

2016

Judicial Externships

Mariana Hogan

New York Law School, mariana.hogan@nyls.edu

Michael Roffer

New York Law School, michael.roffer@nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

 Part of the [Judges Commons](#), [Jurisdiction Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Judicial Externships, Chapter 19 in *LEARNING FROM PRACTICE: A TEXT FOR EXPERIENTIAL LEGAL EDUCATION 3RD ED.* at 489-557 (L. Wortham, A. Scherr, N. Maurer & S. L. Brooks, eds., West Academic Publishing, 2016)

This Book is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

Learning From Practice

A TEXT FOR EXPERIENTIAL LEGAL EDUCATION

THIRD EDITION

EDITED BY

LEAH WORTHAM ■ ALEXANDER SCHERR

NANCY MAURER ■ SUSAN L. BROOKS

 WEST
ACADEMIC
PUBLISHING

Learning From Practice

A TEXT FOR EXPERIENTIAL LEGAL EDUCATION

THIRD EDITION

EDITED BY

JEAN WORTHAM • ALEXANDER SCHERR

NANCY MAURER • SUSAN L. BROOKS

The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

© West, a Thomson business, 1998

© 2007 Thomson/West

© 2016 LEG, Inc. d/b/a West Academic
444 Cedar Street, Suite 700
St. Paul, MN 55101 1-877-888-1330

West, West Academic Publishing, and West Academic are trademarks of West Publishing Corporation, used under license.

Printed in the United States of America

ISBN: 978-1-63459-618-3



To our students.
We hope your practice experience while in
law school helps you find fulfilling work
that is part of a life you love.



To our students:
We hope your practice experience will be
a school that you find fulfilling work
that is part of a life you love.



Table of Contents

Preface—For Teachers	ix
Introduction—For Students	xv
About the Authors	xix
Acknowledgments	xxix
Section I: General Topics	
1 Introduction	1
ALEXANDER SCHERR & SUSAN L. BROOKS	
2 Charting Your Path to Success—Professional Development Planning	15
LAURIE BARRON & NANCY M. STUART	
3 Learning from Supervision	33
LIZ RYAN COLE & LEAH WORTHAM	
4 Observation	59
J.P. “SANDY” OGILVY	
5 Effective Communication and Professional Relationships	83
SUSAN L. BROOKS & INGA N. LAURENT	
6 Navigating Cultural Difference	111
MARGARET REUTER & CARWINA WENG	
7 Bias in the Legal Profession	153
STACY L. BRUSTIN & CARMIA N. CAESAR	
8 Reflection and Writing Journals	203
ALEXANDER SCHERR & MARGARET MARTIN BARRY	

Section II: Professionalism and Ethics

9	Professionalism	237
	NANCY MAURER	
10	Ethical Issues in Externships: An Introduction	261
	LISA G. LERMAN & LISA V. MARTIN	
11	Ethical Issues in Externships: Confidentiality	279
	ALEXIS ANDERSON	
12	Ethical Issues in Externships: Conflicts of Interest	295
	CINDY R. SLANE	
13	Ethical Issues in Externships: Duties to Tribunals and Third Parties	335
	LISA G. LERMAN & LISA V. MARTIN	

Section III: Lawyering and Skill Development

14	Learning About Lawyering	357
	ALEXANDER SCHERR	
15	Client Relationships	399
	ALEXANDER SCHERR	
16	Collaboration and Teamwork	427
	JANET WEINSTEIN & LINDA MORTON	
17	Writing for Practice	447
	KENDALL L. KEREW	
18	Making Presentations	469
	LEAH WORTHAM	

Section IV: Practice Contexts

19	Judicial Externships	489
	MARIANA HOGAN & MICHAEL H. ROFFER	

20	Criminal Justice Law Placements	559
	RUSSELL GABRIEL & HANS P. SINHA	
21	Public Interest Lawyering	605
	SUSAN B. SCHECHTER & JEFFREY R. BAKER	
22	Public Service Lawyering	627
	JEFFREY R. BAKER & SUSAN B. SCHECHTER	
23	Transactional Lawyering	645
	ANN VESSELS, STACEY BOWERS, & MARK POPIELARSKI	

Section V: Your Future as a Lawyer

24	Professional Identity and Formation	685
	DAISY HURST FLOYD & TIMOTHY W. FLOYD	
25	Work & Well-being	699
	MARJORIE A. SILVER	
26	Externships and Career Development	725
	AVIS L. SANDERS	
27	The Future of the Legal Profession and Legal Services Delivery	755
	LEAH WORTHAM	
28	On Finishing Strong: Looking Back and Looking Forward	799
	SUSAN L. BROOKS & ALEXANDER SCHERR	
	Appendix I: Perspectives on Lawyering	807
	ALEXANDER SCHERR	
	Appendix II: Permanent Weblinks	821
	Index	855

FURTHER RESOURCES

Books

ANDREW V. ABELA, *THE PRESENTATION: A STORY ABOUT COMMUNICATING SUCCESSFULLY WITH VERY FEW SLIDES* (2010). A short book about adapting presentation style to the type and objectives of the presentation.

CHIP HEATH & DAN HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE* (2008). The authors synthesize considerable social science research on what makes ideas have “staying power” so people remember and are persuaded by them.

BRIAN K. JOHNSON & MARSHA HUNTER, *THE ARTICULATE ATTORNEY: PUBLIC SPEAKING FOR LAWYERS* (2d ed. 2013). This book focuses on specific things one can practice regarding use of the body, brain, and voice for more effective speaking and reducing jitters.

DANIEL H. PINK, *TO SELL IS HUMAN: THE SURPRISING TRUTH ABOUT MOTIVATING OTHERS* (2012). Another quite readable book applying social science research on what is effective in persuading people, along with the insight that most of us today spend a lot of our time trying to convince someone else to do something.

Article

Chris Anderson, *How to Give a Killer Presentation*, HARV. BUS. REV. (June 2013), at 121, <https://hbr.org/2013/06/how-to-give-a-killer-presentation>. TED Curator Chris Anderson gives a number of useful suggestions based on his observation of many TED talks, which are applicable to other kinds of presentations as well.

Website

PRESENTATION ZEN, www.presentationzen.com.



MARIANA HOGAN & MICHAEL H. ROFFER

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.

