

Panel Discussion: Judges' Perspectives on Law Clerk Hiring, Utilization, and Influence

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Repository Citation

David R. Stras, Diane S. Sykes, and James A. Wynn Jr., *Panel Discussion: Judges' Perspectives on Law Clerk Hiring, Utilization, and Influence*, 98 Marq. L. Rev. 441 (2014).

Available at: <http://scholarship.law.marquette.edu/mulr/vol98/iss1/20>

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PANEL DISCUSSION

JUDGES' PERSPECTIVES ON LAW CLERK HIRING, UTILIZATION, AND INFLUENCE*

PANELISTS

Justice David R. Stras
Minnesota Supreme Court

Judge Diane S. Sykes
United States Court of Appeals for the Seventh Circuit

Judge James A. Wynn, Jr.
United States Court of Appeals for the Fourth Circuit

MODERATOR

Chad Oldfather
Professor of Law, Marquette University Law School

* This is an edited portion of remarks delivered during a panel discussion at the conference *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*, held at Marquette University Law School on April 11–12, 2014.

This Symposium's primary purpose is to engage with questions about how judges select law clerks, the ways in which judges utilize their law clerks, and the degree of influence that law clerks have on their judges. To accompany the journalists, social scientists, and legal scholars who discussed those questions at the conference, we assembled a panel of state and federal judges to comment on their own experiences hiring and working with law clerks.

The transcript below recounts the comments made during that panel discussion. Our panelists brought a wealth of pertinent experience and perspectives to the discussion. **JUSTICE DAVID STRAS** currently serves as an Associate Justice of the Minnesota Supreme Court, and prior to that he served as a member of the University of Minnesota Law School faculty and as a law clerk to Justice Clarence Thomas of the United States Supreme Court, Judge Melvin Brunetti of the United States Court of Appeals for the Ninth Circuit, and Judge J. Michael Luttig of the United States Court of Appeals for the Fourth Circuit. **JUDGE DIANE SYKES** currently serves on the United States Court of Appeals for the Seventh Circuit and previously served as a Justice on the Wisconsin Supreme Court, as a Judge on the Milwaukee County Circuit Court, and as a law clerk to Judge Terence Evans while he served on the United States District Court for the Eastern District of Wisconsin. **JUDGE JAMES WYNN** currently serves on the United States Court of Appeals for the Fourth Circuit, and prior to that he served as a Justice on the North Carolina Supreme Court and a Judge on the North Carolina Court of Appeals.

After initial remarks by some of the panelists, the conversation turned to a discussion about the following three conference themes:

- Selection of Law Clerks
- Utilization of Law Clerks
- Law Clerk Influence

In addition to the judges' discussion about these three topics, the transcript includes their responses to questions from attendees at the conference. For the reader's convenience, all four portions of the discussion are marked in the transcript.

CHAD OLDFATHER: Should we go right to the questions?

JUDGE JAMES WYNN: Well, just briefly, I want to thank you Chad and Todd for putting this together and being on this wonderful panel with David and Diane. This is outstanding. This is a great conference.

In beginning our talk today, it is important to keep in mind that, in the American judicial system, one of the primary roles of an appellate judge is to issue written opinions. As an author of appellate case law, I want to get the law right, and I don't want to issue an opinion that my colleagues are going to criticize. I take these considerations into account when hiring a new law clerk, but there are other factors that go into the selection process as well. For instance, what are your interests and what's your temperament? I'm in a private building in Raleigh. There are no other federal employees around me, so most of my day-to-day contact is with my clerks and my staff. That means my clerk needs to be the kind of person who can get along with the other folks in my chambers. They have to be able to smile, and have a good personality, or they won't work for me. I'm not going to be in an environment with a bunch of people that don't talk to each other.

I think I got seven hundred plus applications through OSCAR last year, then another one hundred plus from other places. Once I've identified the top twenty-five, I have a pretty stellar group of candidates. All of them would probably make good law clerks. That's when you start to look at the nuances of who these people are.

I take diversity very seriously. And not just racial diversity, but gender diversity, geographic diversity, and diversity of life experience. Some of my clerks' undergraduate transcripts don't show a single math or science course, but they got straight As and performed well. Others may have an impressive background in engineering or science. Having that kind of diversity in your chambers is invaluable. I've got four law clerks—and I don't have to pick them all on the same day. Some I might pick early, some I might pick later on in the process. That allows me to get a sense of how they're going to work together.

I'd like to make one last comment on the importance of confidentiality between a judge and his or her clerks. Confidentiality exists not only to protect the judge and the integrity of the judicial process, but also to protect the clerk. Lately, I've been reflecting on the value of confidentiality from the clerk's perspective. It is important to have a confidentiality rule in chambers in part because it allows your clerks to speak freely.

We are living in a different society—don't forget this is the electronic age. Any information you want to discover about a person, it can be discovered. There are no secrets. For example, I didn't know that if you erased text from a document, and then sent the document to someone, that person could go back and uncover those previous erasures. What's that called?

CHAD OLDFATHER: Metadata

JUDGE JAMES WYNN: It's amazing to me. Everything we do now is electronic. When I'm sending a note to a judge to change an opinion, it's electronic. Do I know what happens to that note after it's sent? I question the extent to which our electronic communications are truly secure. These are important issues to think about.

JUSTICE DAVID STRAS: I just wanted to make one remark, which is that one of the things I didn't appreciate when I was an academic, but I appreciate now having observed and talked with judges and viewed the other side of things, is that I really believe that law clerk influence depends more on the idiosyncrasies of the judge, and how the judge approaches his or her job, than it does about the law clerk him or herself. There are judges who allow their law clerks to do more of the things that we traditionally think of as things that a judge should do. I don't know how you could possibly measure that but any sort of study of law clerk influence has to take into account the differences among judge practices because I really think that is the most important variable, even more than reasonable differences among courts—how the judge thinks of his or her role as a judge and what the judge should be doing.

