup>106</sup> The clerks may also be involved in matters relating to the mechanics of argument. Thus, when a litigant asked that a case be heard later in argument week and another member of the panel would have denied the motion, a clerk sent the judge a note saying there was “no reason not to defer” to the other judge “on whether this case should be moved to a later date in the week.”<sup>107</sup>

In a bench memo, clerks also recommend the outcome of the case, or they may indicate alternative positions the panel could adopt and pathways as to how to get there. In one case, for example, the clerk stated three options for the panel—overturning summary judgment and remanding for trial as to fraud on the court, affirming the judgment as a matter of law, or affirming the summary judgment “because as a matter of law . . . there is no fraud on the court.”<sup>108</sup> Another clerk told the judge that she had “drafted a memorandum disposition with two alternative holdings” and recommended “that we choose one of the holdings as a

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<sup>104</sup> On this last point, see the clerk’s comment that, “given the poor quality of the government’s brief, it is unfortunate that [petitioner’s] imprisonment will most likely prevent oral argument in this,” because the government “failed to give any response to the due process claim which I recommend the panel seriously consider.” Memorandum from Meg Keeley to ATG (Nov. 6 1995) (referencing *Gutierrez-Tavares v. INS*, 92 F.3d 1192 (9th Cir. 1996) (unpublished table decision)).

<sup>105</sup> Memorandum from Harry Mittleman to ATG (Nov. 22, 1994) (“I would certainly waive oral argument for this case. I don’t think it’s too late to do so.”)(referencing *Correia v. INS*, 59 F.3d 174 (9th Cir. 1994) (unpublished table decision)).

<sup>106</sup> Memorandum from Valerie Brown to ATG (July 2, 1996) (referencing *United States v. Shannon*, 97 F.3d 1463 (9th Cir. 1996) (unpublished table decision)).

<sup>107</sup> Post-It Note from Mary Rose Alexander to ATG (referencing *United States v. Robinson*, 913 F.2d 712 (9th Cir. 1990)).

<sup>108</sup> Memorandum from Valerie Brown to Panel (Mar. 29 1996) (referencing *Paymaster Corp. v. Am. Bankers Ins. Co. of Florida*, 91 F.3d 154 (9th Cir.1996) (unpublished table decision)).

basis” for the ruling.<sup>109</sup> Bench memoranda thus often take a “[o]n the one hand, on the other form,” as when a clerk wrote, “[t]his panel could hold . . . . On the other hand, if the court wants to provide an additional remedy . . . it could do several things.”<sup>110</sup> At times, the options are provided in “[i]f/then” form, with the clerk leaving open both the factual predicate and thus the legal conclusion, as when a bench memo suggested:

If the panel finds that Agent Trout’s questionable testimony about smelling marijuana on Treleaven’s property was not necessary to establish probable cause to search Treleaven’s property, it should AFFIRM appellants’ convictions. If the panel finds that Agent Trout’s smell testimony was necessary, it should REVERSE and remand for a Franks hearing.<sup>111</sup>

Even when judges instruct the clerks to provide recommendations as to outcome and reasoning, the clerks do not always do so. As Lorne Sossin has said about the Supreme Court of Canada, “clerks tend to be reticent when it comes to conclusions,” and “prefer to exhaust the statutory language, relevant precedents, academic treatments and policy perspectives before working up the nerve to state, ‘therefore, the law is thus.’”<sup>112</sup> Apart from the absence of “academic treatments and policy perspectives,” this is an apt description of bench memos in the United States courts of appeals. However, as a former clerk has observed, “By the end of the clerkship, most clerks seem to overcome any reticence about recommending dispositions.”

Most often, bench memos, written directly for the three panel members by name, are circulated without the judges having read them; instead a cover note is attached which says in effect, “[h]ere is my clerk’s bench memo”—period. There are exceptions when the judge not only reads the bench memo but comments on it before circulation, and he may even suggest changes to them; he engages in this participation because he can head off blunders that would affect both other judges and himself. (Not surprisingly, he agrees with those judges who review bench memos before they are sent).

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<sup>109</sup> Memorandum from Meg Kelley to ATG (June 3, 1996) (referencing *Alarcon-Duarte v. INS*, 87 F.3d 1317 (9th Cir. 1996) (unpublished table decision)).

<sup>110</sup> Memorandum from Donna Prokop to ATG (Oct. 27, 1993) (referencing *Cleveland v. Beltman N. Am. Co.*, 30 F.3d 373 (2d Cir.1994)).

<sup>111</sup> Memorandum from Jenny Horne to Panel (June 28, 1994) (referencing *United States v. Treleaven/Hier*, 35 F.3d 458 (9th Cir. 1994) (emphasis in original)).

<sup>112</sup> Lorne Sossin, *The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada*, 30 U.B.C.L.J. 279, 299 (1996).

It is, however, important to note that it is rare indeed for a judge—not just this judge, but the other judges with whom Judge Goodwin sat—to comment on a bench memo while sending it to the other members of the panel. When a judge does comment on a bench memo in transmitting it, the comment may include disagreement, as when one judge’s covering memo, after noting that the clerk’s “review of pertinent authority is thorough and complete,” said, “I suspect that we will disagree with two of my clerk’s conclusions but we can discuss the matter at conference.” In another instance in which the judge had obviously seen the memo, the clerk included a comment about the judge’s position—and stated her disagreement with it.<sup>113</sup> There are also instances where a clerk’s argument runs counter to the judge’s initially-stated preference but prevails when the judge adopts the clerk’s perspective, but there are many more instances when the clerk’s recommendation is left in the dust as the judges proceed to affirm when the clerk would have reversed or vice-versa. While at times such action by the judges is grounded in an issue other than those on which the clerk focused, more often the disagreement is simply that—a disagreement.

When the bench memo makes a definite recommendation and it is adopted, the clerk may have played an identifiable role in the case outcome, although the recommendation may be little different from the judge’s tentative position after reading the briefs. In some instances, the judges acknowledge the congruence, as when the conference memo says, “[t]he reasons for affirming are substantially set forth in the bench memo,” or “[w]e all agreed with the bench memo that the heightened pleading standard did not apply in this case, and that qualified immunity cannot be decided at the 12(b)(6) stage.” Even if the entire panel does not base its position on the bench memo, one or more judges may do so, as indicated in a presiding judge’s conference memo which noted that two judges “would affirm for the reasons set forth in the bench memo,” while in another case, the conference memo said a judge “thought that the bench memorandum reached the correct conclusion.” At other times, a portion of the bench memo may turn out to be useful, as seen in a judge’s observation that a law clerk had “developed particular inconsistencies between the transcript and the testimony that we could incorporate in an opinion.” The clerks’ development of material about a variety of issues

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<sup>113</sup> Memorandum from Sophie van Wingerden to Panel (Nov. 22, 1994) (referencing *United States v. Roca-Suarez*, 43 F.3d 1480 (9th Cir. 1994) (unpublished table decision)). The clerk noted that “Judge Goodwin recommends that the panel affirm the convictions . . . I recommend the panel also affirm the upward enhancement,” but added, “Personally, I would recommend the panel remand for an evidentiary hearing on Roca-Suarez’s motion to dismiss the indictment for outrageous government conduct.”



in a bench memo would be helpful for the judges even if they did not discuss all of them at conference; they might decide, on the basis of the bench memo, that an issue did not have to be addressed.

As Marvell observed, “[j]udges’ opinions often include sentences or even paragraphs taken from the [bench] memorandum”,<sup>114</sup> more recently, critics say that it is less a matter of judges borrowing from clerks’ memoranda than of judges not putting enough of their own stamp on the clerks’ language. One frequent result of long bench memos—which some say they are “way too long and convoluted”—is that dispositions are long; a short “dispo” can result only if the clerk cuts the earlier work considerably or the judge does so or instructs the clerk to reduce it.

When a bench memo arrives from another chambers, a clerk examines it, giving the judge the benefit of a second pair of eyes (in addition to those of the bench memo writer), and the clerk might prepare a memo for the judge about it. The clerk’s reaction may be positive—“I found the bench memo for this case to be well researched and persuasive” or “[t]he bench memo does an excellent job of explaining the law in this area.” However, clerks often disagree with the bench memo in whole or in part, and they write longer response memos when they do so. The bench memos can be quite negative, not only “disagree[ing] with the bench memo’s conclusion” but also noting that the bench memo fails to discuss certain elements or unnecessarily discusses non-central matters. In such instances, the responding clerk, in effect, provides her own bench memo, and at other times, in addressing one or more issues not discussed in the bench memo, the clerk’s memo is free-standing with relatively little reference to the bench memo, making it more a supplemental memo than a response.<sup>115</sup> While such a memo is prepared for the judge, at times the judge may circulate it to the other panel members.

There are also times when the judges themselves get involved in responses to bench memos. The judge may react directly to the bench memo by calling for assistance. Thus in a case involving the district court’s authority to issue an injunction against a county (for discharging an employee), Judge Goodwin wrote on the face of the bench memo, “I need law clerk help! This doesn’t sound right,” and posed a question about county liability under 42 U.S.C. § 1983.<sup>116</sup>

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<sup>114</sup> Marvell, *supra* note 8, at 90.

<sup>115</sup> See Cohen, *supra* note 9, at 101; *Cf. id.* at 103. Unlike some other judges, Judge Goodwin does not require clerks to write such supplemental memos without looking at the incoming bench memorandum.

<sup>116</sup> Memorandum from Judge to Panel (referencing *Reuter v. Skipper*, 4 F.3d 716 (9th Cir. 1993)).

The judge might discuss with the clerk a bench memorandum's proposed result, evident in a note by the judge on the face of the bench memo saying the clerk agrees with his analysis.<sup>117</sup> In another case, a judge had said that "[a]fter doing extensive work on the merits, my law clerk discovered that we were without jurisdiction," and another panel member then asked for more research by that law clerk on the jurisdictional point.

After bench memos are circulated and responses to them are received, clerks may review supplemental submissions or letter briefs from the parties. For example, a clerk wrote a memo for Judge Goodwin to say she had read a Hawai'i case appellants had brought to the court's attention by letter, in which she concluded, "I do not think the case changes the proof of damages analysis presented in Judge Pregerson's bench memo."<sup>118</sup> Throughout a case, the clerk might also send memos to a judge that were simple reminders of actions the judge needed to take, such as filing a certain order.

At times, as they prepared bench memos or examined those from other chambers, clerks would suggest questions for the judge to ask at oral argument. They might simply identify a subject about which the judges might wish to ask; at other times, there is a more extensive list containing specific questions. In an appeal involving questions about the admission of evidence, the clerk suggested, "[t]he panel may wish to ask counsel about the video tape to ensure that there is not a second tape or a portion of the tape which is now missing. . . ."<sup>119</sup> An instance of preparing questions for the judge arose when an extern said,

[t]he proposed per curiam opinion deals swiftly and correctly with the issues on appeal. I would only suggest that at oral argument, you question that Assistant U.S. Attorney on the effect of the change in the definition of 'offense statutory maximum' in U.S.S.G. § 4B1.1. If it does not apply to this case, what kinds of cases does it apply to?<sup>120</sup>

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<sup>117</sup> "G would affirm if possible but Gov't can't square the multiple loss figure based on crime by other participants. . . . Meg agrees." Note from Brunetti to Panel (June 26, 1996) (referencing *United States v. McGee*, 92 F.3d 1194 (9th Cir. 1996) (unpublished table decision)).

<sup>118</sup> Memorandum from Meg Keeley to ATG (Jan. 2, 1998) (referencing *Abrams v. DiCarlo*, 76 F.3d 384 (9th Cir. 1996) (unpublished table decision)). Note that the clerk attributes the bench memo to a judge, not to the judge's clerk.

<sup>119</sup> Memorandum from Meg Keeley to Panel (Oct. 5, 1995) (referencing *United States v. Thierman*, 70 F.3d 121 (9th Cir. 1995) (unpublished table decision), *amended by*, 76 F.3d 390 (9th Cir. 1995) (unpublished table decision)).

