

PROFESSIONAL DEVIL'S ADVOCATES:



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A number of practitioners equate the title of law clerk with only those recent law school graduates working in a judge's chambers for a year or two in an effort to pad a resume on the path to big law careers.¹ Unbeknownst to some practitioners is the reality that, at least in a number of district courts, tucked away in back offices of chambers across the United States, sit experienced, highly skilled attorneys drafting complex opinions, offering critical legal recommendations, managing extensive and diverse dockets, serving as the most trusted legal adviser to the judge and devoting their entire careers, or at least a significant part thereof, in such a capacity.² The modest official title given to these attorneys is "career law clerk," a title suggesting to those

THE CAREER LAW CLERK

By **MICHAEL N. RHINEHART**



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Susan Stuart

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unfamiliar with the clerking world a conscious decision to work an entire career in pre-bar result limbo.

Certainly, recent law school graduates also fill law clerk positions in many district court chambers, generally under the official title of “term law clerk.” Term law clerks are often trained, supervised, and mentored day by day by career law clerks (although not all term law clerks are recent law school graduates, and certainly many term law clerks have previous experience working in private practice, such as associates in law firms). Present judicial policy permits term law clerks to serve up to a maximum of four years.³ Career law clerks are expected to serve in excess of four years⁴ and, in many instances, they serve longer. Previously, district judges and magistrate judges

could staff at least two law clerks, both of whom could be career law clerks.⁵ Judicial guidelines changed in 2007, and today, district judges and magistrate judges generally staff up to two law clerks in chambers, only one of whom may be a career law clerk.⁶

Who are these experienced attorneys dutifully serving district judges and magistrate judges in the U.S. District Courts? How did these attorneys obtain a career law clerk position? How do these clerks view their role in the judicial process? What can federal practitioners learn from these attorneys about federal practice? Below are these answers and more from career law clerks throughout the country.

DESCRIBE YOUR PATH TO BECOMING A CAREER LAW CLERK.

Anne Kammer: My father-in-law, William Kammer, is a trial attorney who began his legal career as a law clerk for a federal judge. During my second year of law school, he suggested that I consider applying for post-graduate clerkship positions. My father-in-law knows me very well and has never steered me in the wrong direction on any matter, personal or professional. I took his advice and applied for a term clerkship position in the Western District of Louisiana. I was fortunate enough to get the job, and I spent a year clerking for District Judge Tucker L. Melançon in Lafayette, Louisiana (my hometown). My clerkship was a life altering experience. I loved the work itself, I loved everyone with whom I had the fortune to work, and I loved my judge. After finishing my year in Lafayette, I couldn't imagine doing anything else. Luckily, I haven't had to!

Katherine Miltner: Although I always had aspirations of being a law clerk, I went into private practice after law school. I practiced at a litigation boutique for three years before accepting a clerkship position. I anticipated clerking for one to two years, but seven years later I'm still here! I think having practiced before clerking was a huge advantage. Clerks right out of law school simply do not have the real-world perspective that can be critical when assessing calendar, procedural, and discovery issues.

Katharine Gardner: I had already clerked for two years on the Sixth Circuit and worked for two years with a large firm in its employment division when Magistrate Judge John Powers asked me if I would like to work for him as his career "elbow law clerk." "Elbow law clerk" is the actual term for the position, and it accurately describes the fact that the law clerk works at the elbow of the judge. I accepted Magistrate Judge Powers' offer because I wanted to work at the elbow of the judge on different kinds of cases at the fast-paced trial level. After Magistrate Judge Powers retired, Magistrate Judge Bill Carter hired me as his career law clerk.

Christian T. Haugsby: My first opportunity to clerk came in 2004 after I had spent a few years as an associate in private practice. At that time, I applied for term law clerk positions with federal district judges and was hired by Hon. Yvette Kane in the Middle District of Pennsylvania. I worked for Judge Kane on a term basis before returning to private practice with a small office of a large national firm. A couple years later I had the opportunity to return to the Middle District when Magistrate Judge Carlson was appointed to the bench in the fall of 2009. When he offered me a position as his first law clerk, he did so with the possibility that the clerkship could be designated as career status, and I've remained in the job ever since.

Susan Stuart: I have an undergraduate degree in journalism from the University of Missouri, in Columbia, Missouri. I went to law school at Washington University in St. Louis, Missouri. I clerked for U.S. District Judge Jean C. Hamilton in the district court for the Eastern District of Missouri after I graduated from law school. When that term ended, I decided it was a good time to change locations because I needed to find a new job anyway. I wanted to move to a climate that allowed for more outdoor time for running and biking, so Arizona was a good fit for me. I was hired by Brown and

Bain (now Perkins Coie) in Phoenix, Arizona, and worked in their labor and employment department. After a short period of time, I decided to return to the court and was fortunate to find an opening with U.S. Magistrate Judge Lawrence O. Anderson in the District of Arizona (who recently retired). My past clerking experience made me a good fit for a newly appointed magistrate judge. I had planned to stay for a few years, but I enjoyed the work and the working environment so much that I stayed much longer. I am now working for U.S. Magistrate Judge Bridget S. Bade, who began her term on the bench in the summer of 2012.

