Designated Hitters, Pinch Hitters, and Bat boys: Judges Dealing with Judgment and Inexperience, Career Clerks or Term Clerks

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Abstract

This paper explores the relationship of the law clerk to the judge and why judges decide to make their term clerks career clerks or switch from career clerks back to term clerks. In exploring this issue, 26 judges were interviewed and provided a broad set of reasons both to have a career clerk or to stick with term clerks. The decision to hire a career clerk rests on serendipitous events while the choice to switch back to term clerks is deliberate. In the game of baseball the manager in the World Series has to change tactics when considering how to use the designated hitter. The district judge hiring law clerks has to consider how that person is to be used, as a designated hitter, a pinch hitter or a bat boy.

Experience, wisdom, judgment, maturity, and even humility—the aspirational qualities for judges—are not often found in new law clerks. Delegating the judge’s responsibilities to such a person creates risks for the system.

In my estimation, there is a professional service aspect of a judge’s work with law clerks that necessarily suffers to the extent that a judge works with a career law clerk. Indeed, to that extent, this aspect of the work ceases to exist, by definition. The career law clerk is not being groomed for some other service to the society; he or she will represent no clients in that court or any other; such clerks will do nothing as lawyers except to serve as law clerks. By contrast, the clerk who has worked at the judge’s elbow for a year or two will take that training to the next position in the legal profession, likely as a practicing lawyer and sometimes eventually as a judge. The profession and the common good will be advanced.2

I. Introduction

The role of the law clerk is directly related to the court and the judge for whom the clerk works.3 August is usually when new law clerks start work at the courts of appeals. It is also when new law clerks arrive at the district courts, fresh out of law school. The phenomenon is described as follows:

It is all too obvious that young clerks, whose only experience is the sometimes unreal world of the academy, are persuading judges of matters that the litigating parties have never had an opportunity to address and expose. Indeed, before receiving the court’s opinion the litigating parties do not even know that the matters are being considered, nor do they know that a clerk holds the beliefs that ultimately are used against them.4

2 Joseph D. Kearney, A Truth About Career Law Clerks, Marquette Lawyer 30 (Fall 2015).

3 The role of the clerk varies considerably and is defined by the position occupied, i.e. Supreme Court law clerk, Court of Appeals law clerk, District Court law clerk.

There is a wealth of literature on the role and influence of the Supreme Court law clerk, from an ideological perspective. There is also material regarding the role of law clerks on the courts of appeals, which looks to some extent at the ideological compatibility with the hiring judge as well as the potential influence of law clerks in the decision-making process. A review of the literature reveals not much information concerning the role and influence of law clerks at the federal district courts. Regardless of the court, there is a general notion that the first individual in the judicial decision-making process to look at an issue or legal problem can assert significant influence on the case outcome. Judge Richard Posner acknowledged this in an excerpt from *The Federal Courts: Crisis and Reform* when he noted “it is generally true that whoever does the basic drafting of

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a document—a judicial opinion or anything else—will have a big impact on the final product.”

A consistent refrain exists about the litigious nature of American society. The idea suggests that every issue that cannot be resolved by the political process ends up being resolved by or kicked to the courts. The notion provides ammunition for the ideological and political arguments about the role of the courts generally in our constitutional democracy. Implicit in this court resolution is the idea that it is the judge who writes and decides. But the literature that analyzes the decision-making process, whether in state or federal court, does not necessarily


10 Judge Posner observed, “The problem is that, except in the Supreme Court, which controls the major part of its workload (the hearing and decision of the cases that it accepts for plenary review), the caseload per federal judge has risen to the point where very few judges, however able and dedicated, can keep up with the flow without heavy reliance on law clerks, staff attorneys, and sometimes externs too.” Judge Richard A. Posner, “The Rise of the Law Clerk,” 3 The Long Term View: A J. of Informed Opinion 23, 23 (Spring 1995) (excerpted from R.A. Posner, The Federal Courts: Crisis and Reform (1985)).


12 “The public naively assumes that it is the judges who decide cases and explain their results. . . . A clerk ought to be someone whose work is not separate and apart from what the judge is doing, but rather an assistant in the decisional process that is truly the judge’s.” John G. Kester, The Law Clerk Explosion, 3 The Long Term View: A J. of Informed Opinion 14, 16 (Spring 1995).
address the judge as writer, particularly in the federal district court.\textsuperscript{13}

The number of cases in the courts compared to the number of judges makes one pause to ask how does a particular judge work so that fair consideration by the judge is given to all the participants?\textsuperscript{14} The Herculean task of reading and


\textsuperscript{14} The statistical number of cases resolved in federal courts at every level is set forth in the following table:

<table>
<thead>
<tr>
<th>Court</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal District Court Civil</td>
<td>294,336</td>
<td>285,260</td>
<td>271,950</td>
<td>303,820</td>
</tr>
<tr>
<td>Federal District Court Criminal</td>
<td>79,551</td>
<td>75,290</td>
<td>69,449</td>
<td>66,193</td>
</tr>
<tr>
<td>Federal District Court Total Nationally</td>
<td>373,887</td>
<td>360,550</td>
<td>341,399</td>
<td>370,013</td>
</tr>
<tr>
<td>9\textsuperscript{th} Circuit Appeals</td>
<td>11,975</td>
<td>12,438</td>
<td>12,539</td>
<td>12,696</td>
</tr>
<tr>
<td>Federal Appeals Nationally</td>
<td>55,753</td>
<td>56,624</td>
<td>56,453</td>
<td>55,623</td>
</tr>
<tr>
<td>U.S. Supreme Court Petitions</td>
<td>7,713</td>
<td>7,509</td>
<td>7,376</td>
<td>N/A</td>
</tr>
<tr>
<td>U.S. Supreme Court Written Opinions</td>
<td>64</td>
<td>73</td>
<td>67</td>
<td>N/A</td>
</tr>
</tbody>
</table>

While it is not within the matters considered here, the state court numbers are
deciding at the district court is almost impossible without the aid of law clerks.\textsuperscript{15}

Likewise, how much time is available for reflection and thick analysis of cases by judges on the courts of appeals and the law clerks working for them when the number of cases is so great?\textsuperscript{16} Although the reading and writing of the district court is cabined by time constraints as well as the volume of material to be astronomical comparatively speaking. As an example, for state courts in the year 2012, there were 17.9 million civil cases, 19.3 million criminal cases, 5.2 million domestic cases, 1.7 million juvenile cases, 51.9 million traffic cases, totaling 96.1 million cases handled by state courts in the year 2012.

\textsuperscript{15} Most federal district court judges have two law clerks, sometimes three in the absence of a Judicial Assistant. Each of the law clerks are usually busy reading, writing, and doing case management work. The chambers work is assigned evenly by even and odd case numbers. Additionally there is usually one extern and one clinical law student, each of whom also reads and writes. The question that arises is how much can the judge read and how much must the judge rely on staff assistance when the focus of the district court is to: 1) manage cases; 2) decide issues expeditiously; 3) conduct hearings, changes of pleas, sentencings, and preside over civil and criminal trials; 4) make an appropriate record for appellate review; and 5) oversee the work of the law clerks and law students working in chambers.

\textsuperscript{16} In the Ninth Circuit, there are 29 active judges and 15 senior judges. Disregarding duties and obligations of judges on the Circuit other than reading and writing, one could easily conclude they are tasked with a Sisyphus-like job. For the period between March of 2013 and March of 2015, the Ninth Circuit judges filed written memorandum dispositions in 3,156 cases, and published opinions in 1,114 cases. The Ninth Circuit allows opening briefs not to exceed 14,000 words or 30 pages. \textit{See} Fed. R. App. P 32(a)(7)(A), (B)(I). Response briefs are subject to the same limitation. \textit{Id.} Reply briefs can be 15 pages or one-half of the principal brief. Fed. R. App. P. 32(a)(7)(B)(ii). In rough numbers then, just for those cases where there is a written disposition or published opinion, a total of 160,125 pages of briefs must be read, or on average 3,639 pages, that each circuit judge must read annually if the work load for active and senior judges is equal and they don’t do any other reading and don’t read any part of the record. Furthermore, these numbers do not take into account motions panels, staff memos, law clerk memos, and draft opinions or written dispositions that must be read and edited, not to mention reading cases from the Ninth Circuit, from other circuits and from the Supreme Court. So the question becomes who is doing all the reading and drafting, including who is on top of the record?
consumed, the law clerk is central to this judicial process.\textsuperscript{17} Strangely, the number of law clerks available to help a judge is inversely related to the number of cases the judge must decide. This may say something about the priority of factual truth and legal discipline. Nevertheless, it is clear that law clerks, whether term or career, are critical to judicial decision-making. How do judges deal with the unique role that law clerks play?

II. The Role of Law Clerks in the Courts

What judges do is obviously related to whether the judge is a trial judge, an appellate judge or a justice on a supreme court. For the trial court, judges supervise the trial of facts before juries, act as fact finders, and decide questions of law upon various motions in addition to chambers management and frequent participation on various committees, national or local. The workload is heavy and it would be impossible for one person to efficiently accomplish all of the work and write all of the opinions given individual case loads.\textsuperscript{18} But, there is an additional role for judges that relates to their law clerks. They are teachers, for both the

\textsuperscript{17} Maintaining Control of the Judiciary: An Interview with Judge Abner J. Mikva, 3 The Long Term View: A J. of Informed Opinion 9, 12 (Spring 1995) (“Courts would not function nearly as well if they didn’t have clerks.”).

larger world and those who work with them. Even so, many judges disagree and view their duties, not as pedagogical, but as managers for efficient case resolution.

Often times the judge, with the aid of the law clerks, is left pondering what the law is, given the facts presented in the case and the issues the court is asked to resolve. Too frequently the quality of the legal work is sub par when contrasted with the quality of most legal work at the courts of appeals. “If they [law clerks] lack the time they will have to depend on the briefs; and at least at the district court and court of appeals levels this will mean, all to [sic] often, dependence on inadequate research by the lawyers.” The appellate process builds in time for thoughtful reflection and analytical focus on what happened in the district court. The district court, on the other hand, must keep the trains of litigation running while deciding cases. The trial judge has the responsibility to provide answers,

19 See Joseph D. Kearney, A Truth About Career Law Clerks, Marquette Lawyer 31 (Fall 2015).

20 This is a personal observation based on sitting as an appellate judge and as a trial judge in different circuits.


22 “Law clerks in the lower federal courts are a more significant change than at the Supreme Court. The Supreme Court, after all, touches only a very few cases each year even though its opinions permanently shape the law. The lower courts are where the action is.” John G. Kester, The Law Clerk Explosion, 3 The Long Term View: A J. of Informed Opinion 14, 17–18 (Spring 1995).
not theory, to the litigant’s factual and legal disputes. “A district judge cannot hide behind his law clerks in the actual conduct of a trial. He must rule on matters on the spot, and if he is incompetent this will show up much faster than incompetence on the appellate bench.”