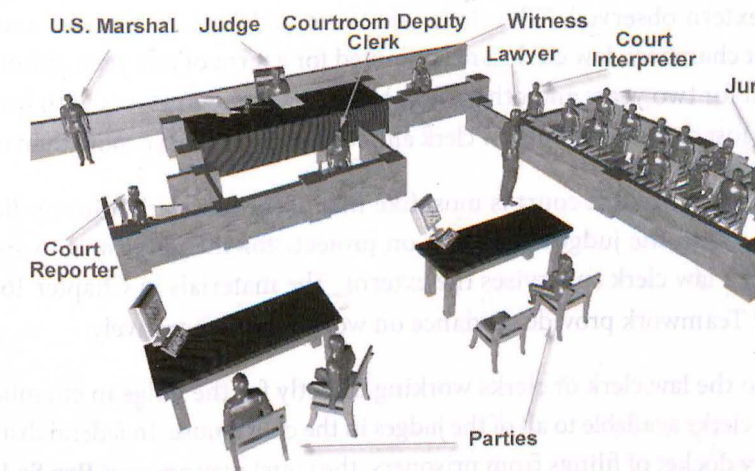
The most common sources of conflicts of interest include work an extern may have done in the past on a case that is now before the judge for whom he or she is externing, matters in chambers that involve a law firm to which the extern has applied for employment or wishes to apply for employment in the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



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.

—Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 9 (1921).

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: “[the 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 those 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.

—Judge Marjorie O. Rendell, *What is the Role of the Judge in Our Litigious Society?*, 40 VILL. L. REV. 1115, 1126 (1995).

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.

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 unmovable 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?

Watch the settlement conference in the movie *THE VERDICT* or read Judge Saxe's fictionalized depiction of a settlement negotiation in a medical malpractice case. David B. Saxe, *Anatomy of a Settlement*, 79 A.B.A. J. 52 (1993). Compare and contrast actual settlement conferences at the court.

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

set limits cite the benefits to counsel of editing their presentation to the jury. Critics express concern about the fairness to the party with the higher burden. See Debra Cassens Weiss, *Federal Judge to Time Lawyers in 9/11 Trial 'Like a Speed Chess Match,'* A.B.A. J. LAW NEWS NOW (April 28, 2011, 8:24 AM), http://www.abajournal.com/news/article/federal_judge_to_time_lawyers_in_9-11_trial_like_a_speed_chess_match/ (last visited Aug. 5, 2014).

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 un- or 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

fair day in court.” Have you 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.

Qualifications

Consult the materials compiled by the “Judicial Selection in the States Project” on the American Judicature Society website at www.ajs.org for a summary of judicial qualifications in your state.

The federal constitution and the constitutions and statutes of each state set out the qualifications for judges. Typically, these qualifications are sparse. Not all jurisdictions require the judges in all levels of their courts to be licensed lawyers. Several minimalist states simply require their judges to be “learned in the law.” In those states that do require their judges to be licensed attorneys, not all require a minimum number of years of legal experience. The range in those that require experience is from four to thirteen years. Many states impose residency requirements ranging from requiring the judge to be a resident at the time she takes the bench to five years in the jurisdiction. There is also no uniformity in age requirements. Thirty is the most common minimum age in jurisdictions where there is an age provision. The federal courts and some state courts do not have mandatory retirement, and in those states that do, the retirement age ranges from seventy to seventy-five years of age. The legal requirements are noticeably silent on what qualities effective judges should have.

What are the qualities that we ought to look for in candidates for judicial office? Alexander Hamilton, writing in *The Federalist* No. 78, sets a high standard:

[T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.

Francis Bacon said, “Judges ought to be more learned than witty, more reverent than plausible and more advised than confident. Above all things, integrity is their portion and proper virtue.” How does this seventeenth century standard hold up today?

In 2000, the ABA issued standards for judicial selection and retention setting out five criteria for judicial selection: experience, integrity, professional competence, judicial temperament, and service to the law and contribution to the effective administration of justice. The ABA standards recommend a minimum of ten years admission to the bar,

and its definition of professional competence includes “intellectual capacity, professional and personal judgment, writing and analytical ability, knowledge of the law and breadth of professional experience.” Judicial temperament includes, “a commitment to equal justice under law, freedom from bias, ability to decide issues according to law, courtesy and civility, open-mindedness and compassion.” The service criteria encompasses “a commitment to improving the availability of providing justice to all those within the jurisdiction.” These last two standards arguably recognize the need for diversity on the bench, racial and gender diversity as well as diversity of practice experience. *Standards on State Judicial Selection: Report of the Commission on State Judicial Selection Standards*, A.B.A. STANDING COMMITTEE ON JUDICIAL INDEPENDENCE (July 2000). Traditionally, fewer judges have ascended to the bench from solo or small practices, from civil rights work, or from the defense bar. Justice Sotomayor, a proponent of diversity on the bench, argues that public confidence in the judiciary will increase if the public sees more judges from their own background. Tony Mauro, *Sotomayor Says Lack of Diversity is ‘Huge Danger’ for Judiciary*, THE BLT: THE BLOG OF LEGALTIMES, (Nov. 20, 2013, 10:28 AM), <http://legaltimes.typepad.com/blt/2013/11/sotomayor-says-lack-of-diversity-is-huge-danger-for-judiciary.html> (last visited Aug. 5, 2014).

There are also many qualities that the standard does not mention, and it does not address the varying needs of different jurisdictions and judicial assignments. The volume of cases judges handle suggests that decisiveness, organization, and management skills might be critical to the role. The advent of more specialized courts also raises the question of whether judges sitting in those courts should have specialized experience to match. (The subject of specialized and problem-solving courts is addressed later in this chapter.) While specialized knowledge has obvious benefits, there are risks to having judges hear a steady diet of similar claims and issues. Fresh perspectives can be valuable. Judge Posner suggests that the use of specialized, expert judges was “the dream of the Progressive movement and led to a proliferation of administrative agencies, many of them specialized courts in effect (such as the Federal Trade Commission and the National Labor Relations Board) . . . ,” which he labels “a flop,” with the principal exception of the Bankruptcy Court and the partial exception of the Tax Court. He concludes “specialized courts just don’t ‘work’ in the federal system.” Posner, *op. cit.* at 94. What are some reasons for Judge Posner’s conclusion?

Exercise 19.9 Create a list of the qualities you think are most important in our judiciary. Compare your list to the ABA standards. How would you rank the ABA standards in order of importance? Would the nature of the court where the judge is

to preside (trial, appellate, or administrative) or the types of cases she is to hear (for example: criminal, family, or civil) affect your list or rankings?

Research the background and experience of the judge with whom you work as an extern. Do your own analysis of the qualities and qualifications that suited your judge to judicial service. Redo the analysis using the ABA qualifications. Compare the two.

Selection

The judicial selection process can be controversial. The crux of the controversy is the tension between ensuring judicial independence and maintaining judicial accountability. Reduced to the simplest terms, judges are either elected, in partisan or non-partisan contests, or appointed, but there are countless variations on both processes, and all seem to have imperfections. Frequent elections maximize accountability while lifetime appointment enhances independence. The myriad methods of judicial selection in effect throughout the country are all attempts to balance these competing interests.

Exercise 19.10 How did the judge you work with get on the bench, and how long will she serve? Answering these questions may be complicated by the fact that in some states and counties, and even within some courthouses, there are multiple routes to the bench, each with different terms of office. What are the implications of the selection process that put your judge on the bench?

