THE MANAGEMENT OF STAFF BY FEDERAL COURT OF APPEALS JUDGES

MITU GULATI AND RICHARD A. POSNER*

Abstract
Federal court of appeals judges have staffs consisting usually of a secretary and four law clerks; some judges have interns or externs or both (law students working part time). These staffs are essential, given judicial workloads and judges’ limitations. Yet not much is known about how the judges manage their staffs. Each judge knows of course, but judges rarely exchange information about staff management. Nor is there, to our knowledge, a literature that explains and evaluates the varieties of staff management by federal court of appeals judges. This article aims to fill that gap. It is based on interviews, some in person, most by telephone, of more than 70 judges, chosen mainly at random and covering almost all of the thirteen federal courts of appeals.

* Gulati is Professor of Law at Duke University School of Law. Posner is a judge of the U.S. Court of Appeals for the Seventh Circuit and a senior lecturer at the University of Chicago Law School.
THE MANAGEMENT OF STAFF BY FEDERAL COURT OF APPEALS JUDGES

MITU GULATI AND RICHARD A. POSNER*

Introduction

Federal court of appeals judges have staffs consisting usually of a secretary and four law clerks; some judges have interns or externs or both (law students working part time). These staffs are essential, given judicial workloads and judges’ limitations. Yet not much is known about how the judges manage their staffs. Each judge knows of course, but judges rarely exchange information about staff management. Nor is there, to our knowledge, a literature that explains and evaluates the varieties of staff management by federal court of appeals judges. This article aims to fill that gap. It is based on interviews, some in person, most by telephone, of more than 70 judges, chosen mainly at random and covering almost all of the thirteen federal courts of appeals. The judges were promised anonymity and that we would disclose no information gleaned in the interviews that would enable any of the judges interviewed to be identified. We thank the judges for their allowing us to interview them, and for their patience and candor.

William Domnarski was to be our third coauthor, but conflicting commitments forced him to resign from the project after he had conducted ten interviews. The notes of his interviews are a valuable contribution to our data, and we thank him for his participation and regret his having to curtail it.

The notes of the interviews conducted mainly by the two of us but, as just mentioned, by Bill Domnarski are our raw material. What follows is a classification and description of the different management models employed by the judges. We offer no evaluation. Our aim is to provide information to the judges themselves, particularly newly appointed judges, about the various management models, with the thought that this information may be helpful to at least some court of appeals judges.

Background and Methodology

Information on how particular judges manage their offices is hard to come by. Someone unfamiliar with the federal appellate judiciary might expect that there would be multiple sources of this kind of information. In particular, there is the Federal Judicial Center that runs programs to help federal judges (including helping new judges get started). They run conferences and have researchers

---
* Gulati is Professor of Law at Duke University School of Law. Posner is a judge of the U.S. Court of Appeals for the Seventh Circuit and a senior lecturer at the University of Chicago Law School.
on staff and their purpose is supposed to be to promote improvements in judicial administration. As best we know though, the only exposure that new judges get to the range of management techniques being used is a short lecture at “new judge school” by some eminent judge who has been invited to discuss his (or her—to simplify, we’ll use just the male pronoun in this article) way of doing things. It is not clear how this particular judge is chosen though (Is it the judge who follows the standard model? Is it the judge who is viewed by the FJC as having the best model of management? Is it a judge whose work product is viewed as high quality, but whose management style is a mystery?).