SELECTION OF LAW CLERKS

CHAD OLDFATHER: My plan of attack now is to ask one question from each of the categories of selection, utilization, and influence. So I'll begin with selection—Judge Wynn referenced this a bit, and Justice Stras talked about this yesterday as well. You each get a tremendously large number of applications for these positions, and I wonder how you go about the process of sorting through them, and maybe more instrumentally for those of us in the room who are law professors, at least, what is it that you look for in things like letters of recommendation?

JUDGE DIANE SYKES: My practice has changed and evolved over time. At the state supreme court, I received far fewer applications than I do now, and the pool tended to be more regional than national. I was allotted only one law clerk and now I get four—an abundance of riches. My process for selecting clerks has changed over time, and of course, in my present position, it has changed as the federal law-clerk

hiring plan has evolved and died.¹ I used to look at every application and sift and winnow the application materials myself to determine which candidates to bring in for an interview. When I served on the state supreme court, I typically would bring in just a handful of candidates for interviews. That practice continued for a while after I was confirmed to the Seventh Circuit. I used to look at all the applications myself and would narrow the list down to a manageable size and then determine which of those candidates to bring in for interviews. My practice has been to interview perhaps eight or so candidates—no more than that—for four positions. For my first few years on the Seventh Circuit, I filled only three of my four law-clerk positions. I eventually learned that I needed four law clerks! Now I fill all four positions on a regular basis.

With the increased use of the OSCAR system—the online application database—I’ve been getting exponentially more law-clerk applications, and I can’t review everything myself. It’s just a prohibitive number. So now my law clerks do the initial screening. I instruct them to give me a list of about fifty or so—there’s no hard cutoff number. They give me candidates they think meet my criteria, which are partly objective and partly subjective. The objective criteria are the obvious ones: academic success and relevant legal experience. I ask my law clerks to take a close look at the applicants’ transcripts to make sure that the candidate has been taking real law courses and not fluffy courses, and also to look at the rigor of the undergraduate coursework. In addition, to the extent that the candidate has other work experience between undergraduate school and law school, that’s an important factor too, although I certainly don’t require it. Then, of course, I ask the clerks to look at the recommendation letters and the writing sample. The writing sample plays a significant role in law-clerk hiring.

What I’m looking for in recommendation letters is someone who can vouch both personally and professionally for the legal skills of the applicant and for a professional fit with my chambers. This is the subjective part of the process. After all the objective measures are met, I’m looking for a subjective fit with my chambers. I don’t have a litmus test. I don’t require participation in the Federalist Society, for example, but I’m looking for a general, philosophical fit with my chambers and

1. See Aaron L. Nielson, *The Future of Federal Law Clerk Hiring*, 98 MARQ. L. REV. 181, 195–96, 199–200 (2014); see also Admin Office of the U.S. Courts, *About OSCAR*, OSCAR, <https://oscar.uscourts.gov/about> (last visited Oct. 27, 2014), archived at <http://perma.cc/BWQ4-2DEF>.

my own decision-making approach because I don't want to be fighting with my law clerks all term. I don't hire an "opposition law clerk."

That's a snapshot of my hiring process. When my clerks reduce the list to the top fifty or so, I read everything myself and decide which candidates to bring in for interviews. I usually schedule about five or six interviews for the four positions, maybe as many as eight—but usually not more than that.

JUDGE JAMES WYNN: Probably much to the chagrin of Judge Posner, I greatly value having a career clerk. Maybe that comes from my military background, but I just believe in having an "Executive Officer" in the office—somebody with institutional knowledge who I can count on. After my career clerk triages the initial set of applications, we narrow it down to a shorter list. Then I go to that list and look it over. I really don't believe in competing with other judges for clerks. There are just too many good people. I look for people who want to work for me. If you know who I am and you've articulated your reasons for wanting to work for me in your application, I take note of that.

If I get any inkling that you would prefer to work for another judge, I'm going to say, "You need to work for the other judge." That way I end up with clerks who are committed to the work that I do. They probably know that I write more dissenting opinions than the average judge. I've always been committed to my own way of thinking, even in law school. I believe that if you write an opinion, you write it well, and you are true to the law and your own sense of what is right, then who knows, maybe in the future that dissenting opinion will be followed. In fact, when I was on the state court of appeals, on several occasions the state supreme court reversed decisions based on my dissenting opinions. My role as a judge is to do what I believe is right and to faithfully apply the law. My clerks need to share that philosophy. That's worked well for me and it helps me to keep my chambers intact.

JUSTICE DAVID STRAS: My approach is probably most similar to Judge Sykes's process. I don't have a litmus test. In fact, if you go back over the eight clerks, including the shared clerks that I've hired, I've had libertarian clerks, conservative clerks, liberal clerks, and moderate clerks. They sort of range all over the board in terms of ideology. So I definitely don't have a litmus test. I'll provide some specifics, but it's very much like Justice Potter Stewart said about

obscenity, “I know it when I see it,”² and I know it when I see it when it comes to clerks. When I look over the application, by the time we get to the interview process, I pretty much have a good idea who I’m going to hire and why I’m going to hire him or her even though we have this twenty-five candidate slate that we interview as a group.

The thing that I look for most is the letters of recommendation, and I’m different from my colleagues from that perspective. A lot of them pay little attention to letters of recommendation. I’m in a little different position having been an academic, so if I don’t know the academic who wrote the letter, I at least know of them. So I’m able to call them and spend a lot of time on the phone asking them the questions that interest me about the candidate. In fact, it’s not unusual for me to spend more time on the telephone, collectively, with the recommenders than with the candidate him or herself, because I feel like by the time the candidate gets there, and by the time I’ve done my individual interview with them, I already know them through all the conversations I had with their recommenders. I kind of feel sorry sometimes for the recommenders because I feel like I’m deposing them during the course of my call—literally, it’s question after question, and if I find some sort of hesitancy in the answer, I immediately seize on it and say, “Okay, now what’s making you hesitate about this candidate?”