<sup>120</sup> Memorandum from Extern to ATG (Sept. 30, 1996) (referencing *United States v. Townsend*, 98 F.3d 510 (9th Cir. 1996)).

Likewise, in a complex environmental case, after developing an extensive analysis, a clerk noted, “[c]onsistent with the comments above, here are some questions that you might consider asking counsel at argument Friday,” and provided questions dealing with effects of EPA action on the state’s position actions; weight to be given to senators’ floor statements and to a letter from the agency head to a member of Congress; the authority for agency interpretation; and application of a savings clause.<sup>121</sup> When a set of the judge’s clerks prepared questions for each counsel in another complex case involving irrigation district bonds, they arranged them to facilitate his making notes:

Following is a list of questions proposed in the accompanying bench memorandum in this case. For your convenience, we have restated the proposed questions, noted the page on which they appear in the bench memorandum and to whom they should be addressed, and provided space for you to take down any response given by counsel.<sup>122</sup>

Shortly before judges hear cases, a judge may meet with the clerks to discuss them. The judge’s preparation will likely vary, depending on interest in the cases and available time, and the judge will put such a session to various uses: to get up to speed, to obtain particular input, to confirm tentative views or hunches or have them challenged, to convey to the clerks which cases need more or less attention. We can see this in one 1986 calendar preparation session. In that session, Judge Goodwin met with his clerks to discuss the cases for the calendar’s first two days, all of which were relatively “light” and had few difficult legal questions. The judge was more familiar with the cases than were the clerks, although the latter were more familiar with the cases that were to be argued rather than submitted on the briefs. The judge would state a case’s basic elements, at times asking for reaction, but generally he summarized; the clerks made desultory brief comments, although on same cases, they did participate actively.

The cases received differing amounts of attention; at times there would be no more than a passing remark that an issue would not be reached, was peripheral, or lacked much substance. The judge might ask an occasional question to check on his understanding of the situation, or at times would puzzle as to what the issues were or what could be the basis of an appeal. For most cases, however, the judge used the session to

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<sup>121</sup> Memorandum from A.J. Thomas to ATG (referencing *Coalition for Clear Air v. S. Cal. Edison Co.*, 971 F.2d 917 (9th Cir. 1992)).

<sup>122</sup> Memorandum from “Your loyal and hardworking clerks” to ATG (Dec. 2, 1988) (referencing *In re Badger Mountain Irrigation District*, 805 F.2d 606 (9th Cir. 1989)).

increase his familiarity with the case, but there was relatively little about which he needed input, and for most cases, he seemed to have reached a conclusion either before the session, which he then reinforced, or during his perusal of the case materials.

The judge's out-loud musings suggest that a meeting with clerks may be one place where a judge can most freely express views not only about legal issues but also about the parties or the quality of legal representation and can make remarks not likely to be made in court or to appear in an opinion. The judge also stated views on certain arguments, for example, that they were totally frivolous. Of particular importance for the clerks is that the judge also indicated how much work should be expended on the cases, perhaps saying that if they found anything, to let him know, "but we won't burn the midnight oil" on it. Perhaps more important for the clerk's learning, the judge at times conveyed certain information beyond particular case-facts, in effect providing a tutorial on the law. For example, he explained the background of the Automobile Dealer's Franchise Act and motions in limine, talked about the language of court of appeals' remands to the district court as compared to the U.S. Supreme Court's remand language, and explained the development of the justices Fourth Amendment jurisprudence.

#### *E. Calendar Week*

If oral argument is in the judge's city, clerks listen to argument in cases for which they are primarily responsible but otherwise continue with their regular tasks. However, clerks occasionally accompany the judge to a calendar in another city. Some judges were said not to let any clerks travel because they considered it a waste of the taxpayers' money, but other judges thought such travel "a key part of the clerkship." In at least one case, in order to attend argument regularly, clerks divided travel money, shared hotel rooms or slept on friends' floors, and drove long distances rather than pay to fly. Judge Goodwin, who took one clerk with him "on virtually every trip," is closer to the latter view. Only two of his clerks responding to the survey said they had not attended an argument session in another city, and one of those said that the judge, as he had to travel so much, felt strongly that it was important that the two clerks be in the office. However, all the others had accompanied the judge to Seattle or San Francisco or Los Angeles a couple of times during the clerkship year. The judge also takes a clerk with him when he sits in another circuit, which he does more frequently as a senior judge.

The most obvious duty when a clerk accompanies the judge is to watch argument; some said this was the only difference from their regular chambers tasks. The judge might want a clerk to see argument

because the clerk had written the bench memo in a significant case and was expected to write the opinion; several clerks talked of “listening to argument in preparation for opinion-writing.” They might also watch argument to report back on the other clerks’ cases. Indeed, one clerk talked about having “some added responsibility to be ‘up to speed’ on all the cases on the docket,” in part so that “the statements of the advocates and the view of the post-argument conference” could be communicated “back to the clerk who would be working on the opinion.” It was also necessary so that one could “coordinate with other clerks” and even the other judges to make certain that any immediate post-argument matters (for example, issuing or removing a stay) were handled properly.

Another regular task was “to prepare the judge for the day’s calendar,” briefing him prior to argument. This might be directed particularly to cases for which the judge’s chambers did not have responsibility and might entail reviewing other chambers’ bench memos and preparing comments and possible questions for the judge to consider,<sup>123</sup> or it might take the form of answering the judge’s questions as he went over those bench memos. One clerk said there was “perhaps a little more schmoozing” with the judge about cases both before and immediately after argument. Clerks were also to carry out last-minute research on issues in cases and to be “available to do spot research,” including answering the judge’s post-argument questions. Some clerks thought their out-of-town calendar week duties were minor or that they had “no duties.” They recognized that accompanying the judge was “a boondoggle” or a “perquisite of the office, not a necessary part of the function,” on which they could have a great time. Although one said it was understood a clerk shouldn’t go unless he or she was caught up with in-chambers work. Even if a “boondoggle,” such travel could be valuable for the clerks, providing them an opportunity to see other clerks and judges “in their natural settings,” something difficult with judges widely dispersed throughout the circuit. Indeed, the judge encouraged such contact, just as he encouraged them to go off and have a good time, which was certainly “very good for morale.” This travel also was “a good way to spend personal and social time with the judge,” and the clerks might be more likely to have lunch with the judge than when at home. When Judge Goodwin was based in Portland, clerks said they might “traipse off to the Hispanic food market in Los Angeles” with him when they were there for argument.

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<sup>123</sup> This was, however, not a substitution for the judge’s own preparation. As a clerk observed, “[s]till, he prepared on each case himself by reading all of the briefs.”

*F. Post-Argument*

After the judges had their post-argument conference to decide the cases on the calendar, the judge, if given the writing assignment in a case, would convey the proposed outcome to the appropriate clerk, who would prepare a draft disposition. As the chambers which had prepared the bench memo would usually receive the writing assignment if that judge was in the majority, the clerk who had prepared the bench memo invariably prepared the draft disposition. After the judge had read the draft, the clerk might be asked to rewrite portions, and when the judge was satisfied, the opinion would be sent to the other panel members. If the clerk had circulated a proposed memorandum disposition instead of a bench memorandum, after conference the clerk would make any necessary changes. When other judges responded to the proposed disposition, the clerk would examine those responses and suggest to the judge what should be done; this included proposing rewording if the clerk thought the other judges' views had merit. For example, when another judge indicated a problem with one aspect of a proposed memorandum disposition, the clerk suggested revising it in response to that concern and specified a new paragraph to handle the matter. The clerk might even admit error, as happened when a clerk, commenting on another judge's reservations about the proposed disposition, said, "I believe I was wrong and that we cannot direct the Director to award benefits."<sup>124</sup> When another judge sends a proposed dissent, the clerk might propose revising the opinion in response. The clerk would also evaluate editorial suggestions and "nits" sent by other judges even when a concurrence was not conditioned on their acceptance.

When another chambers had the writing assignment, the clerk designated to monitor the case would usually see the proposed disposition before the judge did and would examine it to see if it comported with the outcome and general direction specified in the conference memo. The clerk would then recommend whether the judge should concur, although the clerk might suggest waiting for the third judge's reaction before the judge acted. Comments and perhaps revisions would also be provided for the judge's consideration, with the clerk perhaps trying to anticipate the judge or at least to take the judge's positions and concerns into account.<sup>125</sup> While often indicating simple

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<sup>124</sup> Memorandum from Sophie van Wingerden to ATG (Jan. 17, 1995) (referencing *Hoke v. Dir., Office of Workers' Comp. Programs, Dep't. of Labor*, 52 F.3d 333 (9th Cir.1995)).

<sup>125</sup> Memorandum from Meg Keeley to ATG (June 16, 1996) (referencing *Campbell v. Chater*, 94 F.3d 650 (9th Cir. Nov. 18 1996)) ("I have done some further research on this case in an attempt to address your concerns.").

agreement, at other times the clerk might suggest a separate concurrence or dissent, or would prepare one at the judge's suggestion. Clerks do not appear hesitant to criticize other judges' proposed opinions, perhaps realizing that the judge can tone down criticisms he thinks too harsh before communicating with his colleagues.

The clerk also carefully examines the writing judge's revisions to see if Judge Goodwin's concerns were met.<sup>126</sup> Even when Judge Goodwin did not express an intent to dissent, the clerk might heavily annotate a disposition revised after it had been questioned. The judge might request assistance in responding to another judge's proposed opinion or dissent, perhaps asking the clerk to provide certain opinions from another circuit and for advice on voting. Thus in one case, the judge put a post-it to a secretary on a dissent from another judge, "Please pull file & give to a l.c. for study & advice to me."<sup>127</sup> In another case, on receiving a long memo from the writing judge after an exchange with the third judge, he wrote a note to a clerk, "What now?"<sup>128</sup> Likewise, when another judge suggested how to dispose of a case, Judge Goodwin might ask the clerk whether that judge is right. When the I.N.S. argued that a case was moot and another panel member wrote, "Since mootness is jurisdictional, we won't have to cut any corners to duck the Antiterrorism Act," Judge Goodwin wrote on the face of that memo: "Meg - Is it moot? Why?" In some instances, he might indicate to his colleagues that he had asked the clerk to do some research, as when he wrote, "I asked my law clerk to research whether the court could just dismiss the appeal as premature because the . . . claims against one defendant . . . have not yet been decided." Then, in language that sounds like a law clerk memo adopted verbatim, Judge Goodwin went on to discuss a previous case, the proposed memo disposition, and related cases.<sup>129</sup> When the judge asks for research, the clerk will provide an answer, usually in the form of

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<sup>126</sup> Memorandum from Ali Stoeppelwerth to ATG (June 22, 1990) (referencing *United States v. One 1985 Mercedes & Glenn*, 917 F.2d 415 (9th Cir. 1990)) ("While the revision obviously reflects an attempt to address the points raised in your memo threatening to dissent, I am not convinced that the changes are sufficient to cure the problems we identified.").

<sup>127</sup> Post-it Message from ATG to Clerk (referencing *Levitoff v. Espy*, 74 F.3d 1246 (9th Cir.1996)).

<sup>128</sup> Post-it Message from ATG to Clerk (referencing *Datagate v. Hewlett-Packard*, 941 F.3d 894 (9th Cir. 1991)).

<sup>129</sup> Memorandum from ATG to Panel (Mar. 25, 1996) (referencing *Buckner v. County of Napa*, 83 F.3d 426 (9th Cir.1996)).

a memo, along with a recommendation, but will also remain available to examine matters further.<sup>130</sup>

The clerk would also check citations in the disposition. The extent of this examination would depend on the judge's instructions ("lite check" or "soft cite check," for example), and it would be more thorough for a disposition that was to be published. The judge would also ask the clerk to edit a proposed opinion in which he saw problems. The result of this editing in one case led the judge to comment to the author, "I turned a law clerk loose on the draft because it looked a little below the author's usual standard of editing and proof reading"—a slap at the other judge's clerk—and the clerk "ran wild," seen from a *six-page* nit memo.<sup>131</sup> If Judge Goodwin could do this to someone else's opinions, other judges could do it to work from his chambers. Thus another judge wrote, somewhat apologetically, to report a first reaction that the clerk's "nit job . . . was overkill," but then to say that the clerk "picks up, for example, a series of inadvertent number transpositions and odds-and-ends that needed correction," and had also "done a red-line and clean copy, the latter to save a redo by Judge Goodwin's chambers," in which he had "also incorporated some very minor rewordings I suggested." The judge concluded by saying that Judge Goodwin "should feel free to reject any of these suggestions I have made."