Putting aside the FJC, one might expect information about judicial management to be generated by the market. After all, thousands of the best law students every year seek out clerkships on the federal and state courts. And finding a judge with whom the clerk will mesh well with can be important for the clerk’s future career, since this working relationship is likely to be the closest and most intense that the clerk has had thus far. In pragmatic terms, this judge is going to be a key reference for the clerk for the rest of the clerk’s legal career. Given that, one might expect there to be a thriving market opportunity for books with a titles such as “The Insider’s Guide to Judicial Clerkships: All The Things About Judges that Your Law School Clerkship Office Will Not Tell You”.1 But this does not happen – the reason we suspect is that the norms of secrecy about a judge’s chambers are strong and the social penalties (particularly within the elite networks of former clerks) are high. The end result is that those seeking information about the range of management techniques are forced to rely on rumor, anecdote and (if one is a judge) conversations with one’s colleagues (a type of conversation that appears to occur very rarely).2

Our goal with this project was to try and produce the kind of report that we envisioned the FJC producing for new judges. Given the lack of public information on the topic, we decided to go to the judges directly and talk to them about how they managed their chambers. One of us is a full time legal academic, which meant that we had to obtain permission from the University to do research on human subjects. As part of that application for permission, we promised to strictly maintain the anonymity of our subjects. Using a standard request

1 There are exceptions such as Edward Lazarus’s 1998 book, Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court, that generated much drama regarding whether, among other things, Lazarus had violated the Court’s ethical rules and betrayed the trust of his judge and co-clerks.

2 A handful of respondents pointed to Judge Frank Coffin’s book, The Ways of a Judge: Views From the Federal Appellate Bench from 1980, as having provided some insight. To our surprise, the other book that came up a couple of times as a source of information was a novel, David Lat’s, Supreme Ambitions, from 2014.
letter (reproduced in the appendix), we approached roughly 80 federal court of appeals judges and asked them if they would talk to us about our project. Of the 80, six said no to speaking to us and four never responded (we generally sent an initial email and two follow ups). Although there are 179 federal appeals court judgeships, the number of judges is greater because many older judges have elected “senior status,” continuing to judge (normally at a reduced rate, however) while creating vacancies for the appointment of new active judges; there are about 90 senior judges at present. Thus we have interviewed roughly a fourth of the judges on the federal appellate bench.

Our sample is largely randomly constructed, except that we tried to ensure that we had at least some representation from every circuit (we tried to make sure that we had at least three judges from each circuit). And while our sample is dominated by judges with a significant amount of experience, we wanted to ensure that we took into account of any newer methods of management being used by the newest entrants and so we also spoke to a subset of recent appointees (roughly a dozen).

The majority of our interviews were done by phone and each interview typically lasted between a half hour and an hour. A subset of the interviews (about 20) went longer, and these were the ones we did in person. The in person interviews tended to yield a richer amount of information – we were more likely to get the full attention of our respondent and we could observe the office interactions first hand. However, for logistical reasons, we could not do more than a fourth of our interviews in this fashion.

The interviews focused on five aspects of judicial staff management: (1) hiring; (2) allocating work among different staff members (primarily law clerks, sometimes augmented by interns or externs); (3) what kind of work staff did prior to oral argument; (4) what kinds of work it did after oral argument; (5) what kinds of workplace atmosphere they tried to create and (6) post-clerkship interactions with their clerks.

Three basic models of judicial management emerged from our interviews—the editing judge, the authoring judge, and the delegating judge. We describe them below, along with the deviations from the basic models.

The Standard Model – the Editing Judge

There is a standard model of present-day federal court of appeals judicial management that we call the core or “the Editing Judge” model. (We focus mainly on active rather than senior judges, except senior judges—of whom there are a
number—who continue to take a full caseload.) We begin by sketching the core model and then present variants of it adopted by some judges.

1. **Selection of law clerks.** Judge hires four fresh law school graduates for one year. The initial screening of applicant resumés is typically done by the current set of law clerks, who then present the judge with a dozen or so of those applications for review. In deciding which applicants to interview, judge relies primarily on recommendations by law professors whom he knows personally and trusts, or on oral follow-ups to written recommendations from law professors he doesn’t know, because it is widely believed by judges that written recommendations are often exaggerated but that the recommender will level with the judge over the phone. The interviews themselves are rarely substantive in the sense of the judge’s testing the applicant’s legal knowledge or analytical skills. Rather the focus is on seeing whether the applicant will “fit” into the culture of the office. In addition to fit, judges often care about indicia of writing skills, such as whether an applicant has worked on a law journal. Clerks are typically given a short time window (a day or so) within which they have to accept the offer, or else the job will go to someone else.