The other thing it indicates—Judge Wynn is absolutely right about this—the people I’ve hired have tended to be people whose recommenders have called me. Regarding one of my clerks this year, Judge Schiltz, who is a federal judge in Minnesota, called me and said, “This is a great fit for you.” A couple years ago, Richard Epstein called me and said, “This person from NYU is going to be a great fit for you.” So that’s the single most important thing. Then very rarely after I’ve done this sort of intensive process, very rarely does somebody come in and not meet my expectations. Maybe one time in four years have I had somebody who was actually different than what I’d learned from their recommenders.

I don’t place a lot of emphasis on writing samples because I feel like law clerks, when they come in, are going to have some work to do on their writing, and I feel like we can work on that. I’d rather have somebody who’s intellectually curious, who spends a lot of time taking hard classes, who has performed well in law school. If they have those attributes, I feel like I can work with their writing, particularly because I

2. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

edit and rewrite a lot of their work anyway. But I'd say that those are the primary things, and then you'll look at the obvious things. You look at grades. Law review experience is extremely important to me because of the editorial process that we go through in my chambers. But I will hire from anywhere, as long as it's the best candidate. I've had clerks from a range of schools all over the country. I'm just looking for the best fit with me.

JUDGE JAMES WYNN: Let me add that when a judge like Justice Stras sends somebody to me, I pay special attention to that application. I know that he wouldn't have someone in his office who wasn't top notch.

I also don't consider an applicant's political beliefs. It's interesting, sometimes when we're halfway through the term I might find out the political party affiliation of a clerk and say to myself, "I had no clue." It just doesn't come up all that often, and when it does, I find that it's just another valuable source of diversity in the office.

UTILIZATION OF LAW CLERKS

CHAD OLDFATHER: Well, I think that segues nicely into the next question, which is a utilization question, and for this, I'm going to quote at some length from Gerald Gunther's biography of Learned Hand. You've all had access to this quote ahead of time. In that biography, Gunther depicts a scene in which Hand spends an afternoon with a former law clerk reminiscing about all of Hand's former clerks, and here is where I begin quoting from Gunther:

The judge did not hold them all in equally high regard, but his evaluations were usually positive, and significantly, there was a common quality in the very few less than satisfactory clerks: he would say of them that they held back too much and were too unwilling to engage with him. He had no desire for brash, abrasive, or callow clerks, but he very much wanted involved, critical ones. And difficult as it was for law school graduates in their early twenties to challenge—indeed, try to tear apart—the reasoning of a judge of Hand's ability and experience, Hand's best clerks did just that.³

So a couple questions off of that. One, it seems fair to assume that not all clerks are equally suited to the position, and some may be ill-

3. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 291 (1994).

suited to the job. I would like your thoughts on what makes a clerk less than satisfactory from your perspective, and as a matter of judicial management, if you find yourself with an underperforming clerk, how do you deal with that?

JUSTICE DAVID STRAS: I'm happy to go first. I think the hardest thing for me to deal with is a clerk—I can deal with all kinds of different personalities, and frankly, I've had all different personalities in my chambers—the hardest thing to deal with is a clerk who doesn't press as hard as he or she should in terms of working through problems. What I rely on the clerk for is the deep thinking, the research, spending time with the record, really understanding the case. If the clerk's not willing to really bear down and spend the kind of time that's needed to figure the case out, to fill in the gaps for me—because I can't spend the kind of time that the clerk spends on a particular case—it's really problematic, even more so than problems with writing and things like that. So that is where I've had problems with clerks, and it has been very rare, and very isolated as well. It's not been the case that I've had a clerk who has been problematic for the whole year. I've had clerks who have come in and then not done what I've expected, and I've had to sit down and talk to them, and explain to them how they should approach things. But when I've had a problem, it's because the clerks have not spent the kind of time I expect them to spend—and the kind of dedication—to really dig below the surface and figure out the case.

One thing that clerks often do when they first come in is they spend a lot of time with the briefs, and they think the briefs are authoritative. They're authoritative in the sense that they tell us what the case is about, and what the parties are arguing, but they're no more than a starting point. In some cases, they may not even be the starting point because the parties are off talking about something that has nothing to do with their primary argument. So I want a clerk who is willing to look beyond the briefs, or at least not take the briefs at face value, and figure out whether there are other things that need to be looked at. That's very important to me.

I've had clerks who have been very shy and barely say anything, and I've had to draw them out and say, "I know, for example, on your editing of my opinions that you're not telling me everything that you should be. You're holding back. I can tell by the nature of what you're saying in the document that you're holding back and trying to be too respectful. Don't do that." I don't want clerks to say, "This is the dumbest thing I've ever heard," necessarily. They can be a little more diplomatic than that. But I don't want clerks to hold back. Clerks have

been overly critical, and that's hard too, because then those clerks have a hard time dealing with their colleagues and things like that. Sometimes when you say things in a way that's not very diplomatic, the other person has a negative reaction. I've had clerks who were too shy about giving criticism, and clerks who were too willing to give criticism—it runs the gamut. But that's not the primary problem. The primary problem is when the clerk is just not willing to put the work in and views it only as a job rather than as an opportunity to learn. The clerks who do really well view it as an opportunity to learn in addition to a job. I think that's really what I look for in a clerk and where I've had the best success.

