First Assignment:

Required Readings:
Before the first class, students are required to complete readings.
(1) Learning from Practice, A Text for Experiential Legal Education, Chapter 19, pages 489-515
(3) 10 Tips for Better Legal Writing by Brian Garner, ABA Journal

Optional Readings:
(2) PA Bar Association, Ethical Obligations for Lawyers Working Remotely, April 10, 2020
(3) Telecommuting Tips.

Optional Videos:
(1) How to Actually Work When You Are Working From Home, March 11, 2020
(2) Pomodoro Technique, December 10, 2016 Pomodoro Technique

Additional Notes:
Law Clerks are not merely the judge’s errand runners. They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge’s thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be.

—Judge Alvin B. Rubin,
Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983)

Introduction

Judicial externs are in the courthouse. They have access to the judge’s chambers. They enter the well, and perhaps even sit behind the bench, of a courtroom. Short of donning robes, externs are as close as possible to seeing the court system from the judge’s perspective. The opportunity to be a participant-observer of the judicial process is something few lawyers experience in their careers in the law.

While externs will learn a great deal by doing the research and writing the judge and law clerks assign, the opportunity to learn from observing cases in the courts may be even more valuable. With attentiveness, exposure to courtroom advocacy can help develop advocacy skills. Observation of the judge and the other players at the courthouse is a learning bonanza. To realize the potential of these opportunities for observational learning at the courthouse, Chapter 4 on Observation and Chapter 8 on Reflection and Writing Journals will be especially helpful.
As with any externship, the greatest benefits from the judicial externship will come from reflecting on the big picture. To capitalize on access to the courts, it is important to look beyond individual cases and assignments. The materials in the second part of this chapter provide a brief description of how various judges and courts fit into our judicial system and offer a framework for analyzing the work of a particular judge and the relationship between the courts and society. Reflecting on the wider implications of the experience at the courts will make you a better lawyer.

Preparing for the Judicial Externship

Other sections of this book provide information on learning from supervision, developing skills, and addressing ethical issues. This chapter begins by supplementing those materials with information that is unique to judicial externships, including sections on special ethical concerns for judicial externs, the cast of characters at the courthouse, and the research and writing assignments that most frequently arise in judicial externships.

Ethics for Judicial Externs

Significant ethical responsibilities accompany the extraordinary opportunities of a judicial externship. For the purposes of understanding and negotiating the ethical constraints on a judicial extern, you should regard yourself as a law clerk employed by the judge for whom you extern. Federal court law clerks are guided by the Code of Conduct for Judicial Employees (1996), including Advisory Opinions issued by the Judicial Conference Committee on Codes of Conduct, in particular, Advisory Opinion No. 111, Interns, Externs and Other Volunteer Employees; the Ethics Reform Act of 1989 and Judicial Conference regulations promulgated under the Act; and any local court rules or guidelines of the clerk’s own judge. The Federal Judicial Center publishes and makes available online Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks (4th ed. 2013), which provides an overview of law clerks’ ethical obligations and identifies various sources for additional information. State courts have comparable sources for resolving ethical questions. Before beginning work in chambers, externs must familiarize themselves with the guidelines applicable in their jurisdiction and any other sources identified by faculty supervisors or chambers personnel.

In all jurisdictions, three of the most significant ethical issues externs are likely to face are confidentiality, conflicts of interest, and decision making on the record.
Chapters 10–13 on Ethical Issues in Externships provide a more extensive treatment of ethics issues for all types of externs.

Confidentiality: What Goes on in Chambers Stays in Chambers

Perhaps no other single ethical issue is as important as understanding the need for and the extent of preserving the confidentiality of the work of chambers. The relationship between the judge and the judge’s clerk is many faceted—at times teacher-student, at other times colleague-colleague. The relationship often is a close and confidential one. This is necessary for many reasons, not the least of which is the need for the judge to feel free to explore with the clerk the judge’s most personal thoughts about matters for decision. If the judge is not confident she can share questions, soul searching, and preliminary ideas leading up to a publicly-declared decision, the judge may keep these thoughts internalized, and the decision-making process, made possible only through a free-ranging exploration of ideas, is seriously impaired.

In addition, telling tales out of chambers runs the risk of harming the reputation of the judge and undermining public confidence in the judiciary. All rigorous decision-making processes tend to be messy, and judicial decision making is no exception. The judge initially may consider factors that ultimately are discarded as irrelevant, inappropriate, or without sufficient merit, and a snapshot view of that process could easily be misinterpreted and turned against the judge and the courts.

Social media adds a wrinkle to the issue of confidentiality and raises other related ethical issues. All court employees, including externs, must be particularly careful with their social media activities given the permanence, access, and searchability of all posts. In addition to being vigilant about protecting confidential material and refraining from commenting on pending matters, court employees also must be aware of additional dangers such as postings that detract from the dignity of the court or suggest special access to the court or favoritism. Courts are taking steps to address the ethics and privacy issues posed by social media. Many state courts and federal district courts have adopted standards that balance the ethics and security goals with the privacy interests of their employees.

The National Center for State Courts maintains on its website the Social Media and the Courts Network, compiling information and guidance on courts’ usage of social media and its impact on courts, ranging from judicial ethics issues to jury issues to human resources issues.
Confidentiality does not mean you cannot discuss your externship experience in seminar meetings, with your faculty supervisor, or in journals, but it does mean that you must be careful when you do so. You may discuss anything that happened in open court and anything that is part of the public record. That may sound simple, but it can be tricky for you to distinguish between what you observed in open court and what you may be privy to because of your special access to the judge and chambers. Be particularly careful when discussing pending matters. For instance, you would not want to inadvertently suggest which way the judge is leaning. When in doubt about a potential disclosure or comment, remember that discretion is a highly valued trait in the legal profession. It is important for lawyers and prospective lawyers to demonstrate that they can be trusted to maintain secrets and confidences.

Conflicts of Interest

Externs need to be vigilant to actual and potential conflicts of interest between their past, current, and future work as an employee, extern, or volunteer, or simply as someone with knowledge of people or facts, and the work of the court to which they are assigned. The goal is to avoid any appearance of impropriety. Therefore, any suspicion that there may be a conflict of interest with respect to a matter on which an extern has been assigned to work, or on which he or she may be assigned to work, requires informing the judge immediately. In most cases the actual or potential conflict of interest can be avoided by reassigning work to another extern or to the judge’s clerk and ensuring that the conflicted extern has no further involvement in or access to the matter.

The most common sources of conflicts of interest include work an extern may have done in the past on a case that is now before the judge for whom he or she is externing, matters in chambers that involve a law firm to which the extern has applied for employment or wishes to apply for employment in the future, and matters about which the extern has personal knowledge of the facts, parties, or attorneys.

Decision Making on the Record

A law clerk is constrained by the factual record developed by the parties and is not permitted to conduct any investigation to more fully develop the factual record, except as to facts of which the court may take judicial notice. Therefore, an extern may not visit the scene in order to gather information on which the judge might base a decision in the case or otherwise communicate facts to the judge not developed by
counsel but known to the extern because of familiarity with the events or locations of
the case or obtained through factual research the extern has conducted. Rather, externs
are to research the law to be applied to the issues and facts in the case as presented by
the parties. Thorough research includes checking the authorities cited by the lawyers
to determine the relevance and the accuracy of the citations and independent research
to determine whether the lawyers have overlooked controlling precedent or authority
that may be helpful even if not controlling.