2. **Staff structure.** Four law clerks plus secretary. Judge will sometimes get occasional help from staff attorneys on the less important cases. Interns or externs (these essentially are synonyms, so from now on we’ll call both sorts “externs”) – current law students who come to work for free in the judge’s office for a semester as part of a law school program or during the summer—are rarely, or at best intermittently, used. Most judges find that the presence of students is more trouble than it’s worth since it means that there are more people in the office to manage. To the extent that externs are used, it is primarily either to function as law clerks to the law clerks or to help a local law school (with which the judge may have a close connection) have a successful externship program for its students.

3. **Assignments.** Clerks tend to work primarily on the cases that will result in written opinions, though not always opinions that will be deemed precedential, and not always in cases that are orally argued rather than submitted on the briefs. Clerks generally decide among themselves which cases each one will work on. The judge rarely gets involved in the allocation of case assignments, other than to make sure that the allocation is equitable.

4. **Before oral argument or submission on briefs.** The law clerks prepare bench memos for all cases. Judges discuss each bench memo with the law clerk author. Law clerks will probably discuss each case among themselves but judge will discuss each case just with the law clerk who did the bench memo. Law clerks attend argument unless judge’s office is in a different city, in which event at most one law clerk—the one who helped the judge prepare for the cases—will attend. (A judge who is going to travel to the place of court will be likely to assign prep-
aration of all the cases he will be hearing to one clerk; if that’s impracticable and different clerks will have prepared different cases, he will bring more, maybe all, of his clerks with him.

5. After oral argument or submission on briefs. Judge reports on post-argument conference. Law clerk who drafted the bench memo for a case assigned by the panel to the judge will produce an opinion draft. Judge will edit opinion draft. He may ask the law clerk to revise further, and the exchange of opinion drafts between judge and clerk may continue for some rounds. The law clerks will then citecheck and proofread the opinion, which will then be circulated to other members of the panel. (In some circuits, after panel approval the opinion must be circulated to the rest of the judges on the court before it is published.)

6. Atmosphere. Judge will have regular meetings with the clerks as a group, either in lunches or in weekly “work” meetings. Almost all judges say that they seek to create a work atmosphere that encourages the clerks to be candid in expressing disagreement. The methods of doing so, however, differ.

7. Incentives. Judges do not use sticks (the threat of being fired) or carrots (recommendations for a clerkship on the Supreme Court, or for appointment to a highly regarded law firm or government agency, such as a U.S. Attorney’s Office) to motivate clerks. The emphasis instead is on an egalitarian team or family concept where all members are treated as equally valuable in terms of their contributions.

8. Formality. Law clerks call the judge “Judge” and are told that the dress code is “business casual”. Hours, allocation of vacation days, formula for drafting bench memos and opinions and other matters may be specified in a manual that is given to the law clerks when they start. But the manual will rarely get much attention from either the judge or the clerks.

9. Secrecy. The internal workings of the judge’s office, including matters such as the deliberation process of the judge, the extent of delegation to law clerks, and how the judge interacts with his clerks, are matters not to be disclosed to the outside. “What goes on in chambers stays in chambers” is the standard mantra.

10. After the clerkship. The judge stays in touch with most of his law clerks, often providing career advice to former clerks. Photographs of past law clerks or photo albums are often placed in conspicuous places in the office. The goal is to underscore that past clerks continue to be part of the “family.” Judge has reunions every few years with all his former (as well as present) law clerks who are able to attend. The former clerks constitute a network that the judge helps nurture through the reunions and other contacts with the former clerks.
We turn now to the judicial management formats that are simpler than the core—they are extremely rare—and then turn to formats that are more complex than the core; those are common.