■ Elections

Popular election of judges takes many forms. The first distinction is whether the judicial elections are partisan or non-partisan. Non-partisan elections attempt to insulate the electoral process from politics by having the judge run without party affiliation. In partisan elections, the process for nominating judicial candidates varies and may involve nomination by a county political leader or through a party convention. Political nomination processes open the door to allegations that spots on the ballot are bestowed as political favors.

For an engaging description of one jurisdiction's nominating process, see *Lopez Torres v. New York State Board of Elections*, 411 F. Supp.2d 212 (E.D.N.Y.), aff'd,

462 F.3d 161 (2d Cir. 2006), rev'd, 552 U.S. 196 (2008). In that case, a candidate for a judgeship in New York State challenged the political process for selecting candidates for the New York State Supreme Court bench. The district court ruled for the challenging candidate in a lengthy decision chronicling the overtly political process. The Supreme Court reversed the district court 9–0, ruling that the First Amendment gives broad protection to political parties regarding how they select and endorse judicial candidates. *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

■ Campaign Finance and Free Speech

Whether the elections are dubbed partisan or non-partisan, judges running for office have to face the issue of campaigning. Given the role of judges as fair and impartial interpreters of the law, judicial campaigns are potentially unseemly. The problems posed by the need to finance political campaigns generally are seen as more critical in judicial elections because the most likely contributors to judicial campaigns are the lawyers and potential litigants in the jurisdiction where the judge is seeking election. Restrictions on contributions, however, may limit judicial candidates to the wealthy, jeopardizing the goal of a diverse bench of the most qualified candidates. Mandatory disclosure of campaign contributors and publicly-financed judicial campaigns are two frequently proposed solutions that ameliorate but do not completely resolve this problem.

In order to preserve the impartiality of the judiciary and the public's confidence in the impartiality of their judges, most states have prevented judges and judicial candidates from expressing their views on disputed legal or political issues. The various ethical provisions prohibiting judges from announcing their views were designed to insulate judicial candidates from feeling bound by statements they might otherwise make during the course of a campaign, but the provisions also deny voters some meaningful information upon which to base their votes. The Supreme Court's 5–4 decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and a subsequent related decision by the Eighth Circuit Court of Appeals, freed judicial candidates in Minnesota from some of these ethical restrictions on free speech grounds.

In the wake of these decisions, states are grappling with the limits on judicial campaign speech. Critics of the *White* decisions fear that politicizing judicial elections will detract from the independence and integrity of the courts and harm public perception, while proponents of the outcome note that elections in which judges are free to

campaign promote accountability of judicial candidates and informed choice by voters. Litigants are not without recourse if their adversary has made recent and significant contributions to the judge's election. In a 5–4 decision the Supreme Court required the recusal of a judge who had benefited from millions of dollars of campaign contributions from one party on the ground that the risk of potential bias violated the Due Process Clause. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). In addition, a number of states have enacted court rules limiting the ability of judges to hear cases in which any of the attorneys or parties made donations above a set level. William Glaberson, *New York Takes Step on Money in Judicial Elections*, N.Y. TIMES, Feb. 13, 2011, at A1.

Exercise 19.11 If the judge with whom you extern is elected, research her campaign to see what statements she made while campaigning. Did they give an indication of the way she would decide any types of cases or issues? Is her behavior on the bench consistent with her campaign statements? If you were appearing as an attorney before your judge, do you think knowledge of those statements would be helpful to your preparation?

The designation “popular election” may be a misnomer when applied to judicial elections. Many judicial elections are not contested, and, even in contested elections, voter turnout is typically low. One commentator estimates that typically 80 percent of the electorate does not vote in judicial elections and cannot even identify the candidates for judicial office. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 54 (2003). This suggests that most voters know little about their choices in judicial contests, which makes it likely that name recognition and information provided by the ballot, such as affiliation with a political party, play a large role in judicial voting.

More than 100 years ago, Roscoe Pound asserted that judicial elections had “almost destroyed the traditional respect for the bench.” Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. A.B.A. 395 (1906), reprinted in 35 F.R.D. 273 (1964). The passage of time indicates that the situation was not that dire, but the controversy continues. Do you think the democratic value and judicial accountability attributed to judicial elections outweigh the potential detriment?

■ Appointment

The hallmark of an appointment process is that the executive—the President, Governor, Mayor, or County Executive—has the authority to make appointments to the bench. There are variations on how each executive informs his selections. Some processes,

including the system for appointments to the federal courts, involve confirmation of appointees by the legislative branch. Judicial appointment may take the judicial candidate off the campaign trail, but it is difficult to claim that the appointment process is not political. The controversies over federal judicial appointments have been continuous, often culminating with Democrats and Republicans in the Senate squaring off over appointees. Appointment processes in states and localities frequently involve their own brands of local politics.

Much of the controversy surrounding judicial appointments stems from how the executive chooses appointees. Appointment by a single person is susceptible to accusations of cronyism. Executives who seek input only from their own staff or other leaders in their own party may appear to be doling out political favors. There is also the fear that, once appointed, the judge will feel he owes allegiance to the person or party who appointed him.

The least controversial appointment processes involve bi-partisan or multi-partisan screening panels that include a diverse group of lawyers and non-lawyers selected by a wide variety of politicians, bar leaders, law school deans, and citizen groups. The panel reviews candidates' qualifications and makes recommendations to the executive. The executive appoints judges from among the candidates recommended by the panel. This sort of process is touted as a “merit selection” process. The first merit selection system was adopted in 1940 by Missouri voters in response to the notorious machine politics of Democratic Party boss Tom Pendergast. In one variation, sometime after appointment, usually a year, the judge faces the electorate in what is called a retention election. Most often, the judge runs unopposed, and the retention election acts as a sort of referendum on her performance by the electorate.

The merit selection system with a retention election combines the best features of merit appointment with the accountability of elections, but even this system has flaws. Judges who have made unpopular decisions prior to the retention election have been subject to ruthless ouster campaigns, and studies have shown that absent noisy campaigns, retention elections are subject to voter apathy. Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729 (2002).

■ Does Independence Trump Accountability?

Which system offers the best hope of promoting public trust and confidence in the judicial system while at the same time putting a diverse group of the most qualified judges on the bench and ensuring their independence and impartiality? Elections appear to offer accountability but at a cost to independence and the appearance of impartiality.

Moreover, the accountability provided by elections is arguably illusory given the apathy of voters and the dearth of information available to them on the candidates. Appointment by a single executive also compromises independence and impartiality unless the executive relies on a diverse, non-partisan screening committee committed to seeking out the most qualified candidates. Ultimately, the best test of a judicial selection system is the quality of the judges selected.

