



FEDERAL  
APPELLATE  
COURT  
*Law Clerk*  
HANDBOOK



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## About the Author

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## **I. Introduction to the Pocket Survival Guide**

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Welcome to the fascinating world of appellate clerkships. This Inside Guide is intended to provide both an overview of clerkship responsibilities and a reference to assist clerks as they perform their jobs. All too often, new employees are reticent about requesting guidance about their functions, and employers provide information that is either oversimplified or unduly complicated and usually painfully outdated. This Inside Guide seeks to strike the proper balance to give the new clerk the ammunition to perform his or her duties successfully from the first day in chambers.

In addition, the Inside Guide may also prove to be a valuable reference for those people who are considering applying for an appellate clerkship and want to learn more about the nuts and bolts of what the job actually entails.

The appellate judicial decision-making process is not transparent to those who are unacquainted with appeals courts' internal procedures. Indeed, how judges decide cases is seldom addressed during an aspiring lawyer's law school education. This Inside Guide does not purport to reveal any secrets or confidences about how judges reach their opinions; rather, it is strictly a tool to help clerks and would-be clerks understand what law clerks really do.

Although law clerks may like to think of themselves as the locomotives that keep their judges' chambers churning forward (and the analogy may be apt), they must also remember that the train has been in motion long before their arrival and will continue long after their departure. Clerkships are generally conducted for set periods of time (usually 1 to 2 years), whereas a judge's career carries on indefinitely. Therefore, from a new clerk's first day on the job, the chambers is already working on a full docket of cases that have not been brought to resolution.

This means that, in addition to handling cases that are assigned from the outset, the incoming clerk will have to assume responsibility over cases that have already coursed their way through the judicial process and require a final disposition, including a published opinion. Furthermore, there is usually little or no overlap between terms of duty; therefore, a typical training period will consist of an outgoing clerk attempting to bring you up to speed on the cases he or she is leaving unresolved. The rest you will be expected to learn on your own. This highlights the need for clerks to have as much information as possible before their clerkships begin.

We hope you find the Inside Guide to be helpful and informative as you embark on an exciting and significant challenge in serving your judge and your court.



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## II. Overview of Clerkship and Role of the Law Clerk

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One of *Black's Law Dictionary's* definitions of "clerk" is: "One who . . . engages in clerical work such as bookkeeping, copying, transcribing, letter writing, tabulating, stenography, etc." Indeed, this is the connotation that most nonlawyers would assign to the term. Consequently, misbelieving that lay people will appreciate the prestige associated with your new title, you might be disappointed to learn that when you tell would-be love interests that you are a law clerk, they imagine a gnome burrowed away in the bowels of a courthouse, rather than some kind of legal lion tamer. To be sure, your role as law clerk will involve numerous clerical duties; however, the traditional notion of a clerk belies the significance and meaning of the work you will actually perform.

The description that best captures a law clerk's role and responsibilities is one overheard from a federal appellate judge who said that "the law clerk is the judge's lawyer." Over the course of the year, the judge must consider hundreds of cases. The clerks help manage that caseload: conducting research, preparing memoranda, assisting the judge in reaching decisions, and drafting dispositions. The scenario is analogous to working for a senior partner of a law firm or the chief executive officer of a large organization: at the end of the day, the senior manager makes the meaningful decisions, but only after junior associates have facilitated the process by providing the decision maker with the necessary information.

The notion that the law clerk serves as the judge's lawyer also encompasses the confidential nature of the relationship. Law clerks have a duty to represent their judges with the same commitment to professional responsibility as lawyers must for their clients.