The experience of the new district court law clerk fits hand in glove with the influence the clerk may have on the district judge’s decision making. If the judge relies on early work of a new law clerk, without a degree of skepticism, is the judge using the clerk wisely? This is where the question of how the district judge staffs the judge’s chambers comes into play.

Historically, every clerkship was shorter in tenure to that of the judge, a fact serving to keep “the roles of clerk and judge in proper perspective.” This emphasized the mentoring relationship between the new lawyer and the experienced judge. But there is another relationship to consider, that is the


25 Most judges believe mentoring is a part of their job description. “[J]udges view law clerks not only as important subordinates but as fledging [sic] lawyers to whom a duty was owed to mentor and educate.” Todd Peppers, Michael Gils & Bridget Tainer-Parkins, Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks, 71 Alb. L. Rev. 623, 637 (2008).
relationship between the career clerk and the judge. “The qualities and motivation of law clerks differ markedly with their tenure.”26 The relationship of the career clerk and the judicial officer is often more akin to a law firm where there are partners, junior partners, associates, and paralegals. Career clerks are selected for reasons of efficiency, not necessarily creativity; practical court experience as a clerk and evidence of productivity in a bureaucratic environment play a more important role than the notion of mentoring.27 What this dynamic exposes is the tension between the judge who mentors lawyers for public service, and the judge who hires for efficiency and compatibility. Each has an impact on how new clerks are treated and consequently on the judge’s decision to choose term over career or the other way around.28

Trial courts employ different staffing models than appellate courts. The


28 “Clerks with longer term appointments would surely become more efficient and knowledgeable. Extending clerks’ tenure, however, might also have drawbacks more far-reaching than shrinking the number of clerkship openings. For example, clerks hired for longer terms might be more likely to exercise undue influence with their bosses.” Sean Donahoe, *Behind the Pillars of Justice: Remarks on Law Clerks*, 3 The Long Term View: A J. of Informed Opinion 77, 78 (Spring 1995).
Supreme Court rarely hires law clerks directly from law school but usually has law clerks with at least one year’s experience clerking at a court of appeals. In an interview with retired Judge Abner Mikva, he noted feeling anxiety when he clerked at the Supreme Court, “here I was, still wet behind the ears, legally, writing these memos that would help shape the questions for the judge.”

The courts of appeals take the neophyte with no experience, usually getting four new law clerks each fall. District courts occasionally take clerks with experience, usually straight from law school, and generally have two clerks, three if the judge decides a Judicial Assistant (JA) is unnecessary. District judges staff with either two term clerks or one term and one career. Those with two term clerks stagger their start dates.

The Judicial Clerkship Handbook points out that the law clerk’s daily work also differs from court to court and from judge to judge. The primary role of any trial court clerk is to assist the district or magistrate judge for whom the clerk

29 Maintaining Control of the Judiciary: An Interview with Judge Abner J. Mikva, 3 The Long Term View: A J. of Informed Opinion 9, 10 (Spring 1995).

30 The Judicial Assistant is one of three positions a district judge is allotted for staffing chambers. The JA is in essence an office manager. There is a salary cap on the position. Some judges have hired three law clerks and eliminated the JA position.

31 Post-Graduate Judicial Clerkship Handbook (2005), Office of Career Services, Hofstra University School of Law.
works in operating chambers efficiently under considerable time constraints and
tremendous work loads. The principle duties of the law clerk include conducting
legal research, editing, drafting opinions, checking citations, preparing
memoranda, performing legal analysis, and attending oral arguments.32

Trial court and appellate court clerkships on both the federal and state
levels differ significantly. A court of appeals clerk is involved in every
phase of the appellate process, from the screening of cases to be heard
by the court to the writing of opinions. Appellate court work is
generally less hectic than trial work, but nonetheless quite busy. Although clerks in both types of courts have the responsibilities listed
above, the trial-level clerk performs a wider variety of tasks associated
with the litigation process.33

What is striking about this description of the appellate and trial court clerking
positions is the presumption that a person with a formal legal education, totally
lacking in experience with the law, and usually with life’s experience, is
positioned to assist an appellate judge in reviewing the work of a trial judge.34

“Any solemn chump can get away with being an appellate judge, but it takes an

32 Post-Graduate Judicial Clerkship Handbook 5 (2005), Office of Career Services,
Hofstra University School of Law.

33 Post-Graduate Judicial Clerkship Handbook 5 (2005), Office of Career Services,
Hofstra University School of Law

34 With the advent of technology in the courtrooms, many district judges and magistrate
judges have their law clerks attend or observe the proceedings and, with the benefit of Instant
Messaging, communicate directly with the judge during hearings or arguments. This is not likely
with judges and law clerks on the courts of appeals.
honest-to-God he-man to be a good trial judge.”

There is a mistaken perception by some judges, depending on the role of the judge, that smart new lawyers have the necessary judgment to perform the tasks and responsibilities given them, with little or no training in chambers. The problem is particularly acute when the new law clerk first assumes his or her position with the judge. This is where the “August Effect” comes into play. Incidentally, the medical profession has identified the “July Effect,” which in principle is the same. July is a time where most mistakes in teaching hospitals occur when the new “doctors” or interns move from a position focused on education to the position of first-year residents. Another analogy is that of flight training, which exposes the problem of relying on knowledge alone as the criteria in measuring the ability to accomplish sophisticated and difficult tasks in the


absence of experience. Without skill and experience, in addition to knowledge, judgment is much more likely to be faulty or in error. Whether it is the “August Effect” in law, the “July Effect” in medicine, or a disastrous aircraft incident, there is the need to recognize the reality of inexperience and to incorporate specific training or direction from the judge to minimize the impact that a new law clerk may have on the judge’s decision-making process.

 Judgment in any profession or in any activity is specifically related to a series of evaluations that are made over a period of time. Good judgment guarantees the positive aspects of the undertaking, and it is an intangible component of what makes a good law clerk. Brand new law clerks who are unaware of the complications of procedural law and substantive questions but who actually relish the opportunity to question the work of lawyers are likely to provide a judge advice that should be viewed skeptically.\textsuperscript{37} Judgment is often equated with common sense. However, common sense usually derives from experience, and it is not a part of procedural or substantive law nor necessarily the traditional world of law. Judgment stems from recognizing and analyzing

\textsuperscript{37} By analogy, “Airmen who are either unaware of the potential hazards or who actually relish the opportunity to take unnecessary risks are those likely to be involved in judgment-error accidents.” \textit{Judgment Training Manual for Student Pilots: A Cooperative Project by the: Federal Aviation Administration Transport Canada General Aviation Manufacturers Association}, at 2.
available authority, applied to facts, followed by a rational evaluation of the alternatives available to making a correct legal decision. As one judge put it “term clerks are not worth a hoot because they have no wisdom.”

Given the role law clerks play in assisting the appellate judges, the district judges noted that the “August Effect” can play a big role when inexperienced, but well educated, appellate law clerks are reviewing the work of trial judges. The lament of the district judge upon getting reversed by the court of appeals is usually something like, “they weren’t looking at the same case I was.” Or, the judge on being affirmed says, “I was affirmed by the circuit, and I still think I am right.” Most of the judges interviewed held a strong opinion that the “August Effect” is prevalent at the circuit courts of appeals. The general view of the trial judges interviewed is that the judges on the courts of appeals are overly reliant on law clerks and do not have career clerks nor do they have staggered two-year term clerks. This possible reality has not gone unnoticed, as one circuit judge lamented

38 Judgment Training Manual for Student Pilots: A Cooperative Project by the: Federal Aviation Administration Transport Canada General Aviation Manufacturers Association. This description is an adaptation of the argument regarding judgment involved in training aviators.

39 In their article Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks, the authors found the opposite when they observed that district judges do not believe they are overly dependent upon their law clerks, although the respondents were much less willing to state whether their brethren in the federal appellate courts leaned too heavily on their clerks. Todd Peppers, Michael Gils & Bridget Tainer-Parkins, Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks, 71 Alb. L. Rev. 623, 637 (2008).
the 2007 policy of one career clerk for each judge, district or appellate. She noted that the limitation on career clerks would negatively impact the quality of work that comes from the court of appeals.\(^{40}\)

That being said, what is of particular importance here is that the judges interviewed all believe that the “August Effect” is real. One judge said it is like the lyrics of a country western song, “I wish I knew then what I know now that I didn’t know then.” A new law clerk generally has anxiety and an uncertainty the judge needs to address. It stems from lacking real life court experience. As a consequence, new law clerks need greater supervision and more feedback than either an experienced law clerk or a career law clerk. The judge needs to provide more hands-on supervision in training with a new term clerk. Treating a new term clerk as an equal to the second-year term clerk or the career clerk is a mistake. As discussed below, there are strategies judges use in anticipation and recognition of the “August Effect” to minimize the consequences of the new term clerk who can be accurately described as a “deer in the headlights.”