The debate about the relative benefits of merit selection versus election has not proven easy to resolve. Beginning in the 1980s, a series of studies conducted by academics, bar associations, and even the Chamber of Commerce, have attempted to compare the quality of judges elevated to the bench under each system analyzing legal experience, diversity, ideology, work product, and ethics. Each of these categories poses research challenges, and the results are varied and mixed. The difficulty begins with determining what makes a “quality” judge. Even the benefits to diversity on the bench under each system have proven difficult to gauge. While studies have found that appointive systems are more effective in creating a diverse bench than electoral systems, some scholars have noted a “threshold effect,” arguing that appointive systems are only more effective at initially diversifying a non-diverse court, and that they subsequently fail to maintain that result. Rachel Paine Caufield, *What Makes Merit Selection Different?*, 15 ROGER WILLIAMS U. L. REV. 765 (2010).

Evaluation of Judges

It isn't until one closely observes, perhaps even shadows a judge over a period of time that one can get a true feel for a judge's temperament and the way in which she approaches a variety of cases, including trials and settlement conferences.

—Student Journal

The move to develop evaluation systems for the judiciary is relatively recent. Concerns about judicial independence and the difficulty of evaluating the complex and specialized work of a judge make implementing an evaluation system a delicate process. Since 1987, several organizations, including the National Center for State Courts, the Judicial Conference of the United States, and the American Bar Association, have recommended or issued guidelines for the evaluation of judicial performance. The result has been the development of court-sponsored evaluation plans in many jurisdictions. Local bar associations also have stepped in to evaluate judges, particularly where the courts do not sponsor an evaluation plan. The overarching purpose of judicial evaluation is to improve the quality of the judiciary, but the plans can have more specific purposes. Judicial evaluations can have public purposes, such as to enhance public confidence in

the judiciary or to provide information to those responsible for continuing judges in office. Within the court system they can have administrative purposes such as informing judicial assignments and determining where training and education would be beneficial to the judges, and, individual judges can use them for self-improvement.

Courts and bar associations implementing an evaluation system confront a daunting task. In 2005, the ABA adopted Black Letter Guidelines for the Evaluation of Judicial Performance, which include three guiding principles: evaluations must be confidential; they must be based on actual observation of the judge; and the sampling and selection of respondents, information collected, and the methods of collecting and analyzing must comport with accepted scientific standards. Anonymous evaluations may encourage forthright responses, but does anonymity risk unfair comments? To avoid results tainted by rumor or heavy media coverage of a few notorious cases, it makes sense to survey only those with firsthand knowledge of the judge's performance. That includes the attorneys who have appeared before the judge, litigants, witnesses, jurors, and court personnel who have seen the judge in action. Do non-lawyers possess sufficient understanding of the judge's role to meaningfully evaluate judicial performance? Can litigants fairly evaluate the judge who heard their case?

Threshold questions on methodology include determination of who should conduct the evaluation, whom they should survey, and what information they should seek. Generally, it is agreed that obtaining balanced information requires assembling a diverse group of stakeholders to design and implement the process. No single interest group should control the evaluation process. There are a number of criteria on which a judge might be evaluated. The choices made about which criteria to include in an evaluation may reveal the priorities of the group doing the evaluation. There are also questions about how to structure the evaluation. The ABA recommends asking for behavior-based information. Are some criteria more or less susceptible to evaluation on behavior-based grounds? The ABA makes no recommendations as to the relative weight various criteria should be given. Are all criteria of equal importance? The challenges are formidable.

Exercise 19.12 There are countless evaluation forms in use throughout the country. Start by looking at the Judicial Performance Resources on the ABA site www.aba.org. Look at the differences among the forms designed for attorneys, jurors, court staff, and the judge him or herself. Do they accurately capture the differences in perspective each group brings to the process? Are there criteria that are not included in the ABA Guidelines? How would you rank the importance of the various criteria that are included? The Quality Judges Initiative of the Institute for

the Advancement of the American Legal System (IAALS) at the University of Denver has information on the judicial evaluation plans that have been implemented in many states. Check to see if and how the judges in your jurisdiction are evaluated and to whom and how the results are disseminated. <http://iaals.du.edu/initiatives/quality-judges-initiative/implementation/judicial-performance-evaluation>. If your jurisdiction has an evaluation form, complete it using your courtroom observations of the judge with whom you work. Review your completed evaluation. Do you think it conveys an accurate assessment of the judge? How would you improve the evaluation form? Do you think the judge could or would benefit from seeing the evaluation? If there is no evaluation form available in your jurisdiction, choose an evaluation form from another jurisdiction or use the sample Trial Attorney Evaluation of Judge form on the ABA site and reproduced in Appendix 19.1.

Two recent studies raise questions about the ability of non-lawyers to fairly evaluate judges. A 2011 study conducted by Simon and Scurich showed that lay evaluations of judicial decisions and judges were “highly contingent on the decision outcomes. Participants gave favorable evaluations of the judges and their decisions when they agreed with the judges’ outcomes, but reported negative evaluations when they disagreed with them.” Recognizing that the public gets much of its information about judicial decisions from the media, the authors conducted a follow-up survey to determine the extent to which lay people’s judgments of judicial decisions are influenced by expert commentators. They found “that the experts’ commentaries do not alter participants’ evaluations of the courts’ decisions.” Dan Simon & Nicholas Scurich, *The Effect of Legal Expert Commentary on Lay Judgments of Judicial Decision Making*, 10 J. EMPIRICAL LEGAL STUD. 797 (2013). What implications do these findings have for judicial selection and oversight? Courts are making significant efforts to influence public perceptions of the courts. What do these findings suggest about their potential for success?

Issues surrounding judicial evaluations are also discussed below under Judges, Courts, and the Public.

Judicial Oversight

Elections and evaluations are not the only ways to hold judges accountable. The trial courts and the intermediate level appellate courts are accountable for their legal reasoning through appellate review. Frequent reversals may motivate a judge to decide cases differently. Appellate courts do not necessarily limit their review of judges’

conduct to the merits of decisions being appealed. In late 2013, the Second Circuit Court of Appeals removed District Judge Shira Scheindlin from a controversial case that had been tried before her and ordered the case reassigned to another judge. The court’s sua sponte ruling was predicated on its conclusion that Judge Scheindlin had, among other things, compromised “the appearance of impartiality” through the “improper application of the Court’s ‘related case rule,’ . . . and by a series of media interviews and public statements purporting to respond publicly to criticism of the District Court.” *In re Reassignment of Cases*, 736 F.3d 118 (2d Cir. 2013).

Even the highest appellate courts in each jurisdiction may be reversed by the legislature in some cases. If a judicial decision is unpopular, the legislature may “correct” the law through new legislation.

Judicial conduct commissions oversee other forms of judicial behavior. Under the Judicial Improvement Act of 2002 (28 U.S.C. §§ 335–364), anyone may file a written complaint against a federal judge whom they believe has engaged in “conduct prejudicial to the effective and expeditious administration of the business of the courts” or “is unable to discharge all duties of office by reason of mental or physical disability.” The states have comparable oversight systems to investigate allegations of judicial misconduct, although there is variation in the composition of the oversight body, the investigatory process, whether and to what extent the proceedings are confidential, and the appeals processes.