The Courthouse Players

![Diagram of courthouse players]

Source: Federal Judicial Center

Who Does What in the Courtroom

Although it is natural to focus energy and attention on the judge, lawyers also
interact with other personnel in the courthouse. This section reviews the players in the
courthouse, focusing on the ways that they support the judge and interact with lawyers
and litigants.

The cast of characters may differ depending on the level of the court, appellate or
trial, and the jurisdiction, federal, state, local, or administrative. Even where the roles
are similar, titles may vary from jurisdiction to jurisdiction. Because there is more
commonality among the federal courts, the descriptions here will focus on the federal
courts, but the players in a state trial or appellate court system are similar and should
be recognizable to externs working in those courts. Under current Judicial Conference
policy, courts of appeals judges can hire up to five people as law clerks or judicial assistants; district judges can employ up to three people; bankruptcy and magistrate judges up to two people. The judge decides how to allocate these positions to best accomplish the work of chambers.

The judge's chambers is typically staffed with one or more law clerks and a judicial assistant. The judge's Judicial Assistant helps administer chambers operations and often acts as the gatekeeper for the judge and clerks.

The Law Clerks do legal research and writing for the judge and perform other tasks as directed including, especially in chambers with fewer employees, many of the tasks performed by the Judicial Assistant, courtroom deputy, and bailiff. Beyond research and writing, one extern observed, “The clerks are there to debate, to discuss, and to challenge.” In most chambers, law clerks are appointed for a term of one year, although some are employed for two years and others may be permanent employees with no set termination date. Most courts have one law clerk although some will have more than one.

The judicial extern's role at court is most like that of the law clerk. Most judicial externs collaborate with the judge’s law clerk on projects for the judge and in some chambers the judge’s law clerk supervises the externs. The materials in Chapter 16 on Collaboration and Teamwork provide guidance on working collaboratively.

In addition to the law clerk or clerks working directly for the judge in chambers, there may be other clerks available to all of the judges in the courthouse. In federal district courts with a heavy docket of filings from prisoners, the court may appoint Pro Se Law Clerks to review cases filed by prisoners and other unrepresented parties. The pro se clerks assist the court by screening the complaints and petitions for substance, analyzing their merits, and preparing recommendations and orders for judicial action. Pro se clerks usually are long-term employees of the court. At the appellate level, the federal circuit courts employ staff attorneys. Although the tasks assigned to staff attorneys vary from circuit to circuit, generally they include reviewing correspondence from pro se litigants to determine the legal sufficiency of the correspondence as an appeal or request for writ of mandamus; reviewing appeals and applications for habeas corpus involving collateral attacks on state or federal criminal convictions; preparing memoranda of law and recommending disposition of the issues raised by motions; and assisting in case management and settlement procedures.
Exercise 19.1  A 2011 Survey of Clerks of Court and Chief Judges in the U.S. District Courts revealed that a top concern among both groups is the impact of pro se litigation on court staff. Special training for designated court staff and referral of pro se matters to specialized clerks and magistrate judges were among the procedures the clerks and judges respectively found most helpful. What are the implications of these procedures? Do they improve the process for pro se litigants whose cases are reviewed by staff with special training and expertise, or do they create a separate track for this class of litigants to minimize their impact on judicial resources? Does this approach signal a view or result in a perception that pro se cases are less important?

Consider the pro se litigants who have appeared at your placement. What procedures does your court have in place for dealing with them? Do you see any differences in the way that your judge handles proceedings involving pro se litigants? What challenges does the presence of an unrepresented party create for your judge?

Judges also have staff to support their work in the courtroom. Most judges have a Courtroom Deputy or “minute law clerk” or “case manager.” The deputy is an employee of the clerk of court's office, although the deputy serves the judge to whom assigned. In trial courts, nearly all courtroom deputies record the minutes of the court and assist the judge with scheduling trials, hearings, and argument on motions. The deputy's duties may include administering oaths to jurors, witnesses, and interpreters; maintaining custody of trial exhibits; maintaining the court’s docket; serving as liaison between the judge’s chambers and the clerk of court’s office; and other duties as assigned by the judge. The courtroom deputy handles the judge's calendar and case records, so lawyers rely on courtroom deputies to help locate files and documents and for information on the status of cases and scheduling. Courtroom deputies can be good sources regarding the judge’s courtroom practices and preferences.

Many judges also have a Bailiff or Crier who attends sessions of court and announces openings of court, recesses, and adjournments. The bailiff maintains order in the courtroom under the direction of the judge and is responsible for conducting the jury to and from the jury room. Except in a few courts where recording devices are in use, when the court is in session there is a Court Reporter or stenographer present who creates the official record of all court proceedings that are required to be recorded and prepares a written transcript when requested by the court or the parties. Attorneys and court personnel contact the court reporter when they need to make reference to the record of a court proceeding.
In federal courts, courthouse security is provided by the United States Marshals Service, sometimes in conjunction with private contract court security officers. The U.S. Marshals also move prisoners; supervise the department’s Witness Security Program; apprehend federal fugitives; and execute writs, process, and orders issued by the court. In many places, the marshal or marshal’s deputy is in complete charge of the jury. The marshals know when a defendant or witness who is in custody will be produced in the courtroom, and they can help to locate prisoners.

From time to time other players will appear in the courtroom, often to assist the judge by providing information necessary to the judge’s work. Each federal district court has a Probation Office whose officers conduct pre-sentence investigations and prepare pre-sentence reports on convicted defendants; supervise probationers and persons on supervised release; oversee payment of fines and restitution by convicted defendants; and conduct investigations, evaluations, and reports to the Parole Commission when parole is being considered for an offender or when an offender allegedly violates parole. Some courts may have a separate Pretrial Services Office whose officers assist the judge in making bail determinations on criminal cases and supervising defendants who are released pending trial. Finally, anytime a non-English-speaking party or witness appears in court, an interpreter attends to provide translation.

In certain cases, judges require specialized assistance. Under Federal Rule of Evidence 706 the judge may appoint a Court-Appointed Expert witness to help the court and jury understand complex matters outside the common understanding of the court and lay jurors, including helping to understand the often conflicting testimony of the parties’ own experts. Federal Rule of Civil Procedure 53 authorizes any district judge before whom an action is pending to appoint a Special Master as an impartial expert designated to hear or consider evidence or to make an examination with respect to some issue in a pending action and to make a report to the court.

There are two groups of attorneys who appear regularly in the federal courts: United States Attorneys and Public Defenders. In all cases in which the United States is a party, a representative of the Department of Justice is the attorney for the government, usually the U.S. Attorney or an Assistant U.S. Attorney for the district in which the case is pending. The counterparts in state courts are local prosecutors and attorneys from the state attorney general’s office. The Criminal Justice Act of 1964 (18 U.S.C. § 3006A) requires each federal district court to have a plan to ensure that federal defendants are not deprived of legal representation because they cannot afford it. This need may be met by assigning cases to private attorneys or, in districts where at least 200 appointments are made annually, by establishing a public defender organization.
State and local governments may have comparable systems in place. A more detailed discussion of these issues appears in Chapter 21 on Criminal Justice Law Placements.

Moving from the courtroom to the remainder of the courthouse, there are two significant resources that attorneys use: the Clerk’s Office and the library. The Clerk of Court in a federal district court serves as the chief operating officer of the court, implementing the court’s policies and reporting to the chief district judge. The clerk’s responsibilities include maintaining the records management system to safeguard the official records of the court, accepting pleadings and other papers required to be filed with the clerk, issuing subpoenas, and managing the jury selection process. Each chief clerk is assisted by one or more deputy clerks and clerical assistants. Depending on the size of the jurisdiction, deputy clerks and assistants may have specialized duties. The clerk’s office establishes the procedures for filing cases, serving documents, obtaining court orders, and finding court records.