\section*{III. Interviews and Findings}

\(^{40}\) Ninth Circuit Judge Consuelo Callahan is quoted as saying, “There is a big difference between hiring people just out of law school and those with a lot of experience.” On the other hand, U.S. District Judge Charles Breyer suggested that judges overuse career clerks and that recent law-school grads go on to serve as ambassadors for the judiciary and provide new insights and fresh views. See Peter Lattman, \textit{Career Law Clerks v. Recent Law-School Grad Clerks}, Wall St. J., August 30, 2007 (referring to a story from the Natl. L. J. (August 30, 2007)).
I conducted 26 separate interviews of judges regarding the “August Effect” and how it impacts the choice of career or term clerks in their chambers. Nine of the interviews were recorded with the permission of the interviewee judge. The other interviews were by telephone or in person where I took extensive notes but which revealed the same kind of views as those in the recorded interviews. The methodology began with the identification of a willing “switcher” judge, that is a judge who either started with career clerks and switched to term clerks, or a judge who started with term clerks and switched to a career clerk. Once a switcher judge was identified, the first step was to contact the judge by email, or by phone to find out the judge’s willingness to be interviewed. In that contact I explained the “August Effect.” I made sure that each of the judges was a “switcher.” After my initial contact with the judge, I sent a follow-up email that was more detailed about the interview and my thesis, and that agreed to a time and date at the interviewee judge’s convenience. On the agreed date, I asked permission to record the interview with a promise of no attribution or identifying information to be used. All of the judges agreed to be recorded without hesitation. No judge held back on any questions I asked. After the second contact, I forwarded an

41 Use of the “switcher” judge avoids complicating questions of proxy because the “switcher” is the same judge so getting at why the switch was made from term to career or vice versa is a good study because the judge who switches is a clone of himself or herself.
“Interview Questionnaire” to the judge. (Attached as an Appendix.) The purpose in forwarding the questionnaire was to focus on the particular judge’s reasons for switching. At the beginning of each recording, I read the “Human Research” waiver and gave the interviewee my advisor’s name if the judge felt there was a problem. I advised all judges they could terminate the interview at any time. (Attached as an Appendix.) I recorded each of the interviews on an old iPhone 4. At the conclusion of the interview, the digital recording was sent to a court reporter who volunteered to transcribe the interview and remove all names regarding the judge and any names or places that could be associated with the judge. The interviews I did not record essentially followed the same process. After the interview I immediately reduced my hand written notes to a type written narrative of the interview.

I began all interviews by asking the judges to explain how they ended up on the federal bench. I did this for two reasons, my background research on the interviewee confirmed my relationship with the judge, and secondly, as an icebreaker, most judges like to explain how they reached the federal bench.

The backgrounds of the various judges provide context for how each determined not only to set up chambers, but also how chambers would operate. Six of the judges had military backgrounds after college; four before attending law
school and two who were JAG officers with the armed forces. The legal experiences ranged from private practice in law firms that emphasized civil defense litigation, public service including criminal defense work, plaintiff’s litigation, and, in one instance, setting up his own firm immediately out of law school. Five of the judges are, or were, magistrate judges, four of whom later became Article III district judges, and five were state court judges before being appointed as Article III judges. Judicial experience ranged from six years to forty years. Interviews were with current and former magistrate judges, active Article III judges, senior Article III judges, and retired Article III judges. The judges were educated for the most part at local or state law schools, one judge being a graduate of an elite law school. Male and female judges were interviewed as were minority judges. All of the judges had been active politically while four had been law clerks to federal judges. Of the Article III judges, some were appointees of President Ronald Regan, one was appointed by President Jimmy Carter, a couple

42 The judges appointed by President Regan each made a point of telling the story of the individual call they received from the President, asking if they would permit the President to submit his or her name as a prospective Article III judge. None of the judges appointed by the other Presidents receive the honor of such a call. There are not so many Article III judicial appointments that making such a call would significantly impede on the President’s time. President Regan’s practice should be a regular practice of any President appointing someone to a lifetime office. One judge had prepared a secretary, soon to be JA, to capture the call on film. As the nominee stood at attention when the President called, the office quieted and listened as the President asked his nominee’s permission to submit the nominee’s name to the Senate. All went well but for the duty assigned to the soon-to-be JA. The secretary forgot to turn on the camera.
were appointed by President George H.W. Bush, several by President William J. Clinton, two by President George W. Bush, and three by President Barak Obama. The magistrate judges interviewed all matriculated to the bench by a merit selection panel of the district where they sit.

A. Law Clerks and Their Work in Chambers

1. Hiring Process

Many of the judges interviewed deemed OSCAR as not very helpful because it provides the judge too much information. The general practice followed by the judges is to have existing clerks narrow the field of potential clerks to a manageable number, and the judge weeds the potential law clerk list to those the judge wants to interview. The judges noted almost all who are interviewed are qualified for hire, leaving the judge to make what is frequently a visceral choice. Many of the judges look to local law schools. Grades are important, but they are not the only qualifier. Grades are mostly useful as a limiting factor in the selection of new term law clerks. One judge indicated that

OSCAR (Online System for Clerkship Application and Review) is the computerized database for clerk applications by which the Judicial Conference urges judges to use in considering law clerk applications.

This practice is quite different from the elite selections the Supreme Court and the courts of appeals engage in. Unlike the district courts, those courts seem to engage in a “best clerk” competition and seek law clerks with the best credentials and recommendations from feeder professors at the elite schools.
grades are an important indication of the ability to communicate while simultaneously being a reflection of intelligence. Several judges thought that unless the person was at or near the top of the class the applicant was not a good candidate for hire.

When first hiring term clerks it is common for the judge to go to law school deans and friends to find potential applicants. Some judges go to other judges seeking advice about hiring clerks and deciding if the clerk should be term or career.45 Several of the judges interviewed teach at a law school. Teaching provides an opportunity to observe the work of prospective clerks, to be exposed to their ability to think and analyze, and is, as one judge stated, like having a “farm team” to find clerks for the big leagues. Other judges looked to interns/externs as a pool for clerks. None of the judges seemed wedded to “elite” graduates to serve as clerks at the district court. While none of the judges said they looked for clerks with compatible ideological views as their own, at least one judge had a preference to hire a term clerk whose ideological views conflicted with his own. He noted it kept him “honest” and objective. The diverse perspective enured to the benefit of his chambers. On another occasion a seminar was being taught by an eminent but

45 Under current Judicial Conference policy a new judge is not allowed to hire a career clerk at the beginning of his or her service on the bench. The judge must wait at least three years before a qualified person can be promoted to career status.
conservative jurist who noted that he always tried to hire a “liberal” law clerk. But, he said, they had to meet his intellectual standards. He then went on to note he had been unable to find any qualified candidates. A recent paper found that law clerks tend to be disproportionately liberal, that judges tend to hire clerks with similar ideological perspective and that this was most pronounced in the Supreme Court while the least pronounced for district court judges.46

2. Work Assignments

The most common way to assign work in chambers, regardless of whether the judge has term clerks, career clerks, or a combination of both, is to assign case work to either law clerk based on an odd-even rule. That is, one law clerk is assigned all the even-numbered civil and criminal cases, and the other clerk is assigned all the odd-numbered cases. Some judges are very hands on and are very adept at using the CM/ECF electronic case filing system. When judges are tech savvy, they will usually triage how work is assigned. Judges may do some orders or docket management by text order themselves. They determine the complexity of a new case and may specifically assign the work to the career clerk based on their determination of how long the case may take, and how difficult or novel the

46 Bonica, Adam et al., The Political Ideologies of Law Clerks and their Judges 45 (Mar. 22, 2016).
issues in the case might be. When judges have a career clerk and a term clerk, attention is paid to the likely time needed to resolve the case from filing to trial and judgment. An effort is made to avoid assignment of complex or extended cases to term clerks because they may end their service before the case is over, which means reinventing the wheel. This kind of triage by judges is the secondary level of work assignment that compliments the odd-even system. Other judges rely on the JA to act as the office administrator and look to the JA to monitor chambers work.

One of the roles assigned to a career clerk is often to do the additional level of triage to refine assignments to the term clerk and to the interns/externs working in chambers. When this happens, the career clerk is also serving in a mentor role, assigning term clerks and interns/externs work in the areas of their known interests. There is an expectation among some judges that regardless of the assigned work, all of the clerks share their thinking on each of the cases and issues before the court, particularly in civil cases. One judge’s career clerk established a “peer review” by all of the clerks and externs in chambers to review each opinion, order or bench memo before it is given to the judge.

Regardless of the way work is initially assigned, all of the judges have a particular way that the law clerks work, as one judge noted “there are no
universals.” For instance, before a hearing the judge may get a notebook or packet from the law clerk. The notebook contains the pertinent pleadings and briefing together with a draft order. The judge may not read the draft order before the hearing, or if no hearing, before reading the briefs. Some judges outline the arguments of the parties and will not read any proposed order or opinion until after the hearing on a motion. Because of the volume of work several judges rely on the law clerk’s work and may not read briefs filed by counsel, instead being informed by bench memos, law clerk discussions and the law clerk’s draft orders. All of the judges work collegially with the law clerks on analyzing the arguments and positions of the parties. This is consistent with the findings of Oakley & Thompson where they noted that, at least in part, draft opinions by law clerks serve first as a discussion piece to enlighten the judge.47 One judge thought “the lawyers would be surprised to find out how much law clerks are actually doing” on motions the judge decides.

Ultimately the most common chambers arrangement for clerks falls into one of two categories. The first is the judge who has two term clerks staggered with two-year terms so that the rotation means there is always one senior clerk to help

mentor the new term clerk. The other is a chambers set up with one career clerk and one term clerk, again ensuring the judge that there is one person who knows the ropes and can mentor the new term clerk as well as interns/externs.\textsuperscript{48} Several of the judges have or had two career clerks. Up until 2007, Article III judges could offer each clerk the salary and benefits of career status. Many judges grandfathered term clerks in 2007 when the Judicial Conference changed the career clerk policy because of the budget crisis. In September of 2007 the Judicial Conference adopted the recommendations of the Committee on Judicial Resources to eliminate Leave Act coverage for non-career law clerks, to limit judges to one career law clerk per chambers, and to require a three-year qualification period before a term law clerk could be made a career law clerk.\textsuperscript{49} Because of the policy change, judges who had two career clerks could seek an “exception” to continue

\textsuperscript{48} There is no salary difference based upon the status of the clerk as term or career. The difference comes from longevity. The term for a term clerk is limited to four years. A term clerk starting right after law school graduation starts at a grade 11 ($59,246.00). The term clerk can be promoted to grade 12 after one year ($71,012.00). If the term ends at two years there are no more raises. If the clerk stays another year a performance raise can be granted by the judge to a grade 13 ($84,443.00). The top salary for a career clerk is grade 14 ($129,723.00) but it takes twenty-two years for a career clerk to reach that salary. If the clerk was hired before October 31, 1994, the top salary is $152,593.00.