There may well be work for the clerk even after a disposition is filed. At times, clerks comment on litigants' requests that an unpublished memorandum disposition be redesignated for publication. The clerk would summarize the case briefly, note the litigant's argument for publication and other relevant information, and then make a recommendation, as in this brief note to the judge:

The government has requested that the case be published. The other judges have voted to grant the motion. The case involves the enhancement of a sentence under the Guidelines for obstructing justice. The issue is not earth shattering, but in light of the other votes I see no reason to vote to deny the motion.<sup>132</sup>

The clerk is also involved when one of the parties asks for correction of an alleged error, usually being the first to deal with it. In one such

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<sup>130</sup> Memorandum from David Litt to ATG (July 7, 1993) (referencing *United States v. Bishop*, 1F.3d 910 (9th Cir.1993)) ("If you disagree, I will continue my research on this matter and try to find a different basis for the judge's response.").

<sup>131</sup> Memorandum from ATG to Panel (Jan. 22, 1991) (referencing *Erdman v. Cochise County*, 926 F.2d 877 (9th Cir. 1991)).

<sup>132</sup> Memorandum from Peter Hammer to ATG (June 17, 1992) (referencing *United States v. Jackson*, 974 F.2d 104 (9th Cir.1992)).



situation, the clerk's examination led him to conclude no change was necessary, but he provided an alternative nonetheless.<sup>133</sup>

When a petition for rehearing ("PFR") is filed, the clerks play a "reminder/refreshers" role because it is often quite some time after filing of the disposition. The clerk who has been handling the case prepares a memo for the judge summarizing the case and the panel's decision, then summarizes and characterizes the PFR and recommends a disposition. The usual recommendation is to reject the PFR, based on the clerk's judgment that it "merely reiterates the arguments already made in the panel," although the clerk might also provide other options.<sup>134</sup> In one lengthy post-PFR memorandum on a case involving counting marijuana plants or weighing them for sentencing purposes, the clerk evaluated the petition, the government's response, and the arguments made by the defendant's new attorney. Then, saying there was a need to alter the disposition, the clerk examined cases, both from the Ninth Circuit and other circuits, before proposing how the panel could deal with the issue.<sup>135</sup>

When a litigant wrote to the judge, a clerk would also be involved, examining the letter and either making a suggestion to the judge or asking how to proceed. An example was correspondence from a litigant whose lawyer "evidently did not inform him how to proceed or notify him of the adverse decision w/I enough time to file a motion for rehearing." Believing "the counsel had failed in his oblig to his client under the CJA rules and otherwise," the clerk had prepared a proposed order—that the lawyer inform the court about filing a PFR or request withdrawal as counsel—and asked the judge if he agreed.<sup>136</sup>

Although in the vast majority of cases activity ends with the panel's decision to deny the PFR, in some cases off-panel judges raise questions about the panel's ruling. If an off-panel judge intervenes before the PFR

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<sup>133</sup> Letter from Steven Bennett Weisburd to ATG (April 23, 1993) (referencing *Cent. Ariz. Water Conservation Dist. v. U.S. Evtl. Prot. Agency*, 990 F.2d 1531 (9th Cir. 1993)) ("If you disagree, and feel that modification of the opinion is required, I recommend only . . .").

<sup>134</sup> Here the clerk said, "If the panel feels that it needs to address this further. . . ." suggesting some language that might be used. Memorandum from Eugene Whitlock to ATG (Dec. 18, 1995) (referencing *McAuslin v. Federated Mut. Insur. Co.*, 70 F.3d 1279 (9th Cir.1995)). In another case, a clerk wrote, "From what I can gather after sifting through the voluminous materials generated by this case, appellants' argument has also been raised, and rejected. I recommend that the petition be denied." Memorandum from Harry Mittleman to ATG (Sept. 19, 1994) (referencing *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir.1994) (per curiam)).

<sup>135</sup> Memorandum from Valerie Brown to ATG (Feb. 5, 1996) (referencing *United States v. Herman*, 85 F.3d 638 (9th Cir.1996) (unpublished table decision)).

<sup>136</sup> Memorandum from Jenny Horne to Panel (Mar. 14 1994) (referencing *United States v. Reed*, 15 F.3d 928 (9th Cir. 1994)).

is received, the clerk may be dealing with both a PFR and those interjections at the same time. In one situation when there was both an off-panel judge's memo and proposed changes from panel members, the clerk addressed the PFR, one judge's concerns, and another judge's proposed amendment. The clerk said the latter "clears up some of the confusion but does not quite get us all the way there," and remarked that proposed amending language from another judge would "better clarify the panel's position and remove the problem of the opinion's initial statement."<sup>137</sup>

When an off-panel judge "stops the clock" to ask that the panel rethink its result or its reasoning, with an en banc call possibly to follow, much time is likely to have elapsed since the judge's last work on a case. Then the clerk, examining the "stop clock" memos, will summarize the situation and the off-panel judge's argument, will evaluate the latter, even if it is only to say that the clerk was "not sure exactly what concerns" the judge,<sup>138</sup> and will make a recommendation as to possible amendment of the panel ruling, putting it into the form of a memo to panel judges conveying the information the clerk discovered as well as a proposed amendment to the opinion "to eliminate some language that may be causing all of this confusion."<sup>139</sup>

One such lengthy communication from the clerk was sent to the judge, who was out of town. The clerk pointed out that, as the author, Judge Goodwin had "to advise the panel on how to respond" to the stop-clock and threat to call for an en banc.<sup>140</sup> She also said the panel opinion "may not be sufficiently clear" as to the cases on which it relied, and suggested eliminating an out-of-circuit citation.<sup>141</sup> The clerk also noted that the off-panel judge had already made the same arguments in another case, unsuccessfully, and had missed another possibly conflicting case.<sup>142</sup> The clerk concluded by telling Judge Goodwin that the other members of the panel "will agree with the conclusions presented in this memorandum but I cannot be sure that they will satisfy" the off-panel judge.<sup>143</sup> Saying "your suggestions look good to me," Judge Goodwin approved of the clerk's suggestions and asked the clerk to draft a memo to the panel. The

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<sup>137</sup> Memorandum from Kim Parker to ATG (June 10, 1997) (referencing *Turk v. White*, 105 F.3d 478 (9th Cir. 1997)).

<sup>138</sup> *Id.*

<sup>139</sup> Memorandum from Donna Prokop to ATG (Mar. 25, 1994) (referencing *Stuart v. United States*, 23 F.3d 1483 (9th Cir. 1994)).

<sup>140</sup> Memorandum from Mary Rose Alexander to ATG (May 3, 1990) (referencing *DiMartini v. Ferrin*, 889 F.2d 922 (9th Cir. 1989)).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

subsequent memo to his panel colleagues, although containing the judge's own first paragraph, followed the clerk's memo very closely.<sup>144</sup>

There was yet more post-filing case-related activity. In one instance, shortly after Judge Goodwin took senior status, a clerk prepared a memo for him about whether he could participate in activity concerning an en banc rehearing. The question arose because appellate proceedings concerning the case had begun when he was an active judge, but the vote on whether to have an en banc did not occur until after he had taken senior status.<sup>145</sup>

Clerks might also be involved in attorney's fee questions, although the judge could handle these with far greater facility because the clerk would not have practiced law and thus would not have dealt with fees. A clerk could, however, deal with the question of whether a litigant was a "prevailing party" or had "substantially prevailed," or whether the government was "substantially justified" in its position—a question at the heart of fee awards under the Equal Access to Justice Act ("EAJA"). Those were questions of law like other issues with which clerks dealt; clerks could also apply circuit rules on procedures for seeking fees. Thus in one case, the clerk said a plaintiff was the prevailing party, but noted noncompliance with a circuit rule requiring parties to indicate their intent to seek attorney fees; as that rule could be waived, the clerk, rather than recommending, asked, "What do you think?"<sup>146</sup>

### *G. Communication with Other Chambers*

In his recent study, Cohen suggests that "(1) judges may use their clerks to circuitously contact other judges; and (2) judges may use their clerks to contact other judges' law clerks."<sup>147</sup> A judge's clerks are regularly in contact with other judges' clerks, both in their own building if other judges have chambers there<sup>148</sup> and when they go elsewhere with the judge. Even when a judge is alone in a city, telephone and now e-mail makes communication between clerks at different locations easy. Such communication, which helps constitute an appellate court as an

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<sup>144</sup> Memorandum from ATG to Panel (May 16, 1990) (referencing *DiMartini v. Ferrin*, 889 F.2d 922 (9th Cir. 1989)).

<sup>145</sup> Memorandum from A.J. Thomas to ATG (Mar. 16, 1992) (referencing *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992)).

<sup>146</sup> Memorandum from Donna Prokop to ATG (Apr. 7, 1994) (referencing *Dobronski v. F.C.C.*, 17 F.3d 275 (9th Cir. 1994)). The judge proposed an order remanding the fee issue to the lower court.

<sup>147</sup> Cohen, *supra* note 9, at 139.

<sup>148</sup> This was the case in the Oregon Supreme Court, so it is not surprising that there was much more inter-clerk communication there, across a broad range of topics, than in the U.S. court of appeals.

organization,<sup>149</sup> is important because it is related to and stems from judges' communication with their own law clerks. As discussed earlier, much communication between judges is really between clerks because a memo from one judge to another "is often ghost-written by a clerk and responded to similarly." Judges also recognize that colleagues' doubts about a case may have been raised by a law clerk, and judges who enjoy "bouncing ideas" off their clerks find it assists subsequent communication with other judges. Thus communication within chambers facilitates communication between chambers.

Although some judges do attempt to limit clerks' inter-chambers communication, chambers cannot be hermetically sealed off from each other, and it is generally understood that clerks in fact speak to each other between chambers regardless of rules or other constraints. Such communication does not always surface when clerks talk to their own judges, but a clerk might relay what was revealed in a contact with another judge's clerk, and the intelligence so obtained might be the basis for a suggestion as to how to proceed. For example, a clerk, noting that another judge's clerk had said his judge was doing further work on a case, suggested to Judge Goodwin, "I would recommend your sending your thoughts about this recent draft to [the judge] . . . so that he can have our input before he begins draft number four of this never-ending case."<sup>150</sup>

Both geography and numbers have effects on clerk-to-clerk communication. The growth in the number of judgeships, along with the presence of numerous senior judges and the increased number of clerks per judge, has diminished the opportunities for any one clerk to get to know other clerks well. This makes the clerks' earlier friendships, particularly those from law school, more important.<sup>151</sup> When there were fewer judges, they sat with each other more frequently and the smaller total number of clerks would have more frequent contact—in those days, primarily by phone—that would serve to cement contact made in person during calendar week, and friendships and even some romances developed that way. With many more judges, the likelihood that one judge will sit on a panel with the same judge more than once each year is greatly reduced. This decreases any clerk's likely contacts with clerks from particular chambers; even if two judges sat together more often, the same clerk might not accompany the judge each time. Thus

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<sup>149</sup> See Cohen, *supra* note 9, *passim*.

<sup>150</sup> Memorandum from Ali Stoeppelwerth to ATG (June 22, 1990) (referencing United States. v. One 1985 Mercedes & Glenn, 917 F.2d 415 (9th Cir. 1990)).