JUDGE DIANE SYKES: My reaction to the Learned Hand anecdote is that it describes the judge's chambers as a kind of academic colloquium. I've found that we have too much work to do and simply don't have time to take that approach. It's just intellectually, humanly impossible. That's a bygone era of judging. Judge Hand had the luxury of the caseloads of the time. We don't. We have far too many cases to follow that model. So we can't have a lengthy academic discussion about the trajectory of the law on each and every case. I need to strike a balance between the cases that deserve that kind of intellectual energy from me and my clerks and those that are more routine. The triage process that Judge Wynn spoke of earlier becomes extremely important, at least at the intermediate court of appeals. In contrast, at a court of last resort like the Minnesota Supreme Court and the Wisconsin Supreme Court, every case gets a lot of TLC from the court staff and the judge. But at the intermediate court of appeals, there just isn't time to give every case that same treatment.

My clerks do a terrific job on the bench-memo work because they're speaking for themselves as legal analysts and giving me their independent analysis of the case. That's what I tell them to do. I don't skim the briefs and tell the clerk which way I'm leaning or what my general impressions are. They work completely independently on the bench memos. I ask them to give me their best reasoned legal judgment about how the case ought to be decided and to do whatever necessary auxiliary research—beyond what's in the briefs—to give me a sound, informed recommendation.

Opinion drafting is another matter. Law clerks tend to be more cautious and formal when they prepare the first draft of the panel opinion. I've been at this for twenty-two years, and I used to be a journalist, so I have a more direct and less formal writing style. And I know what's important to put in the opinion and what can be left out,

and sometimes that's half the battle. The goal is to write an opinion that is clear and accessible and useful as a statement of the law. We all hope that our opinions will stand the test of time as a statement of the law and will be useful to the bench, bar, and public.

Law clerks are obviously less experienced at that, which is why I end up doing a lot of my own writing. I work from a law-clerk draft for most of my opinions. In the Seventh Circuit, we publish about half of our dispositions as precedential opinions.⁴ That may be a consequence of having a number of former academics on our court, but whatever the reason, it is the standard in our circuit. So, often my opinions will reflect as much as sixty percent or seventy-five percent of my own writing. But on some of the more routine opinions and in unpublished dispositions, I do light editing of the law-clerk draft, and they tend to do a fine job of giving me what I need.

JUDGE JAMES WYNN: I agree with Judge Sykes. I think when you run your office the way I do, in a military style, no one comes in and yells or anything like that in my office. When it happens, it is an academic discussion that goes back and forth, and I find out later on, usually from my career clerk or judicial assistant.

Usually any back and forth between me and my clerks happens when they present their bench memos. The week before court, I pull out a big board in my office, and each of the clerks has to come in and defend his or her bench memo before the whole chambers. They present the facts, outline the law, and give their recommendations. During that session there may be quite a bit of back and forth discussion with the clerks. If anything, the clerks tend to be a little too deferential at times.

But it's important to remember that, while I rely heavily on my clerks, it's the judge's job to make the decision. An older colleague of mine once gave a summer internship to the daughter of a mutual friend. In the end of the summer, he came to me and said in his old English style, "Jim, she is a perfectly nice young lady. She desires to clerk for me. She has all of the attributes and the skills of social grace, and knows how to look at these things." Then he said, "But I can supply all of the

4. Orin Kerr, *Rates of Unpublished Opinions in the Different Circuits—And Especially the Fourth Circuit*, VOLOKH CONSPIRACY (Sept. 8, 2011, 12:53 PM), <http://www.volokh.com/2011/09/08/rates-of-unpublished-opinions-in-the-different-circuits-and-especially-the-fourth-circuit>, archived at <http://perma.cc/EKD8-BCA4>.

common sense I need to these opinions. What I need is a clerk who can do the hard research and assist with the analysis of the law and facts.”

A good judicial law clerk will put you in a position to make an informed judicial choice. I don’t need to be wasting time figuring out what the standard of review is on the case. That’s my clerk’s job—to distill the important facts and summarize the black letter law. My job is to make an informed judicial choice. But my clerks have to put me in a position to make that choice. At that point, we can have a discussion. But ultimately, if, after hearing the law and the facts, I see it differently, that’s the way it’s going to go.

LAW CLERK INFLUENCE

CHAD OLDFATHER: All right. My last question is the influence question, which I think in a lot of ways brings together much of what we’ve been talking about over the course of the weekend. I think it has come out in some of the panels. There is a sense in which it’s uncontroversial to suggest that clerks influence the decision-making process. Indeed, if they didn’t influence the decision-making process, there would be no point to having them because there are lots of ways in which clerks make things better. They make the process more efficient. They allow for deeper exploration of the issues and so forth. But even acknowledging that there is much that is good about the law clerk, nothing is an unmitigated good, and some of our panelists have suggested at least the possibility that there are ways in which law clerks have influence that would go past the point of propriety into impropriety. We can imagine all sorts of ways in which that might be true. Perhaps it is because of the ways in which lines of responsibility are drawn such that staff attorneys get too much responsibility. Perhaps the delegation of the initial responsibility for drafting of opinions could be viewed as giving too much away. Perhaps the nature of opinions changes, that clerks write opinions that are too long or too much like law review articles and so forth. My question is—consistent with ones I’ve asked previously—a compound question, which is, Do these concerns ring true? Maybe a better way of phrasing it is, Where is the line, to the extent that we can identify one, between proper clerk influence and improper clerk influence? How does one, either as a judge or as a court more generally, guard against these sorts of things?

JUDGE DIANE SYKES: Well, there are a couple different dimensions to that question. To the extent that the proposition is that judges rely too heavily on their law clerks to draft the opinions—that, it

seems to me, is a genie we're not going to put back in the bottle. The caseload is too large and our decisions have to be explained in writing, and no single judge can do it all himself or herself, unless you are in the league of Judge Posner and Judge Easterbrook. The rest of us are mere mortals, and we have to rely on our legal staffs to assist us. The measure of whether that's a good thing or a bad thing is simply the quality of the work product. If the judge is consistently issuing solid, well-reasoned opinions that are drafted in whole or in part by the law clerks, then the practice is uncontroversial.