The American Judicature Society website has a wealth of information on judicial oversight with links to specific information for each state. www.ajs.org.

There are other less formal methods of “oversight” that also aid in ensuring judges remain accountable. A host of services, in print and online, collect and disseminate evaluative information about judges. Beyond basic biographical background, some of these sources offer generalized insights about individual judges’ practices and tendencies through anonymous comments from members of the bar who practice before them. (See Further Resources at the end of this chapter.) Some popular web sites, including The Robing Room which describes itself as “where judges are judged” go further offering numerical ratings on federal and state judges based on lawyer-submitted data.

Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit suggests that one important constraint on judicial decision making is an internal one:

the judge's own self-respect. Kosinski posits that because "[j]udges have to look in the mirror at least once a day" and "have to like what they see," they are likely to hew to the correct decisional line. Do you think this form of self-oversight works? Does it obviate the need for other forms of oversight?

Academics, too, are playing a role in providing oversight, offering empirical analyses of judicial opinions that purport to yield objective measures of judicial performance. See Robert Anderson IV, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeals*, 76 MO. L. REV. 315 (2011) (ranking judges based on positive and negative citations to their judicial opinions).

Empirical analysis also plays a role in some commercial tools (e.g., WestlawNext Attorneys & Judges Profiler and Lexis Advance Litigation Profile Suite) offered to litigators that structure judicial profiles of individual judges based on the judge's historical docket, offering aggregated information on cases by practice areas, types of motions filed and the average time to decide various motions, awards by resolution, and appellate record.

One frequent complaint about our judicial system is its lack of efficiency, including judges' productivity. A court system's administrative office may monitor productivity by recording and publishing statistics on caseloads, such as the number of cases each judge resolves, the average number of days before each judge renders a decision on a motion, the number of cases pending on each judge's docket, the average age of the cases on the judge's docket, and the like. Court administrators may react to an individual judge's statistics by reassigning the judge to a different court or altering the number or types of cases the judge is assigned.

Exercise 19.13 Does the court where you are externing keep case statistics? Who keeps the statistics? Do individual judges keep them? Are the statistics available to the public? Are the statistics conveyed to the judge? Think about the impact the statistics have on the judge.

Finally, citizen groups, bar associations, and the media use a variety of methods to hold judges accountable. Citizen groups sometimes send court watchers to monitor what is happening in the courts. Bar associations may survey their memberships and produce reports on judges in the jurisdiction. The media report on cases of note and instances

of egregious judicial conduct. In some jurisdictions the media is not limited to sending reporters to the courthouse; cameras bring televised proceedings into viewers' homes.

Cameras in the courtrooms offer another possible avenue for judicial oversight, although cameras are not permitted in all jurisdictions. If they are, their use is likely to vary from judge to judge and, perhaps, even case to case. Despite decades of experience with cameras in the courts, there is no consensus on whether the behavior of judges, lawyers, and witnesses improves under the camera's watchful eye. There is some concern that conduct deteriorates because participants "play to" the cameras. Other concerns include whether cameras in the courtroom discourage knowledgeable witnesses from coming forward and whether televising court proceedings enhances public understanding of the courts or, because of the sensational trials that attract public attention, contributes to skewed notions of the judicial process.

The Radio Television Digital News Association, <http://rtdna.org>, offers a state-by-state guide to cameras and electronic coverage in state court courtrooms (current as of summer 2012). The federal judiciary has completed the first three years of a four-year pilot program to evaluate the effect of cameras in the courtroom. Fourteen federal trial courts are participating in the pilot program. See www.uscourts.gov.

While much of the media coverage of the judiciary furthers the goals of public access to the courts and judicial accountability, some forms of public criticism of judges threaten judicial independence. It is difficult to defend ad hominem attacks on judges as productive, but where is the line between harsh, but permissible, criticism and personal attack? When a judge is subject to unfair or inaccurate criticism, what is the proper response, and who should respond? Judicial ethics rules in many jurisdictions strictly limit the judiciary's response to criticism of judges' decisions. Should judges who anticipate a public reaction to a decision take greater pains to explain their reasoning when they rule? What role should the bar associations play in defining the limits of permissible criticism and responding to improper criticism of judges and the judiciary? Whether good or bad, sensational or mundane, media coverage of the judiciary is not just a form of oversight. It also contributes to public opinions of the judicial system.

Exercise 19.14 One extern reported the following: "[F]rom reading the news stories [about the judge] I had preconceived notions about him. However, after working with him I realized that these stories were published from one point of view and the

Judge was in fact a very nice, respectful, and approachable judge . . . I remind myself that what I hear or see through second-hand accounts or media portrayal is not necessarily what is reality.”

If there is media coverage of a case with which you are familiar through your externship, read or watch the coverage with a critical eye. Write a journal entry analyzing the accuracy of the coverage and the effect, if any, of the media scrutiny on the judge, lawyers, witnesses, and parties. What effect do you think media coverage might have on public opinion of judges and our judicial system?

Judges, Courts, and the Public

Judges may appear to be put on a pedestal—we refer to them as “Your Honor,” we don’t interrupt them, and we rise when they enter and exit. However, when important decisions are being made involving people’s lives—whether it be their liberty money or property—society benefits from the appearance and practicality of someone “put on a pedestal,” who is well-respected, independent, and not subject to outside influence.

—Student Journal

Another of the benefits of a judicial externship is the opportunity to reflect on the role of judges and courts in society and the public perception of that role. Judicial externs become insiders in a major cultural and political institution that much of the public sees only through the filters of media coverage or pop culture, as litigants represented by lawyers or as jurors fulfilling specific functions. Clients impose their expectations of the judiciary and the courts on their attorneys, and those expectations can inform their positions on how their cases should be handled. Litigators argue their clients’ cases to jurors who bring to that role certain expectations of the court system. Their reactions to the evidence and arguments are colored by their image of the system. But these are instrumental reasons to think about public perceptions of the judicial system. The more critical reason why public perception of the courts is of consequence was well put by Justice Felix Frankfurter: “The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.” *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

Recognition of the importance of the public’s perception of justice led the American Bar Association Judicial Division Lawyers Conference to host “Perception of Justice” events across the country between 2008 and 2012. Through town hall meetings, small group sessions, and panel discussions members of the judiciary, lawyers, and community members shared perceptions and suggestions on how to improve perceptions of justice. The most frequent discussion topics included procedural justice and user experience in the courts; the impact of public outreach and education; and the impact of race, ethnicity, religion, gender, and sexual orientation. Jurisdictions continue to host these events. Has your jurisdiction held a Perception of Justice event? If so, what was the outcome? Were changes made?