CAST OF CHARACTERS IN THE JUDGE’S CHAMBERS

Circuit Judge (usually more informally referred to as “Judge”)	<ul style="list-style-type: none"><li>• May be active or senior (i.e., semi-retired, hearing only the volume of cases desired, with some limitations in voting procedures, etc.).</li></ul>
Chief Judge	<ul style="list-style-type: none"><li>• Responsible for the administrative supervision of the Court, in addition to regular active circuit judge duties.</li></ul>
Presiding Judge	<ul style="list-style-type: none"><li>• Responsible for presiding over oral argument with the three-judge panel, running the postargument conference, assigning opinion-writing duties, etc. Usually, this is the most senior, active judge on the panel.</li></ul>
Judge Sitting by Designation	<ul style="list-style-type: none"><li>• A judge who is not a member of the Court who is invited to participate in hearing cases; usually this is a Circuit Judge from another circuit or a District Judge from the same circuit. Authorized to participate in the decision and the writing of the opinion, but may have limitations on certain voting procedures (en banc, etc.).</li></ul>
Judicial Assistant	<ul style="list-style-type: none"><li>• The judge’s legal secretary or administrative assistant. Responsible for organization of office documents, filing orders with the Court, etc. Most judges employ only one judicial assistant, but others have two or more (and, as a result, fewer law clerks).</li></ul>
Law Clerks	<ul style="list-style-type: none"><li>• Clerks to the judge who assist with research and writing. Usually, they are fairly recent law school graduates who serve limited terms (typically one to two years). Some may be permanent members of the judge’s chambers (or “career clerks”). Most active Circuit Judges employ four law clerks, although some have fewer (particularly if they have more than one judicial assistant). Senior judges usually have fewer clerks.</li></ul>
Extern	<ul style="list-style-type: none"><li>• Usually a law student who performs duties similar to the law clerks in exchange for course credit, rather than compensation. Externs may be part-time or full-time for terms of various lengths, although terms typically last for one semester or the summer. The extent of responsibility given depends on the extern’s ability and interest and the judge’s needs.</li></ul>

Clerk of the Court	<ul style="list-style-type: none"> <li>• A career position. Responsible for coordinating all of the court's receipt of filings and distribution of orders, opinions, etc. Essentially, the Clerk of the Court's office is the central repository through which all official correspondence flows. The Clerk of the Court is usually also responsible for many administrative duties in managing the administration of the Court. Notice that the term "clerk" presents possible confusion between "Clerk of Court" and "Law Clerk."</li> </ul>
Records Clerk	<ul style="list-style-type: none"> <li>• Responsible for ordering, receiving, and distributing records from the adjudicatory bodies below.</li> </ul>
Staff Lawyers	<ul style="list-style-type: none"> <li>• Most Circuit Courts employ a staff of lawyers who assist with the organization of cases, refining the issues on appeal, looking for related cases that present similar issues, facilitating the consideration of certain motions filed by the parties, screening for cases that do not require oral argument, etc.</li> </ul>

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### **III. History of the U.S. Court of Appeals**

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Article III of the Constitution of the United States states: “The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The Judiciary Act of 1789 created the three-tiered federal court system composed of U.S. District Courts, U.S. Courts of Appeals, and the U.S. Supreme Court.

Originally, the 13 states were divided into three geographical circuits. Each circuit court sat twice annually within each district in its circuit. Two U.S. Supreme Court justices and one district judge made up each circuit panel. By 1869, the number of circuits had expanded, and a permanent circuit judge was appointed to each to sit with the two traveling U.S. Supreme Court justices responsible for that circuit. In 1891, the Evarts Act established nine U.S. Courts of Appeals consisting of three judges in each circuit, which relieved the Supreme Court justices of this duty.

Supposedly, Justice Horace Gray introduced the practice of employing law clerks to the U.S. Supreme Court after his appointment in 1881. Justice Gray had apparently begun this system when he was Chief Justice of the Supreme Judicial Court of Massachusetts, hiring an honors Harvard Law School graduate to serve as his secretary each year. By 1886, Congress provided for a law clerk for each Supreme Court justice. This privilege was extended to U.S. circuit judges in 1930, U.S. district judges in 1936, U.S. magistrate judges in 1979, and U.S. bankruptcy judges in 1984.