<sup>151</sup> Cohen *supra* note 9, at 160.

communication among Ninth Circuit clerks in 1986 did not seem as extensive as it appeared to be in 1977.<sup>152</sup>

With judges' chambers scattered throughout a large circuit, clerks have far less interaction with clerks not in the same city—indeed, not in the same building.<sup>153</sup> Thus there is far less such interaction than at the U.S. Supreme Court, where all judges have their chambers in the same building and where they all sit on the same cases, and thus there is considerable inter-chambers discussion among the clerks there, which is an important element in the Court's decision-making.<sup>154</sup> This was also true at a state court where a former clerk is now a judge, where there was “pretty much free interchange between clerks and judges” from different chambers.<sup>155</sup>

Findings from two earlier surveys of inter-chambers communication in the Ninth Circuit<sup>156</sup> provide a more complete picture, to which Judge Goodwin's clerks' 1995 survey responses can be added. Unlike Cohen's data,<sup>157</sup> both sets of earlier findings and those from Judge Goodwin's clerks report clerk-to-clerk communication; however, they reveal little such contact and none said to be initiated by the judge.

In 1977, a majority of the judges said they had their law clerks contact other judges' clerks but only infrequently; judges were said to avoid such communication because they felt that “judges should talk to judges.” However, by 1986, with the Ninth Circuit Court of Appeals doubled in size, all but a small proportion of judges used clerk-to-clerk communication, although it did vary with the judge to whose chambers communication was to be directed.<sup>158</sup> For example, one judge used it only when it was clear that the other judge relied heavily on a law clerk.

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<sup>152</sup> See Stephen L. Wasby, *Communication Within the Ninth Circuit Court of Appeals: The View from the Bench*, 8 *GOLDEN GATE U. L. REV.* 1 (1977) [hereinafter, Wasby, *The View from the Bench*]. See also Stephen L. Wasby, *Communication in the Ninth Circuit: A Concern for Collegiality*, 11 *U. PUGET SOUND L. REV.* 73 (1987) [hereinafter Wasby, *A Concern for Collegiality*].

<sup>153</sup> In these terms, Los Angeles and Pasadena are not the “same city.”

<sup>154</sup> See Ward & Weiden, *supra* note 13, *passim*.

<sup>155</sup> Sossin, *supra* note 112; See also Sossin, *The Sounds of Silence*, at 295 (noting that in the Supreme Court of Canada, the clerks' network of clerks may give them “access to a better overview of the Court's thinking on particular issues or cases than individual Justices do.”).

<sup>156</sup> These surveys were the basis for Wasby, *The View from the Bench*, *supra* note 152, at 12–14, and Wasby, *Concern for Collegiality*, *supra* note 152, at 121–126 (1977 interviews with circuit judges and some district judges who sat regularly with the court of appeals and 1986 interviews with court of appeals judges). Certain quotations from the judges surveyed for those studies are not attributed, as the judges responded on the condition that their names not be used. Those materials are on file with the author.

<sup>157</sup> Cohen, *supra* note 9, at 139.

<sup>158</sup> Wasby, *supra* note 152, at 121–26.

Over time judges seemed to give greater recognition to colleagues' dislike of its use and to resulting problems. Judges routinely referred to several judges who wanted "all communication through the judge," and they seemed aware of which of their colleagues preferred that such communication not take place, with one saying, "If there is any reticence on the part of the other office, I don't use" such communication.

Clerk-to-clerk communication can take place within parameters the judges establish and can be said to substitute for judge-to-judge communication. Indeed, a former clerk from another circuit said that clerk-to-clerk contact is largely judge-initiated. Several judges had rules that a clerk was not to talk to another judge's clerk on official business without permission of the initiating clerk's judge, and others said that they expected their clerks to use discretion in their communication. Some judges do not wish to have their clerks inquire of another judge's clerk about the latter judge's position, as that was "none of their business," and, in any event, "those clerks can ask their own judges." Although some judges "wouldn't object to the clerk responding to an inquiry," the operative rule apparently was that "clerks shouldn't volunteer" a judge's views.

However, the rules were not always followed, and some judges said that "rules trying to regulate how to deal with each other are counterproductive." While all judges recognize that clerks communicate on their own, at least in part because "law clerks are lawyers and like to talk about cases," it occurs much more frequently than the judges realize because their schedules and preoccupations preclude their monitoring it closely. The volume tends to vary with the clerks' personalities, and there is more communication among those from the same law school. Communication between staff attorneys and law clerks has not developed to the same extent as that among law clerks, in large measure because of their different tenures and career tracks, but also because the staff attorneys are located at circuit headquarters.

Despite efforts to constrain communication among clerks, some judges actually facilitate it; those who bring their clerks to oral argument know that these clerks will talk with the clerks of other judges sitting in the same location, and they may even feel that clerks' interchange of ideas is as important as such an exchange among judges. Although one judge thought that inter-clerk communication "doesn't add anything," in 1977 judges overwhelmingly found inter-clerk communication helpful; it provided a "new perspective" on a problem, case, or series of cases

which “helped them with their analysis or with understanding a rule of law.”<sup>159</sup>

Judges’ use of clerks for inter-chambers communication by and large is not about the merits of a case, and in 1986 the clear consensus was that substantive decisions should not be handled by this indirect communication through clerks. Instead, it might be used to expedite “trivial,” “perfunctory,” and pro forma matters. For instance, it might be used to obtain materials, to inquire who has an opinion, to check on the status of a memorandum, or to arrange trading of memoranda. These are instances when the judge whose office is contacted need not and should not be bothered, and telephone communication between clerks may be a “more collegial way of taking care” of the matter than a cold memo or a “way of avoiding confrontation” when a judge is “getting impatient about the status of a case or curious when something hasn’t come.” Where the law clerks know each other, their communication may be both a way of “eliminating snafus” and an “inoffensive way to find out what’s troubling a judge.” It is also thought to be efficient, saving a “lot of time . . . instead of having judges write memos to each other.” There are also situations in which judges use clerks to “send out a trial balloon” about an opinion. Judges with a difference of opinion might adopt a more “arm’s-length” stance because of their long-term relationships, but use of law clerks helps because they “can get right down to specifics,” and a few judges suggest clerks may even be able to serve as “mediators” in working out opinion language.

Judges in 1977 were evenly divided as to whether clerk-to-clerk communication entailed problems. Some pointed to those inherent in dealing with anyone through an intermediary: “accuracy, perception, and nuance” are lost, so a judge hearing from a clerk what another judge believed would have to be skeptical. There was also the matter of efficiency: too much “chewing the fat, diverting attention from work” meant clerk-to-clerk communication “can waste an incredible amount of time.” A particular problem was the clerk who “did not accurately communicate or articulate what his judge said;” another was that the clerks “may or may not [appear to] be speaking for” the judge when the clerks “talk too much and nothing is off-the-record.” At times when they are not supposed to do so, the clerks indicate what the judges think perhaps causing the judges embarrassment. In another circuit, the rule was that clerks, when socializing during court work, could discuss cases freely—but they were to make clear that the views they expressed were

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<sup>159</sup> Nine of twelve circuit judges felt it was helpful, with one neutral and only two feeling it was not helpful.

their own, not the judge's. It was also suggested that judges may be interested in what clerks learn from other clerks during this socializing, even if the judge does not ask the clerks to obtain any information.

Clerks' inexperience—they lacked maturity and were “cocky, fresh from law school”—was thought to contribute to the problems. Clerks sufficiently headstrong to assume the authority to say “Judge X feels” or “Judge Y says,” “may feel they have more power and authority than they have; the clerks ought not to feel they can act as agent for the judge.” In addition, lacking perspective, clerks may make more of a matter than do their judges, so that disputes get exacerbated and are more serious at the clerks' level than at the judges' level. Another problem is that some overenthusiastic clerks even lobby with other judges' clerks about case results, despite judges' clear feelings that there should be *no* lobbying by clerks for a point of view. As a judge reported, “we all lecture our clerks against that.” Despite the judges' strictures, some clerks said “there is definitely lobbying among the clerks,” and one clerk talked of having been approached on cases to see how Judge Goodwin was leaning.

In addition to using their own clerks to communicate with colleagues, judges may also use staff attorneys, although some judges thought that they would not be as likely to do so as they would with their own elbow clerks because they did not work as frequently or as closely with staff attorneys, who, as one judge put it, thus did not “share the ‘premises’ of the judge.” This communication takes place most frequently when judges serve on screening or motions panels, where staff attorneys undertake the principal preparation, including orders to dispose of motions and proposed memorandum dispositions in lieu of bench memos in screening cases. The motions attorneys have become an important communication link between judges because motions must receive prompt disposition, and the papers are likely to be in the hands of the motions attorneys rather than with the judges. Therefore, a motions attorney will call a judge, who will provide an opinion that the staff attorney will then communicate to the other motions panel judges. However, when matters are controversial, the judges are likely to communicate directly among themselves.

All but a couple of Judge Goodwin's clerks reported they had communicated with other judges' clerks about cases, but the extent and scope varied. At its most limited, this communication took place mostly through bench memoranda or might take place only rarely except about procedural and scheduling matters, the “mechanical work” of bench memorandum assignments, or whether different panels were dealing with



an identical issue and should see each other's opinions<sup>160</sup>— “just process, not substance” or only non-dispositive matters. At its fullest, however, clerk-to-clerk communication included all aspects of cases and “open and robust” dialogue. This includes exchanges of ideas about how each clerk saw a case and such topics as the binding nature of questionable precedents and cases that could be distinguished, backlogs, and difficult issues. There might even be a “little bit of an effort to persuade.”

Differences among judges on the panel, “[p]ossible or actual disagreements as to the disposition,” might lead to communication and might prompt a memo to see if the differences could be resolved. Clerks reported that only “very rarely” would clerks talk about a draft opinion, as “that was really a judge function,” but communication about the outcome of, and reasoning in, a case did take place. This could be seen when a clerk reported an “impression” from speaking to another judge's clerk “that they are going to try and beef up the analysis along the lines [the third] [j]udge . . . suggests because they feel so strongly about how the case should come out,”<sup>161</sup> and when another judge's clerk “said that he agreed with our memo and had written a memo to” his judge.<sup>162</sup> More likely was that clerks might deal with technical changes when a proposed opinion was not clear; in addition to drafting memos to provide suggestions for other chambers, they would often handle an initial attempt to incorporate suggestions. This could be seen in a judge's comment, “[m]y clerks have talked to [Judge Goodwin's] clerks and offered some minor suggestions,” and the clerks' regular role in preparing lists of grammatical and punctuation changes and citation corrections (nits) and editorial suggestions could be seen in a judge's note that “[m]y law clerk has a few nits which he will pass on to Judge Goodwin's clerk.”

Several factors affect the extent of communication among clerks. For example, there was no communication with the clerks of a couple of judges who did not exchange bench memos, and some judges were “totally rigid about no contact” with clerks from other chambers. Some clerks talked with others about cases only if on a panel with their judge. There was more discussion with clerks known from law school, and

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<sup>160</sup> “My clerk . . . understands from your clerk . . . that a panel of which you are a member has an attorneys' fees questions similar to the one we face . . . Your clerk indicated that you might like to have a copy of my panel's bench memo.”

<sup>161</sup> Memorandum from Ali Stoepelwerth to ATG (June 22, 1990) (referencing U.S. v. One 1985 Mercedes & Glenn, 917 F.2d 415 (9th Cir. 1990)).

<sup>162</sup> Memorandum from Jenny Horne to ATG (Apr. 15, 1994) (referencing Yesler Terrace Comty. Council v. Cisneros, 37 F.3d 442 (9th Cir. 1994)). Judge Goodwin's clerk then reported saying that “I thought we might wait to respond” until after that judge reviewed the issue.

clerks “talked about everything with the clerks of the judge down the hall.” The amount of that contact might be affected by judges’ absence and by judges’ attention to their clerks when the judge was in town. For example, Judge Goodwin’s clerks had frequent contact with the clerks of a judge “whose indifference to clerks” was said to be “notorious.” When visiting judges and their clerks were in town, there was an effort to have lunch once during calendar week, but that was said to be difficult because “we eat in often; we don’t make much money and are in debt.”<sup>163</sup>

All but one of the judge’s clerks reported that the judge did not exercise control over their contacts with other clerks. However, some qualified this by saying that there were “no formal restrictions” or observed that “there were limits but not very great,”<sup>164</sup> although the judge was said to “lecture us on not lobbying” clerks about their judges’ positions. One clerk commented that “the most you can do is tell the other clerk to look out for something, as eventually it has to go through the judge.” Yet, even with only “very general ethical precepts” and “few formal limits,” the clerks “did, ourselves, keep confidence,” and “tried to keep most discussion within chambers and with our judge.” The clerks acquired “understandings” such as that there was to be no talk about current cases if the other clerks’ judges were not on the current panel, although it was fair game to talk to them if their judge was on the panel; sensitive or divisive issues were intramural only. Clerks also came to believe that it was important “to be discrete and to discuss precedents and issues, not cases,” and particularly not to discuss anticipated outcomes in pending cases. An additional constraint on discussion with clerks from other chambers was that a clerk would “feel uncomfortable in communication unless you know where the judge stood,” as it was important “to keep your powder dry.”<sup>165</sup> Likewise, a clerk might not know a counterpart enough to trust the clerk, as we see in the observation that, “when preparing a disposition, I don’t usually contact other judges’ chambers unless I know a law school friend whose judgment I trust.”