Exercise 19.15 Take the opportunity at the beginning of your placement in chambers to assess your own image of the courts in your community. What do you know about the particular judge for whom you will be externing? Start by completing the short survey found in Appendix 19.2. Compare your responses to the responses of members of the general public about their perceptions of the courts in their communities, which are contained in David B. Rottman, et al., NAT’L CTR. FOR STATE COURTS, *Perceptions of the Courts in Your Community: The Influence of Experience, Race and Ethnicity, Final Report* (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/201302.pdf>.

At the end of your placement, come back to the survey and take it again. Reflect on any changes in your responses now that you have become an insider in the court system and a member of your individual judge’s inner circle. If there are differences in your responses, do they raise any concerns about the ability of the public to fairly and accurately evaluate judges and the judicial system?

What is the Public Perception of Courts and Judges?

Since 1977 most of what is known about the public perception of courts and judges is through public opinion surveys that have been conducted over the years on both the state and national levels. A 2003 report by the National Center for State Courts reviewed many of the previous state and national surveys and reported findings from those surveys and concluded that there was an “apparent lack of significant change in public opinion about courts” over the years covered by the surveys. The authors of the Report note that “[t]he core public image of state and local courts is a stereotype—one

that seems to change little over time or differ from state to state or locality to locality.” The stereotyped images have both negative and positive facets.

The positive images include the perception that “judges are honest and fair in making case decisions, that they are well trained, that the jury system works, and that judges and court personnel treat members of the public with courtesy and respect.”

The negative images center on perceptions of limited access to the courts due to cost and complexity, delays in the processing of cases, unfairness in the treatment of racial and ethnic minorities, leniency toward criminals, and a lack of concern about the problems of ordinary people. Specific concerns include a perception of leniency in sentencing in criminal matters and favoritism toward the corporate sector and the wealthy in the civil justice system. There also is strong evidence of public concern that political considerations, especially related to campaign fundraising, exert an undue influence on the judiciary.

The authors of the 2003 Report noted that “distinctive views of the courts are associated with race and ethnic groups. African-Americans tend to have distinctly lower evaluations than do whites of the performance, trustworthiness, and fairness of courts. Latinos emerge as generally holding the most positive assessments of the state courts, but present a mixed picture in terms of specifics. . . .” A national survey conducted by Pew Research Group a decade after the 2003 Report shows views of the courts continue to be divided on racial lines and reveals a parallel urban/rural divide as well. Forty percent more of the black respondents than white respondents believed that blacks are treated less fairly by the courts than whites, and 17% more of the urban participants than the rural respondents shared that view. Eileen Patten, *The Black-White and Urban-Rural Divides In Perceptions of Racial Fairness*, PEW RESEARCH CENTER FACTTANK (Aug. 28, 2013), <http://www.pewresearch.org/fact-tank/2013/08/28/the-black-white-and-urban-rural-divides-in-perceptions-of-racial-fairness/>. What are the potential consequences of having any group feeling they are receiving disparate treatment by the courts?

Exercise 19.16 Differing perceptions of the courts along racial, ethnic, or gender lines within our society raise concerns about the fairness of the courts to different segments of society. Bias or the perception of bias in the courts runs counter to the core values of our judicial system. Over the last several decades most state and federal courts have studied the issue of fairness to diverse segments of society and issued reports. Do you see any evidence of bias in your court? Look at any reports on bias in the courts issued in your jurisdiction. The *National Center for State Courts Gender*

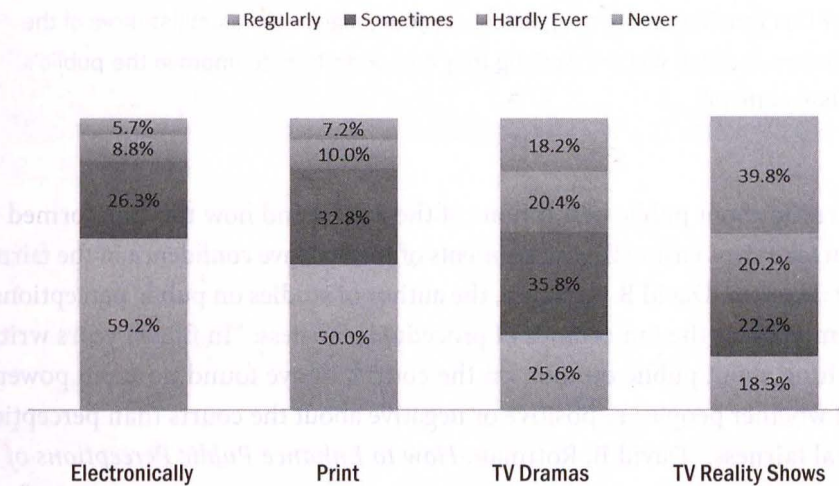
and Racial Fairness Resource Guide has a wealth of information with data and links to many of the state reports on their website <http://www.ncsc.org>. The federal circuits also have done reports, many of which are available through the Circuit Executive at the court. Pull the most recent reports from your jurisdiction and compare your own observations with the results presented in the reports.

How are Public Perceptions of Judges and Courts Formed?

How do people form their perceptions of their local courts? Several studies have attempted to answer that question. A 1999 national survey by the National Center for State Courts interviewed 1,826 randomly-selected Americans. Approximately 53% of the respondents indicated some personal involvement in the courts, with almost one-half of personal experience taking the form of jury service. About half (48.7%) of the respondents felt they knew “some” about the courts, but only 14.1% felt they knew “a lot.”

The sources identified by the respondents as regularly providing information to them about the courts were as follows: some personal involvement with the courts (53%), electronic sources (59%), and print sources (50%). Interestingly, TV dramas and comedies were identified by 25.6% of the respondents as regularly providing information about the courts, and TV reality shows (for example, *Judge Judy* or *The People’s Court*) regularly provided 18.3% of the respondents with information about the courts.

Where do you most frequently get information about the courts?



The survey analyzed in the 2003 Report only asked for sources of information that contributed to an overall impression of how courts in the community worked from respondents who indicated that they or a member of their household had any personal involvement in the courts in the preceding 12 months. Seventy-one percent rated their experience in court as a very important source of information. Further down the list was TV news (23%), newspapers (27%), and TV reality programs (8%). Generally, the three identified racial and ethnic groups, African-Americans, Latinos, and whites, reported similar patterns of information sources. African-Americans, however, were most likely to cite personal experiences in court (77%) compared to whites (70.4%) and Latinos (55%), and Latinos were more likely to cite TV reality shows (21%) than African-Americans (15%), and whites (3%) as important sources of information about the courts.

Overall, the data suggest roughly 50% of Americans have had some personal experience with the courts that is used to inform their images of the judiciary and judges, but even those with personal experience also report relying on TV news and newspapers for a significant amount of information about the courts. The other 50% of the population necessarily relies on media sources, such as sensational news stories and TV dramas, for much of its information about the courts. Recognizing the sources of public perceptions of the courts, astute litigators follow media and pop culture coverage of the courts and adapt their presentation style, evidence selection and jury arguments to meet and address juror beliefs and expectations. Have you seen the judge or lawyers either explicitly or implicitly attempt to address juror perceptions of the court system?