In terms of law-clerk influence on outcomes and reasoning, which is the more substantive part of the question, there may be times in which the law clerks have outsized influence on the judge. I've seen that occur. I don't know that there's a check on that practice other than to pay attention to how the judges themselves are chosen. We hope for candidates—in both the state and federal judiciaries—who are prepared to make the hard decisions and not just defer to their law clerks. What I think is more common is that the law clerks come to the judge with all the fresh legal knowledge from the legal academy, and having studied the doctrine at the “why” level, they come to the court and they want to make a mark. They may not fully recognize the limitations of the collegial process or have the same sensitivity to process values that I do. Law clerks come to the court with ideas of what the law ought to be, and they want to work with the judge on setting things right.

There's certainly an important role for the law clerks to play in that regard because appellate judging is not limited to simple error correction. The law-development function is critically important at our level. In the end, it's up to the judge to check an overzealous law clerk.

JUDGE JAMES WYNN: When I came to the court twenty-four years ago, I was appalled at the notion that someone else would actually be writing any part of the opinions. I'd been in journalism and practiced law. I thought that writing was solely the role of the judge. Clerks were there just to help with logistics. Over the years, my thought process evolved. Ultimately, this job is not about me. It's about the end product. What does it matter how the opinion gets out there as long as it's a good opinion? Whether a judge permits his or her clerk to write the opinion or the judge writes it himself or herself, the judge is responsible for what comes out of that office.

If a judge changes clerks every year, and you see that judge's opinion style changes every year too, that's a pretty good indication that the judge's clerks are having a strong influence on the opinion writing process. But as I said, the most important part of being a judge is really

not whether your sentences connect or whether you've used proper grammar. That's all basic stuff. Everybody better know that. I'm comfortable in this role of being a judge at this point in my life. Maybe because I'm a lifetime appointee as opposed to being elected the way I was in state court, I'm not bothered by those kinds of criticisms, if they even exist.

I want my clerks to show me how good they are. But at the end of the year, they start writing too much like me, so it's time for them to go. [laughter] We only need one judge in my chambers, so they've got to go.

The clerk is really an extension of the judge. I tell my clerks that they've got one job—and they realize it when they come in—that job is to make the judge look good. Wherever they go for the rest of their lives, they will be identified in connection with their judge. If you don't fulfill your duty to your fellow clerks and to your chambers of making your judge look good, you're hurting yourself. It's more than just a family. It's a connected, professional relationship that you develop. The object is to get the best possible work out of that chambers that you can.

JUSTICE DAVID STRAS: I want to second what Judge Wynn said. You look at other fields, you look at creating software, you look at making widgets, and I realize what judges do. We don't make widgets, right? But the fact of the matter is you don't put the product together by yourself. The product is not as good when there's only one person involved, and when you have multiple people involved in the process, I think it makes the product, the end product, a lot better. We're judged by the end product. What we're doing is we're serving the people. We're trying to come up with the best product. We're trying to advance the law. We're trying to clarify the law. As long as the product is good, I think that's the most important thing.

Now, where you run into problems—and part of that is how I think about the job. I say what are the core functions of a judge? What are judges expected to do? Well, we're expected to decide cases. We're expected to write opinions. In my court, we're expected to liaise to a bunch of different committees and to deal with rule amendments. If I were to lose control—so, my main thing is that I want to have control over all of those core functions. But I'm not so stuck on myself that I feel like I can necessarily do everything better than the clerks can. The clerks can help to make me a better judge. So as long as I'm in control of those core functions, and making sure those core functions are being carried out, and don't lose track of things, then I'm satisfied that I'm

doing my job well. I think it's those instances in which the judge loses control or doesn't care about how those core functions are being carried out that you might have some issues with undue clerk influence. But I don't really worry about that from my perspective, because I feel like the product we're putting out in the end is the best it can be. That's the thing I really care about.

AUDIENCE QUESTIONS

CHAD OLDFATHER: With that, let's open the floor for questions and comments.

ALBERT YOON: I have a question that's maybe more to satisfy my own curiosity. When I was at Northwestern, I was head of the Clerkship Committee for one year, and I was on it for a couple of other years. My philosophy when I was advising students was to try to get a letter from somebody who knew the person and could say something well. When I was on the other end being asked to write a letter, I felt uncomfortable writing a negative letter, so if someone asked me to write a letter for a clerkship and I didn't think I could write something good, I would as diplomatically as possible encourage them to find someone else to write the letter. So the question I pose to all three of you is, Do you see a lot of variation in the letters? That is to say, at least at Northwestern, if you're a good student and you want to clerk—say, have a shot at the Seventh Circuit—you might ask the people who really know the Seventh Circuit judges well, and a strong letter from them would go a long way. If you couldn't get that then you would try to find someone else, but maybe without the same clout. But I'm curious whether you observe at the end of the day with all letters that they all look pretty good, it's just the question of who's saying the good things, or whether you can really see a difference in the underlying qualitative aspects of the letter.

JUDGE DIANE SYKES: The recommenders do make a difference. If it's someone I know and trust to send me good candidates, that certainly is a plus factor for me. If it's someone I don't know personally but I know of their work, that might be a plus factor as well. I can usually tell when a recommender is truly enthusiastic about a candidate. On the other hand, some letters are over-the-top enthusiastic without telling me something really informative about the candidate. There really is no substitute for a holistic evaluation of the application package, which takes account of the candidate's transcripts, résumé, recommendation letters, and writing sample. Some judges rely almost

exclusively on specific law professors to send them law-clerk candidates. I cast a wider net and try to do the more holistic evaluation that I've described. It sounds like that's what you do too.