As to contact between judges and other judges’ clerks, some judges indicated they would not talk to another judge’s clerks without that

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<sup>163</sup> It was also observed that clerks socialized with clerks from other chambers, not with secretaries from their own offices; the secretaries “play bridge.”

<sup>164</sup> None of the Oregon Supreme Court clerks responding said there were any particular rules, and all said the judge did not exercise control over their contacts with other clerks.

<sup>165</sup> This was like the comment of an Oregon Supreme Court clerk that clerks felt free to communicate with other clerks, but this clerk “wouldn’t until I had a clear perception about our approach to a case” because he would not have wanted to indicate an approach not based on discussion with the judge.

judge's permission and some wish to avoid any judge-to-clerk and clerk-to-judge communication. Said one, "I have a rule: judges talk to judges, law clerks to law clerks, and I enforce it as rigorously as I can." The dominant view among those interviewed in 1986 was that clerks "should have no reason to initiate a call to another judge." However, such contact cannot be avoided: a clerk calling a clerk in another chambers may end up talking to the judge, or a judge calling a temporarily absent colleague may discuss a matter with the clerk working on the case. Roughly half of Judge Goodwin's clerks said that he allowed such communication; the other half said he didn't. One clerk who couldn't recall being specifically instructed against such contact said "it was not something we would have done in connection with a case." Another, who also did not remember formal restrictions, nevertheless reported checking with the judge before speaking directly to any of the other judges. Another said that, while they were not forbidden, there were "no significant discussions" with other judges, adding that, "It was generally easier to talk with the other judge's clerks if it seemed necessary to lobby for a vote or anything of that sort."

Those who said such communication was allowed said it was only minimal and was social rather than case-related, and many do not recall ever having done it or said "it didn't come up."<sup>166</sup> More than minimal contact might, however, take place with a familiar judge, which had been more likely when the court had fewer judges so that judges sat together more frequently. Clerks might have social interchange with judges they saw in the courthouse halls or with judges who sat with Judge Goodwin and who came to chambers to confer with him. A clerk might also meet a judge through a clerk who was a friend or when Judge Goodwin and his clerks visited chambers while sitting in other cities. Two situations in which a clerk did talk to other judges about substantive matters are of note because they were unusual. In one, a clerk assisting Judge Goodwin in his role as the court's en banc coordinator communicated with judges about matters related to the en banc process. In the other situation, the judge asked a clerk to participate in discussion among panel members when quick action was required on a stay and injunction and the panel was still in the process of formulating its views.

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<sup>166</sup> This was a difference from the situation in the Oregon Supreme Court, where all clerks responding said the judge let them communicate with other judges. While one said "all the judges were readily accessible to the clerks, we didn't speak to them about cases," there were in fact substantive contacts. For example, if Justice Goodwin were part of a dissent, he would ask the clerk to hear the other point of view; at times, the judge would also ask this clerk to share a case or authority that Goodwin had that another judge had overlooked. One clerk had apparently gone so far. In situations where the judge was authoring an opinion containing some of the clerk's ideas, the clerk would discuss them with certain other judges who were "receptive to discussions with a clerk."

## IV. WORKING RELATIONS WITH THE JUDGE

*A. General Reactions*

That interaction among clerks depends to some extent on various clerks' different relationships with their judges brings us directly to those working relations, exploring Judge Goodwin's chambers at some length largely through the clerks' retrospective views. Relations between clerk and judge are affected not only by the number of clerks: where there is only one clerk, there will be greater interaction than when there are several who may have to compete for the judge's time. However, the judge's personality and work style also affect clerk-judge relations. Judge Coffin has said that present "collaboration between clerk and judge is much more than proffering only a suggestion, doing research, preparing memoranda, and cite-checking."<sup>167</sup> That collaboration can take place in a variety of modes, running from "the authoritarian," where the law clerk is "under a tight leash" and has been given "rather precise instructions," through the "discretionary mode," where the judge's basic decisions still leave "room for minor decision-making by the clerk," to a more collegial mode.<sup>168</sup> By all accounts, Judge Goodwin fits in the latter category.

Some judges keep their distance from their clerks, maintaining only formal working relations in chambers and not engaging in social intercourse with them.<sup>169</sup> Other judges, however, like Judge Goodwin, interact with their clerks more informally, both in chambers and out; this may include work-talk, but conversation often turns to other topics. The judge's informal interactions with his clerks have been a "fluid relationship" which has "evolved over time." In considerable measure because of the increasing difference in age between clerk and judge,<sup>170</sup> the relationship "became more avuncular" and the "tendency to get law clerks involved as extended family became more impersonal," which was reinforced by the increase from two to three clerks per year. Some clerks commented that the judge's earlier court of appeals clerks were able to get "a little closer to him and his family" than did later clerks.

Quite frequently, the judge and his clerks would go to lunch. They particularly enjoyed a Chinese restaurant that had good food and inexpensive luncheon specials, which helped the clerks' pocketbooks and

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<sup>167</sup> Coffin, *supra* note 74, at 74.

<sup>168</sup> *Id.* at 74-75.

<sup>169</sup> Of course, some clerks likewise separate or exclude themselves from anything other than formal interaction.

<sup>170</sup> There was not such an age difference during the judge's service on the Oregon Supreme Court, and the judge's family and clerk's family would even trade babysitting.

appealed to the frugal judge.<sup>171</sup> In addition, the judge would join clerks on a late Friday afternoon for their informal office gatherings with clerks from other chambers, including those of visiting judges, and, on occasion, a visiting judge would be present. The judge has also invited his clerks to accompany him and his family on a camping adventure once a year. Initially such a trip was to Death Valley, when the judge vacationed there; later, it was to Oregon, where, before he built a permanent residence, the judge had a small camp at which people had to “rough it.”

Judge Goodwin’s clerks almost invariably used generally positive adjectives to describe their working relations with him, calling them “very good,” “excellent,” or “fantastic.” By and large, clerks “felt comfortable with him,” although earlier discussion suggests that within any year, some had better relations with him than did others. One reason for the clerks’ perception of a positive working relationship was how the judge dealt with their personal lives. He was supportive when a clerk had personal problems. As a result of personal issues a clerk had, the judge might develop a close relationship with the clerk; he also would respect a clerk’s personal life and would push the clerk to limit night and weekend work so the clerk could go home to be with family.

The judge was said to be quite flexible with respect to clerks’ hours, as long as work was completed, and to allow flexible schedules, not being like the boss who says if he is there, you must be, too.<sup>172</sup> The judge felt he was treating the clerks like professionals in allowing the flexibility, but he realized that it was “a minus for their being in law practice, where you are expected to be there all the time.” That he allowed clerks to work in the evening, on weekends, and at home meant at times the secretary couldn’t find them when they were needed. A clerk observed that the judge did not micro-manage but “would ask how close I was to finishing, not where I was and how I was handling the case.” Also capturing the temper of the office was the comment that with his “hands-off style,” the judge “wasn’t intimately involved in the organizational product,” because “you did your work and handed it to him.” If the judge was accommodating to his staff, he was also

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<sup>171</sup> During four successive days one week, the judge, two clerks (the third was out of town) and a visitor went to four different Asian restaurants. The conversation touched on the clerks’ career choices and the jobs they would take upon completing the clerkship, the general state of the legal profession, current events, and sports. The conversation also included cases, particularly as one of the clerks had just returned from accompanying the judge to sit in another circuit and was attempting to persuade him to change his view about a case; he was ultimately successful.

<sup>172</sup> When the judge was away, however, the atmosphere in chambers was more casual in terms of dress and was pervaded with a greater ease.

accommodating to others who made requests of him, and some said he couldn't say "No." This affected the clerks because if he would accept requests from the Clerk of Court's office to take an extra panel when a judge was needed, the clerks would find that, after having to deal with their regular calendars and knowing what they would be doing for the month, they now had more work, and this annoyed them.

Not all clerks had positive views of their working relations with the judge. Part of this related to his absences. The judge's view is that while his absence "makes it different than if I were here year around," it "hasn't crippled relations" with clerks. They perforce adapted, and one even suggested that the judge's absence was good because the clerks "had to work on their own," and another felt that it made clerks take the initiative to see him. Yet, the frequency with which clerks mentioned the judge's absences when asked about their access to the judge—it was a key comment among the five former clerks who said he was not sufficiently accessible<sup>173</sup>—indicates that it was a problem. "He traveled a lot that year," said one clerk, and another said, "he seemed to be away from the office half or more of the time, with the result it was sometimes difficult to communicate with him." While working relations were "very good to excellent when he was available," his absence could create problems. It was difficult for those in chambers if the judge's decision on a motion was required and he was not there, and if there was a writing problem, it would take a while to resolve.

Some clerks felt that the judge did not examine their written memos adequately. "I don't rely on a written memo with him," said one, as he "might be inclined to disregard it." And if the judge were often not present, it would also be more difficult for the clerk to convey views to the judge face-to-face. There was the negative observation that the judge's travel "discourages me from exploring with him matters of secondary priority," in which the clerk included other judges' opinions, en banc matters, and motions, and a clerk spoke of wanting to sit down with the judge to discuss cases with judgment calls in the district court. As one clerk put it, the phone and later email was "simply no substitute" for face-to-face contact, and when the judge was on the road, "it was not always easy to discuss cases with him in the detail that I would have liked."

Judge Goodwin's travel suggests the need to distinguish between his physical absence, which limited clerks' access to talk to him, and his accessibility when he was in chambers. At least some secretaries acted somewhat as a "screen" between clerk and judge, although they did not

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<sup>173</sup> All twenty-one responding said that, yes, he was accessible.

try to prevent access to the judge, which was available either directly or through the secretary “on a relatively open basis.” Although the judge was busy even when he was in chambers, a clerk thought he “was fully accessible when he was physically present unless there was some urgent business,” and another said that when he was in chambers, “access was free and friendly.” Most saw it possible to obtain access easily: “I just walked into his office,” said one: “there was an open door between us” (and that was meant literally). “The judge’s door was always open,” said another. “I was never nervous about going to talk to him about cases.” The door might even have been *too* open—to the point that at least one clerk, who said she felt she tended to go there too often, said there should have been more of a deterrent in going in to see him.

Apart from travel-related issues, a couple of clerks spoke of having what one called a “fairly adversarial relationship” with him. Included were at least a couple of instances which, at least from the clerk’s perspective, were uncomfortable for the judge because the clerks, who called themselves “stubborn,” pressed the judge with arguments; it was not the substance of the arguments but the argument itself which was said to be troublesome. One clerk underscored the judge’s “undue emphasis on speed,” which the clerk compared to his own “undue emphasis on precision,” with the contrasting perspectives leading to “strains in the relationship.”

All but one of the responding clerks said the judge complimented them on their work. A few said he “was free with compliments when he liked something,” as “part of the general free inter-change in the office” and complimented “relatively often.” However, many others said that explicit compliments were not frequent and that the judge was not effusive with them, perhaps writing “good job” or something like it on a draft. Such comments were, however, made in the context of young professionals who expected to work on their own without close supervision, and a clerk could “know he liked my work because he used it.” One clerk did not recall “verbalized praise” until the year was nearly over, but “a light edit of my draft was a compliment.” However, even if compliments didn’t flow freely, clerks said “we felt appreciated.”