The Stripped-Down Model – the Authoring Judge

1. Selection of law clerks. These judges do all or almost all of their own first-draft opinion writing. Unlike the standard mode, in which the clerks are the primary authors and the judges are editors, the judge is the primary author and the clerks focus on research and editing. The criteria for selection of clerks tend to be the same as those used by the core judges, except that less weight is placed on writing skills and the interview. Judge may prefer a law clerk who has several years of practical experience, or academic study in fields other than law (preferably technical fields), before going to law school. (Some core judges have similar preferences, especially a preference for clerks who have had some practical experience.) These judges are also unlikely to make exploding offers to clerkship applicants whom they interview, or indeed set any deadline for the acceptance of an offer.

2. Staff structure. The judges using this model do not think they need as much law clerk assistance as those using the standard model, and they sometimes hire less than the full complement of four law clerks. They are unlikely to hire externs.

3. Assignments. The clerks generally do not prepare bench memos or opinion drafts. Generally they decide among themselves which of them will take the lead in helping the judge with particular cases. The judge may ask the clerks for assistance on specific issues or the clerks may decide that it would help the judge to provide him with a memo on a particular issue.

4. Before oral argument or submission on briefs. The clerks read the briefs and do research before argument (deciding among themselves which clerks will take the lead on which cases). They may do research memos for the judge and give him background materials that they think will be useful to his understanding of the case. The clerks will typically meet with the judge prior to argument to discuss the case; they will articulate their views of the case and there will be free discussion. The clerks attend the arguments unless the place of court is in a remote location.

5. After oral argument or submission on briefs. Judge reports on post-argument conference. There is some discussion with the clerks, and the judge may ask the clerks to do additional research on particular issues in the cases assigned to him. Judge drafts opinion and gives it to the law clerk to review, make editorial suggestions, and think about issues that may need further exploration. The judge
will revise his draft and the clerk may do further research to assist the judge on particular issues. A different clerk will do the citecheck, and a third will do a careful final proofread after the panel has approved the opinion. Judge is unlikely to want the law clerks to fuss over citation format style.

6. Atmosphere. Judge is likely to have frequent lunches and chats with his law clerks. There are unlikely to be strict deadlines of timelines or repeated revisions of memos. The general atmosphere is that of a collective enterprise in which clerks help the judge get the work done.

7. Incentives. These judges do not use incentives, positive or negative, to get their clerks to work hard. If the clerk does not get the work done, the judge is likely to do it himself.

8. Formality. Formality is minimal regarding dress codes (dress as you wish), how the clerks address the judge (usually by first name), and rules about vacation days or work hours (generally none, so long as the clerks are productive). Judge treats the clerks as colleagues rather than as subordinates.

9. Secrecy. There are no rules about what is to be secret other than the official requirement that clerks may not discuss with nonjudicial personnel any case that has not been decided yet. And the clerks are not to repeat any criticisms that judge may make of any living judge.

10. After the clerkship. There are likely to be periodic reunions. But things like photo albums of outings with the clerks and walls in the office that are lined with photographs of former clerks are unlikely. Nor is the judge likely to pay attention to nurturing a network of former clerks.

A subcategory of these judges, well illustrated by Judge Henry Friendly, have a touch of Asperger’s syndrome and get little help from their clerks because they don’t know how to work with other people and are therefore more comfortable doing (almost) everything themselves.

The Hierarchical Model -- The Delegating Judge

Most variations from the core are in the direction of higher levels of hierarchy and concomitantly greater delegation to staff.