\textsuperscript{49} One benefit judges could offer term clerk was to place them on the Leave Act. While this meant different accountability issues regarding vacations and other work requirements, in the end when the term clerk left the clerk could cash in unused vacation time, which meant that the departing term clerk usually left with a check for at least one month’s pay. \textit{See Summary of the Report of the Judicial Conference Committee on Judicial Resources}, DT: Committee Report, CR-JUDRES-SEP 07 (September 2007).
manning chambers with two career clerks so long as the judge applied for the exception before January 30, 2009. If the judge made the requisite application for exception it was granted; consequently many judges grandfathered the two career clerks, including judges interviewed for this paper. The interviews established two judicial philosophies on the kinds of law clerks a judge should retain. One view says a judge should always have at least one career law clerk. The other view was expressed by a senior judge who noted “career law clerks are the worst thing to happen to the judiciary.”

3. Clerks’ Work on Different Types of Cases

Judges express greater confidence in a career law clerk’s work on complex cases such as environmental, multidistrict litigation, or patent cases. The confidence rests on the length of time the judge has worked with the career clerk. It comes from the judge who has learned to appreciate the career clerk’s thinking and writing skills. The career clerk in such instances has usually captured the ability to write in the judge’s voice. Judges who have been with career law clerks for any appreciable time find that the clerk “thinks like I do” and has captured the judge’s style and expression. Two of the judges who rely on long-term career

clerks noted that in exchanging drafts of opinions there is frequently an exchange of “external comments”\(^{51}\) to see if one or the other is actually reading critically what is written. Generally, with the notable exception of longevity, the judges saw no real difference in the work of career and term clerks. This observation may be accurate if it references only the structure of legal writing, but it undermines the arguments made in favor of career clerks over term clerks.

Non-jury cases require the presence of a law clerk. Judges use the law clerk as a scrivener for proposed findings of fact and conclusions of law and often discuss the credibility of witnesses and the evidence with the law clerk before rendering judgment. Non-jury trials are a very collaborative process that involves debate among the law clerk and the judge to help the judge refine the judge’s thinking. It is like a mini advisory jury\(^{52}\) trial, but ultimately it is the judge who makes the call, including issues of credibility and the significance of other evidence.\(^{53}\) The process is judge directed.

\(^{51}\) One judge referred to this process as giving alerts to the law clerk, or to the judge, when a zinger is put in the opinion. A note will accompany the text asking, “Is this a good idea?” Other judges call these statements or comments “judicial excited utterances.” That is a “statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.” See Fed. R. Evid. 803(2).

\(^{52}\) See Fed. R. Civ. P. 39(c).

\(^{53}\) See Fed. R. Civ. P. 52(a)(1) (“In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state conclusions of law separately. The findings and conclusions may be stated on the record after the close of evidence or may appear in
Judges often do not have a law clerk review the findings and recommendations of the magistrate judge, but perform that review themselves. In the words of one judge, “I wasn’t going to have a law clerk review the Magistrate Judge’s work.” This practice is not universal. The observation is at odds with the practice that courts of appeal follow where law clerks are generally reviewing the work of experienced trial judges and magistrate judges, even when the law clerk has no practical experience or judgment. The Article III judges with prior experience as a magistrate judge, or as a state trial judge, dispose of criminal matters orally, or through the judge’s own writing. When this happens, the law clerks edit what the judge has written from whole cloth. The edits are for grammar, blue book citations, logic and analysis, and most assuredly to question any “judicial excited utterances.”

There is a marked difference in criminal cases as opposed to civil cases in how the law clerks are used, but term clerks and career clerks are generally utilized the same. The distinction seems to be the judge’s personal experience at the bar or on the bench. Judges who were magistrate judges, or state trial judges, do not rely much on clerks when it comes to criminal matters. The reason is the judge has “been there done that” so many times that the judge has confidence that an opinion or memorandum of decision filed by the court.”
no help is needed from the clerks, especially term clerks who do not have any experience. It is an extension of prior state trial experience where the judge had no law clerk and was not required to give reasoned written opinions.

Another area where judges are disinclined to rely on the help of clerks, career or otherwise is in discovery disputes. As with criminal cases, there is comparatively little court writing and consequently less reliance on clerks. Some judges cut off discovery disputes by making themselves available by telephone to nip the fight in the bud. However, there were a few judges who used career clerks as nominal avatars for the judge when dealing with discovery problems. This idea is based on the belief that the career clerk knows the judge so well, and knows how the judge thinks, that the career clerk can talk to the lawyers having discovery difficulties and generally know what the judge is likely to do. None of the judges vested this kind of responsibility with term clerks.

In thinking about questions to ask the judges interviewed, I tried to focus on the functional relationship between the judge and law clerks, term and career. I can recall my own experience as a law clerk to a federal judge and what my unrealistic expectations about the job were when I went to work. I naively thought I would be charged with research to assist the judge in his writing, that I would check for proper citation and Blue Book compliance, and that I would undertake
assigned tasks but only as a research assistant to the judge. That experience is the
 genesis of the “August Effect.” Clearly I had no idea about what law clerks really
do, and I immediately recognized the enormity of expectation regarding writing
and advising the judge, matters I was not prepared to address. Nonetheless, I did
find one aspect of the law clerk’s job that fell squarely within my perception of the
judge’s role and my own as a law clerk. Sentencing was the one thing the judge
did entirely on his own, the part of his job that as a law clerk I could offer no help.

Sentencing is the solitary act that district judges perform without the help of
law clerks or any other staff. It is the stuff of working weekends and nights to
understand who the defendant is, what the crime is and how the sentence will
impact the various entities that the judge must consider when rendering judgment
against another human being. Taking liberty is not easy, and it is a topic that
judges do not consult their law clerks about, whether the clerk is term or career.
Sentencing may be the closest thing that district judges do that fits within the
theoretical idea of a judge that does all of his or her own work.54 Even those
judges who do not regularly read the lawyer’s briefing in civil cases abandon that

54 See Todd Peppers, Michael Gils & Bridget Tainer-Parkins, Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks, 71 Alb. L. Rev. 623, 626 n.15 (2008) (“Representative David K. Carter of Ohio scornfully suggested that the justices were asking Congress [for law clerks so] that they might be furnished with auxiliary brains, to do their thinking... which now God knows, they did not do.”).
practice in sentencing preparation when they read every document in the court file before imposing sentence.

I asked each of the judges interviewed what he or she felt the most difficult task a judge has. One hundred percent of the judges answered with one word, sentencing. All of the judges in one way or another expressed the view that not only is sentencing the most difficult task of a district judge, but it is supposed to be the hardest thing a district judge does. If it ever gets easy the judges uniformly stated “it is time to retire or move on.” One judge said that sentencing is the most difficult and lonely task a district judge performs. It is the single part of the job that the judge really does alone:

For me it was always sentencing. I am playing a demigod when dealing with the life of a human being. I couldn’t afford to kick the dog at home because I was having a bad morning and go into the courthouse and kick some poor soul that I’m sending to prison. I wanted to make sure that I was focused, that I was balanced; balanced between justice, punishment, compassion, mercy. Balanced. It’s hard. It’s a lot harder to have balance as a judge than it is to say it. You know exactly what I’m talking about, and you anguish about some of the sentences. You anguish about how it affects the victims. You anguish about what society is going to say about this. Is it appropriate deterrent for the crime that was committed? Is it really just to send a 19-year-old, pock-faced, meth-addicted kid to prison because she had a boyfriend that beat the crap out of her to sell his drugs? And how long are you going to do it?

And, thankfully, with some relaxing of sentencing guidelines, we had more discretion. But with that additional discretion came more thought. You know, let’s face it: We used to grouse about how straight-jacketed
we felt under the restrictive sentencing guidelines, but when Justice Scalia [sic, United States v. Booker, 543 U.S. 220 (2005) (Stevens, J.)] and others started going on the war path about giving district judges more discretion, that was wonderful. We wanted it. And, oh, my God, we got it, and that created greater responsibility for us to get it right.

Many of the judges said that if sentencing is easy the district judge has lost sight of the constitutional power being exercised. Preparation to sentence an individual is the one matter that takes the most time and thought of the judge. It is the task that causes the most wear and tear on the judge mentally and physically. It is an extremely difficult exercise of judgment that is emotionally draining; there are very few sentencings where the judge says, “I got that right, and the sentence is a just one.” Mandatory minimum sentences frequently put the judge in tension with the judge’s idea of “justice.” The rule of law compels the judge to impose the mandatory minimum sentence even when the judge believes it is wrong. What usually happens in such cases is the judge takes the time to explain to the defendant that the “rule of law” means the sentence must be imposed, even if the sentence is contrary to the judge’s sense of justice and a sentence that is “sufficient but not greater than necessary.” Even so, sentencing is a solitary act that probably more than anything else a judge does comports with the perception and

55 18 U.S.C. 3553(a) (“The court shall impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in paragraph (2) of this subsection.”).
expectation the public has of “judging.”

4. In the Courtroom

A significant difference in the role of the term clerk and the career clerk is in their courtroom assistance to the judge. The judges who have career clerks do not insist on the clerk’s presence in the courtroom during argument. Frequently the clerk observes and listens to the hearing from chambers. When a case involves a term clerk, the judge usually has the clerk in the courtroom although this is not universally the case. In either instance the law clerk’s job is to listen, think, and evaluate the arguments made by the lawyers, and think about how an opinion or order might be written. When there is an interesting case both types of law clerks may be involved not only to help the judge but also for the experience. The benefit is in observing the quality of the lawyers, how complex the issues in a case can get, and in learning as much about what does not work as what does. During a hearing, several of the judges use instant messaging or email the law clerk and essentially carry on a conversation about the arguments while they are being made. Having the clerk in the courtroom is viewed as a specific part of the judge’s duty as a mentor. It is viewed only as an “interesting opportunity” by judges who are disinclined to view their role as one of mentoring.

There are two schools of thought on having a law clerk, career or term, in
the courtroom. One holds it is a useless proposition because the law clerk could be doing meaningful work in chambers with access to audio or video stream from the courtroom from a work station. It is an efficiency argument and does not consider the mentoring role the judge plays, particularly with the term clerk. The other school of thought holds that it is beneficial to the law clerk and the judge to have the clerk in the courtroom to observe so as to assist the judge in reaching an informed decision after the hearing. The law clerk has a computer terminal in the courtroom and can do other work, but also provide immediate assistance to the trial judge. The second school of thought is closer to the described role of the judge as mentor with a duty to the bar and public to produce educated trial lawyers and public servants. For many judges, the clerk serves the additional courtroom function as the bailiff for the jury, assisting the judge with quick legal research, and preparing the instruction package for the judge’s review and editing.