- Compare your perceptions of the court in which you are externing with those of the general public as reflected in these data. What similarities and differences emerge? Can you think of any suggestions for your judge or the administrators of the court system in which you are working they can undertake to improve the public's perception of them?

By learning about public perceptions of the courts and how they are formed the judiciary can take steps ensure that all segments of society have confidence in the fairness of the judicial system. David B. Rottman, the author of studies on public perceptions of the court, emphasizes the importance of procedural fairness: "In fifteen years writing and researching about public opinion on the courts, I have found no more powerful predictor of whether people are positive or negative about the courts than perceptions of procedural fairness." David B. Rottman, *How to Enhance Public Perceptions of the*

Courts and Increase Community Collaboration, COURT EXPRESS (Nat'l Ass'n for Court Mgmt.), Fall 2013, at 3.

Procedural fairness has four basic components: respect, neutrality, participation, and trustworthiness. These aspects of procedural fairness apply to every interaction at the courthouse, not just proceedings before the judge. Be alert to issues of procedural fairness at the court. How are witnesses, litigants, jurors, and observers treated in all parts of the courthouse? Once litigants are before the judge, how much time does the judge take to explain matters to them? Are litigants offered ample opportunity to be heard? Does the judge effectively convey genuine concern for the litigants? What about jurors and witnesses? How does the judge interact with them? How does Rottman's view about the significance of procedural fairness square with the Simon and Scurich findings about public judgment about judicial decisions described in earlier in this chapter under Evaluation of Judges?

Exercise 19.17

The judge is at all times respectful, affable, and courteous to the jury. In many ways he exhibits all the traits of a good host attending to the comfort of his guests . . .

—Student Journal

Jury service is one of the most frequent ways that members of the public interact with the courts. If you have an opportunity to watch a jury trial, try to put yourself in the shoes of the jurors. How have they experienced the court system? How do you think their experience has affected their view of our judicial system? How did the judge interact with them? Can you identify some ways the judge could limit any frustration jurors seemed to experience during your observation?

For fascinating first-person accounts of jury service by former jurors, read D. Graham Burnett, *A TRIAL BY JURY* (2001) and William Finnegan, *Doubt*, *THE NEW YORKER*, Jan. 31, 1994, at 48.

Courts Adapting to Change

The static nature of public perception of the courts may be a manifestation of the public's belief the courts do not change. There is value to stability and predictability in a judicial system, but constancy does not preclude modernization to improve delivery

of services. Courts across the country are constantly innovating. Sensitivity to public perceptions prompts improvements to the court system. The procedural fairness movement, community courts, and outreach and education programs are just a few of the innovations in response to public opinion. Breakthroughs in technology, changing demographics, and new studies and findings by social scientists also inspire court innovations. Courts are alert to changing demographics so they can both anticipate and respond to new demands. The growth of the elderly population, the “silver tsunami,” and the number of veterans returning from service abroad have prompted courts to look for ways to better serve these groups’ legal needs. Social science also prompts change. One example is the increased use of Evidence Based Decision Making (EBDM), a movement widely used in medicine in which research tracking past outcomes informs decision making. EBDM has gained increased traction in a number of jurisdictions, particularly in criminal and juvenile courts.

One of the most significant issues the courts face is access to justice. In 1994 Washington formed the first statewide Access to Justice Commission and in the two decades since 33 states have followed suit. The Commissions typically include representatives from the courts, members of the bar, legal services providers, law school faculty, and community leaders. Technology has provided some of the most promising tools for increasing access to justice. In 2011, a Tech Summit brought together representatives from the National Center for State Courts, the Legal Services Corporation, the American Bar Association, the United States Department of Justice Access to Justice Initiative, the National Legal Aid and Defenders Association, the New York State Courts, and the Self-Represented Litigation Network to work on using technology to improve access to justice.

Technology

Technology has been a boon to court clerks and lawyers craving paperless litigation. E-filing, the filing and storage of court documents in an electronic format rather than on paper, has many benefits. E-filing offers obvious savings on paper, copying, postage, couriers, storage space, and staff time. Electronic documents also are easily accessible and searchable. E-filing is mandated in all federal courts and is in use in an increasing number of state court systems.

Electronic filing presents special challenges to pro se litigants, but it also has tremendous potential. The federal courts are exploring systems that would lead pro se filers through the creation of pleadings and “document assembly programs” are already in use in some jurisdictions. The Do-It-Yourself Forms Project in New York, providing

tenants with forms through the Internet or at terminals in the courthouse, is an example of a document assembly program. A number of states have partnered with organizations like Pro Bono Net to provide pro se litigants with these computerized forms that use prompts to help non-lawyers draft pleadings and papers. See Chapter 27 for further discussion of use of technology to enhance access to justice.

Courts are experimenting with other ways to use technology to serve different constituencies. Nevada has an Appellate Court App with access to documents, court calendars, court rules, and decisions. The civil courts in the District of Columbia launched a live-chat feature where during business hours the public can get information about the status of cases, court procedures, availability of forms and filing processes. The federal courts have introduced an online eJuror system, and jurors in New Jersey can opt to use an online system and receive notifications by email or text message. Juror attendance is taken by scanning each juror’s assigned barcode. The defendants in federal cases now provide information to probation and pre-trial services officers electronically at kiosks, by phone, or over the Internet through the new Electronic Records System (ERS). Many states are using Video Remote Interpretation (VRI) to provide language interpretation and use of a cloud-based service is under investigation. Does your court use technology in innovative ways?

Advances in technology have also dramatically changed communications. New avenues of communication flow both in and out of the courthouse. Our networked society allows for instantaneous and worldwide information sharing. These developments present challenges and opportunities for the courts. Traditional media outlets are no longer the only source of information. Websites as well as user-generated content on social media sites like Facebook, Twitter, and blogs give the courts and everyone else an opportunity to be heard and unprecedented and immediate access to information. To what extent are the courts tapping into such sources to inform and educate the public and to give greater access to justice?

Court websites vary widely. Some are relatively static, offering little fresh information. Others include published opinions, calendars, and judicial profiles. The most innovative websites have begun to realize the public relations potential of the Internet by posting information in a more user-friendly format. A number of states post case summaries, court news, and some even include a court blog. North Dakota’s court calendar includes case summaries and links to court documents.

Exercise 19.18 Take a look at your court's website. What kind of online presence do the court and judge have? What information is available for the court's constituencies: lawyers, litigants, witnesses, jurors, the general public? To what extent is the court using its website to educate the general public? What, if any, resources are available? Is the site multimedia? Is the site interactive? If not, can you imagine ways it could be interactive; video it might include? What information does the site have about your judge? Is there information you would recommend adding?