1. Selection of clerks. In the standard model the judge hires four law clerks fresh out of law school and the relationship among the clerks usually is egalitarian. In the hierarchical model, the judge may have a junior manager to whom a portion of the management tasks are delegated. The junior manager is typically the “career clerk” (sometimes called a “permanent clerk,” but that is generally inaccurate) who coordinates, assists with, and reviews the work of the other
three clerks (who usually are one-year clerks). The career clerk may also assign work on cases to the other clerks and also assist with screening and interviewing applicants for the one-year clerkships. The career clerk’s employment with the judge is unlikely to coincide with the judge’s career, but he may work for the judge for a number of years. He may or may not have formal supervisory authority over the one-year clerks. In lieu of (or sometimes in addition to) a career clerk, judge may hire at least one or two clerks with prior clerkship experience, usually on a federal district court. These clerks can get started faster than the other “newbies” and can also help show the others the ropes in terms of drafting opinions and understanding the court’s processes. Judge is likely to give significant weight to a personal interview, designed in part to see whether the applicant will fit in—will make a good match with the judge and the other law clerks.

2. Staff structure. The career clerk sits at the top of the hierarchy simply because of the informational advantage that he or she is likely to possess, even if there isn’t a formal structure (although sometimes there is). If there are externs, they are likely to work primarily for the law clerks. Staff attorneys (law clerks hired by the court rather than by individual judges) may also be used to draft of the simpler opinions.

3. Assignments. This works much as in the standard model, except that the career law clerk may have assigning authority and also review all opinion drafts by the one-year clerks before they’re shown to the judge. The judge or more likely the career clerk may assign cases in specialized areas that generate an especially large number of cases, such as immigration, habeas corpus, and social security disability) to a particular clerk who has relevant expertise, such as the career clerk.

4. Before oral argument or submission on briefs. Judge is likely to discuss a case before oral argument only with the law clerk who worked on that case, but generally all the clerks attend the oral arguments unless they’re in a distant place.

5. After oral argument or submission on briefs. The judge reports back to the clerks on what the panel decided. The clerks then begin drafting the opinions assigned to their judge, based on the bench memos they did. Each draft opinion then goes to the judge either directly or via the career law clerk. As in the standard model, other clerks will do the citechecking and proofreading after the opinion has been approved by the judge and is ready to be circulated. Early in the year, when the one-year clerks are new, the career clerk is likely to play a larger role in the editing process than later in the year, when the new clerks have gained experience.

6. Atmosphere. The atmosphere is likely to be more formal in the hierarchical model, with the senior clerk taking on primary responsibilities for interactions with the more junior clerks. Sometimes, the secretary may serve as a conduit for
communications between the clerks and the judges. Size of staff and hierarchical structure within staff (career versus one-year clerks) are likely to be correlated with formality.

7. Incentives. Judge may implicitly hold out the prospect of job recommendations for the best performing clerks (to the Supreme Court, the Solicitor General’s Office, a U.S. Attorney’s Office, or some other high status job) or (though this is rare) may hold over the clerks that threat that they might be fired.

8. Formality. There is likely be a high degree of formality in terms of matters such as how the judge is referred to ("judge"), interactions with the judge (limited), dress code, work hours, and vacation days.

9. Secrecy. There is likely to a strict code of secrecy regarding all matters having to do with the judge, ranging from how the office is managed to discussions about cases. Failure to comply with the codes can result in ostracism from the judge and the network of former clerks.

10. After the clerkship. Periodic reunions are likely, as is a network connecting the former clerks. Judge will probably have a dedicated wall in the common area of the office with pictures of the former clerks, or an album with those same types of pictures. And there is likely to be a strong network among the former clerks.

**Deviations from the Basic Models -- The Idiosyncratic Judge**

The models described above are necessarily stylized. Many judges vary from them in some way or the other, which we’ll now describe.