JUSTICE DAVID STRAS: I do. I will say this—having been the Chair of the Clerkship Committee at the University of Minnesota for two or three years or something like that, and now, being in charge of the clerkship process for our branch, at least for the appellate courts, and really spending a lot of time with it—there is so much variation in recommendation letters. You see everything from “I had so and so student in my class in spring of 2013 and this person got an A, and from my limited conversations with the person, I think they're okay or they seem like a good person.” Those don't do anything. If you're going to write a recommendation letter, those are actually negative recommendation letters in my view, because it shows me that the student really didn't have a close relationship with any of his or her professors. If I were going to make phone calls, and call the recommenders, I'm not going to get any more information, and so I'm not going to have that comfort level with that candidate.

But then I've seen three-page or four-page recommendation letters, where the professor or law firm partner or someone like that writes about the person's childhood, writes about the volunteer service they've done, writes about specific conversations they've had with the candidate that really had an effect on that particular person. Those are really valuable because those are the ones—like I said, I like to get to know the person before I even meet them, and those are the types of recommendation letters where I actually get to know the person. One thing that I would say is I tended not to write negative recommendation letters. I tended to say, “Go look for somebody else.” But I was always open if a judge called me—I had a great relationship with a lot of judges—and they'd say, “I have this candidate from the University of Minnesota. I know you're on the faculty and I want to talk to you about this candidate.” If I didn't think the candidate was worth hiring or interviewing, I would say that flat out. I've done that over the years. I've done that probably half a dozen times where I have said, “Judge, I didn't write a letter of recommendation for that person. I do not think highly of that particular candidate.” Because you have to have credibility. Then when you send the judge somebody who's really excellent you can say, “Judge, remember there are not-so-good candidates. This is one of the really good ones who I think you should really take a look at.” So it's really valuable to give that honest assessment when judges call you.

JUDGE JAMES WYNN: I agree with that. When you've narrowed your list down to around thirty candidates, there are no negative letters in that bunch. They're like military fitness reports for officers. You have to read them closely to see the telltale signs of an excellent clerk. Everybody uses buzzwords; everyone uses clichés. But when the time comes for me to make a selection, I always call the recommenders and ask them what I call the litmus test. I say, "If this clerk does not work out for me, will you promise to come and clerk for me?" [laughter] Sometimes they'll hesitate. But sometimes they'll say, "Judge, absolutely." I had one former dean who was a little bit too enthusiastic about the prospect of being my clerk. He said, "Oh, can I write your opinions? Yes. Please, please." To which I immediately replied, "No, the offer is off the table for you." [chuckles]

The recommendations, which usually come from law professors, are just added validations. That being said, I look particularly closely at recommendations from professors who taught courses on substantive law—the basic stuff. I like to hear what they have to say. When they tell me, "I taught three hundred students in the last ten years and this is the best one I've ever had," you've got to look at that pretty carefully because that's a powerful statement for someone to make in a letter. It's not so powerful if they say it in every letter. [laughter]

DAVID LAT: I think I've changed my question. I want to pick up on what you were just saying. I'm curious about the recommendations also in the sense that, do you ever worry that they—say you were talking about the lukewarm letter where the person says, "Well, this person is really smart." Do you ever worry that the recommendation process—how to put it—privileges the aggressive? Don't get me wrong. I'm extroverted. I'm all in favor of aggression. I think it should be rewarded. But I do wonder, if you're a really smart student—and people have wondered about this in the context also of diversity—oftentimes, again, don't mean to stereotype, but there's certain groups where the people are just more confident. They're the ones who are more willing to go up to the professor at office hours. They're the gunners. They raise their hand in class. Someone might be brilliant but very quiet, and they haven't made the effort to interpose themselves in front of the professor. Do you worry that recommendations privilege that, as opposed to people who are just really, really good students, and smart and diligent, but kind of a little shy?

JUSTICE DAVID STRAS: From my perspective, it probably does. But it actually has a connection to the job itself. The fact of the matter is, if a student is not willing to go in to talk to a professor at some point

during the semester—I'm not talking about the gunners here—but at some point during the semester, and have a conversation with the professor about a particular topic, and to really engage on that particular topic, it is not necessarily somebody that I think may fit well in my chambers, because I want the clerk to be able to come into my office and say, "Hey, I think that we might have a problem here. I think you should maybe go a different way, and here's my reasoning for that." So I think you are absolutely right that it could disadvantage those students who are less aggressive. Incidentally, when I see a recommendation that says, "This student was in my office every day," that's a red flag. I don't want anything to do with that. [laughter] The really super aggressive, that doesn't help me either. It's sort of the median person who spends some time with the professor. But I've always viewed that as job-related. I've never thought about the demographic implications of it, but I view that as something that is important to the job itself, so I don't mind taking that into account when I make my decision.

JUDGE DIANE SYKES: This is where there's a distinction between state supreme court justices, who only have one law clerk (or one and a third, as Justice Stras has described), and federal appellate judges, who have four law clerks. I'm looking to put together a good chambers team each year and that requires all personality types. There's a balance to be struck, a kind of interpersonal chemistry. I'm looking for a diversity of background and experience when I assemble my team every term. I do check for that tendency that you've just mentioned; candidates with over-the-top recommendation letters may be presenting themselves to their law professors in a more overt way for the specific purpose of gaining access to the judges they want to clerk for. I'm essentially looking to assemble a balanced group of highly talented lawyers who are easy to work with.

JUDGE JAMES WYNN: I agree. I don't know if it makes that much of a difference though. By the time I'm calling you, I've pretty much made up my mind. I trust what the law professors write, though I may also look to your grade in the class, which tends to be an unbiased assessment of your talents.

Often I'll say to candidates, "I haven't heard from your dean?" They look at me and say, "Dean?" And I reply, "The dean of your law school knows all of the top students. And if he doesn't know you, then that seems to signal to me that you may not be considered amongst the best at your school." So that's my general theory. As I told Dean Kearney the other day, "The very best students in your law school—I

bet that you know them.” The dean usually knows the very best. He’s thinking about who’s going to go out and make some money. Most deans will push the very best students to serve on federal circuit courts. Apparently, serving as a clerk on the federal circuit court is a big deal. [laughter] I didn’t realize it when I was serving as a state court judge. Diane, did you?