Chary with explicit praise, Judge Goodwin also did not express anger at the clerks or at others. As one clerk put it, “I screwed up an opinion once, and the judge never reprimanded or criticized me.” Of twenty responding clerks, only three said he was ever angry at them, with one saying it was about “politics.” And only two said he became angry at

others, with one of those saying it was over “poor work.”<sup>174</sup> Even without anger, however, the judge had ways of conveying how he felt: “I don’t ever remember his ever losing his temper, but he often let us know gently if he was disappointed in any of the workers in his chambers or his colleagues on the bench.”

### *B. Delegation*

A key aspect of the working relations between clerks and their judge is what the judge delegates to them and any guidance that accompanies the delegation.<sup>175</sup> A judge’s delegation to law clerks and secretaries is usually seen as weakness on the judge’s part and a detriment to the system.<sup>176</sup> Such a view is often based on a traditional model in which judges do their own work, in particular, writing their own opinions; criticism of another judge for over-reliance on his clerks is typical of this perspective.<sup>177</sup> In the traditional view, clerks’ drafting of opinions is excessive delegation, no matter how thoroughly the judge has communicated guidance and reviewed the clerk’s work, and no matter how much it is at odds with the reality of the large number of cases any appellate judge must decide if they are to be disposed of within a reasonable time.

However, if the judge’s staff, secretaries included, is competent, delegation can be positive because it harnesses the strengths they bring to their positions. From this latter perspective, for the judge to do all the work on his or her own is a weakness and is detrimental.<sup>178</sup> Clerks bring

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<sup>174</sup> As to anger directed at others, the most that was said was something like, “Maybe I saw him with a stern look if he didn’t like what was happening in a case or peeved at another judge,” and another clerk talked of the judge expressing frustration and anger at, for example, judges who could not seem to write an opinion with twelve to eighteen months after argument; even then, he never expressed anger directly at them.

<sup>175</sup> The delegation discussed here is within a single chamber, although one can also talk of delegation to other chambers. For example, when one chambers prepares bench memos for use by other judges on the panel, this can be seen as delegation by the receiving chambers to the “writing” chambers of preparatory work on the cases. See Cohen *supra* note 9, at 100.

<sup>176</sup> For a recent statement, see *id.* at 11.

<sup>177</sup> One judge wrote to say that he hoped another judge “was unduly relying on his law clerks in his citation to [a statute], and failed to read it itself. I refuse to believe that he would deliberately mischaracterize the statutory language.” This was also a way of laying out another judge’s law clerks, although a judge doing that would have to be very sure that the judge whose clerk was criticized did not get defensive.

<sup>178</sup> An interesting view of clerks as a resource came in a clerk’s extended observation: “It was a question of where can people’s expertise be better used.” With ‘all that experience’ the judge had, should he be taking the time to write those opinions or should he be off at the ABA?” The question, said the clerk, was how to use best the “very sharp mind behind that affable exterior.” Leaving drafting, and definitely cite-checking, to the clerks “only makes sense.”



to a judge's chambers "extra hands and legs, which, when coupled with an inquiring mind, are indispensable to a judge."<sup>179</sup> Their memos allow judges' output, not only opinions in cases but also responses to colleagues, to be more thorough and complete than would be true without the assistance they provide. Clerks may also bring a breadth of perspective,<sup>180</sup> as well as significant substantive legal knowledge, including exposure to recent academic views. Their skills also affect whether delegation aids or hinders the judge, just as their competing priorities may hinder a judge who has delegated work to clerks and depends on them to complete it. If they are working on deadline to complete bench memos, it may serve to delay the flow to the judge of important material such as a draft opinion about which the judge wishes a clerk's view.

That a judge may trust clerks' abilities sufficiently to treat them as a useful—indeed, as necessary—resource does not mean overestimation of what clerks bring to chambers by way of work habits and knowledge. An intellectually quick clerk who does not dig sufficiently, resulting in semi-finished work, leaves the judge either having to repair the deficiencies or to send it back to the clerk. Indeed, judges recognize clerks' potential deficiencies, including their lack of seasoning. One judge noted that "the depth of knowledge that many clerks possess on substantive matters is rarely matched with a solid grasp of trial processes,"<sup>181</sup> which is important because an appellate court reviews what had transpired at trial. And Judge Goodwin has observed that most clerks and staff attorneys are "freshly out of law school, [and] they don't know any more about attorney fees than a hog knows about holy water."<sup>182</sup>

Clerks for Judge Goodwin see him as engaging in "quite a lot" of delegation, "a good deal" or "a tremendous amount," so that they "were very involved in every aspect of the process" related to cases. One clerk said the judge "allowed us to handle as much as we could and sometimes more," although one qualified it by saying such delegation took place "after an initial period" and another observed that the extent of delegation had increased over time, because the judge's "travel schedule requires it." Looking back, at least one clerk thought that the amount of delegation was "enormous in light of my inexperience," and he said "not knowing any better" he "eagerly took all the power I could get." However, in general, the clerks knew it was delegation and that the judge had the ultimate responsibility. The delegation began with the

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<sup>179</sup> Wright, *supra* note 26, at 1180.

<sup>180</sup> Sossin, *supra* note 112, at 300.

<sup>181</sup> Wright, *supra* note 26, at 1180.

<sup>182</sup> Memorandum from ATG to several judges (Aug. 20, 1990).

assignment of cases among offices, which means who writes the opinion, and certainly included initial drafting.<sup>183</sup> Delegation did not, however, extend to the result in a case, at least not without the clerk having to argue to the judge a position contrary to the one the judge preferred.<sup>184</sup>

The extent of delegation, which was thought to be more extensive than in other chambers, can be seen in the view that clerks “were pretty much on their own, so long as we met deadlines” and in the observations that “he gave us lots of room to run” and “gave us much leash” and was “interested in the result of my work rather than trying to tell me how to get the result.” What may have caught the essence of Judge Goodwin’s delegation was the remark that “the delegation was large yet controlled,” with the clerk feeling “very responsible for my work” because, as another clerk put it, the judge “had faith in me and my ability.” Another view is that while clerks did most of the initial draft, it was “subject to revision (occasionally significant revision) by him,” and another observed, “every opinion that came out of our chambers was distinctively Judge Goodwin’s product.” Another clerk who said the judge delegated “a great deal” immediately added, “but he always was well aware,” and another observed, “we were drafting something for the judge, not for yourself.”<sup>185</sup> The recognition of the judge’s ultimate authority was perhaps put best in the comments and “he took the ultimate responsibility for our work product” and, particularly, “we always knew whose name was on the presidential commission and who had been confirmed by the Senate.”

Thus the judge used the clerks’ material, but he would not automatically do so: “If they were hitting on all cylinders, he used their stuff; if not, he would back off,” and he would even have the clerks continue to work and not use their product. The “ultimate criterion,” said this clerk, was “if your stuff saw the light of day.” In a related comment, a clerk found that “an appropriate amount” was delegated because “he was always the judge, we were always the clerks,” and others found the judge delegated “as much as I had hoped for,” but there was a dissenting view that other judges had criticized the judge for inconsistency in writing style, a result of his sending out work he had not checked. Yet

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<sup>183</sup> It would appear that there was much less delegation to the clerk in the Oregon Supreme Court, where the judge wrote his own opinions, but at least one clerk said “[s]ome cases he would have turned over almost completely to me, but I wouldn’t let him,” indicating that the judge was willing to delegate, and another said he delegated “only what he thought I could do,” and still another said he was delegated “as much I could handle” in research, review of briefs and other materials.

<sup>184</sup> “There was no real discretion regarding opinion or rulings,” said one clerk, “but there was some discretion about writing drafts and memos.”

<sup>185</sup> The clerk added, “I was drafting for his approval, not for my glory.”

Judge Goodwin's handwritten comments on materials in case files make it evident that he is a judge who does not simply pass along his clerks' writings to other judges without change. He often takes the language which the clerk has provided in a draft memorandum and edits it, not just for "nits" but to embellish in language and style that is clearly his own.

His approach to his clerks' written material, whether in transforming a bench memorandum into a draft disposition or in taking a draft opinion and improving it, is that of an editor: he cuts sections, adds other material, and rewrites for style, in doing so leaving his inimitable style on it, even if the bulk of the text was originally put to paper by the clerk. Because, as another clerk recognized, the judge "wanted drafting opinions to be a learning process for the clerk," autonomy in opinion-drafting did not necessarily mean the judge ignored the clerk's work, although the judge's writing facility meant "he could have written the opinion in half the time."

### *C. Guidance*

Closely related to delegation is the guidance that precedes or accompanies it. Apart from the earlier-discussed limited orientation clerks received at the beginning of their tenure, all but two of twenty-one clerks responding said they had been given sufficient direction in their ongoing work.<sup>186</sup> However, that apparent consensus masks a difference in views as to the specificity of the guidance. One of the two who felt that guidance was not sufficient said he "was off my game from beginning and was somewhat daunted by the task," so that "talking about cases would have been helpful." The other, faced with drafting dispositions on the basis of the bench memo "with virtually no guidance," said the judge "rarely gives legal guidance before we write" and was "very uneasy about the amount of control." As this suggests, what is "sufficient" direction depends on the guidance one wants. A clerk who preferred "little direction" would be satisfied with guidance another might find deficient. Variation in perception thus "would depend on personality," because "some might need more hands-on to make the clerkship work well," while others who "knew what needed to be done and did it . . . didn't feel [they] needed a lot of direction." Among the

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<sup>186</sup> This is like the responses by the judge's Oregon Supreme Court clerks, all but one of whom felt the judge gave sufficient direction, but even he was not negative: "I was on my own to define my role, which I managed to do in a way that served to blend well with the judge's." Another spoke of having "never felt at a loss for direction." They all also felt that had the amount of flexibility and discretion they wished, although one said he had "too much" flexibility and said of the judge that "had he been a tougher taskmaster he might have worked on cases harder."

latter was the clerk who said, “[a] little direction goes a long way with me. I take the initiative.”<sup>187</sup>

As this suggests, clerks vary in their certainty about how to handle matters and their willingness to ask the judge if he wishes more work done; some clerks ask him about the proper way of handling matters while other clerks hesitate to do so. Thus it is not surprising that within the same set of clerks, there were differences in views as to the amount of guidance provided. One clerk, who said that “overall, there was more concern [among the clerks] about lack of direction,” recalled “feeling (and hearing co-clerks complain at times about) lack of direction,” but at other times, the clerks would “voice concern about direction which was different than they desired.” This indicates that agreement was not seen as guidance but that disagreement was seen as guidance of an unwanted type. A further indication of this ambivalence came from a clerk who said bluntly, “I don’t want him there to supervise my work” but then added, “I want him there so he will know what is going on in his chambers.”

The judge may, however, have a good sense of what his clerks could handle on their own. This can be seen in a clerk’s observation that he had as much autonomy “as I could handle within what he felt was prudent” while feeling “challenged” by the tasks before him. The judge might also intentionally withhold guidance to prompt clerks to develop their own thinking, and lack of explicit step-by-step guidance might cause a clerk to engage in analysis not otherwise undertaken. Thus, one clerk who said the judge “gave almost no direction” remarked that it “required me to think more deeply about what I was doing.”<sup>188</sup> As another clerk said, “[t]he judge would let us form our own views of the case, before engaging us in debate,” while still another indicated this might have occurred from the beginning: “[i]n one case—my first! —he looked to me for advice and did not tell me how the decision should come out.” Such a stance by the judge would certainly be in the spirit of treating the clerkship as a learning experience for the clerk, as one clerk made explicit: “He wanted drafting opinions to be a learning process for the clerk.” Indeed, more than one clerk talked of the judge’s “teaching by experience and example” and another referred to “a good student-teacher relation” existing between clerk and judge.

For the judge to have a good sense of the clerks’ capabilities, the judge must be paying some attention to their work. For example, without

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<sup>187</sup> He added, “[i]f I was cornered or concerned, I asked and the judge was always there for me.”