1. Selection of clerks.
   a. School preferences. Some judges prefer particular schools—so much so that they may hire more than half their clerks from those schools. Others may toss out all applications from particular schools. Preferences for particular schools sometimes result from the judge’s placing a high level of trust in one or two faculty members. Or they may feel an obligation to the local schools in their circuit or city or may have close ties to their alma mater or to a school at which they teach part time. A judge who sees clerkships as valuable training opportunities that should not all go to the students of elite institutions may hire some of his clerks from lower-ranked schools.
   b. Determining fit. Some judges emphasize the importance of a law clerk’s fitting in with the culture of the office. Typically, the interview and recommendations from trusted law professors are the judge’s basis for determining fit, but some judges go further and have their current law clerks investigate the final ap-
plicants by doing further research, such as talking to the applicants’ classmates at law school to find out what they are like to work with.

c. Writing samples. Some judges place so much weight on writing that they may instruct applicants to submit only writing samples that have not been through any editing process by a law review editor or anyone else. A judge who cares a great deal about consistency in his opinions, and who delegates much of the writing, may try to determine whether the clerk applicants have familiarized themselves with the judge’s writing style in past opinions.

d. Clerk ambitions. The judge may have a preference for clerks who plan to go into public interest work, who wish to work in the local area or who have ambitions of becoming legal academics. This preference may be a function of the kinds of clerk the judge feels comfortable with or may be tied to the kinds of clerk the judge feels an obligation to provide a valuable training opportunity to. Some judges may seek out clerks who have ambitions of clerking on the Supreme Court because the judge wants to develop a reputation as a “feeder”, which in turn will produce higher quality clerk applicants.

e. Team dynamics. A judge may want to have one two-year clerk and three one-year clerks, or two former district court clerks and two newbies, in order to smooth the transition from one year’s law clerks to the next year’s clerks. Others want little overlap between groups of clerks, so that the judge himself sets tone and agenda rather than the prior clerks. Judges may also seek to create a team of clerks that will have a diversity of background experiences, especially experiences that differ from his. The judge may also want clerks who he will be confident will get along not only with him but also with each other.

f. Hiring from the trial courts. Some judges want one or two of their clerks to have had a year of experience clerking on a trial court. Some judges have preferences for a particular trial judge or judges and may even make their offer of a clerkship contingent on the applicant’s landing a job with a particular trial judge. Some judges, however, regard a district court clerkship as a negative in an applicant for a court of appeals clerkship.

g. Test questions. A few judges pose test questions for the applicants, whether to test the legal skills of the applicants, their ethical sense, or even their knowledge of trivia or pop culture. The judge may also want to know whether the applicant has a specific interest in this judge and such a judge may inquire into the clerk’s knowledge of his opinions.

2. Staff structure.

a. Externs. Some judges ask externs to do the first drafts of bench memos, which will be reviewed by the law clerks before they are given to the judge. The goal is to free up the time of the law clerks to focus on opinion drafting.
b. Career clerks. Some judges who have career clerks have those clerks provide training and guidance to the one-year clerks. Judges may vary over their judicial careers in terms of preferences for a career clerk. Some will have a career clerk early in his or her career, but dispense with them later as the judge becomes more experienced or fears excessive delegation of his judicial responsibilities to the career clerk. Others hire a career clerk as they become more senior and feel that their energy and ability are declining.

c. Secretaries. For some judges the secretary plays an important managerial role. The secretary may interview the clerkship applicants, help them learn about the judge’s preferences and habits, maybe even help them interpret and negotiate the judge’s moods, and eventually organize reunions and keep the judge in touch with former clerks. At the other extreme, a judge may dispense with the traditional secretary and instead hire an aspiring law student—someone able both to perform administrative tasks and engage with the cases substantively (perhaps doing a final proofread of opinions before they leave the chambers to make sure they are readable by nonlawyers). Unlike the traditional secretary, who is a career employee, this new type of assistant is a short-term employee, staying for no more than a couple of years before heading to law school.

d. Keeping tabs. Some judges require weekly reports from their law clerks regarding the clerks’ progress on the cases assigned to them. Others may use online charts, or a whiteboard in the common area in the office, that displays the clerks’ individual assignments and deadlines.