Most externs find their way to the library in the courthouse. The Librarian is a source for resources and techniques to help deliver a more efficient and reliable product to the judge. Attorneys who understand the resources that are available to the judges and their law clerks can tailor their advocacy accordingly.

Judicial externs are likely to come into contact with most if not all of the persons described above, but there are others employed in the courthouse, some less visible but nevertheless serving important functions, with whom there may be interaction. All interactions with members of the courthouse community present valuable opportunities to gain knowledge that will inform practice as an attorney. One extern shared the following insight on courthouse interactions:

*I have always had a policy of getting to know those individuals in a work environment whose tasks seem more removed from mine both as a showing of respect for their work, and as an investment in general good will.*

—Student Journal

Research and Writing for Judges

*This matters. Unlike the briefs I wrote for first-year legal writing class or other legal analyses that I’ve made in school or on other issues, which involved imaginary parties or hypotheticals, this was a real person whose life I was affecting.*

—Student Journal
The primary players at the courthouse are the judges, and just as the supporting cast described above work to assist the judge, much of an extern’s experience and learning will revolve around helping the judge. In almost all courts, judicial externs will do some research and writing. This section identifies some of the idiosyncratic writing products that judicial externs may be asked to prepare and provides some general advice about research and writing in judicial chambers. Additional assistance on further developing research and writing skills is provided in Chapter 17 on Writing for Practice. In addition, a number of helpful resources appear at the end of this Chapter under Further Resources.

Opinions are of varying complexity and length. “Full-dress” opinions are those that require structured discussion of the facts, legal principles, and governing authorities. Memorandum opinions are used where the decision does not require a comprehensive, structured explanation but still needs some discussion of the rationale. They are generally brief and informal and may or may not be published. Per curiam opinions issued in the name of the court as a whole and identifying no single judicial author, generally are included in this category. Summary orders simply state the disposition of an issue or the case, sometimes with a brief statement of findings and conclusions, but often with little or no explanation. Summary orders usually are not published.

Orders are many and varied in complexity and form, from an Order of Judgment disposing of a case after a jury verdict to an order granting an unopposed request for an extension of time. Some orders of judgment may be as detailed as a full-dress opinion, such as where a complex matter was tried to the court sitting without a jury. Other orders are so routine in nature they are prepared by the office of the clerk of court rather than in chambers. In some jurisdictions, the parties prepare proposed or draft orders and the judge just signs them. A voting memorandum presents the view of a judge on a panel to the other members of the panel. It is usually more succinct than the related bench memorandum and typically will reflect the view of the case that was developed at oral argument.

A bench memorandum typically is a brief document prepared to orient the judge to the facts of the case, the arguments of the parties, and the applicable law. It may be prepared by the parties or by the clerks. In a trial court, it may be as short as a page or two in length and include the facts as presented by the parties, the applicable law, an analysis, and a conclusion or recommendation to the judge. In an appellate court, the bench memorandum typically is longer, as it must deal with all issues raised by the parties’ arguments. For the appeals court judge, the memorandum is most often a summary of the briefs of the parties, together with an analysis of the validity of the
respective positions of the parties, and an identification of issues that require further inquiry at oral argument.

A single-issue memorandum is a research memorandum that deals with a single issue that arises during trial, often as a result of inadequate preparation by counsel, an unexpected development during trial, or the judge's wish to pursue an aspect of the case not fully developed by the attorneys.

Some trial court judges may ask clerks or externs to draft case summaries of recent appellate court opinions to keep the judge apprised of current developments without the judge having to read the entire opinion.

Rarely will the clerk or extern be asked to prepare routine correspondence for the judge's signature. On occasion, however, the task may fall to the clerk or, less likely, an extern. The judge will always sign such correspondence because the clerks and externs should not have any contact with the parties or their attorneys unless directed to communicate with them by the judge.

**General Advice—Research**

Regardless of the nature of the written product externs are asked to prepare, it is likely that some research will be necessary to gather the facts and law required to prepare the document. Chapter 17 on Writing for Practice contains additional material to help externs become more proficient at research; Chapter 3 on Learning from Supervision contains material on working with supervisors on written assignments. One word of caution—although a number of courts have begun citing to Wikipedia, at least with respect to facts deemed incontestable, the practice is far from universal. Externs should be guided by the preferences of their respective judges.

**Clarify the Assignment**

Whether the assignment is simple or complex, a clear understanding of the research and writing tasks involved is essential to doing an effective and efficient job. Asking for answers to fundamental questions after receiving the assignment but before leaving the clerk's or the judge's office to begin organizing the task often can save hours of fruitless work and dead ends. At a minimum it is important to have answers to these questions: In what format should the project appear when turned in? Where the format is unfamiliar, are there any examples to review? What is the deadline for the project? Are there any sources or resources to use or be aware of in working on the project?
Organize the Project

Upon receiving the assignment, establish a work schedule and a work plan. Usually the first step is to collect all of the materials needed to commence researching the project. For example, when drafting an order granting or denying a motion, be sure to collect all of the papers filed by the parties in support of or in opposition to the motion as well as any notes created by the judge that reflect the judge's thinking on the outcome.

Check for Conflicts

As soon as possible after receiving an assignment, an extern should familiarize himself or herself with the parties involved in the matter and determine whether there is an actual or potential conflict of interest because of a relationship to the matter or one or more of the parties. For example, the physician whose expert opinion's admissibility is in dispute may be an aunt or next door neighbor or former employer. Externs should discuss the potential conflict with the clerk or the judge and resolve the question of conflict of interest before proceeding any further.

Do Background Research

Unless you already have a citation to a primary source, the best place to begin almost any research project is usually in a secondary source, such as specialized-treatises and texts, legal encyclopedias, law review articles, loose-leaf services, and ALR annotations. Do not hesitate to ask the law clerk, the judge, or a reference librarian for suggestions. After the judge and judge's clerk, the most important and helpful person may be a good reference librarian, either at the court's library or your law school library.

Keep a Research Log

A research log or journal, especially for long-term, complex research tasks, can be invaluable, providing a detailed trail of your research through all of the materials consulted. A well-maintained research log helps avoid duplication of efforts, especially if there is a time lapse between research sessions. It can also be very useful to someone else—such as the law clerk or another extern—should it be necessary to pass off the assignment. Finally, a research log can form the basis for a discussion of any problems encountered in the course of research. There is no single best format or style of log but a simple form would identify each resource consulted, describe the search path used
within the resource, record the relevant results of the use of the resource, and describe any limitations or problems with the resource.

General Advice—Writing

- **Know the Audience**

  When turning from the research task to the writing task, it is important to be clear about the format for the document and its intended audience. A bench memorandum is for the judge’s eyes alone but should be in a familiar format so that the judge easily can find the information needed. An order disposing of a routine motion is addressed to the lawyers for the parties and, to a lesser extent, the parties themselves. The language used should reflect this audience. Opinions are written primarily for the litigants and their lawyers, but opinions also serve to guide the future action of others: lawyers, lower courts (appellate opinions), agencies, and the general public. The broader the intended audience, the more important the appropriate tone, language, and detail of fact and analysis become.

- **Keep It Simple**

  Written work should always be clear, concise, and logical. To ensure that everything pertinent is included in the draft, it is helpful to prepare a sentence or topical outline before beginning to write. In general, less is almost always preferable to more: fewer words are better than more words; shorter words are better than longer words; shorter sentences are better than longer sentences. The use of abstract or obscure words and phrases, flowery language, or complex literary devices may interfere with the reader’s ability to understand the point. Leave flourishes to the judge.