HOW DO YOU VIEW YOUR ROLE IN THE JUDICIAL PROCESS?

Haugsby: Modestly. My primary job as a law clerk is to advise the judge objectively and clearly about the matters pending before the court and to provide sound legal advice regarding the proposed disposition of those matters. Additionally, I think clerks have an important role to play in helping to ensure that matters before the court are addressed in a timely manner, which I believe the parties and the public deserve.

Kammer: I think there can be no doubt that a career law clerk's role in the judicial process is an important one. The role might be aptly described as quality assurance specialist. I view my role as ensuring that my judge renders fair and correct decisions as consistently as possible. One of the primary benefits a career law clerk can provide to a federal judge is consistency, derived from institutional memory based on years of experience. This lends efficiency and accuracy to the process of judicial decision-making, which parties, attorneys, and Congress all appreciate greatly.

Miltner: Career law clerks give up the ego and the salary associated with private practice to work as a ghostwriter and sounding board. There is simply too much work for a judge to single-handedly manage his docket, so it's my job to interpret the law and make sound legal recommendations. If I felt like I didn't play an integral role in the judicial process, I wouldn't still be here.

Gardner: I examine the law and the facts and provide analysis for the judge to aid him in making the ultimate decision about an issue brought to him for resolution. It is the law clerk's role to ensure that the judge is fully informed of all the important points, arguments, and authorities, even those not fully anticipated or examined by the parties, which bear on an issue that he must decide.

Stuart: I consider my role in the judicial process as facilitating the fair and efficient resolution of civil matters by managing civil cases and recommending rulings to the judge. I enjoy the collaborative process and also see myself as a sounding board for the judge.

The author of this article does not suggest that judges are devils, that law clerks advocate for evil, or even that law clerks advocate anything at all. The title simply plays on the astute words of U.S. District Judge Robert J. McNichols, who once wrote that

“[i]f [a] law clerk is fortunate and the judge wise, the clerk will ... be utilized as a sounding board and devil's advocate in the decision-making process.”

Bishop v. Albertson's Inc., 806 F. Supp. 897, 900 (E.D. Wash. 1992)

HAVING UNDOUBTEDLY OBSERVED A NUMBER OF TRIALS AND HEARINGS, AS WELL AS REVIEWED THOUSANDS OF PAGES OF WRITTEN ARGUMENTS, WHAT HAS MOST IMPRESSED YOU ABOUT A PRACTITIONER BEFORE THE COURT (E.G., WRITING STYLE, TRIAL PREPARATION, OR ORATORY SKILLS)?

Kammer: While the importance of legal writing cannot be underestimated in federal court, I tend to be impressed more often by attorneys' oratory skills. This is in part because I consider myself an excellent writer but only a sub-mediocre orator, so I'm perhaps more easily impressed when an attorney comes into court and nails a closing argument or performs a brilliant cross-examination of a difficult witness. But it is also due to the fact that civil litigators don't frequently have the opportunity to practice their oratory skills in federal court. Therefore, when an attorney appears before my judge for oral argument and knows the record by heart, doesn't rely on any notes while answering questions from the bench, and speaks smoothly while maintaining a calm, professional demeanor, it is quite a sight to behold.

Miltner: I was assigned to a white-collar criminal trial a few years ago, and the attorneys blew me away. Not only were they extraordinarily well-prepared, but they saw the forest for the trees. When lawyers live and breathe a case, by the time they get to trial they tend to be consumed by minutiae and lose the jury in the details (the same can be said for dispositive motion writing).

Gardner: What I appreciate most about a practitioner is his or her civility to opposing counsel. When counsel are civil to one another—for example, by offering professional courtesies such as minor extensions for discovery matters or simply treating one another with respect in a deposition, hearing, or at trial—it makes the judge's and the law clerk's jobs easier, it reflects well on the profession publicly, and provides a better quality of life for the lawyers.

Haugsbj: There are many different attributes that successful practitioners demonstrate in our court. Some of the lawyers we see are especially strong oral advocates; some have great rhetorical skill in their writing; others have the ability to connect with a jury in a powerfully effective way, especially when explaining complicated subjects. The best practitioners we see are able to blend these attributes in a way that leads to effective advocacy for their clients at all stages of litigation. One trait that these successful lawyers also share is the ability to tell a story and explain the application of law to that story clearly, fairly, and persuasively. The lawyers whose writing is especially clear, succinct, and well-supported tend to be the most effective advocates we see in our court.