JUDGE DIANE SYKES: I did.

JUDGE JAMES WYNN: It is a big deal. People go out of their way to lobby and that’s where the dean comes in. I never had a dean call me while I was on the state court of appeals. Back then I think they just said, “Well if you want him, fine.” [laughter].

STEVE WERMIEL: I’m sorry to turn this into a practice session on how to instruct law professors on how to write clerkship recommendations. But if you’ll indulge me, all of you mentioned looking for clerks who challenge themselves as law students. With all the attention in law schools now on experiential learning, clinics, and trial practice classes, and all that sort of stuff, do you consider those to be the kinds of challenging classes that you’re looking for, or are you talking more about taking securities regulation, and law and economics and so on, and subsequent views?

JUDGE JAMES WYNN: That’s right. She’s shaking her head.

JUDGE DIANE SYKES: Not law and economics. Clinics are fine, but not at the expense of the necessary doctrinal courses. And you can take a “cotton candy” law course once or twice along the way, but if you want to clerk, you should not load up your schedule with that. You’ve got to challenge yourself with doctrinal courses that are useful for a clerkship at a federal court of appeals. You all know what they are. If I see too much of one area of coursework and it’s not relevant to what we do every day at the court of appeals, I’m going to pass over that application.

JUSTICE DAVID STRAS: I actually look at clinics as a positive. But like everything else, it needs to be in moderation. So, like Judge Sykes, if you’ve got a clinic, it looks like you’ve done some real work. So on the description of the résumé—wrote a brief, argued a motion in conjunction with a professor, that type of thing—that really is valuable because it shows that you can engage with difficult issues and you’ve been in a professional setting. But I like variety. I like variety in core stuff. So I like somebody who has taken family law, tax, and evidence, and federal courts or whatever, whatever the mix might be. In addition to maybe a clinic and in addition to law review, because I just feel like

the person, as long as they've got that core group of classes, they're going to be fine. It's where you see people who have taken a lot of the fluff stuff or taken a lot of the clinics. That's where I start to get worried, when there's too much of one thing.

JUDGE JAMES WYNN: Yes, I follow that. I look strongly at the core courses. I find that when law students enter their third year, they start taking all kinds of stuff, stuff I've never heard of before. They're nice courses [chuckles]—wonderful things to study, but it's the core stuff that really matters to me. Law schools are starting to adopt more practical curricula. But since I've been on the appellate court, it really is a telltale sign when you see that an individual has worked on a journal and is constantly involved in writing.

Maybe you guys will correct me on this. It's amazing how different schools select the law review board. I had an applicant from one law school whose resume showed that he was an editor on the law review. He says, "Well judge, all the students are that." I said, "What are you talking about?" "All the students are the editor on the law review at my school." [laughter] I couldn't figure it out. And he was very candid in the way he said it. Then you wonder how a student gets to be editor-in-chief? The managing editor or the case note editor may actually be the real plum of the bunch, because sometimes, the editor-in-chief is basically a political choice. I have a better understanding of that now. One of my judge friends used to say, "Can they go in a box, and close the door, and get the work done?" Not can they go out and be friends with everybody, and talk about the ball game.

CAROLYN SHAPIRO: So I have another question about writing recommendations and promoting candidates. I've also served on my law school's Clerkship Committee, and sometimes we've had candidates or students who really, in my view, were outstanding, but might not have had a perfect record. So it may be that you get so many perfect applications that these students are just not even in the running, but I've always thought that it might be useful to them to have a letter from a professor in whose class they maybe didn't get their highest grade. If the professor says, "I think this person is outstanding for whatever reason—the curve in my class," or, "I don't think this grade reflects their abilities and here's why," is that something that you would look at or is it just not even worth it given the enormous numbers of perfect candidates you have?

JUDGE DIANE SYKES: I think it's very valuable to have an explanatory letter from a professor who thinks very highly of the candidate, notwithstanding the occasional B grade. Usually it's a B plus

instead of an A minus, and there's not that much difference between an A minus and a B plus. Again, I follow a very holistic selection process. The objective measures of success can be met by a less-than-perfect transcript if the right course selection is there and the less-than-perfect grades are very respectable. In most cases they are, and the other measures of success become important at that point.

JUSTICE DAVID STRAS: What I think the best advice to give law students—and this is borne out as true on the other side—is to find the recommenders who know the candidate the best. Even if it's a professor that gave them a B or B minus, if that professor can explain to me, "Well, I gave this person a B, but I worked with them as adviser on the law review and they were fabulous, and here's why they're fabulous." But the letter is persuasive writing too, because if you're sending somebody to me who got a B in the class and, the way your curve comes out, there were bunch of people who got A minuses and As, you need to tell me why you're not sending me the person who had the A or the A minus, why the person with the B is actually the best candidate, and why I should hire that person. But I would always give this advice, and I gave this advice to students: You always want a couple law professors as the recommenders, but if there's some law firm partner, judge that they interned for, who knows the candidate really well, go ahead and throw in a recommendation from one of them too. For me, it doesn't have to be three professors as long as you get the people who know the candidate the best. That's the key for me.

JUDGE JAMES WYNN: Yes, I agree with what's been said. Let me also point out—and not all judges do this—but I actually hire from my internship pool. If a student like the one you've described comes in and does an exceptional job during the summer, that's the kind person I might hire.

TRISTAN DOLLINGER: Yesterday, Professor Shapiro raised the issue of possible judicial non-delegable duties. I was wondering if you felt that there were a certain set of non-delegable duties, and if the answer to that question varied depending on which court system you were looking at or the level of the courts. Obviously, you've spoken to some variation within chambers, but do you think there are just certain tasks that should not be delegated to clerks?