<sup>188</sup> This clerk added that, “[b]ecause of the friendly, slightly adversarial relationship we had, I might not have been open to too much more direction.”

reviewing some of the clerk's work, the judge cannot know if the clerk can read a case. If the judge gives the clerk little attention early in the clerkship, the judge cannot know how accurate the clerk's work is. Here is the need for "quality control" because of variation among clerks in competence and attention focus or ease with which they can be distracted. Judge Goodwin has said that he might rely on a clerk's reading of cited cases "if it's a simple case, and the law clerk has been there long enough for me to have faith they'd read the case as I would" and to "independently arrive at the same judgment" about the weight the lawyer has placed on the case. However, when the cited case is important to the resolution of the matter before the court, the judge will ask the clerk to "bring me the case," and in five minutes the judge will "know if I agree with the law clerk, and will be comfortable enough with the case not to be blind-sided by a petition for rehearing that says the judge didn't read or understand the case." A judge who depends on law clerks all the time, he says, will be blind-sided; thus, "if it's an important case on which we are relying, I must check on them."<sup>189</sup>

Because clerks prepared bench memos before the judge was immersed in a case, guidance as to the recommended result was unlikely, although it was "subject to the judge's suggestions and his right to change the analysis or preferred result." One reason is that clerks begin work on a case before the judge does—unlike the Supreme Court, where a justice may become familiar with a case through involvement in granting review. In addition, even if somewhat familiar with the case, the judge may be undecided about a preferred outcome or may waffle. However, at least one clerk believes that the judge intentionally "did not reveal his point of view," so that the clerks "had to brief all sides of a case and make a recommendation." As the bench memos are usually sent to other chambers without review, judges not only do not commit themselves to their clerks' recommendations but they also do not hesitate to overrule them.

Even if some clerks saw judicial guidance on opinions as limited, there was some, and any guidance from the judge at this time was particularly important because the presiding judge's written conference memorandum, while providing at least general direction, was usually quite terse. Most of the time, however, the judge's comments or notes to the clerks were also short, the latter containing "minimum directions like

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<sup>189</sup> One of the judge's Oregon Supreme Court clerks observed that "For the most part, my readings of the cases and the proper citation of cases and checking of accuracy was adopted by the judge."

not dealing with an issue we'd dealt with in the bench memo"<sup>190</sup> or the judge would tell another clerk to write the opinion as the bench memo had been written. "Most of the time he told us the panel's decision or tentative decision," "told us what the conference vote was as to the expected outcome and rationale," and would "usually explain the ruling and basis for the decision and the type of opinion to be drafted."

While we tend to think of guidance as coming before a task is begun, it can also come throughout the process of opinion-development when a clerk might have a discussion with the judge to be sure "we were not too far off of what the judge was thinking." It could also come from the judge's examination of work product, in his answering "all questions" a clerk might have, or in "constructive feedback." As one clerk put it, "We worked independently, but the judge was always available to help and give direction." Another clerk said that he and the judge rarely disagreed, but if they did, "we debated it as peers, until he had to decide. . . . I always felt *heard*." While at times "the judge will exercise a veto if he dislikes the outcome," which certainly provided guidance after the fact, this clerk would have preferred initial guidance. Interchange between judge and clerk can also convey long-term guidance apart from specific guidance that a clerk may wish on a particular case. As one clerk observed, the judge had a sense of justice, of right and wrong, and of how the law is and should be, and "you gather this through discussing individual cases with him."

#### *D. Clerks' Influence*

Judges' delegation to clerks, even with guidance and review, gives rise to the question of clerks' excessive influence over the court's product, although clerks' influence is also relative to that of lawyers, from what they have briefed and argued.<sup>191</sup> If clerks have primary responsibility for drafting opinions, without much initial direction from the judge, and the judge does not review the clerks' handiwork rigorously, decision making will have flowed to the clerks. To return to a point noted in the Introduction, if clerks divide the work so that each is

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<sup>190</sup> A further example is a handwritten note from Judge Goodwin on the face of a memo, "Cut out the surplusage. Put it on vehicle exception and probable cause to believe vehicle was being used." (referencing *United States v. Miller*, 46 F.3d 1146 (9th Cir. 1995) (unpublished table decision)).

<sup>191</sup> Judge Goodwin, in writing to a district judge, said that the appellate courts were "blessed with a lot of super-smart young law clerks who think it is their duty to provide the losing litigant with better legal advice than he or she had in the trial court," and that "sometimes judges pay more attention to their law clerks than they do to the lawyers who are representing the clients." Memorandum from ATG to Owen M. Panner (May 5, 1990).

working on one-third of the cases, each clerk has less *individual* influence, or the potential for it, in one sense because that clerk is not working on all cases, but the clerks' *collective* influence may be greater, as the knowledge each clerk has of each case is that much greater in relation to the judge's familiarity with the case.

There is disagreement as to whether clerks influence judges, and, if they do, whether they do so excessively. It has been unclear what actually happens, and broad claims of clerk domination, if not control, of the process have been made without close examination of actual working relations between judge and clerk. One's evaluation of the "too much" question depends on one's view of how much of the work on a case the judge should perform or can reasonably perform. To the extent others work on the case—a necessity in situations of high caseload—the judge cannot possibly "do it all" and may have to use slightly reworked clerk memoranda as dispositions rather than significantly altering them to make the product their own. One's evaluation also depends on whether one accepts that judges can delegate work so long as they take responsibility for the final product. Here we should keep in mind the observation that "the extent that clerks do exercise influence over the wording or even the substance of decisions . . . is an influence that the Justices have determined to be beneficial to their own needs and goals."<sup>192</sup>

In discussing whether clerks influence judges, one must specify what "influence" means, keeping in mind that perceptions of clerk influence are affected by the observer's amount of experience. This is seen in the reaction of a former clerk, who was "surprised by how much power I had (or thought I had)." If influence means that a clerk persuades a judge to adopt an outcome contrary to the judge's initial inclination, then it is rare, although it does take place. Certainly at times clerks do try to persuade the judge to adopt a particular position. In one such situation, a clerk who had accompanied Judge Goodwin when he sat in another circuit pressed the judge to look further into it and the judge, this clerk and another clerk spent most of a lunch hour the following week discussing that case.<sup>193</sup> Another clerk told a story about lobbying the

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<sup>192</sup> Sossin, *supra* note 112, at 298. He also observes that the "increasingly important role" clerks will play in "broadening of judicial horizons . . . is a role generally welcomed and encouraged by the Justices, who tend to be eager to keep abreast of new perspectives." *Id.* at 300.

<sup>193</sup> The clerk clearly had caused the judge to think further about the case, which involved a question of a trial judge requiring restitution when it is not for the charged offense. The judge was willing to have the defendant pay. However, he didn't want his Eleventh Circuit colleagues simply to vacate for resentencing but wanted a remand for

judge—who was “in the middle” between two judges of vastly different views. While driving the judge on an errand, the clerk drove out of his way in order to have more time to persuade the judge to the clerk’s point of view.<sup>194</sup> Indeed, one clerk was quite explicit that a clerk’s role was “to challenge the judge, present ideas of another generation and new law school ideas, to bring on fresh ideas.” This observation fits with the judge’s comment that, during the year, each clerk would be likely to have an argument with him and urge him to adopt a particular position: “Each clerk argues with me about at least one case; no clerk leaves without having an argument about a case.” The judge has also said he tells them that they should feel free to express their feelings about cases to him, but not to put those feelings in bench memos without documentation, and that they could, if they wished, give him “side memos” (to him alone, not shared with other chambers) and “pound my desk.” Clerks do influence judges by writing memos that persuade by the force of their logic as well as by responding effectively to a judge’s questions.

A judge may acknowledge movement to the clerk’s position. This may be done obliquely, as when Judge Goodwin wrote, “[a]fter considerable internal conflict and a close review of the record,” he could not join a disposition affirming the position of the Secretary of Health and Human Services in a Social Security disability case,<sup>195</sup> or it may be more open, as when a judge wrote to colleagues, “[a]t conference, we decided to affirm the district court’s dismissal on the grounds that all claims were time-barred . . . My law clerk has since persuaded me that Housley’s *Bivens* claims are not time-barred.” Even when the clerk’s influence is not acknowledged, a visible shift of position may have come after pressure from a clerk. Where the district court had given summary judgment to a company in a personal injury diversity case, the conference memo reflected that Judge Goodwin and one other judge would affirm. When the other judge circulated a proposed unpublished disposition affirming, Judge Goodwin’s law clerk argued that the disposition “incorrectly interprets California law” with respect to the limitations period, and ended her memo, “I suggest you vote to reverse summary judgment for the defense,” something the clerk pointed out was the recommendation of the bench memo from another judge’s

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the district court to develop the record to see if there was a connection with the offense(s) of conviction that warranted restitution, a ruling which would be new law.

<sup>194</sup> The judge seldom has clerks do any personal errands for him, but the judge’s car was in the shop and something had come up that needed attention at home.

<sup>195</sup> Memorandum from ATG to Panel (June 18, 1996) (referencing *Campbell v. Chater*, 94 F.3d 650 (9th Cir.1996)).



chambers.<sup>196</sup> The next day, the judge wrote to the panel, “[a]t the time of the post-argument conference, I was leaning toward affirming” but “I now suspect that there may be a fact question about what he knew and when he knew it.”<sup>197</sup>

If there are some instances when the clerk affects the judges’ outcome, there are numerous others when the panel did not adopt the clerk’s recommended result in the bench memo, including instances where the judge argued the opposite position in conference. Judges may not call attention to this disagreement, but when the bench memo recommendation goes one way and the judge votes the other way, it is obvious. There are other times when the judge acknowledges the clerk’s position, or, saying it was put well, disagrees nonetheless. Thus Judge Goodwin, writing to his fellow panel members said, “[m]y law clerk has made a strong case for the appeal,” but the judge went on to say that, “[f]or various reasons that may come out at oral argument, I do not believe we should reverse the conviction.”<sup>198</sup>

Bench memos might influence the judges more in complex cases. The clerk has more time to devote to the case than does the judge, and, while the judge might also devote proportionately more time to a complex case than to a simple one, the clerk’s “information advantage” might be greater. The judges can grasp simple or routine cases more quickly, using heuristics from past cases, while the clerk, particularly at the beginning of the year, may struggle with unfamiliar material. Nonetheless, the clerk might spot an issue the judge would miss by viewing the case as “same old, same old.”

One reason that clerks seldom affect outcomes is that, as a number of clerks pointed out, clerks and judge seldom disagree, and even in disagreeing, a clerk might not state that disagreement, although there are situations when disagreement is stated openly.<sup>199</sup> Another reason is that a clerk may not make a recommendation pointing clearly in a single direction, as competing considerations leave the clerk unsure of what to

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<sup>196</sup> Memorandum from Donna Prokop to ATG (June 23, 1994)).

<sup>197</sup> Memorandum from ATG to panel (June 24, 1994) (referencing *Ward v. Westinghouse Canada*, 32 F.3d 1405 (9th Cir.1994)). The presiding judge reassigned the case to Judge Goodwin for a short memorandum disposition.

<sup>198</sup> Memorandum from ATG to Panel (Apr. 26, 1993) (referencing *United States v. Simoy*, 998 F.2d 751 (9th Cir. 1993) (The court affirmed)).

<sup>199</sup> An example is a bench memo where the judge has already stated his views, in a previously-noted instance. The judge recommended affirming convictions but the clerk stated her personal recommendation for a remand for an evidentiary hearing. *See* Memorandum from Sophie van Wingerden to Panel (Nov. 22, 1994) (referencing *United States v. Roca-Suarez*, 43 F.3d 1480 (9th Cir.1994)).

recommend.<sup>200</sup> In addition, timing may limit the clerk's possible effect. When disagreement about the outcome is stated in a clerk's memo about a petition for rehearing, it is probably too late for the judge to be willing to change direction unless other members of the panel are so inclined. In addition, influence may run from judge to clerk instead of from clerk to judge, as the clerks work to adhere to the judge's position or realize that the judge's view, not their own, controls. This is evident in the comment to the judge from a clerk, who did not make a certain argument "due to . . . the belief that I would be fighting an uphill battle with this panel!"