Several judges made the distinction between the term and career law clerk in preparing instructions; some judges always assign the task of preparing jury instructions to the career clerk. This is because the judge believes the career law clerk is familiar with the judge’s rules and how the judge wants the instructions prepared. An additional advantage is that the career clerk can anticipate what instructions the clerk thinks the judge should give based on past cases. The judges
all have different ways of dealing with instructions for jury trials, but the common aspect of jury instructions among the judges is the importance of the law clerk in reviewing, preparing, assembling, and finalizing the instruction packet at the judge’s direction. Once the collaboration between the judge and the law clerk in preparing the instruction packet is complete, the judge usually meets with counsel to go over the instruction packet and permit the lawyers to make a record. If there are changes, the law clerk serves as a scrivener taking notes and following the judge’s instructions for changes. Notably, the judges who were formerly state trial judges do not use law clerks when it come to jury instructions. Again, a reflection of having done that part of trial work without law clerks as a state trial judge.

In civil cases the law clerk, either term or career, and the judge usually brief each other before any hearing. The law clerk has the responsibility to ensure the judge is up to date on the issues and the law as well as suggesting questions the clerk thinks need to be raised at argument. After argument the judge usually has a post-hearing discussion with the law clerk to analyze what took place at the hearing and to discuss the possible resolution of the pending issues. This undertaking in addition to discussing the substantive answer to the legal problem presented in court, is an opportunity for the judge to mentor future lawyers on the professionalism and technique of the various lawyers who presented evidence or
argued.

5. In Chambers

The greatest variation in the use of law clerks rests in chambers operation. All of the judges use law clerks differently for chambers work, work that includes writing, scheduling, discovery disputes, and delegating work assignments when a career clerk is employed. A prominent concern of all of the interviewed judges is abdicating the adjudicatory function of the judge, heightened when long-term career clerks are employed. Several judges indicated that an advantage of the term clerk is the hands-on mentoring required of the judge, and minimizing the abdication concern. Those judges with career law clerks make a point in the management of chambers that no hierarchy of authority exists, and the judges make it clear there is only one boss. Having said this, there is a recognition that a career clerk is treated differently by those outside of chambers including members of the clerk of court’s staff. Judges are aware of a potential problem when a career clerk is employed; a pecking order naturally evolves by virtue of longevity. Part of the reason this happens is the role the career clerk serves as a junior mentor to help the term clerks and the interns/externs in order to mitigate the “August Effect.”

The law clerk, particularly the career clerk, acts as a conduit for the judge
with outside agencies. However law clerks are usually admonished by the judges that they must keep in mind that the only matters that can be discussed with outsiders are procedures the judges follow.\textsuperscript{56} The law clerks are prohibited from discussing substantive matters, and when a law clerk arrives to begin work, the judge advises the clerk of the responsibility to be careful in discussing matters outside of chambers and that whenever the clerk speaks, the listener hears the judge, not the clerk. One judge tells each new term clerk they will have an irresistible urge to reveal “how important they are in the bar and with the ‘bar’.” The judge makes the metaphorical point that “loose lips sink ships” and the law clerks are not to discuss anything about what takes place in chambers, in public. Some judges require law clerks to sign agreements that in effect solidify the rule referred to by several judges, “What happens in Vegas stays in Vegas.”\textsuperscript{57}

Every judge interviewed emphasized that all term clerks, career clerks, and

\textsuperscript{56} “Because of the confidential nature of chamber activity, as well as the varying ways in which different judges use their clerks, our knowledge of law clerk duties is somewhat limited . . . [I]t would be unwise to generalize about the duties of district court clerks from a description of appellate court duties. One duty that many judges and clerks acknowledge at all levels has been some drafting of judicial opinions or final orders, though the level of clerk participation varies widely over time as well as across chambers and different types of courts.” Todd Peppers, Michael Gils & Bridget Tainer-Parkins, \textit{Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks}, 71 Alb. L. Rev. 623, 631 (2008).

Interns/externs are supposed to verify that they have read and understand the canons of ethics for judges and law clerks. While not specifically mentioned by all the interviewed judges, a couple of them indicated there is a dress code, first referencing that it applied to “females who must dress appropriately” later mentioning that male law clerks and interns/externs are also subject to proper attire when in chambers. For some, the senior career clerk has the authority to set the dress code for chambers when the judge is away. A different dress code exists during the summer months when there are fewer hearings. In one courthouse if there is no court activity the law clerks can dress casually, shorts and collared shirts or blouses are acceptable as long as the clerk avoids the courthouse public spaces.

Most of the judges described their chambers as being “laid back,” “collegial,” and “informal” with no shouting or screaming even when mistakes are made. Judges want to make chambers a work place where everyone wants to be and where everyone on staff is enthusiastic about being there. For those judges who have kept a staff position filled by a JA, the JA serves as “traffic control” for chambers. There is nearly unanimous agreement among the judges that if a judge has no JA, instead employing three law clerks, then a career clerk is a necessity. Chambers requires an office administrator and a law administrator. In the absence
of a JA the career law clerk fills those administrative roles.

6. Writing

The ideal writing relationship between the judge and a clerk is based on two factors. First it is the judge who must retain responsibility for decision making. Then, the clerk must carry the adversary process into chambers, challenging the judge to justify each aspect of the decision-making process. The law clerk then makes a significant contribution by drafting part or all of an opinion or order. The process reflects the need to delegate, after a decision is made, writing tasks that are given to the law clerk because of time constraints. If there is writing, the general rule is that it needs to be collaborative between the judge and the law clerks. Several of the judges look to draft orders or opinions before any serious discussion with a law clerk, a practice which raises Judge Posner’s observation of influence on outcome. The judges make it clear that the judge decides the case and provides direction on how the outcome should look. This is so even when a law clerk


60 Many of the judges interviewed, if not all, expressed concern about abdicating the judge’s role. All were concerned with the notion expressed by John G. Kester, who noted: “Overreliance [sic] on law clerks injures the judiciary. It encourages bad habits—the tendency of judges to delegate their nondelegable functions, and the intellectual laziness that comes from
disagrees. The reason for the policy is to avoid abdication of the judge’s duty to
decide and to deal with the potential inexperience of the assisting law clerk. As
one judge put it, term clerks in particular “have no wisdom.” While the judges
generally said there is little difference in the quality of the work done by term or
career clerks, there is closer mentoring of the term clerk until the clerk “learns the
ropes.”

Judges say there is too much reading for one person to accomplish and at
the same time be able to write every order or opinion from scratch. When any
issue, particularly in criminal hearings, involves credibility findings, the judge
often writes the first draft of an opinion or order. The most common instance of a
judge writing the first draft is if a case or an issue appeals to the judge’s curiosity
or intellect by virtue of its familiarity or uniqueness. In almost every other
instance the law clerk will write the first draft opinion from a bench memo or from
scratch. Writing is generally a collective undertaking, rarely does the judge
provide the initial product. Regardless of the method by which chambers
produces written opinions or orders, each of the judges employs a procedure that
distinctly shows it is the judge who determines and guides the law clerk in the

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knowing that there is someone in the back room who can rationalize any decision.” The Law
Clerk Explosion, 3 The Long Term View: A J. of Informed Opinion 14, 15 (Spring 1995).
writing that decides motions or cases. Many district judges start out with bench memos\textsuperscript{61} written by the law clerk for any particular issue the judge must decide. Then, after some experience with the bench memo practice, judges might prefer a draft order or opinion from the law clerk because experience leads the judge to the conclusion that a bench memo is a waste of the law clerk’s time. It is more efficient to edit or work from a draft opinion than it is to work from a bench memo. Other judges believe the bench memo serves the purpose of making the law clerk summarize both arguments and point out authority cited as either controlling or distinguishable. The analysis and structure of the argument needs to “write”, which can be a benefit of the bench memo. The judge can then rely on the bench memo at hearings and use it as a starting point for editing an opinion or order. Sometimes the bench memo acts as the skeleton for the judge to flesh out when ruling from the bench.

Of the multiplicity of roles law clerks serve in the district court, writing is a critical part of their job. No district judge or magistrate judge identified himself or herself as a solo writer. But, there is a clear line between the judges who prefer

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\textsuperscript{61} A bench memo is a document prepared by a law clerk that outlines the arguments of each party, discusses cited authority, and recommends a ruling to the judge. It can include various information so the judge knows when the issue was fully briefed, the names of counsel, and any pending trial or motions dates.
bench memos and those who like draft orders or opinions. This internal operating
procedure is one that is dependant on the individual judge’s preferences but it is
also one that, depending on whether it is a term or career clerk, can have both a
downside and an upside. The downside is theoretical in that the first person who
looks at an issue will generally dictate the direction of its outcome. Thus, if the
judge is using the clerk to draft orders or opinions instead of bench memos the
career clerk who knows the judge may be in a much better position to accomplish
the initial draft than a term clerk. On the other hand the use of bench memos gives
the judge the opportunity to read briefs and then the bench memo to see if the law
clerk’s analysis comports with the judge’s judgment.

Even the busiest judges are likely to pick and choose the opinions that they
will personally draft. As previously noted, writing with judges and clerks is an
interactive process. Judge Alex Kozinski noted, “Often you can do your best
thinking by talking to someone about the case. They [the law clerks] have their
view, you have your view, and by talking you are often able to develop your own

62 “If the judge just reads the bench memos and doesn’t read the briefs [prepared by the
lawyers in the case] the law clerk is going to have a lot of influence.” Working Within The
Confines Of Our Current Judiciary: An Interview With Judge Richard A. Posner, 3 The Long

63 John Oakley, Defining The Limits of Delegation, 3 The Long Term View: A J. of
Informed Opinion 85, 85 (Spring 1995).
thoughts a lot better than if you just try to puzzle out an issue on your own.”

One of the judges who had served in the armed forces suggested that the district court writing was akin to what the judge had learned as a military officer in the doctrine of “Completed Staff Work.” Though the doctrine is not a perfect fit, the observation captures some of the ways judges at the district court work with a law clerk in writing. The “Completed Staff Work” doctrine encompasses the study of a problem and the provision of a solution by, in this instance, the law clerk. The work is done in such form that all that the judge has to do is to give approval or disapproval of the draft order or opinion:

The concept, completed action, is emphasized because the more difficult a problem is, the more there is a tendency to present the problem to the boss in a piecemeal fashion. It is the duty of a staff person to work out the details. The individual should not consult with the boss in the determination of these details, no matter how perplexing they may be. The individual may and should consult other staff people. The product, whether it involves the pronouncement of a new policy or affects an established one, should be worked out in finished formed [sic] before presentation to the boss for decision.