JUDGE JAMES WYNN: Yes, I don't generally encourage my clerks to talk to other judges about cases in my chambers without my permission. And I don't allow my clerks to go to another chambers and say, "I want to talk about how your judge has written this opinion." No, you don't get to talk about that, at least not without my permission.

There are certain things that stay in my chambers. For instance, I don't share memos on cases because I think every judge should have an independent basis for making decisions. I am ultimately responsible for deciding how the case is going to go. That's not the clerk's job. I have the ultimate responsibility. When it comes to the mechanics of the opinion, the bottom line is to produce good work product. If it's not looking good, it's not going to be used. If it is looking good, it will go in the opinion.

I do not allow my clerks to even draft memos that comment on the quality of the work of another judge. They don't get to criticize another judge. That's not their job. So if you see that in one of my opinions, I'm the one that wrote that, and it's rarely going to be a direct criticism. I don't like to put names of judges in opinions. I'll say the dissenting opinion or the majority opinion, and things of that nature, because it's really not about us, personally. It's really not about that judge. It is about the law.

JUDGE DIANE SYKES: I think it's very individual. In my chambers I don't have my law clerks write questions for me to ask at oral argument. Oral argument is a very dynamic process, and I know what I want to ask and how to test the premises of the lawyers' arguments. In many respects the process reacts to questions from my colleagues on the bench, and written questions are not meaningful in that sense. When we're commenting on opinion drafts from other chambers, I do ask for input from my clerks. I always ask the law clerk who worked on the case with me to review the draft. But if I'm going to comment on it, I typically do not ask the law clerk to write a memo to send to the panel. I write comments myself; I don't delegate that.

JUSTICE DAVID STRAS: Judge Sykes and I are very similar in that respect. I do think that there are certain tasks that are non-delegable, and you have a problem if the judge is delegating too much, and the judge, at bottom, at least has to make the decision. You at least have to make the decision. You at least have to decide whether to grant or deny a motion. You at least need to decide to affirm or reverse. Now, in my chambers, as Judge Sykes talked about with respect to her chambers, there's a lot more non-delegable tasks than just those. But at bottom, I just think that if you're telling the clerk, "We've got a motion to dismiss coming in and I'm not all that interested in the case and I don't really want to do the reading. So why don't you read it and make the decision in this case," you have a real problem—that just is not appropriate and I don't know if that happens. I haven't seen it happen, but if it is happening, I think that it is inappropriate.

CHAD OLDFATHER: Tony, last question.

TONY MAURO: I can't help but ask the question about racial and ethnic diversity among the clerks. Do you find it's hard—are you getting enough diverse applicants for clerkships that are highly qualified? If not, why not? Judge Sykes and Judge Wynn, are you getting any encouragement from above to find more candidates, more clerks who are diverse?

JUDGE DIANE SYKES: We're not getting specific encouragement from the Supreme Court on that. We do file EEO reports after we've hired our clerks each term. I find it difficult to get racial and ethnic diversity and also find the right match for my chambers. Perhaps it's because I'm known as a conservative and there aren't as many women law students who are also conservatives, to take one example and overgeneralize. One of the papers presented yesterday compared the number of women law clerks at the Canadian Supreme Court and the U.S. Supreme Court.⁵ I suspect the reason for the greater number at the Canadian Supreme Court is that it's a more liberal court. The U.S. Supreme Court has four or five conservative justices, depending on how you measure "conservative," and it's sometimes hard to find conservative women in the law-student pool. The same may be true of the ethnic and racial composition of the candidate pool as well. And there's a certain amount of self-selection among the candidates. I don't specifically recruit law clerks for diversity. I take the applicants as they come to me, screen them, and choose those who are a good fit with my chambers.

JUDGE JAMES WYNN: I actively seek diversity, and I actually alert folks that are out there in law schools that I'm looking for diverse candidates of all types. I like a good diverse chambers. When I had my investiture four years ago, we took a chambers picture of my former clerks that covered my twenty years on the bench; it is very rewarding to look at that picture and see the level of diversity. I hadn't really thought about it at the time. Now, in the federal level, I've got four clerks, and I can pick and choose people from different backgrounds.

There is also a pool of students who do not seek clerkships because they just either don't know about it or they're not encouraged to apply by their law schools. You have to be on the lookout. The other way

5. John J. Szmer, Erin B. Kaheny & Robert K. Christensen, *Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrepancies in Clerk Selection*, 98 MARQ. L. REV. 261 (2014).

that I get them is through my internship program. I will bring in students that I might consider for diversity, but they might not have the resume, and I want to see what they're going to do. That's what law firms do, isn't it? They bring in students for internships, and if they perform well, they bring them on board? It makes sense to me.

JUSTICE DAVID STRAS: I would say that the segment of the population, like Judge Sykes, where I would like to see more applications is with women. I don't necessarily receive as many as I would like to receive. But really, what it comes down to for me is I just want people with diverse backgrounds, which can include things like race, region, things like that. I've had a gay clerk. I've had a clerk who grew up on a farm. I've had clerks who have done all kinds of different things. I've had one clerk who I was particularly impressed with because no one in his family had ever gone to college. He didn't fall into the traditional sort of ethnic or gender diversity, but it was really impressive to me that he was the first one to go to college, and not only had he gone to college, but he went to law school too. So I really look for people with a diversity of background experiences because I think it makes me a better judge, whatever those experiences might be.

JUDGE JAMES WYNN: I get a large number of female applicants. My career clerk is a woman. That trend may relate what's happening in law firms. In many instances, a female lawyer in a law firm may find that the demanding schedule of a law firm does not lend itself to starting a family. On the other hand, a clerkship may allow for more flexibility of schedule. This year, three of my four clerks are female. And that's not out of the norm for my chambers.

CHAD OLDFATHER: Well, with that, we will bring things to a close. Thank you very much, Judges Wynn and Sykes, Justice Stras. [applause]