- **Adopt the Judge’s Preferences**

  Not all judges have the same philosophy or approach to writing. Some prefer to write their own opinions while others look to their clerks to provide drafts that they then edit—some lightly, some heavily. Some will expect their clerks and externs to draft memoranda that the judge will work with to craft his or her own final document. Learn the judge’s personal style preferences and use them. For example, the judge may prefer to write “plaintiff and defendant” or “the plaintiff and the defendant” or to substitute the name of a party (Smith) or a descriptive term (tenant) for plaintiff and defendant.
Know which style manual to use. Not all courts or judges use The Bluebook and the citation style should conform to that which the judge uses.

- **Proof and Edit the “Draft”**

*All players in the game depend on and use other people’s writing when producing their own. I relied on the parties’ legal writing to draft my memorandum and my judge used mine to draft her opinion.*

—Student Journal

The draft should be an extern’s “final” product. Even though the clerk or the judge may ask for a draft memorandum, only best efforts should be provided to them. For all but the most basic documents, a second draft will likely be required after receiving input and edits from the clerk, the judge, or both. Nonetheless, every document should reflect an extern’s best effort at preparing a final product. This means employing the proper document format, ensuring that references are appropriate and accurate, and thoroughly proofreading the document to catch all spelling and grammatical errors as well as typos. Using a computer’s spell check function is necessary, but never sufficient. For many of us, it is much more effective to proofread from printed pages than from a computer’s display. If it is possible to do so without violating the rules of confidentiality, it can be helpful to ask a colleague for an additional proofread before submitting the document.

- **Check in With the Clerk or Judge**

Throughout the research and writing process, do not hesitate to ask the clerk or the judge for further guidance on the assignment, help in doing research, or suggestions in writing. Be mindful, however, of their limited time: consult additional resources on your own first; ask multiple questions at one time rather than posing each question as it arises; learn the times of day when interruptions are least disruptive and approach the clerk or judge with questions at those times unless the question requires urgent attention.

**Context for Analyzing Your Judicial Externship Experience**

There are many ways law students might improve their research and writing ability during law school, but where, other than a judicial externship, could they observe a judge at work? Understanding the work of the judge and the implications of the judge’s approach to his or her work potentially has a huge payback that transcends all other gains externs may make during a semester at the court. Using time in the courthouse
to observe and analyze the judicial process and its implications in real cases is bound to improve advocacy skills. Analyzing the judicial externship experience in the broader context of the judicial system also will give working with an individual judge, in a single courtroom, in just one courthouse, in a specific jurisdiction, more universal meaning and value.

The Work of a Judge

As a lawyer, you don't get a choice which side to argue, but you have to see both of them and figure out ways to dismiss the opposition. As a judge, on the other hand, you do get that choice and there lies the problem because people's lives depend on you being right, not simply on you out-arguing your opponent. It must be extremely difficult to turn off the “argumentative” side and be able to function as a neutral party.

—Student Journal

What are the elements of the judge's work? Typically, we picture judges hearing legal arguments, reading briefs, and researching and analyzing the law all in order to render a well-reasoned written decision. Certainly, opinion writing is central to the judge's role, but the work of a judge, particularly a trial judge, includes making a variety of decisions beyond the published written opinions that are so familiar to law students. In addition to rendering written and oral decisions on a range of issues, judges engage in increasing amounts of what has been called “case management”—all of the other work that goes into managing and resolving a large docket of cases.

The Judge's Role as Decision Maker

I cannot imagine the level of self-control and dedication it takes to make decisions strictly based on legal principles. We are taught in law school that the rule is most important and that our arguments always need to be supported by legal principles; however, there is always so much emotion and passion that gets intertwined into those arguments. The judge is faced with aggressive and passionate litigators who make it extremely difficult to ignore those emotions, and I am always amazed at a judge's ability to make sound legal decisions amidst all that chaos.

—Student Journal

When we think of what a judge does, decision making is likely the first thing that comes to mind. In fact, the verb form of the word “judge” is synonymous with the words “decide” and “determine.” The essence of the judicial role is deciding things; yet, the
process by which judges make decisions is difficult to discern. Justice Benjamin Cardozo noted that even judges have difficulty describing how they make decisions:

The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth.


So how can we start to determine how judges make decisions? Cardozo attempted to further the inquiry:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. Id. at 10.

Understanding the way a particular judge brews the "strange compound" to make a decision is a skill that good advocates cultivate. Externs can use their time at the court and interactions with the judge to begin to develop that talent.

Judges are confronted with different types of decisions. It is possible to categorize them in any number of ways, including by type: findings of fact, statutory interpretations, and application of standards or rules. Some judges distinguish between decisions based on their level of difficulty. Cardozo describes three types of cases:

Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. . . . In another and considerable percentage, the rule of law is certain, and the application alone doubtful. A complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs . . . . Finally there remains a percentage, not large indeed, and yet not so small as to be negligible, where a
decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. Id. at 164–65.

Does your experience at the court confirm Justice Cardozo's assessment that the majority of cases present only one possible result? How do judges decide that small number of very meaningful cases that move the law? Cardozo suggests that a judge must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales. Id. at 162.

Writing almost 100 years after Cardozo, Judge Richard Posner, who sits on the United States Court of Appeals for the Seventh Circuit, rejects what he terms “formalist approaches to law,” which he says “are premised on a belief that all legal issues can be resolved by logic, text, or precedent, without a judge’s personality, values, ideological leanings, background and culture, or real-world experience playing any role.” Richard A. Posner, Reflections on Judging 1 (2013). Is this contemporary approach consistent with Cardozo's?

**Exercise 19.2** Take a difficult issue in one of the cases before the judge with whom you are externing and analyze the judge's decision making on that issue. What "ingredients" did the judge consider? Of those, were some more meaningful to the judge than others? How, if at all, did the judge reveal her inclinations to the lawyers? How effective were the lawyers' arguments, written and oral, in recognizing those "ingredients" and their relative importance to the judge?

At her 2009 Senate confirmation hearing, Judge, now Justice Sonia Sotomayor explained her judicial philosophy as “Simple: fidelity to the law. The task of a judge is not to make the law—it is to apply the law.” Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 111th Cong. 59 (2009) (statement of Hon. Sonia Sotomayor). Compare that statement with another from Judge Posner:

Judges tend not to be candid about how they decide cases. They like to say they just apply the law—given to them, not created by them—to the facts. They say this to deflect criticism and hostility on the part of losing parties and others who will be displeased with the result, and to reassure the other branches of government
that they are not competing with them—that they are not legislating and thus not encroaching on legislators' prerogatives, or usurping executive-branch powers. Posner, supra at 106.

If judges are "just saying" they are applying the law, what is it they are actually doing?

Justices Cardozo and Sotomayor and Judge Posner were reflecting on the judge's decision-making process at the appellate level. Many externs are placed in trial courts. Trial judges are called upon to do more fact finding than appellate judges. In one classic text on judging at the trial level, Jerome Frank distinguishes fact finding from other types of judicial decision making. He refers to facts as guesses and notes that the judge, in finding facts, is subjectively judging the testimony of witnesses. Jerome Frank, COURTS ON TRIAL 22 (1950). Frank suggests that the trial judge's ability to find the facts plays a determinative role in many cases all the way through appeal. Does that shed a different light on the importance of the trial judge's findings of fact?