Stuart: I am most impressed when an attorney concedes a point or takes some other action that shows that the attorney, while advocating for his or her client, also recognizes the duty of candor to the court and the importance of efficiently resolving litigation. I am impressed when parties are able to resolve their differences and preserve their clients' and the court's resources.

DESCRIBE THE BEST ASPECTS OF BEING A CAREER LAW CLERK.

Kammer: One of the first things that comes to mind is the nature of the work. This is a great aspect of being a law clerk, whether career or term. The work is always challenging, always different, and always cutting edge. Many states, including California, exempt law clerks from certain CLE requirements precisely because of the type of work we do—we're learning new things in many areas of the law all the time, and we have to make ourselves into instant experts so that we can advise our judges. For those of us who are career law clerks, this dynamism ensures that we never get bored or burnt out. That is a really special attribute for a job in the legal profession.

Another great aspect of being a career law clerk is working directly on a daily basis with a federal judge. Our federal judges are

the top legal minds in their communities. Having a federal judge as a long-term supervisor and constant mentor is very much a privilege.

One of the best aspects of being a career law clerk is also sometimes one of the hardest: having the opportunity to work with and mentor term law clerks. Due to term limits, a chambers will always have some level of turnover in its personnel. This creates a wonderful opportunity to meet and work with new people on a regular basis. I love that we are always expanding our chambers family from year to year. Some of my best friends are my prior co-clerks, which is why this aspect of being a career law clerk can also be one of the hardest. It is often bittersweet when a term law clerk moves on from our chambers to the next phase of his or her legal career.

Finally, I would be remiss if I didn't mention the lifestyle benefit of being a career law clerk. At the end of the day, we are federal employees who have access to great health-care plans and a generous portfolio of retirement options. We often are able to work a 40-hour week, which gives us time to pursue other interests, spend time with our families, and enjoy life.

Miltner: As a practical matter, I appreciate the opportunity to follow a case from the filing of the complaint through the final appeal. There is a lot to be learned from how attorneys manage cases at different stages in the process. Unfortunately, term clerks often get thrown into cases mid-litigation and leave before a case has resolved. However, the best aspect of being a career law clerk is building a rapport with the judge. In a law firm you don't always get to choose who you work with, but I'm grateful to work exclusively for a judge whom I consider to be both my mentor and my friend.

Gardner: The best part about being a law clerk is the variety of matters on which I have the opportunity to work. For example, I have addressed complicated discovery issues in multidistrict litigation cases and substantive constitutional and federal law matters in cases where the parties have consented to the magistrate judge's jurisdiction. I have also enjoyed the many Fourth Amendment suppression issues that have been referred to the magistrate judge. It's impossible to be bored.

Haugsbj: There are many rewarding aspects to being a career clerk, among them the pride I feel working for a judge and a court that I admire and respect; the opportunity to have a firsthand role in helping the court make decisions that affect the lives of real people; [and] the satisfaction that comes from being part of a talented staff of court professionals dedicated to serving the public and the law. But in addition to these aspects of the job, a career law clerk provides the uniquely valuable opportunity to form a close relationship with a judge who can fill the role of mentor, colleague, teacher, and trusted friend. This personal aspect of the job has been especially rewarding for me and is something I'm grateful to have found in my professional life.

Stuart: The best aspects of being a career law clerk include working on challenging legal issues in a variety of areas of the law but at the same developing a proficiency in areas of the law that regularly arise in federal court (habeas corpus and Social Security, for example). I also enjoy working for and with intelligent people who care about the quality of work that is produced. I am proud to work for the District of Arizona. And the best aspect of the job is enjoy-

ing these benefits in an environment that allows for a healthy work/life balance. For me, the decision to become a career law clerk was influenced by a desire to have a challenging, satisfying career, but having time to enjoy the people and activities that are important to me outside of work.

IF YOU COULD GIVE ONLY ONE PIECE OF ADVICE TO PRACTITIONERS APPEARING IN FEDERAL COURT, WHAT WOULD IT BE?

Kammer: I think the Boy Scouts said it best: Be prepared. Know your case backwards and forwards. Know where the courtroom is located. Know how to dress appropriately. Appearing as a trial attorney? Prepare your witnesses. Appearing for oral argument? Prepare your argument. Appearing for a settlement conference? Prepare your client. An appearance in federal court is not an occasion any attorney should take lightly. It is an honor and a privilege. So be prepared.