Clerks may also realize that there is a difference between a legally sound position and a preference based on policy considerations; the judge would be less likely to adopt the latter. For example, a clerk distinguished between agreeing "theoretically" with the analysis of another judge, "but practically speaking, I am sympathetic" toward the other party's position.<sup>201</sup> In another instance, a clerk said that, "[a]lthough as a policy matter, I have sympathy with the result" in another judge's proposed opinion in an automobile forfeiture case, "on legal grounds I cannot recommend that you concur in this opinion." A clerk who later worked on this case said he shared the third judge's "uneasy feelings about the resolution of this controversy" and that greater due process protections should be provided but concluded that, "[o]n legal grounds, the decision is undeniably correct."<sup>202</sup>

If instead of affecting the result, influence means persuading a judge to adopt a certain way of reaching the judge's preferred outcome, there is more of it. Clerks' influence may appear in "the details of reasoning," where clerks have reported greater disagreement with their judges.<sup>203</sup> One hears this in the observation that the judge "has quite a bit of control on the level of results" but "relatively little control on doctrine," so that, "[o]n one's way to a result the panel agrees with," a clerk will "have a fair amount of flexibility in doctrine." It is also suggested in the clerk's comment critical of Judge Goodwin as a "very fact-oriented" judge and for not having "much patience in working out

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<sup>200</sup> "I do not know what to advise in this case," said a clerk, a statement followed by discussion of a "purely legal approach" and a "realistic perspective," which pointed in opposite directions. Memorandum from Meg Keeley to ATG (June 16, 1996) (referencing *Campbell v. Chater*, 94 F.3d 650 (9th Cir.1996) (unpublished table decision). One former Oregon Supreme Court clerk said he "never really gave [the judge] suggestions as to result—only my opinion of what the law actually was."

<sup>201</sup> Memorandum from Sophie van Wingerden to ATG (Sept. 30, 1994) (referencing *Ravetti v. United States*, 37 F.3d 1393 (9th Cir. 1994)).

<sup>202</sup> Memorandum from Ali Stoepelwerth to ATG (June 22, 1990) and Memorandum from Fred Philipps to ATG (referencing *United States v. One 1985 Mercedes & Glenn*, 917 F.2d 415 (9th Cir. 1990)).

<sup>203</sup> Marvell, *supra* note 8, at 92.

details with the law” as well as being difficult to pin down to discussions about such legal matters. Nonetheless, many times when there is disagreement over rationale, the clerk loses, as judges are certainly not hesitant to disagree with their clerks. A clerk “had a free hand to write what seemed correct based upon the facts and the law,” but if the judge disagreed, “we’d talk and maybe I’d do another draft.” Once the clerk had drafted an opinion, “If he agreed with our proposed result, great. If not, he was open to being persuaded.” Or, “If there were disagreements, I told him and they got worked out.”

In drafting bench memoranda which are the basis for the first draft of an opinion, the law clerks have the first word. As this can be the most important word, the drafting function gives them influence. They also participate in agenda-setting by identifying issues in their bench memos and by suggesting those which should be pursued at oral argument and specific questions to be asked there, and issue-framing is certainly a form of influence. As one judge has written, “The bench memo author’s cut on the case often has a disproportionate influence on the panel’s thinking.”<sup>204</sup> As the bench memo is often the first document through which a judge sees a case, particularly if the judge examines it as a précis or road map of a case before turning to examining the briefs and record directly, it “often serve[s] as a screen or filter through which the appeal is first viewed,”<sup>205</sup> and it thus helps frame consideration of the cases, at least within the boundaries created by the parties’ briefs.

If a clerk prepares a proposed memorandum disposition in lieu of a bench memo, the clerk’s effect on the case disposition is clearer still, but must be discounted by the fact that these are non-precedential rulings and often, although not always, come in the simpler cases where the result is at least relatively obvious. When the disposition is not to be published, clerks’ views may carry more weight because the writing judge may be less concerned with approach and language and has little reason to disturb the bench memorandum recommendation.

If clerks influence judges by exposing them to ideas about a case or about an issue to which the judges would have been less likely to have had exposure, clerks do influence judges. As Marvell notes, clerks’ influence “seems to consist of presenting judges with ideas and information they would not otherwise have time to discover” and comes simply from their contact and discussions.<sup>206</sup> As Sossin says about

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<sup>204</sup> Memorandum from Ninth Circuit Judge to Associates (Nov. 17, 1999).

<sup>205</sup> Sossin, *supra* note 112, at 292.

<sup>206</sup> Marvell, *supra* note 8, at 96.

justices of the Supreme Court of Canada, “It is rare for a Justice to be completely unaffected by these exchanges.”<sup>207</sup>

Whatever the extent of clerks’ influence, it is not identical across all cases. The judge is more likely to be directly engaged in a case on a high-visibility, hot-button issue like asylum for an alien or an issue salient for that judge; in those situations, the views of the clerk are less likely to weigh heavily. On some issues, such as those in criminal cases, a clerk observed, Judge Goodwin was “quite open to our opinions of the law,” but the judge “had developed his own views and was less susceptible to our persuasion” on other issues. If the clerk’s recommendation is within the judge’s “zone of indifference,” it is adopted because the judge may not wish to expend the energy to reexamine the record. However, even in those situations, the clerks, selected by the judge at least in part for ideological compatibility, may be attempting to “write to” the judge’s views as they perceive them.

If not likely to succeed with a recommendation when the judge has a committed view, the clerk may have more discretion when the law is unclear or when there is a circuit split. Thus, in a case involving jurisdiction over an interlocutory appeal as to qualified immunity when both an injunction and damages were involved, the clerk wrote, “[t]his is an open question in this court over which other circuits are split. I recommend following the majority view which allows jurisdiction over such appeals.”<sup>208</sup> Clerks’ influence may also be greater when the judge has little background in the area of law or, while knowledgeable, lacks interest in the subject,<sup>209</sup> and particularly if the subject is one the clerk studied in law school. Cohen reports that some of the law clerks to whom he talked “felt particularly able to convince their judges of points in more obscure areas of the law.”<sup>210</sup>

Do the clerks feel the judge has given their suggestions proper consideration? All the survey respondents felt that Judge Goodwin did give their views proper consideration.<sup>211</sup> Representative were comments that the judge “listened to our suggestions” and that the clerks “got an open hearing,” but that does not necessarily mean the judge accepted the suggestions, which is related to what consideration the clerks consider “proper.” This is quite evident from the remark of a clerk who said that

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<sup>207</sup> Sossin, *supra* note 112, at 293.

<sup>208</sup> Memorandum from Andrea Oser to Panel (Aug. 4, 1989) (referencing *DiMartini v. Ferrin*, 889 F.2d 922 (9th Cir. 1989)).

<sup>209</sup> William E. Kovacic, *Antitrust Decision Making and the Supreme Court: Perspectives from the Thurgood Marshall Papers*, THE ANTITRUST BULLETIN, Spring 1997 at 93–114.

<sup>210</sup> Cohen, *supra* note 9, at 49–50.

<sup>211</sup> This was also true for clerks in the Oregon Supreme Court.

he regularly debated with the judge about the constitutional rights of aliens and criminal defendants and did not think the judge was “paying proper attention to the law as I saw it.” The judge, he observed, “uniformly ignored my suggestions,” but, he concluded, “In retrospect, that was proper.” Or, as another clerk stated it, “The judge had more experience in making tough judgment calls.”<sup>212</sup>

Asked if their suggestions were incorporated in the judge’s opinions, a possible indication of influence, all clerks agreed this took place. However, they varied in their perception of its extent, all the way from “sometimes” to “very often,” “frequently,” “most of the time,” and even “always.” Some referred to specific situations, for example, where “there was a problem with how to write an opinion to get a majority without making bad law,” where the clerk “found a solution the judge adopted.” One spoke of “only one or two times” when the clerk and the judge “had different views about the appropriate outcome or analysis and the judge changed an opinion at my urging.” Another said that “angles on things I initiated came into the final product.”

In general, the clerks said that their suggestions had been used because “we generally wrote the first draft and as a result our suggestions were always considered and often incorporated into the judge’s opinion.” As another put it, “[u]sually, the initial drafting was a clerk function, so our ‘suggestions’ often formed the foundation or framework of the opinion.” Indeed, one clerk said, “very often, opinions were largely my writing.” Yet clerks’ views did not have free sailing, evident in comments that suggestions were incorporated “to the extent they were on point” and that when the judge drafted, “he would incorporate suggestions to the extent he found them persuasive and useful.” It was clearest in the observation that “suggestions were incorporated to the extent he agreed with them,” which “on small matters he usually did,” but “on major things such as the analysis or the result, he often did after discussion, or the discussion led to a better approach.” It was also clear in the terse observation, “[i]f he disagreed with proposed analysis, he did not use it,” although that was said to be rare, perhaps because the clerk wrote to what the judge was thought to want. As has already been noted, the judge edited opinions—some editing of all draft opinions, said a

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<sup>212</sup> An Oregon Supreme Court clerk said, “Certainly in making major decisions, the judge used his own good sense,” and another, who said that the judge “probably more attention to my ideas than they deserved,” and noted that his language appeared in opinions on a few occasions, said Goodwin was “such a good writer that that didn’t occur very often”—in a situation, however, where the judge drafted more opinions himself. Still another clerk said, “I am not sure that I ever changed his mind in any one case, but I would like to think that I had some influence from time to time.”

clerk, with some of the editing being “heavy,” so that “each opinion was his own.” Yet even in that situation, much of the clerk’s work “survived [the judge’s] pencil.”

#### V. CONCLUSION

This examination of a federal appellate judge’s chambers and of his clerks’ views of their tasks and working relations with the judge reveals a set of complex relations between judge and clerks which include clerks’ extensive involvement in cases. At least in chambers where clerks’ autonomy was considerable, those tasks were not limited to cite-checking, research, and commenting on draft opinions. Instead, the clerks were delegated responsibility for the full range of aspects of cases, beginning with bench memo preparation and extending through drafting of dispositions to recommending responses to rehearing petitions.

What has this portrayal told us about the relationship between clerks as s working for their principal, a judge? In relation to the question “whether the law clerk possesses an advantage in information and expertise regarding the case, such that the law clerk is in a position to persuade the judge to rule differently than the judge otherwise would have,”<sup>213</sup> we find that almost by definition, clerks will know more about individual cases than will the judge. That is certainly true at the initial stage of chambers involvement in a case, because, in most instances (and in many chambers), the clerks prepare a bench memo before the judge reads the briefs. After the judge has prepared for argument, has heard argument, and has conferred with colleagues, the judge may be fully up to speed. In addition, because each clerk deals with only one-third of the cases while the judges must deal with all of them, the clerk is likely to be more in touch with the details of the cases on which he or she is working. Offsetting these advantages held by the clerks, however, is the experience with many prior cases the judge brings to the judge-clerk interaction; the judge’s better knowledge of underlying law; and the broader perspective provided by working with all the cases (not only one-third of them), which allows the judge the better sense or feel of what is central and what is peripheral in a case.

On the matter of clerks’ influence, we see that extensive clerk involvement and significant daily autonomy does not mean that the clerks were unconstrained. Although initial orientation is limited, most training is “on the job,” and the judge provide the clerks with little

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<sup>213</sup> See Rick A. Swanson, “Tentative Reflections on the Judge-Clerk Relationship Using Principal-Agent Analysis,” paper presented to the Southwestern Political Science Association (Mar. 27–30, 2002) (on file with author).

explicit direction, continuous guidance comes through the judges' comments on clerks' work and in the judge's discussions with them. In any event, the clerks generally do not diverge from his position, and they understand that the judge makes basic decisions on case outcomes. The clerks do influence cases, not only by casting the issues in bench memos but also by the way they construct reasoning. Yet seldom do they produce an outcome different from the judge's inclination, and, when they do, such changes do not happen from inadvertence but because the clerks have persuaded the judge. Some reading this account as well as some clerks may prefer judges to be more directly involved in direct supervision of clerks' work, but it does appear possible for a judge to be in charge of clerks without constant hands-on control.