**Exercise 19.3** Do you always agree with your judge's assessment of witnesses' credibility and her determination of the facts of the case? Pay particular attention to the testimony of a witness at a hearing where the judge will be making findings of fact. Develop your own findings of fact based on the testimony of the witness. Compare it to the facts as found by the judge. If your findings of fact are different, analyze the application of the law to the facts as you found them. Is your result different from the judge's? Why?

Finally, to what extent do judges bring their personal beliefs into the decision-making process? Even Cardozo, a judge renowned for his legal reasoning, recognized that "the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man" influence judges' decisions. Cardozo, op. cit. at 167. Most judges try to resist the temptation to substitute personal preferences for principles. Is it realistic to expect that judges can make purely principled decisions? Judge Frank seemed to think it was not possible: "[t]he trial judge's decisional process, like the artistic process, involves feelings that words cannot ensnare." Frank, op. cit. at 173. If that is the case, what does that teach you about how lawyers should approach legal arguments?
Does personal experience play a role in judicial decision making along with law and ideology? A recent study of 2,500 votes by 224 federal appeals court judges found that judges with at least one daughter were more likely to find in favor of women's rights. What does this finding mean for judicial selection and the importance of diversity on the bench? How does it affect public confidence in the judiciary? Adam Liptak, Another Factor Said to Sway Judges to Rule for Women's Rights: A Daughter, N.Y. Times, June 16, 2014, at A14.

The Judge's Role as Case Manager

My experience externing has allowed me to witness first-hand how matters are “moved along” and the attempts to balance the interests of justice against the time constraints imposed by enormous caseloads.

—Student Journal

The sheer volume of cases requiring decision has the potential to overwhelm the judiciary. Courts struggle to reduce, or at least control, persistent backlogs. How can the courts, which seem to be swimming against the tide, hold their ground and offer judges the opportunity to make reasoned, not rushed, decisions?

Exercise 19.4. Analyze the caseload your judge is handling. How many cases are on the judge's docket? How old is the oldest case? If your judge holds regular “calendar days,” how many cases does she typically have on the calendar in a single day? How long, on average, does she spend on each case? How many cases does she close each month? Compare this to the number of new cases added to her docket each month. How many of these are newly-filed cases and how many are cases being transferred from another docket?

The past several decades have seen an increased focus on judicial case management. Some have argued that aggressive judicial case management techniques have contributed significantly to managing effectively the increasing number of case filings. Not everyone credits case management with improving the pace, much less the quality, of justice. One federal judge, criticizing legislation aimed at moving civil cases through the federal courts more expeditiously, summed up the challenges:
There is little consideration of quality control, as such, but the judge, wearing two hats—quality control and assembly line monitor—knows that both aspects of the case are her concern. Moving the case along without concern for the substance of what is happening is not only a useless act, but it just doesn’t work. Images of I Love Lucy with Lucy on the assembly line in the candy factory come to mind.


What does the judge’s role as case manager entail? Case management takes many forms—some more substantive than others and even the ostensibly routine ministerial procedures can have a significant impact on the outcome of a case. Judicial involvement in discovery, scheduling, and settlement are all types of judicial management. Even mundane matters like the frequency of and length of time between adjournments leading up to the trial are management issues. Some judges like to call the attorneys and parties into court frequently while others prefer to let the cases proceed largely outside the courthouse and only calendar the most significant case markers like the pre-trial conference and the trial itself. Whom does the judge want to see in court at each of these adjournments? Some judges require an attorney or party with settlement authority to appear each time the case is on the calendar, while others routinely excuse the parties in civil matters requiring only the lawyers be present.

Court systems and individual judges also have different approaches to the flow of cases. Does the judge routinely grant extensions of deadlines and adjournments on the consent of the parties, or is he largely unyielding? Some of the more aggressive means of judicial management include setting hard and fast trial dates and restricting discovery. Courts routinely using more aggressive management methods have earned names like the “rocket docket” or are termed “fast track” courts. Even judges whose courts have not earned such monikers sometimes resort to those tactics to move a particular case forward or at the request of one of the parties.

Effective litigators research the management policies of the judges and courts in which they appear, and they think about whether there are ways to use the policies to their clients’ advantage in litigation. They use their understanding of case management techniques to inform strategy decisions at every stage of a case, beginning with the decisions of what kind of case to bring and where to file it.

As an extern, be alert to the management techniques in use in your court. Pay particular attention to when and how the judge becomes involved in cases and who initiates the judge’s involvement, the judge or the parties. Think about whether any of
the methods of case management your judge uses potentially have a disparate effect on different kinds of litigants or attorneys. For example, short and unrelenting discovery deadlines are likely to benefit the party with greater resources to devote to the case. Do the lawyers try to exploit the case management techniques, and, if so, how does the judge react?

**Exercise 19.5** Many judges have their own rules and procedures that they provide to attorneys and litigants at the beginning of each case. Find out if your judge has individual pre-trial practices. If so, how does she convey them to attorneys and litigants? Go to www.uscourts.gov and follow the links to your local federal district court’s website. If you work in a state court, go to the comparable website for that court. Explore it, paying particular attention to the information individual judges have posted. You are likely to find a variety of individual practices that the judges expect attorneys appearing before them to follow. Print out one example and compare it to your judge’s practices.

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**The Judge’s Role in Settlement**

*It’s not always clear whether the judge is suggesting settlement because he or she thinks it is in the best interest of the parties, or whether he or she is suggesting it because it is in the best interest of the court. Settlement is easy. It saves time and money.*

—Student Journal

Settlement before trial has become an essential case management tool available to judges. Judges make choices regarding the role they will play in the process. There are a wide range of views on the appropriate role of the judge in facilitating settlement. One prominent critic of settlements contends that the judge’s role is not “to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.” Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073, 1085 (1984). Proponents of settlement see benefits when judges use the settlement process selectively to craft quality solutions, not simply to clear the docket. Each judge has her own viewpoint about the role she should play in the settlement process ranging from those who disdain involvement to those who aggressively pursue settlement.
The judges who eschew a role in the settlement process do so for a variety of reasons. Some judges believe that any urge to settle should come from the parties rather than being imposed upon them, but the pressure of heavy dockets makes it increasingly difficult for the judiciary to sustain a hands-off policy. Participation in the settlement process arguably calls into question the judge’s impartiality. It may be difficult for a judge who has actively participated in settlement negotiations to preside impartially over later proceedings if the settlement talks fail. Without empirical research it is difficult to assess the effects of judicial involvement in settlement, but lawyers surveyed in several jurisdictions express concern about the impartiality and effectiveness of settlement negotiations conducted by the trial judge. The majority of those surveyed express strong preference for negotiations conducted by staff mediators noting their ability to devote ample time to the discussion and their specialized communication skills. Roselle L. Wissler, Judicial Settlement Conferences and Staff Mediation Empirical Research Findings, Dispute Resolution Magazine, Summer 2011 at 19. Other solutions to the impartiality concern include assigning cases that do not settle to a different judge for trial or having the trial judge’s law clerk oversee settlement discussions. Do these solutions resolve the problem?