Many law clerks have gone on to successful careers themselves, including the Honorable John Roberts, Chief Justice of the U.S. Supreme Court, and former law clerk to then–Associate Justice William Rehnquist, who was Robert’s immediate predecessor as Chief Justice and who had clerked for Justice Robert Jackson.

## A. APPEALS PROCESS

The Court of Appeals, naturally, hears appeals. In most instances, the cases are appeals from the District Court, although they may also be final orders from other adjudicatory bodies, such as the Board of Immigration Appeals, Bankruptcy Court, Tax Court, Social Security Administration, etc. The caseload includes both civil and criminal cases.

United States Court of Appeals			
<b>District Courts</b> • Magistrate Judges	<b>Bankruptcy Court</b>	<b>Administrative Agencies</b> (e.g., Board of Immigration Appeals (INS), EPA, FCC, FERC, FTC, NLRB, etc.)	<b>Tax Court</b>

Once there has been a final disposition below, one (or sometimes both) of the parties may initiate the appeals process by filing a Notice of Appeal. The case is given a file, docketed, and assigned a case number (e.g., 00-12345, for a case filed in 2000); then, the Office of the Clerk of the Court establishes a schedule for the parties to submit their briefing. Next, the briefs and Excerpts of Record are received by the court. Staff Lawyers review the materials to help organize and focus the issues, manage the case flow, and determine whether the issues presented are sufficiently complex or in dispute to warrant a hearing by a merits panel of three judges; cases in which the law is unequivocal are merely disposed of by a screening panel of judges (also composed of three judges).

In some circuits, the cases are weighted by the staff lawyers according to an assessment of the complexity of the issues they present. For example, a death penalty case would receive the highest weight, whereas a “simple” appeal of denial of a habeas corpus petition may receive the lowest weight

(some circuits actually assign numbers to these “weights”). In other circuits, however, the cases are merely distributed to the panel judges’ chambers, where the law clerks engage in a kind of informal weighing of cases to distribute them as fairly as possible amongst themselves.

The cases are next set on a calendar for oral argument before a three-judge merits panel,<sup>1</sup> and copies of the materials are distributed to the chambers of each of the judges.

LIFE CYCLE OF AN APPEAL		
Action	Responsible Party	Associated Duties
Notice of appeal	Litigants (Appellant)	
Docketing and Designation and Preparation of Record	Clerk’s Office	
Briefing and Excerpts of Record	Litigants	<input checked="" type="checkbox"/> Opening Brief (Appellant) <input checked="" type="checkbox"/> Answering Brief (Appellee) <input checked="" type="checkbox"/> Reply Brief (Appellant)
Calendaring	Clerk’s Office	
Preparing to Hear Case	Judges’ chambers	<input checked="" type="checkbox"/> Division of Cases among Law Clerks <input checked="" type="checkbox"/> Reviewing Briefs <input checked="" type="checkbox"/> Research <input checked="" type="checkbox"/> Drafting of Bench Memo <input checked="" type="checkbox"/> Preparation of Bench Book

<sup>1</sup>There are generally two types of panels: merits panels and screening or motions panels. Merits panels always consist of three judges and screening or motions panels generally do. Screening or motions panels consider cases and motions that present issues that are easily decided after reviewing the briefing by the parties and without any oral argument. Merits panels, in contrast, hear cases that present thornier questions and usually involve oral argument before the panel. Because of the complexity of the issues they present, cases that are scheduled for oral argument before merits panels will require more attention by the law clerks. Indeed, most judges do not involve their clerks when considering screening cases or certain motions.