While the doctrine is descriptive, there are few judges who follow it to the tee because “sign off” is viewed as an abdication of the judge’s role. Where the

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64 Making the Case For Law Clerks: An Interview with Judge Alex Kozinski, 3 The Long Term View: A J. of Informed Opinion 55, 55 (Spring 1995).

doctrine may be significant is with those judges who do not regularly read all of
the briefs or other materials filed in a case.

Virtually all of the judges rely on law clerks to draft routine orders. These
kinds of routine orders are usually discussed with the judge, or the judge uses
CM/ECF himself or herself, to grant or deny. Judges with career clerks frequently
have that clerk review everything before the judge sees it. None of the judges
authorizes a JA or law clerk to file any order before the judge’s review and
authorization. This is so despite the observation of one judge that law clerks are
really junior judges. “The only thing they can’t do is hold court and sign orders.”

Chief Justice Vinson did his opinion writing “with his hands in his
pockets.” All of the judges recognized the near impossibility of scratch writing.
Each recognizes a career law clerk is beneficial to the individual judge, because
the career clerk enables the judge to discharge his or her work more efficiently.
The judges interviewed acknowledged that a term clerk is less valuable to the
judge in writing and other assignments until later in the term clerkship. The
judges recognized the risk of delegating the judicial function of making decisions
as a constitutional officer and all the judges take steps to make sure that while
“writing with [their] hands in [their] pockets” they are making the judgment and
instructing the first draft scrivener. When interviewing the judges whether they
had switched from term clerks to career, or the other way around, each was concerned about abdicating the judicial function by relying too heavily on law clerks. The same is true of the non-switchers interviewed. The subject of abdication and the role of law clerks has been written about and criticized. Authors “have challenged the clerkship institution on the ground that it permits law clerks to exercise too much control over the legal process. Challengers to this institutional practice argue that law clerks are writing judicial opinions and wielding an inappropriate level of influence over judicial outcomes.” Some have asked, “Is there a point at which delegation of responsibility to clerks crosses the line from undesirable to unconstitutional?” Perhaps this question demands further discussion in light of the way some career clerks are used. This is especially so in the case of the lazy judge.

7. Interns and Externs

Interns and externs are students who work either part-time for a judge while carrying a reduced load of law school classes or are given academic leave for one term but receive credit for the work in chambers. They are usually third-year


67 Chad Oldfather & Todd C. Peppers, Introduction: Judicial Assistants Or Junior Judges: The Hiring, Utilization, And Influence Of Law Clerks, 98 Marq. L. Rev. 1, 6 (Fall 2014).
students who have performed with distinction and who have enjoyed discovering tangible evidence of what lawyering is like. The experience provides valuable insight about the operation of courts and for many is an invigorating experience.68

All of the interviewed judges have interns/externs in chambers. The role of the intern/extern varies with chambers but most judges view the benefit to inure to the intern/extern. Judges are cautious about delegating writing to the intern/extern, and when an assignment is made it is usually regarding an issue that is not difficult, and the written product is reviewed by a supervising clerk before the judge sees it. Many judges view the use of interns/externs as a contribution to the bar and an opportunity to mentor law students. This notion is true even for judges who employ career clerks and who do not believe a federal judge necessarily has a teaching role. When selecting the intern/extern there is a preference for those who have done well academically. The recommendation of certain professors bears more weight in the selection of intern/externs than it does in choosing a law clerk. Not infrequently the intern/extern for a particular judge is offered a position as a term clerk. Three of the judges, all from different parts of the country, always have interns not only from the local law schools but also from

foreign law schools in English speaking countries that follow the common law.

8. Law Clerk Qualities

A law clerk’s position is viewed by judges as an office of public trust. In the hiring process a judge makes a distinction between clerks the judge is hiring for a term and those considered potential career clerks. From this perspective several judges ask when hiring a term clerk, “will this person be a trial lawyer?” and then mentor the term clerk to go into the world as a lawyer with qualities instilled by the judge. The career clerk must have the essential quality of being able to push the judge intellectually and must possess the skill and ability to tell the judge that the judge is wrong and to reason why. Several of the judges related stories of having a clerk express the view that the judge was wrong and would be reversed. The judge didn’t change paths and was subsequently reversed by the circuit. Judges want clerks with some of life’s experience, persons who have worked outside the law, have military experience, or have experience with deadlines. They like to have clerks who are smarter than they are but recognize that the difference in the degree of judgment is experience. In this vein career

69 “All things being equal, someone who has more experience, who has done other things in life, has a leg up on other people applying for a clerkship.” Making the Case For Law Clerks: An Interview with Judge Alex Kozinski, 3 The Long Term View: A J. of Informed Opinion 55, 55 (Spring 1995).
clerks do have more experience and are more likely to be “in tune” with the judge and so are able to provide better assistance and recommendations to the judge. They are in harmony. The term clerks do not play the same role as the career clerk in the deliberative colloquy with the judge. But, as the term clerks gain legal experience and expertise, the asymmetry of expertise between the term clerk and the career clerk lessens.\textsuperscript{70}

Any law clerk should have organizational skills and be able to get along well with others, especially a career clerk. A variety of characteristics were described by judges seeking term clerks, or altering the status of a term clerk to that of a career clerk. The qualities include someone who is really smart and who is a good writer. Judges are averse to clerks, particularly career clerks, who are “Yes, Judge” people. When judges find career clerks they want an honest clerk who is able to pleasantly disagree. The career clerk needs to have the ability to work well with others and should love the work. Furthermore, a career clerk should not be a bureaucrat, someone who is just in it for the pay check. A certain “nerd” quality about technology and a desire to get the work right in valuing the administration of justice is also important. So is the quality of being a problem

solver who loves to dig deep to find the answer, the important fact, or the controlling case, rule or statute. Judges encourage law clerks to avoid being shy if they see a case or an issue from a different perspective than the judge. In essence most district and magistrate judges want a law clerk who will be the “devil’s advocate” around chambers.

The literature suggests that term clerks can be of higher quality than career clerks and that they bring a greater degree of freshness of thought to the court. Judges who switched from career to term clerks emphasized this quality. Through their freshness, term clerks provide an antidote to the professional isolation that a judge suffers when assuming the monastic mantel of the bench. Judges acknowledge the benefits of a career clerk in terms of familiarity with the judge and knowing how things get done. Even those judges who have had career clerks for a long time recognize the problem of abdication. The problem of career clerks is the judge’s fear that the clerk will become the judge’s alter ego, subject to less supervision and acquiring greater and greater authority in the operations of chambers. More problematic with the career clerk is a perception by the bar or the public that there is a role reversal between the judge and the clerk.

The choice judges make regarding the status of the law clerk is predicated on two different views of the judge’s role. There is the mentoring model, where the judge has a duty to the bar and to newly minted lawyers to mentor law clerks but to avoid keeping them for extended periods. There is a professional service aspect of the judge’s work with law clerks that suffers when the judge switches to career clerks. “[T]he clerk who has worked at the judge’s elbow for a year or two will take that training to the next position in the legal profession, likely as a practicing lawyer and sometimes eventually as a judge. The profession and the common good will be advanced.”

A different view holds that the judge’s duty to the bar and to litigants justifies retention of a career law clerk. Because the career clerk brings efficiency and is “in tune” with the judge there is a benefit to the bar and to the litigants in having judicial support that is experienced. Whatever the purpose of the judge in switching to career law clerks, career clerks should come from a court’s term clerk alumni. This is consistent with Judicial Conference policy that now requires three years of term clerk experience before a clerk is eligible for career status.

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72 Joseph D. Kearney, A Truth About Career Law Clerks, Marquette Lawyer 30 (Fall 2015).

B. Switching: Career vs. Term Law Clerks

The interviews revealed some factors judges consider when choosing between term and career clerks. Each of the judges interviewed stated in one way or the other that a significant aspect of choosing between term clerks or career clerks was wanting to have a clerk who knows the ropes to avoid the mistakes of the abyss, the things the new term clerks don’t know until they know what they don’t know. The most common reason for the switch from term to career seems to be the intellectual vigor of the clerk, how well the clerk gets along with the judge and the judge’s staff personality wise, as well as the absence of an overt effort by the clerk to establish a chambers pecking order. The desire to switch from career to term reflects a concern that the career clerk, though smart and a good writer, begins to sense there is a pecking order in chambers. That in turn creates a friction internally with the other clerks and interns/externs when the career clerk casts a “mini judge” shadow.

Another consideration in making the switch is the concern a judge has for clerks and their respective futures. Some career clerks, when they depart chambers, have a difficult time getting employment, particularly with the larger firms because six, seven, or even ten years of clerking raises the question of “Why?” One of the switchers from career to term clerks advised that the new
blood and thinking of term clerks kept him on his toes. Having had career clerks for long periods, several judges felt that individual career clerks had turned into bureaucrats, mostly interested in the pay and hours and not very ambitious about the work. “[N]o matter how satisfied a court becomes with its complement of career clerks, it never [should] permit its judges to insulate themselves from short-term clerks altogether. A court which forsakes the short-term clerk is a court which has forgotten—or worse, forsworn—the law clerk’s highest purpose.”

Ultimately, switching from a term clerk to a career clerk is a serendipitous event. But, the switch from a career clerk to term is a conscious event principally based on chambers atmosphere.

1. Career v. Term Law Clerks

The issue of term clerks and limiting each judge to one career clerk was on the agenda of the Judicial Conference of the United States in 2007. Up to that point there was no direction given to judges concerning career status or not, and a number of district judges had two or more career clerks. Budget issues forced consideration of the viability of personnel decisions being left to individual chambers. The cost differential between and among chambers with term clerks

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only, and those with career clerks, was enormous. The argument in favor of limiting judges to one career law clerk was the following:

1. Judges should be encouraged to hire term clerks because the practice:
   a. provides federal court experience to a greater number of future attorneys;
   b. allows the judge and the judiciary to benefit from the infusion of fresh ideas, energy and new perspectives;
   c. provides more opportunities for diversity in chambers;
   d. helps judges build a constituency in the practicing bar; and
   e. benefits law clerks themselves as they will have received a tremendous opportunity to promote themselves professionally and financially in the private sector.