Among the judges who view encouraging settlement as part of their role, there are a range of techniques and styles. Some judges actively analyze the merits of the case, suggest an appropriate figure, or formulate proposals not contemplated by the lawyers. Other judges encourage compromise without endorsing a number or assessing the strength or weakness of the respective cases. Judges may require attorneys and their clients to attend the settlement conference. Some judges even bypass the attorneys and advocate settlement directly to the litigants. Another technique favored by some judges is meeting with each attorney separately to discuss settlement. Do you see any potential problems with these meetings? Other judges use more indirect means of encouraging settlement such as setting a quick or unmoving trial date or alluding to the weakness of a key motion made by the attorney for a recalcitrant litigant. Attorneys who anticipate and understand how the judge is likely to encourage settlement can use the judge’s participation to their clients’ advantage. For example, an attorney who recognizes that a particular judge is likely to encourage settlement by moving the case to trial quickly will be certain to prepare for trial early so that the judge’s technique will not impose undue pressure to settle. An attorney who knows that the judge is prone to argue settlement directly to the parties by noting the weakness or strength of a pending motion will take pains to impress upon the judge the relative strength of any motion he has pending during a settlement conference.

A wide range of techniques for encouraging settlement are acceptable up to and including sanctions, but there are limits. The law “does not sanction efforts by trial
judges to effect settlements through coercion." *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985). In *Kothe*, the U.S. District Judge had threatened to impose sanctions on the party rejecting his recommended settlement if a comparable settlement was reached after the trial started. The parties settled the case one day into the trial, and the judge imposed the sanction on one of the defendants. The appellate court vacated the sanction as coercive. Sanctions are more likely to be upheld where they are applied for failure to send an attorney or party with settlement authority to the court appearance. See *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 654 (7th Cir. 1989) (en banc); *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1396 (9th Cir. 1993).

**Exercise 19.6** Think about the settlements you have seen during your externship.

What role has the judge or her clerk played? What techniques does the judge or clerk use? Are any of the techniques arguably coercive?

Analyze a particular settlement you have seen. Do you think the settlement was "fair" to both sides? Was justice served by settlement? Do the parties seem satisfied? Have you ever seen the judge voice concern over the fairness of a settlement? Describe the circumstances.

Plan how you would approach a settlement conference with your judge or her clerk if you represented a plaintiff in a case.

One extern reported that a plaintiff's attorney told her:

*The trial judge will always tell you your case is terrible. They will tell you to settle and take whatever you are offered. They will tell you what your case is worth and do everything they can to shake your confidence about going to trial. Don't listen to them.*

How does this advice square with your observations?


**The Judge's Role at Trial**

For that small percentage of cases that do not settle, there will be a trial. For judges, presiding over trials is a complex, and sometimes frustrating, function. In a frequently
quoted passage, the United States Court of Appeals for the Second Circuit adopted the trial judge’s view that he “need not sit like a ‘bump on a log’ throughout the trial.” *United States v. Pisani*, 773 F.2d 397, 403 (2d Cir. 1985). Yet, in the adversary system, the attorneys have the more apparently active role in trying a case. Francis Bacon warned, “Patience and gravity of hearing is an essential part of justice; and an over speaking judge is no well-tuned cymbal.” What is the judge’s role during a trial, and what are the limits of judicial intervention?

In a jury trial, the judge typically structures the selection of the jury, instructs the jury on the law, controls the flow of the trial, and admits the evidence. In a non-jury trial, the judge also evaluates the credibility of witnesses and assesses the evidence to “find the facts.” The judge is expected to produce a just, speedy, and economical trial. It sounds straightforward, and many judges make it look easy, but presiding over a trial while maintaining impartiality is a difficult task.

Think about the number and variety of decisions the judge must make during the course of a trial. The pace of trial often requires instantaneous rulings from the bench on legal and evidentiary issues. Throughout the trial, not just during the charge, the judge instructs the jury on the law. Knowing many areas of the law is only one part of the decision-making process. Frequently, the judge has to make a factual determination before making a legal ruling so that, even in a jury trial, the judge acts as a fact finder. The decision-making process is complicated. To determine the facts, the trial judge must evaluate witnesses:

He must do his best to ascertain their motives, their biases, their dominating passions and interests, for only so can he judge of the accuracy of their narrations. He must also shrewdly observe the stratagems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions. Frank, op. cit. at 414–15.

Even before the trial begins, the judge can make rulings that have a dramatic impact on the case. One of the more controversial steps judges may take in exercising control over the trial process is to set hard and fast time limits for the presentation of evidence at trial, sometimes enforcing the limits with a stopwatch. Judges who have

Judges also may determine the structure of the trial, for example, bifurcating the presentation of evidence on liability and damages.

Jonathan Harr’s book, A Civil Action, chronicling the litigation of a mass tort case in a federal district court, vividly describes the impact of the judge’s decision on the structure of that trial.

The procedural rules leave the judge broad discretion in controlling the conduct of trials within her courtroom. The judge is charged with establishing trial procedures effective for determining the truth, avoid wasting time, and protect witnesses from harassment and undue embarrassment (see Fed. R. Evid. 611). That is no small task, and potentially contradictory. (Fed. R. Evid. 611). In addition to making decisions regarding the structure of the trial, for example, whether it is by judge or jury, when it will begin, and whether it is consolidated with another related matter, (see Fed. R. Civ. P. 39, 40, 42), judges also control the flow of the trial by determining the structure and length of the voir dire, the order and number of witnesses, and the length of witness examinations and attorney argument (see Fed. R. Civ. P. 47; Fed. R. Evid. 611).

Trial judges may even call witnesses and may question witnesses whether called by the court or by a party, for example, under Fed. R. Evid. 614. Judges also have inherent power to control the conduct of attorneys, parties, witnesses, and jurors during trial. In addition, the judge controls seemingly mundane matters such as where attorneys may stand when questioning a witness, how evidence and exhibits will be handled, when and how matters will be discussed outside the presence of the jury, and how objections may be made. All of these elements of the conduct of the trial may affect the outcome, particularly if an attorney has not anticipated them when planning trial strategy. During your externship be attentive to the varying abilities of counsel to exploit, or at least cope with, the judge’s direction of the trial.
Exercise 19.7 Some judges provide trial attorneys with a list of trial conduct rules they expect the attorneys to follow. Think about what sorts of trial procedures your judge employs and how she communicates them to attorneys. Consider how the judge’s control and structure of a trial you have observed affected the lawyering or the outcome of the trial.

Judges must perform all these trial functions impartially. What constitutes impermissible partiality? Jerome Frank sums up the quandary “[T]here can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, ‘bias’ and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will.” Frank, op. cit. at 413. Whatever opinions the trial judge holds, she must be careful not to signal to the jury bias toward any party. Judges who call or question witnesses, comment on witnesses or testimony, or repeatedly rebuke counsel in front of the jury, sometimes find their behavior the subject of appellate review. The bar is high for overturning a verdict based on the judge’s intervention at trial. The party asserting the claim of improper bias by the judge must show not only that the judge in fact displayed bias to the jury but also that serious prejudice resulted from the showing of bias. Appellate courts look at the totality of the trial and assess the quantitative and qualitative nature of the judge’s questioning as well as the witness to whom the questions were directed and the presence or absence of curative instructions. Reversal is only warranted in extreme circumstances where the judicial intervention was substantial and prejudiced the outcome. Reversals are more likely when the judge questions a defendant in a criminal case joining the prosecutor as a “tag team,” as one court described. See United States v. Filani, 74 F.3d 378 (2d Cir. 1996). Appellate courts often refuse to reverse based on regrettable comments towards counsel or witnesses, noting the trial judge’s duty to manage trials to eliminate confusion and prevent them from becoming needlessly protracted and costly. In other words, only the most egregious intervention by the trial judge is likely to result in reversal.

One extern remarked that the judge “adjusts his level of involvement depending on the parties before him and their resources—taking more or less control over the litigation as needs dictate. But he is just leveling the playing field to ensure that under-represented parties receive the protections and advantages to which they are entitled under the law. While he cannot correct for the circumstances that brought a party into his courtroom, he can and does at least make sure that they receive a
You've noticed whether your judge alters her involvement when pro se litigants appear before her?