Miltner: Do I have to pick one? (1) Be prepared. I am routinely surprised by the number of lawyers who fail to participate in duly scheduled conferences, participate but have not accomplished anything, and/or fail to timely file papers. (2) Be collegial. No matter how obnoxious opposing counsel may be, when you complain about them, it distracts from the substance of your argument. (3) Be concise. While I understand the need to preserve the record, everything doesn't need to be so complicated. Complex arguments tend to be ambiguous arguments. Make things simple.

Gardner: Write no more than is necessary. The more briefs I have read, the more I have come to appreciate and admire the skill required to clearly and concisely explain to the court the issue at hand, the relief sought, and the authority to support that request. There are very few motions, even dispositive ones, which truly require 25 pages, and many can be adequately briefed in 10 or less. Often, less is more.

Haugsbj: I would encourage practitioners to commit to being prepared and professional whenever interacting with the court or opposing counsel. Lawyers who are well-prepared at all stages of litigation—whether during initial phone conferences, in written submissions and briefs, or during court proceedings—tend to be especially effective, and their advocacy tends to be very persuasive. Taking the extra time to ensure that you are prepared when interacting with the court and opposing counsel, and that your written work is carefully prepared, often results in greater success for your clients and bolsters your credibility with the court.

I would also emphasize the importance of maintaining a high degree of professionalism and civility with the court and opposing counsel. Doing so does not mean compromising zealous and effective advocacy, and, in fact, it often has quite the opposite effect by enhancing the quality of that advocacy. Moreover, it helps lawyers build their reputation and standing in the court and is appreciated by judges and members of the bar. The Local Rules of the Middle District of Pennsylvania specifically include a code of professional conduct that all lawyers admitted to practice here are obligated to

follow. Lawyers who maintain this commitment seem to have more success, and a better relationship with the court, than lawyers who fail to honor this obligation.

Stuart: Treat every member on a judge's staff as if he or she is the judge. In other words, show the same respect for the staff as you would for the judge.

Although this is just a small sample of the many law clerks in the United States, familiar themes abound from their responses. These talented lawyers practice in relative obscurity but clearly serve a critical part of the judicial process in federal courts. ☺

Michael Rhinehart is a career law clerk for Hon. Michael J. Newman, U.S. magistrate judge for the Southern District of Ohio. Rhinehart previously served a four-year term clerkship for Hon. Timothy S. Black, U.S. district judge for the Southern District of Ohio. A graduate of the University of Dayton School of Law, he worked in private practice for several years before clerking for the District Court.

Endnotes

¹As Judge Robert J. McNichols pointed out, “[n]ot so very long ago, law clerks typically held their positions for only a one- or two-year period.” *Bishop*, 806 F. Supp. at 900. However, as the court

continued, welcoming a new law clerk annually, while a “good experience for the law clerk,” was “not particularly helpful to the system” because, “[b]y the time a clerk became sufficiently familiar with the mechanics of the task at hand to be productive, he or she would move on.” *Id.* (citations omitted).

² “[N]ot merely the judge’s errand runners[,]” law clerks “are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision.” *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983). In fact, “a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge’s own exercise of the judicial function.” *Oliva v. Heller*, 839 F.2d 37, 40 (2d Cir. 1988). This is not to say, however, that law clerks devoting their careers to such a position are “carried away with delusions of authority they do not have.” *Bishop*, 806 F. Supp. at 901.

³Conference Adopts Recommendations on Law Clerks, The Third Branch, www.uscourts.gov/news/TheThirdBranch/07-09-01/ConferenceAdoptsRecommendationsOnLawClerks.aspx (accessed Nov. 20, 2014).

⁴Judicial Administration and Organization: Law Clerks, Fed. Jud. Center, www.fjc.gov/history/home.nsf/page/admin_03_11.html (accessed Nov. 20, 2014).

⁵See Conference Adopts Recommendations on Law Clerks, *supra* note 3.

⁶*Id.*

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Last but not least, the committee addressed the appendix of forms provided for by Rule 84. Recognizing that Rule 84 was originally adopted in 1938 when the Civil Rules were established, the committee observed that many of the forms were out of date, amendment of the forms would be time-consuming, and multiple alternative sources existed for forms. As the committee characterized it, it was time to “get out of the forms business.”

In Closing

In connection with Rule 1’s goal of the “just, speedy, and inexpensive determination of every action and proceeding,” the amendments proposed by the committee contain a series of significant steps that seek to expedite early pretrial stages, bring clarity to many facets of discovery, and redefine a party’s ESI obligations. If approved by the Supreme Court and subsequently Congress, the amendments are

scheduled to take effect Dec. 1. Practitioners are advised to proactively research how these changes may affect their practice areas. (Interested parties are encouraged to visit the U.S. Courts website, which contains extensive information on the changes to the FRCP, including reports of the Judicial Conference Committee on Rules of Practice and Procedure.) ☺



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