3. Assignments. No significant deviations from the models described above.

4. Before oral argument or submission on briefs.

a. Guidance for the bench memo. Some judges may take a quick look at the briefs and draft a short memo (a page or so) to guide the clerks on how to craft the bench memo. Some judges want just want a short note from the clerk, sometimes as short as a page. Some judges will edit the bench memo in order to facilitate its eventual conversion (should the case be assigned to the judge) into an opinion. On circuits where the bench memos are shared across the judges on the panel, the question of whether the judge was involved in the production of the bench memo can be an important signal of the judge’s views to the other members of the panel.

b. The pre-argument moot. Some judges ask their law clerks to defend their recommendations, before oral argument, concerning how they think the judge should vote to the other clerks and any externs. Such “moots” can last from a few hours to a day or so. They are thought to promote teamwork among the clerks.

c. Folders for the bench. In addition to or in lieu of bench memos clerks may be instructed to prepare a package of materials (sometimes called a “goodie basket,” or just “book”—and in fact it can be book-length) that the judge can read
before, and take with him to, oral argument. These folders may include key cases, relevant statutes, excerpts from the record and anything else the clerk thinks the judge might need, or that the judge has directed the clerk to include.

5. After oral argument or submission on the briefs.

   a. The starter memo. Some judges draft a memo for the writing clerk on how they want the opinion to look. A judge may also decide to do the facts section of an opinion to give himself control of the narrative, or instead draft the key analytical sections.

   b. Authorship preferences. Some judges write the easier opinions themselves because it can be done quickly and leaves more time for the clerks to work on the more difficult cases. Other judges may write the more difficult opinions because the clerks are inexperienced and lack the judgment to tackle difficult cases. Some do all their own dissents and concurrences because such an opinion is more personal (it is not a shared product of the panel) and therefore, these judges believe, need to speak in a more personal voice.

   c. The unused draft opinion. Even judges who write most or all of their opinions may ask each clerk to draft an opinion, usually at the end of the term, as a kind of reward for the clerk’s labors during the term.

   d. Discussions with clerks from other chambers. Some judges encourage or at least permit the clerks to discuss their views (and maybe even those of the judge) with the clerks for other judges, on the theory that such communications can lead to better decisions.

6. Atmosphere

   a. Elaborate reunions. Reunions vary in how elaborate they are. At one end of the spectrum are judges who have a dinner with their former clerks either in the judge’s city or with clerks in a city that the judge visits in which several of his former law clerks live. At the other end of the spectrum are affairs that can last multiple days and involve multiple meals, outings, and speeches. And some judges have not one but two reunions a year—maybe a picnic at the end of the summer to welcome the new clerks and say goodbye to the old ones and then a more formal one during the year.

   b. Other socializing. When judges travel to a different city with their clerks to hear oral argument, the trip can be an occasion for bonding. The judge may have multiple meals and perhaps cocktails with the clerks since they are all away from home. Sometimes a judge and his clerks may even get together for a social event with another judge and that judge’s clerks.

   c. Inter office socializing. Some judges may prefer their clerks have no more than minimal contract with clerks from the offices of other judges, disfavor inter-office socialization, and specifically bar communications with clerks in other offices about cases. At the other end, there are judges who not only encourage
their clerks to communicate with those in other offices, but organize social events that welcome clerks from other offices. Most judges do not make any of this explicit.

7. Incentives. No significant deviations beyond the basic models.

8. Formality. There are judges who utilize hybrid models in between the formal and informal. Judges may have special rules for how the clerks are to dress when they attend oral arguments (more formal) or how they are to refer to the judge in private (or in social settings where only the judge and the clerks are present) as opposed to in more public settings where other court employees are present (more formality in the latter settings than the former).

9. Secrecy. No significant deviation beyond the basic models.

10. After the clerkship. Most judges use the team or family metaphors to describe their offices. And most judges seem to take interest in the future careers of their clerks and regret it when clerks lose touch. Some judges regard the clerks, the clerks’ spouses and even clerks’ children (sometimes referred to as “grandclerks”) as part of the judge’s extended family. And in rare cases, a judge who has clerked before, may have his clerks join the reunions (and network) for his former judge.