In classic texts on the role of the trial judge, two experienced judges urged restraint by the trial judge. Bernard Botein suggested that a trial judge should remain aloof emotionally from the trial, keeping only a finger on its pulse to ensure healthy progress. TRIAL JUDGE 125 (1952). Is this a realistic approach? In the televised O.J. Simpson murder trial, the presiding judge was criticized for his laid-back demeanor that gave substantial leeway to trial counsel and arguably prolonged the trial. Marvin Frankel raised another concern. He noted that judges, by virtue of their role, have limited knowledge of the cases that come before them. Intervening from a position of ignorance they risk clumsily interfering with each side's trial strategy. Marvin E. Frankel, The Search For Truth: An Umpireal View, 123 U. PA. L. REV. 1031, 1042 (1975).

Exercise 19.8: Do you think the judge's manner or participation at a trial you have watched has hurt or helped one side? Did the attorneys do anything to provoke the judge? Could they do anything to blunt the impact of the judge's behavior on the jury? Did the judge's behavior differ depending on whether or not the jury was present? If the judge's participation arguably helped one side, did the attorneys for that side capitalize on the judge's favor? Is it appropriate to take advantage of a conflict between the judge and your adversary?

Selection and Evaluation of Judges

After reviewing all of the elements of the judge's role and the myriad ways judges control and shape the judicial process, you can see why savvy lawyers like to know about the judges before whom they appear. The judge's background and experience prior to donning the black robes may inform a lawyer's advocacy. Similarly, the judge's experience, route to the bench, and term of office provide externs with important context for evaluating and analyzing their experiences at the court.
Committee on Codes of Conduct Advisory Opinion
No. 112: Use of Electronic Social Media by Judges and Judicial Employees

This opinion provides the Committee’s guidance on an array of ethical issues that may arise from the use of social media by judges and judicial employees, particularly members of a judge’s personal staff. This guidance is intended to supplement information the Committee developed in 2011 to assist courts with the development of guidelines on the use of social media by judicial employees. See Resource Packet for Developing Guidelines on Use of Social Media for Judicial Employees. The Committee noted in the Resource Packet that “[t]he Code of Conduct for Judicial Employees applies to all online activities, including social media. The advent of social media does not broaden ethical restrictions; rather, the existing Code extends to the use of social media.” The Committee also recognizes that electronic social media may provide valuable new tools for the courts, and that some courts have begun to use social media for official court purposes. This opinion is not intended to discourage the official use of social media by the courts in a manner that does not otherwise raise ethics concerns. Nor is this opinion intended to supplant any social media policy enacted within each judge’s chambers which may govern that specific judge’s internal chambers’ operation. If an individual judge’s personal chambers’ policy is stricter than that set forth below, the individual judge’s policy should prevail.

I. Ethical Implications of Social Media

The use of social media by judges and judicial employees raises several ethical considerations, including: (1) confidentiality; (2) avoiding impropriety in all conduct; (3) not lending the prestige of the office; (4) not detracting from the dignity of the court or reflecting adversely on the court; (5) not demonstrating special access to the court or favoritism; (6) not commenting on pending matters; (7) remaining within restrictions on fundraising; (8) not engaging in prohibited political activity; and (9) avoiding association with certain social issues that may be litigated or with organizations that frequently litigate. These considerations implicate Canons 2, 3D, 4A, and 5 of the Code of Conduct for Judicial Employees, and Canons 2, 3A(6), 4, and 5 of the Code of Conduct for United States Judges. The Committee recognizes that due to the ever-broadening variety of social media forums and technologies available, different types of social media will implicate different Canons and to varying degrees. For that reason, many of the proscriptions set forth in this opinion, like those set forth in the Employees’ and Judges’ Codé, are cast in general terms. The Committee’s advice is to be construed to further the objective of “[a]n independent and honorable judiciary.” Canon 1.

Social media include an array of different communication tools that can mimic interpersonal communication on the one hand, and act as a news broadcast to a larger audience on the other. For example, some social media sites can serve primarily as communication tools to connect families, friends, and colleagues and provide for sharing private and direct messages, posting of photos, comments, and articles in a tight-knit community limited by the user’s security preferences. The same media,
however, can serve to broadcast to a broader audience with fewer restrictions. Similarly, some social media sites can serve as semi-private communication media depending on how they are used, or can instantly serve as a connection to a large audience. Aside from social communication sites, users also have access to others' sites where they may comment on everything from the posting of a photograph, to a legal or political argument, or to the quality of a meal at a restaurant. This type of media can implicate other concerns since the user is now validating or endorsing the image, person, product, or service. Finally, there are media where the user is personally publishing commentary in the form of blogs. The Committee recognizes that the Canons cover all aspects of communication, whatever form they may take, and therefore offers general advice that can be applied to the specific mode. In short, although the format may change, the considerations regarding impropriety, confidentiality, appearance of impropriety and security remain the same.

II. Appearance of Impropriety

Canon 2 of the Employees' Code provides: "A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office." Similarly, Canon 2 of the Judges' Code states that "a judge should avoid impropriety and the appearance of impropriety in all activities." The Codes forbid judges and judicial employees from using, or appearing to use, the prestige of the office to advance the private interests of others. Canon 2 therefore is implicated when an employee or judge engages in the use of social media while also listing his or her affiliation with the court. For example, the Committee has advised that a law clerk who chooses to maintain a blog should remove all references to the clerk's employment. The Committee concluded that such reference would implicate Canon 2 concerning the use of the prestige of the office and the appearance of impropriety. The same can be true for a judge if she is using the prestige of the office in some manner in social media that could be viewed as advancing the private interest of another. For example, if the judge is using the media to support a particular establishment known to be frequented by lawyers near the courthouse, and the judge identifies him/herself as a supporter, the judge has used the office to aid that establishment's success. Similarly, if a judge comments on a blog that supports a particular cause or individual, the judge may be deemed as endorsing that position or individual. The Committee therefore cautions judges to analyze the post, comment, or blog in order to take into account the Canons that prohibit the judge from endorsing political views, engaging in dialogue that demeans the prestige of the office, commenting on issues that may arise before the court, or sending the impression that another has unique access to the Court.

III. Improper Communications with Lawyers or Others

Another example of social media activity that raises concerns under Canon 2 is the exchange of frequent messages, "wall posts," or "tweets" between a judge or judicial employee and a "friend" on a social network who is also counsel in a case pending
before the court. In the Committee’s view, social media exchanges need not directly concern litigation to raise an appearance of impropriety issue; rather, any frequent interaction between a judge or judicial employee and a lawyer who appears before the court may “put into question the propriety of the judicial employee’s conduct in carrying out the duties of the office.” Employees’ Code, Canon 2. With respect to judges, communication of this nature may “convey or permit others to convey the impression that they are in a special position to influence the judge.” Judges’ Code, Canon 2B. A similar concern arises where a judge or judicial employee uses social media to comment—favorably or unfavorably—about the competence of a particular law firm or attorney. Of course, any comment or exchange between an attorney and the judge must also be scrutinized so as not to constitute an ex parte communication. At all times, the Court must be screening for potential conflicts with those she communicates with on social media, and the Canon 3C provisions which govern recusal situations may be implicated and may require analysis.