2. Given the average case load, one career clerk can provide the stability needed in chambers. Additionally, a judge can have multiple term law clerks at any given time, where appointments can be staggered for continuity.

3. Clerical duties that law clerks perform could be better accomplished by other employees at lower pay grades, providing more opportunities for office staff.

4. Balances the little restraint to chambers’ growth when compared to CPS growth.

5. Important for the public to view Judiciary as an open agency.  

The arguments on the other side, favoring career law clerks, were as follows:

1. Career law clerks are valuable because compared to term law clerks, they:
   a. are more efficient due to their institutional knowledge

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and experience;
b. make more valuable contributions and keep up with the workload better;
c. have an innate understanding of what the judge requires and can anticipate the action his or her judge would take on any given issue;
d. stay long enough to provide continuity to highly complex areas;
e. draft opinions that are reversed less often on appeal, reducing the district court workload;
f. are highly desirable in light of the trend to appoint younger judges.

2. The option adversely affects the career status and job security of present career law clerks because:
a. present career law clerks cannot always serve enough years to reach minimum retirement age with one judge and often will attempt to gain more credible service by service with a second or even third judge. This option prevents this from readily occurring;
b. a career law clerk who is forced by circumstances to move from one judge’s chambers to another loses ‘career status’ and becomes ineligible to make contributions for three years. The qualification in Proposal 5 ‘as long as they continue to work in the chambers where they are presently employed’ should be removed.

3. Option fails to consider workload issues. The rise in career law clerks is directly related to the rise in the judiciary’s burgeoning workload, increased filings and long-term vacancies in judicial positions, without a concomitant rise in judges to handle the workload.

4. Cost of hiring term law clerks outweigh the benefits. For example:
a. resources (including time) are wasted on interviewing, hiring and training new clerks who stay, at most, two years;
b. term clerks spend a significant amount of time at the back end of their clerkship searching for a new job;
c. Term law clerks work more slowly; they accomplish less and make for a less productive court; the economy is illusory.

5. Judges shouldn’t be limited in the way they run their chambers.

6. Limiting chambers to two career law clerks is more acceptable and provides stability and flexibility.

7. Law Clerks - term or career - are not fungible.

8. Eliminating clerks would lead to chambers relying on the libraries with reduced staff. And if resources were moved to the libraries, the savings would be, of course, less than otherwise anticipated.

9. The assumption that “law clerks are not motivated by salary” is false. 76

Now because of Judicial Conference policy, new judges start with term clerks. One senior judge noted this policy “is a matter not policed well, if at all.” For many the switch to one or two career clerks came early in their judicial tenure, which the policy now prohibits. For others, the switch to career clerks “just happened,” and there was no discrete process that led to the switch. When judges switched back and forth from term to career to term it was largely based on an alteration of the working relationships in chambers and with the judge. Depending on the aspirations of the individual law clerk, the role of term clerk may be the best fit for the new lawyer. This is true primarily with those judges who hire term clerks based on a commitment to the bar and the view that the judge has a duty to


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mentor future lawyers, leaders and judges.

The “August Effect” is a factor for judges whether hiring term or career clerks. Term clerks when they start do not know what they do not know. There is far less hand holding by the judge with a career clerk than there is with the term clerk. The career clerks serve the judge differently because they have longevity in the position, know the judge’s way of thinking and are likely to capture the judge’s voice in writing. When asked if an outsider could tell who an author was from any written opinion from a particular chambers, the judges with career clerks expressed the view that it would generally not be possible though it was likely that if there was a zinger in the opinion or order it is likely from the judge’s pen.

The general reasons the judges think a career clerk is more valuable to a federal judge rest on principles of continuity, a comfortable working relationship, and collaboration in writing, analysis and expression. Furthermore, with the passage of time on task the career clerks gain wisdom, that is good judgment. The career clerks also fill the role of training and mentoring term clerks and interns/externs. A career law clerk is more likely to be able to tell the judge he or she is incorrect and is not fearful of pointing out prior cases where the judge may have ruled differently on a similar issue because of the career clerk’s institutional memory. Importantly judges who employ career clerks all noted that a “career”
does not equate to lifetime tenure. Many of the clerks who were career clerks served terms of ten years or less. The longest serving career clerk was thirty-four years, the shortest was four years. The judge always has the option to change from a term clerk to a career clerk when a mutually beneficial relationship with an existing term clerk comes along. Judicial Conference policy now requires term clerking experience before promotion to career clerk status.⁷⁷

With the exception of complex matters, as discussed above, there is usually no difference in the quality of work between career clerks and term clerks except on the issue of judgement. The complexity of a case is primarily a concern when the case is likely to exceed the time in chambers of the term clerk. Thus, most often the career clerk handles such matters for the judge. One judge adopted a policy on very close legal questions of having the term clerk write the opinion for one outcome while delegating to the career clerk writing an opinion coming out the other way.

A concern in making the transition from a two-term-clerk chamber to a career-clerk and term-clerk chamber is that at some point the career clerk is at risk

⁷⁷ *Summary of the Report of the Judicial Conference Committee on Judicial Resources*, DT: Committee Report, CR-JUDRES-SEP 07 (September 2007). The report recommends no more than one career law clerk per judge and limits the period during which a term clerk can serve to no more than three years. The report recommends that if career clerks are to be hired they must have term clerk experience in the same chambers.
of entitlement syndrome. As previously suggested, the concern is that a career clerk can get so comfortable not only in chambers but with the pay, that the clerk loses perspective. The judge needs to address this when making a decision to convert a term clerk into a career clerk.

The qualities of a good term clerk are, that despite a lack of knowledge about court and chambers procedures when initially employed (the “August Effect”), the term clerk is usually at the top of the clerk’s law school class and comes to chambers motivated to learn and to do good work for the judge. Term clerks generally work hard and generally want to learn while being dependable in the work they do for the judge. An early characteristic the term clerk develops is how to handle many different things simultaneously, the “ball juggling” skill. One judge, who was a district judge but is now an circuit judge, felt the district clerkship is a more difficult job than an appellate clerkship. The judge’s view was appellate clerkships are an extension of law school academics while the district clerk needs to learn multitasking of entirely new experiences and must learn quickly to triage and balance deadlines and workload. There is a consensus about

78 There is a concern that a long-term relationship with a career clerk “breeds an atmosphere of too much equality and hence too much dependence on the clerk.” John Bilyu Oakley & Robert S. Thompson, Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in American Courts 109 (U. of Cal. Press 1980). There is a concern by some judges that career status can “encourage judicial indolence.” Id. at 126.
term clerks that there is an initial period of ignorance but rapid learning, a period
that lasts two to four months. What follows then is a year or a little more that the
term clerk is extremely functional. The next phase is about four to six months
when the term clerk is looking forward to the next step in the clerk’s career as a
lawyer. The period of the “August Effect” is a tangible reason judges give for
hiring career clerks; they to not have to retrain a new clerk every year. The
mentoring judges noted that a one-year term is a good fit from the term clerk’s
perspective, but a two-year term is the best fit for the judge who employs a term
clerk. Staggered term clerks means that the judge will always have a seasoned
clerk. All of the judges who use staggered term clerks paid particular attention to
mentoring term clerks and to learning about recent technology as well as current
legal education. A long term for a career clerk may present a situation where it is
“too long to keep lightening in the bottle.” If this happens the judge should be
wary as well as attentive if the judge wants to avoid abdicating the judge’s duties.

Judges have concerns about switching from term to career clerks based on
observations of other judges in the same district who employed career clerks.
Those judges often delegated the responsibilities of judging to the career clerks.
This concern is a reason to thoroughly vet the career clerk concept. It is also a
reason for a judge to be mindful of the lazy judge syndrome.
In some districts it is the custom and practice of every judge to hire at least one career clerk. While the career clerks hired in the district fit hand in glove with the judge who employs them, the jump off from term to career used to take place very early. The judge finds a term clerk with whom the judge develops an almost instant affinity and elects to stay the course with that clerk. The switch is not a planned event. The decision is not one where the judge sets out to find a career clerk. Instead it is more happenstance where the judge finds a person whose personality, intellect, and work ethic meet the judge’s needs, and the offer is made to the clerk to become a career assistant to the judge.

B. Balancing the Pros and Cons

The “August Effect” is a core principal in the decision of a judge to go from term clerks to one or more career clerks. There are several different methods for staffing and for dealing with the “August Effect” in the district court. There are intertwined reasons to choose career or term law clerks. I have coined descriptive terms for the various categories of law clerks that encompasses this discussion. First there is the “one and done” class. These are term clerks hired for one year. They come in late August and leave around the same time after one year of service. Several judges said this kind of clerkship seems best for the clerk. Even so it is the kind of clerk least helpful to the judge. The second group is called
“two and shoo.” These are term clerks who serve the judge for two years. From the judge’s perspective two years is the ideal length of service for a term law clerk. The two-year term clerk, after learning the ropes, provides the judge sound advice coupled with an enthusiasm and energy for the work. In trying to minimize the “August Effect,” the district judge can look for term clerks who have experience clerking for another court or judge, or a person who has life’s experience. The third group is the career clerk. There are various advantages to the judge with the career clerk but there is a concern when a career clerk is employed that the clerk becomes a “mini-judge” or the judge delegates so much responsibility to the career clerk that an abdication of responsibility occurs. Each of the judges interviewed felt that the best working arrangement for a judge and law clerks was either staggered term clerks serving two-year terms, or one two-year term clerk and one career clerk. Those judges in the latter category emphasized continuity and energy a combination fostered by the characteristics of the new clerk and the skills and abilities of the career clerk. The principle advantage to the judge is that the arrangement keeps new “blood” and enthusiasm in the judge’s work but more importantly it is a safeguard against abdication of the judicial function. This arrangement also addresses the “August Effect.”

IV. Conclusion
A. Are career clerks designated hitters?

Much of the information revealed by the judges I interviewed seems without a down side. It is like the judge is a baseball manager that uses the career clerk as a designated hitter. The rules of baseball however do not authorize the unrestrained use of the designated hitter. Indeed, designated hitters are not a part of the National League except in the World Series. The analogy pops up in the views that judges have on the merits of career as opposed to term law clerks. Underlying the question is the “August Effect”, the issue of inexperience and how that relates to chambers staffing. There are no universals among judges about the normative question of which kind law clerk is best. There is no doubt that a particular judge’s view as to the answer is experience driven. But, the role of the clerk can be as a designated hitter (the career clerk who acts as a junior judge), the pinch hitter (the two year term clerk who works closely with the judge but has a more limited role), or the bat boy (the one year term clerk who only assists the judge and is of limited use by virtue of the brief time in chambers).