Questions for Further Research

A number of the judges in the course of being interviewed expressed interest in learning more about certain aspects of judicial staff management. These may be areas where the Federal Judicial Center, or law school professors, may be interested in conducting research, which would be valuable to the judiciary.

1. Do different judicial management practices influence the quality or quantity of judicial output? The answer might be no, on the theory that each judge adopts the management scheme that is optimal for him or her, given circuit rules and culture, the judge’s background and experience, the judge’s personality, and so forth. Or the answer might be yes—after correction for other factors, different models of judicial management (for example, whether a judge’s law clerks include a career clerk as well as one-year clerks) may vary in quality as measured for example by number of citations to a judge’s opinions or the speed with which the judge issues his or her opinions.

2. The economic value of a clerkship. Many judges whom we interviewed were curious about whether we knew (or planned to investigate) the economic value of a judicial clerkship to a young law student. Versions of this question included whether the value of clerkships is a function of the prestige of the court on which the clerk serves or the quality of training he receives from his judge, and whether
clerkships were of greater value to students intending to be litigators rather than transactional lawyers.

3. What do the trial judges do? Some judges expressed surprise that we were not studying the management practices of district judges. District judges have heavier caseloads on average than court of appeals judges, yet smaller staffs. Adjustments they make to handle their higher ratio of cases to staff might provide information valuable to appellate judges.

4. The shared bench memo. In a few circuits, bench memos are shared among judges. Many judges disapprove of the practice because of the incentives it creates for free riding, the extent to which it involves delegation of power to the clerks, and the social pressure to share (sharing is not mandatory).

5. Reunions. Many judges were curious about the attitudes of their colleagues—particularly those in other circuits—toward clerk reunions.
Appendix

What follows below is an example of the email we sent to judges to ask them if they would speak to us. If we knew the judges personally though, or had acquaintances in common, we modified the email appropriately.

Dear Judge:

I am a faculty member at the Duke Law School and am writing to you in relation to a research project that I’m working on with Judge Richard Posner. The project on which we are working is one on which information is not easily available and we are hoping to collect it from informal (and confidential) conversations with a subset of judges. My aim in writing you is to ask whether you would be willing to talk to me regarding this project.

The aim of the project is to provide, for the benefit of federal judges, especially but not only newly appointed ones, information about the different ways in which judges manage their staffs, consisting primarily of law clerks. We are interested in such questions as how many law clerks a judge has, how he or she selects them, their terms, whether the judge has a permanent clerk (or clerks), or a senior clerk, how the judge organizes and supervises and divides up the work among the clerks, whether the judge has interns and/or externs besides the clerks, if he is a senior judge how if at all his judicial management system has changed from when he was an active judge. The goal of the project would be to classify judicial management styles or systems in a few different categories, and to try to induce the Federal Judicial Center or some other body to distribute the results of our study to all federal judges.

Our "survey" will be informal, consisting of short personal interviews (no written survey), unrecorded, with no identification of the judges interviewed. We do not intend to offer our personal opinions, or indeed any other opinions, on which management style or system is best. We suspect there is no "best," that variance in docket, location, judge’s age and background, and other factors determine which style is best for a particular judge in a particular court. But we think judges may benefit from a catalog of the different styles--not just a newly appointed judge, but also an experienced judge who may nonetheless pick up useful tips from seeing the variety of styles "on offer," as it were.
As a final matter, I should emphasize that we will neither identify the judges we interview (either by name or by indicating facts that might enable their identification), nor offer any judgments on the merits of different judicial management styles. We just want to exhibit the variety of those styles, as providing possibly useful information to the federal judiciary and to lawyers who practice in the federal courts.

Regards,

Mitu Gulati
Professor of Law
Duke Law School