The connection with a litigant need not be so direct and obvious to raise ethics concerns. The same Canon 2 concern arises, for example, when a judge or judicial employee demonstrates on a social media site a comparatively weak but obvious affiliation with an organization that frequently litigates before the court (i.e., identifying oneself as a “fan” of an organization), or where a judge or judicial employee circulates a fundraising appeal to a large group of social network site “friends” that includes individuals who practice before the court.

IV. Extrajudicial Activities

Circumstances such as those described above also implicate Canon 4 of both the Employees’ and Judges’ Codes, which govern participation in outside activities. Canon 4 of the Employees’ Code provides that “[i]n engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with disclosure requirements.” Canon 4 of the Judges’ Code states that a judge should not participate in extrajudicial activities that detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, or lead to frequent disqualification. Invoking Canon 4 of the Employees’ Code, the Committee has advised that maintaining a blog that expresses opinions on topics that are both politically sensitive and currently active, and which could potentially come before the employee’s own court, conflicts with Canon 4. Such opinions have the potential to reflect poorly upon the judiciary by suggesting that cases may not be impartially considered or decided. This advice would also apply to judges’ use of social media. A judge would be permitted to discuss and exchange ideas about outside activities that would not pose any conflict with official duties, (e.g., gardening, sports, cooking), yet the judge must always consider whether those outside activities invoke a potentially debatable issue that might present itself to the court, or an issue that involves a political position.

V. Identification of the Judge or Judicial Employee
Canons 2 and 4 are also implicated when a judge or judicial employee identifies him/herself as such on a social networking site. Through self-description or the use of a court email address, for example, the judge or employee highlights his or her affiliation with the federal judiciary in a manner that may lend the court’s prestige. The Committee has recommended that courts address in their social media policies whether judicial employees may identify themselves as employed by a specific court or judge. It is the Committee’s view that social media policies should, at the very least, restrict judicial employees from identifying themselves with a specific court or judge on social networking sites, except that judicial employees, with the permission of their court or judge, may state their association with the court or judge on professional networking sites like LinkedIn. The Committee also advises against any use of a judge’s or judicial employee’s court email address to engage in social media or professional social networking. The court employee or judge should consult the court’s policies on permitted and prohibited use of court email, and the court’s guidance on the employee’s conduct while using a court email server and court email address. Similarly, the court email address should not be used for forwarding “chain letter type” correspondences, the solicitation of donations, the posting of property for sale or rent, or the operation of a business enterprise. See Guide to Judiciary Policy, Vol. 15, § 525.50 (“Inappropriate personal use of government-owned equipment includes ... using equipment for commercial activities or in support of commercial activities or in support of outside employment or business activity....” This policy also prohibits use of the email system for “fund-raising activity, endorsing any product or service, participating in any lobbying activity, or engaging in any partisan political activity.”)

VI. Dignity of the Court

Furthermore, Canon 4A of the Employees’ Code provides that “[a] judicial employee’s activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves.” Certain uses of social media raise concerns under Canon 4A that are not within the ambit of Canon 2. For example, a judge or judicial employee may detract from the dignity of the court by posting inappropriate photos, videos, or comments on a social networking site. The Committee advises that all judges and judicial employees behave in a manner that avoids bringing embarrassment upon the court. Due to the ubiquitous nature of information transmitted through the use of social media, judges and employees should assume that virtually all communication through social media can be saved, electronically re-transmitted to others without the judge’s or employee’s knowledge or permission, or made available later for public consumption.

VII. Confidentiality

Canon 3D of the Employees’ Code provides in relevant part that a “judicial employee should avoid making public comment on the merits of a pending or impending action ....” Canon 3D further states that a judicial employee “should never disclose any
confidential information received in the course of official duties except as required in performance of such duties, nor should a judicial employee employ such information for personal gain.” Canon 3A(6) of the Judges’ Code provides that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” Canon 4D(5) of the Judges’ Code provides that “a judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge’s official duties.” Most social media forums provide at least one—and often several—tools to communicate instantaneously with anywhere from a few to thousands of individuals. Any posting on a social networking site that, for example, broadly hints at the likely outcome in a pending case, divulges confidential case processing procedures, or reveals non-public information about the status of jury deliberations violates Canon 3D. Such communications need not be case-specific to implicate Canon 3; even commenting vaguely on a legal issue without directly mentioning a particular case may raise confidentiality concerns and impropriety concerns. Thus the Committee advises that in all online activities involving social media, the employee may not reveal any confidential, sensitive, or non-public information obtained through the court. The Committee further advises that judicial employees who are on the judge’s personal staff refrain from participating in any social media that relate to a matter likely to result in litigation or to any organization that frequently litigates in court. Lastly, the Committee reminds that former judicial employees should also observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

VIII. Political Activity

Canon 5 of the Employees’ Code specifically addresses political activity: “A judicial employee should refrain from inappropriate political activity.” Similarly, Canon 5 of the Judges’ Code states that a “judge should not ... publicly endorse or oppose a candidate for public office” or “engage in any other political activity.” Judges’ Code, Canon 5A(2), 5(C). In the social media context, judges and judicial employees should avoid any activity that affiliates the judge or employee to any degree with political activity. This includes but is not limited to posting materials in support of or endorsing a candidate or issue, “liking” or becoming a “fan” of a political candidate or movement, circulating an online invitation for a partisan political event (regardless of whether the judge/employee plans to attend him/herself), and posting pictures on a social networking profile that affiliates the employee or judge with a political party or partisan political candidate. Furthermore, the Committee advises that while there is not an obligation for a judicial employee to search out and modify or delete endorsements or statements of political views that predate the judicial employment, the Committee recommends that if such endorsements or statements appear to be current, they be modified to clarify that they predate the judicial employment. To the extent that it is impractical or impossible to modify such previous endorsements or statements, the Committee suggests posting the following statement on the applicable website: “I have taken a position that precludes me from making further public political comments or endorsements and this site will no longer be updated concerning these issues.” For
example, on some social media it may be possible to remove one's political affiliation, and replace it with the above statement, when it is impractical or impossible to remove all posts or likes that appear to be current political endorsements or statements. The Committee reminds that while Canon 5B of the Employees' Code permits certain nonpartisan political activity for some judicial employees, the Codes specify that all judges, members of judges' personal staffs, and high-level court officers must refrain from all political activity.

IX. Conclusion

In light of the reality that users of social media can control what they post but often lack control over what others post, judges and judicial employees should regularly screen the social media websites they participate in to ensure nothing is posted, whether by the employee him/herself or by others on the employee's webpage, that may raise questions about the propriety of the employee's conduct, suggest the presence of a conflict of interest, detract from the dignity of the court, or, depending upon the status of the judicial employee, suggest an improper political affiliation. We also note that the use of social media also raises significant security and privacy concerns for courts and court employees that must be considered by judges and judicial employees to ensure the safety and privacy of the court.

While the purpose of this opinion is to provide guidance with respect to ethical issues arising from the use of social media by judges and judicial employees, the Committee also notes that social media technology is subject to rapid change, which may lead to new or different ethics concerns. Each form of media and each factual situation involved may implicate numerous ethical Canons and may vary significantly depending on the unique factual scenario presented in this rapidly changing area of communication. There is no "one size fits all" approach to the ethical issues that may be presented. Judges and judicial employees who have questions related to the ethical use of social media may request informal advice from a Committee member or a confidential advisory opinion from the Committee.

Notes for Advisory Opinion No. 112

The Code of Conduct for Judicial Employees ("the Employees' Code") defines a member of a judge's personal staff as "a judge's secretary, a judge's law clerk, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff." The term judicial employee also covers interns, externs, and other court volunteers.

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