Action	Responsible Party	Associated Duties
Oral Argument (or submission on the briefs)	Judges	<input checked="" type="checkbox"/> The parties may request that the case be submitted without oral argument or the judges may (unanimously) decide that the case is suitable for submission without oral argument. <i>See Fed. R. App. P. 34(a)(2).</i>
Postargument Conference	Judges (primarily Presiding Judge)	<input checked="" type="checkbox"/> Preparation of a Conference Memo about Each Case <input checked="" type="checkbox"/> Assignment of Writing Responsibility
Decision	Judges	
Writing Disposition	Judges' chambers	<input checked="" type="checkbox"/> Opinion or Memorandum <input checked="" type="checkbox"/> Circulation of Initial Draft <input checked="" type="checkbox"/> Preparation and Circulation of Comments <input checked="" type="checkbox"/> Editing <input checked="" type="checkbox"/> Preparation of Final Draft
Prepublication Reports and Slip Opinions Distributed		
Petition for Rehearing or Rehearing En Banc	Litigants (Note: As discussed below, a judge may also call for a vote as to whether a case should be taken en banc.)	<input checked="" type="checkbox"/> Law clerks must evaluate the merits of the petition or call for rehearing and advise the judge.
Mandate Issues (21 days after disposition is filed)		<input checked="" type="checkbox"/> Decision becomes final and jurisdiction is returned to the lower court.
Petition for Writ of Certiorari	Litigants	

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## IV. Merits Panel Case

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### A. MATERIALS RECEIVED BY THE CHAMBERS

In anticipation of the Oral Argument, the judges' chambers typically receive the following materials:

#### 1. Inventory Sheet

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The inventory sheet is prepared by a staff lawyer of the Court. It contains information such as the type of case, the district of origin, the original judge or agency, a summary of the case, and a statement of the issues. The inventory sheet sometimes also includes other helpful notes (e.g., whether there is another case pending that presents a similar issue, the reason the case was “kicked” from the screening panel to a merits panel, etc.).

#### 2. Briefs

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##### a | Opening Brief, Answering Brief, and Reply Brief

As with other examples in the adversarial process, at the appellate stage, the parties engage in a call and response argumentation. The Appellant submits an Opening Brief; the Appellee responds with an Answering Brief; and, finally, the Appellant may elect to submit a Reply Brief. The covers of the briefs are color-coded, and they are sometimes referred to as the Blue, Red, or Gray Briefs, respectively. In some circuits, parties are required to submit two sets of briefs per chambers, which means that one set can be used by the clerks while the other is reserved for the judge.

##### b | Contents of Briefs

The form of the briefs is governed by Fed. R. App. P. 32, and the contents of the briefs must comply with Fed. R. App. 28, which requires:

1. Corporate disclosure statement if required by Fed. R. App. P. 26.1.
2. Table of contents.
3. Table of authorities (cases, statutes, etc.).

4. Jurisdictional statement, including subject-matter jurisdiction, appellate jurisdiction, establishing the timeliness of the appeal or petition for review, and an assertion that the appeal is from a final order or judgment. Jurisdiction is sometimes contested on any one of these grounds.
5. Statement of the issues presented.
6. Statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below.
7. Statement of relevant facts.
8. Summary of argument.
9. The argument, including:
  - (a) The contentions and reasons or authority supporting them
  - (b) A concise statement of the standard of review for each issue
10. Short conclusion stating the precise relief sought.
11. The certificate of compliance with Rule 32(a) (7).
12. Note: Unless the Appellee is dissatisfied with the Appellant's statement about the following points, the points need not be repeated: jurisdiction, statement of the issues, statement of the case, statement of the facts, and the statement of the standard of review. In most cases, however, the Answering Brief includes this information, often spinning it in the Appellee's favor.
13. The optional reply brief is considerably shorter and intended to be a reply to the Appellee's Answering Brief.

#### **c | Supplemental Briefs and Amicus Curiae ("Amici")**

Often, additional briefs are submitted because there are multiple parties to the action, the parties request to submit supplemental briefing, the Court orders supplemental briefing, or amicus briefs are filed after permission is received to do so.