There are two models that look at the relationship between the judge and the law clerk. On the one hand is the traditional view that the historical role of the elbow clerk was to provide assistance to the judge in the performance of the court’s work. The judge is a mentor of young lawyers who then become practicing
lawyers, leaders of the community and in some cases public office holders and even judges. These former clerks become ambassadors for the court and for the judge with the bar and the broader public. This model of the relationship favors term clerks, the more the merrier because of the opportunities for new members of the bar. The benefit is afforded to the term clerk and the bar. If it is a one year term position it does not enure to the benefit of the judge, only staggered two year terms do that.

The other model is that of public service and efficiency model where the relationship of the judge and the clerk emphasizes efficiency, quality, continuity a strong connection and collegial working relationship. The chambers relationship is like that of a law firm with the judge being the senior partner, the career clerk serving the role of the junior partner, the term clerk as an associate and the externs in the role of paralegals. The focus is on a smoothly operating court that does not require remaking the wheel every year because the career clerk serves as a mentor to the term clerks that come and go, always providing the same management tools. This model favors the judge and is a benefit to the career clerk.

There is a difference at the outset in the role of the clerk and the judge depending on whether the Article III judge has served as a state trial judge or as a U.S. Magistrate judge. In those instances the judge is more likely to do certain
tasks without law clerk help, because the judge has had only one clerk or no law clerks to help in the work of the court. When it comes to writing it is safe to say that very little writing is done in the first instance by any judge. Most judges are editing judges when the written work of chambers is considered. With the career clerk the author of the writing is indiscernible once the judge’s voice is captured. Career clerks create a confidence in the judge based on the long term relationship though it is clear the “career” is a misnomer in most instances. “Long term” is a more accurate description. Judges with career clerks hold the view that efficiency and longevity lead to wisdom and quality work. Those with term clerks believe the energy and enthusiasm for the work is higher in chambers when a new clerk arrives eager to get in to the court’s business with both feet. The new term clerk also brings to chambers contemporary thinking about new or novel issues.

Some judges, whether they have career clerks or term clerks look to the law clerk for guidance on issues that the judge must decide and not to the lawyer’s briefing. While that happens whether the judge reads all the lawyer briefing or not, there is a certain danger that the law clerk may lead the judge astray. There is also a concern that too much dependence on the law clerk fosters an abdication of the judicial role. The judge can easily become too lazy and give the law clerk too much responsibility.
The baseball analogy is striking here too. In the olden days there were managers that also played. Maybe that is what most judge do in relationship to their law clerks, there is a team that all are a part of. On the other hand in modern times the manager does not play and at least in the American League chooses to use the designated hitter as an active player in the game, other than a hitter, only in limited circumstances. Career law clerks are not judges. Like the designated hitter’s relationship to the team manager, they need to be used within the rules and not as assistant judges.

**B. Further Study**

An area for study is whether the “August Effect” should be a serious consideration at the courts of appeals. Are the decisions issued by the courts of appeals that are argued between August and January more likely to be reversals because there is a new batch of appellate law clerks? One way might be to look at cases where the panel decision is taken en banc, cases where the attorneys try to point out the mistakes in the panel decision, and compare that with the en banc decision. It might show that the attorneys are catching mistakes made by a three-judge panel that are likely caused by new law clerks working for the appellate judges, who because of the “August Effect,” did not catch the law or analysis they should have.
C. Reflections

Often when one engages in a quest to determine how something works, or why is it done that way, there is the opportunity for self-reflection. Such is the case here. I have never had a career law clerk though I have had term clerks with whom I worked for more than three years. In listening to my colleagues as I interviewed them I questioned that practice. But maybe as a senior district judge, it is time to slow the pace and ask one of my term clerks if he or she is interested in working in that capacity. The one attribute mentioned by several of the judges when promoting a term clerk to career status is what might be given up. The enthusiasm and new ideas and the attitude that the new term clerk brings is something that I think I would miss. I would also face the dilemma of trying to figure out if I had told a “war story” or some joke to the career clerk before. With term clerks, there is the advantage of recycling stories and jokes every two years.
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Tell me about becoming a judge. When did you become a judge?

What was your lawyering experience before you became a federal judge?

How did you go about selecting your first staff? How did you select law clerks? Did you hire your initial clerks on a term basis or did you hire career clerks? Why did you choose term vs career or career vs term?

Has your selection of law clerks changed in the time you have been on the bench? How? Why?

As it relates to career clerks or term clerks, do you perceive an advantage of one over the other? Please explain.

In a book written in 1980 called Law Clerks and the Judicial Process, the authors express a caveat that judges should never insulate themselves from short-term clerks altogether and that career clerks pose a risk of turning into bureaucrats dedicated to continuity of service rather than providing the judge with variation and stimulation in the performance of judicial duties. What is your view on the tension for a judge in deciding whether to employ a career clerk or term clerks?

How do you use your law clerks?

Who assigns work to the law clerks and what is the process?

Do you treat a new clerk differently than a clerk that has been with you for a year or so? How so?

There is literature describing the “July effect” in teaching hospitals. What it means is the transition from degreed medical doctors to first
year residents is when the most mistakes are made. I am trying to
discover if a similar phenomenon exists for judges that I call the
“August effect”. That is, the likelihood of getting unsound work or
advice from a law clerk is in roughly the first four months of the clerk’s
term. What are your thoughts about my hypothesis? Do you deal with
the phenomenon explicitly in how you use the law clerk?

Do you use interns or externs in your chambers? What precautions do
you take with their work in terms of them being persons with limited
legal knowledge, no skill to speak of, and no experience, and
consequently limited legal judgment?

What writing do you rely on from clerks? Do they do bench memos,
draft opinions, procedural or scheduling orders?

How would you describe the role of law clerks in terms of substantive
legal orders, memoranda or opinions that you issue?

How would you describe the role of the law clerks at oral arguments on
various discovery or procedural motions that you must decide?

How about the use of law clerks at changes of plea or sentence
revocations?

What about the use of law clerks at sentencing? Do you ever consult
with law clerks before sentencing someone? How would you describe
that process?

Do you use your law clerks as conduits do communicate with probation
or various attorney offices including the US Attorney and Federal
Defender offices? How does that work?

Are there certain kinds of motions in civil cases or criminal cases that
you limit the role of law clerks? Discovery is what comes to mind, “been there done that” to get the answer usually eliminates meaningful input by an inexperienced clerk. Are there any kinds of civil or criminal matters that you generally rely very little on the law clerk? Can you explain that?

If you have used term and career clerks is there ever a change in that use of the clerk? What is the change and why is it made?

What is the role of the law clerk at a jury trial?

What is the role of the law clerk at a non-jury trial?

How do you use your law clerks, if at all, in preparing the jury instructions to be given? What about non-jury cases, do you use Rule 52 and make oral findings? How does the law clerk play in this process?

When there are post trial motions what use do you make of the law clerks?

In any of these matters if you have a career law clerk and a term law clerk, do you use one over the other for certain duties? If so, what are the duties and why do you assign the work to one or the other?

How would you describe the chambers atmosphere that you have enjoyed over the years?

How do the clerks address you? How do you set work hours or vacation/time off days? Is there any difference between the career and the term clerk in this area? What difference?

How do you deal with the inner workings of the chambers? What about social media, how is that handled? Is there a difference with the career clerk and the term clerk? What and why?
What is the difference in the quality of your own work depending on whether you are helped by a term clerk or a career clerk?

After the clerk leaves you employ do you stay in touch or have gatherings of any sort?

In a perfect judicial world what makes a judge qualitatively better and more efficient, help from career clerks or help from term clerks? Why

What difference does it make in a judge’s work and life if he or she has only term clerks, or has one or more career clerks?

How would you suggest that judges at the district court level deal with the “August effect”?

Do you think clerks at the courts of appeal suffer the “August effect”?

What else should I ask you about clerk selection or employment that either I haven’t asked or that forgot?
Part D. Research Description

1. Purpose of the study.

The purpose of the study is to inquire of active, senior, and retired judges how they use law clerks, and in particular how recent graduates hired as law clerks or incorporated into chambers work. The interviews are to be conducted by phone or in person. The interviewees are assured of confidentiality and no identifiers will be used in writing about the information communicated. I intend to interview 15 to 20 judges and magistrate judges who fall in a limited classification of those who have used career law clerks and switched to term law clerks as well as those who started with term law clerks and switched to career law clerks. The topics include a determination of whether the identified judges explicitly or implicitly recognize the potential problem of vesting new law clerks with too much authority and how that issue is dealt with, and to examine what alternatives are used to deal with the issue in chambers management. No identifiable data will be used in writing the Master’s thesis; interviews will be reviewed and redacted of any inadvertent identifiers.

2. Subject Selection.

The proposed subject population is active and retired magistrate judges who have switched from term to career clerks or vice versa, active, senior, or retired
U.S. District court judges who have switched from term to career law clerks or vice versa. The subjects are contacted by the investigator personally by phone, by email, or in person and asked if the judge is a “switcher” and if so if the judge is willing to be interviewed about the choice and whether that decision incorporates any aspect of the August effect.

3. **Informed Consent.**

Oral informed consent is likely the most common means of relating information to the person interviewed as I know most of the judges personally.

I am Judge Don Molloy currently enrolled at Duke Law School in the Master of Judicial Studies program. I am writing my Master’s Thesis on the “August Effect” which is a term used to describe the consequences of taking on a new law clerk and assigning duties to such person that may question the exercise of judgment. The purpose of my research is to gather information from judges as to how they deal with new law clerks and how a new law clerk is integrated into chambers activities including drafting memoranda and draft orders or opinions. You are at liberty to avoid or refuse answering any questions during the interview and you are assured that any information communicated by you will not be attributable to you or your chambers in any way. I expect the interview will take between thirty minutes and one hour. I am currently working with an advisor from
Duke Law School, Professor Mitu Gulati. I can be reached by at (406) 542-7786 or by email at Donald_Molloy@mtd.uscourts.gov. Professor Gulati can be reached at the Duke Law School or by email at Gulati@law.duke.edu.