The accessibility of electronic court records gives new meaning to the notion of public access to the courts. To examine traditional court papers, an individual would have to travel to the court and request the one physical set of court records on a matter from the court clerk. Electronic records can be available online to anyone with Internet access. The wider access to electronic records and the ability to search electronic records with a keystroke raise confidentiality and privacy concerns for lawyers and courts. Identity theft, corporate espionage, and unfair competition are some of the potential misuses of information in court files. Courts are grappling with ways to strike a balance between the privacy concerns presented by Internet access and the fundamental right of public access to the courts.

Exercise 19.19 Look at the court file for one of the cases before the judge. Is there information in the file that you would characterize as "private"? What makes the information "private"? Could the information be used to embarrass or harm someone, for an illegal purpose such as insider trading, or for a commercial purpose? Weigh the privacy concerns you have identified against the three fundamental values of public access to court records: monitoring the court system to promote fairness and honesty, protecting public health and welfare, and allowing the media to report on matters of public interest and concern.

How are the courts coping with issues such as increased scrutiny, misinformation about their decisions and proceedings, and the ready availability of information to jurors? The challenges social media presents to the jury system are telling. Courts across the country have seen various types of juror misconduct related to Internet use. For example, jurors have consulted Wikipedia for definitions of legal terms, done Internet research on scientific evidence, attempted to "friend" witnesses, and "googled" the parties to the litigation. The federal courts and many states have responded by adding language to their

jury instructions explicitly admonishing jurors not to consult various Internet-based sources. Other steps either taken or contemplated by courts include polling the jurors after the verdict, displaying warning posters in jury rooms, providing Internet training for prospective jurors, and enacting specific punishment for violations.

In late 2009, the Judicial Conference Committee on Court Administration and Case Management in the federal courts drafted Proposed Model Jury Instructions on The Use of Electronic Technology to Conduct Research on or Communicate about a Case. Here is an excerpt of an instruction the judge can give at the beginning of the trial:

You may not communicate with anyone about the case on your cell phone, through email, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

Exercise 19.20 Technology is a good litmus test for innovation. One student intern previously reported: "I see very little evidence of technology in the courtroom." To what extent have you found technology in use in the courtroom, courthouse, and the clerk's office? Is Internet access available in the courthouse to lawyers, to members of the public? What are the implications of your findings?

Courtroom Technology

The potential for use of new technology in the courtroom to present and argue cases is vast, but courtroom technology has been slow to spread. In 1993, the National Center for State Courts and William & Mary Law School unveiled Courtroom 21, a courtroom designed to experiment with the use of technology to improve the legal system. Since then, a number of jurisdictions have opened showcase high-tech courtrooms with innovations such as real-time court reporting facilities; real-time streaming video to other locations; interactive whiteboards; touch-screen monitors in the witness box; integrated electronic podiums and benches; personal computer docking stations at counsel tables, the witness box, and on the bench; equipment and monitors for presentation of electronic evidence; and wireless Internet access points. Some courts also have technology available to bring into courtrooms on request. The cost of outfitting and, in many instances, retrofitting courtrooms has been an impediment to rapid deployment of new technology, but these

obstacles have diminished with improved wireless capabilities and the availability of lower cost equipment.

Jurors who participated in a 2010 D.C. Superior Court survey on the Use of Technology in the Courtroom overwhelmingly favored the use of technology and reported that it improved their ability to serve as jurors. Hon. Herbert B. Dixon, Jr., *The Evolution of a High-Technology Courtroom*, FUTURE TRENDS IN STATE COURTS 2011, at 28 (Aug. 5, 2014) <http://www.ncsc.org/~media/Microsites/Files/Future%20Trends/Author%20PDFs/Dixon.ashx>.

During your externship has technology been used in the courtroom? Did it enhance the presentation of evidence to the judge or jury?

Cost concerns aside, technology in the courtroom presents questions about reliability, access, and training, as well as presentation issues. For example, is it preferable to have one large central monitor or separate ones for individual jurors? Litigators prefer to have a central screen that encourages eye contact with the presenter. Who should have control over the images and sound projected in the courtroom? Typically the judge or court clerk plays this “traffic cop” role rather than the attorneys litigating the case. When mistakes happen, as they inevitably will, how should judges respond? Many courts install a “kill switch” to allow the judge to rapidly turn off screens and sound. These are just a few of the additional decisions courtroom technology present for judges, but as technology becomes more pervasive, courts are adapting.

Specialization

Our society is increasingly complex resulting in more specialization in the profession. Professor Richard Susskind, who writes and speaks frequently on the future of the legal profession, predicts increased specialization among lawyers—through what he describes as “multi-sourcing”—as a matter of professional survival. Richard Susskind, *TOMORROW’S LAWYERS* (2013). How does greater specialization affect the courts? Should they follow suit? Many states have specialized courts at the trial level, but state appellate courts continue to hear all kinds of cases. In the federal courts, both trial and appellate judges hear a mixed docket, although federal district court judges who have reached a certain age may opt out of hearing certain kinds of cases. Administrative tribunals are specialized. What has motivated the creation of specialized courts? What are the pros and cons of specialized courts?

Some trial level state courts are specialized courts. The specializations can be as a result of a statute that establishes the jurisdiction of the court or they may be by administrative assignment of the chief judge or other court administrator. Some jurisdictions have statutorily established courts to handle certain types of cases—for example criminal, housing or family courts.

Exercise 19.21 Take a look at the statutorily-established specialty courts in your jurisdiction. What kinds of cases do they hear? Who are the typical litigants? One commentator has dubbed many of these courts “poor people’s courts.” Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 39 (2010). Is that a fair description in your jurisdiction? What are the implications of creating “poor people’s courts”?

Within a court of general jurisdiction, the court administrators may designate judges to hear either criminal or civil cases rather than a mix of both. One recent trend has been to assign business cases or complex commercial matters to particular courts for resolution. Court administrators also can assign judges to hear only certain stages of the litigation—for instance judges may hear only the pre-trial aspects of the case, or cases may be referred to them only for the actual trial. Administrative assignments can allow the court administration to play to individual judge’s experience and strengths and offer judges more targeted training. However, there is the potential for court administrators to use assignments politically or for politicians or bar groups to pressure administrators to move judges who have made unpopular decisions.

Problem-Solving and Community Courts

One form of specialization that has taken hold in the state courts is the creation of problem-solving courts. The movement to address societal problems that were bringing repeat offenders into the criminal justice system began in the late 1980s and early 1990s with experimental programs in several jurisdictions. The most typical problem-solving courts handle criminal cases and fall into four categories: community courts, domestic violence or DV courts, drug courts, and mental health courts. The hallmark of these problem-solving courts is they attempt to resolve the criminal case while also addressing an underlying or related social or psychological problem. Courts continue to experiment with the problem-solving approach. Recent innovations include veterans courts aimed at addressing the issues that bring returning veterans into the court system, reentry

courts for recently released prisoners, landlord and tenant courts focused on addressing homelessness, and specialized courts for human trafficking cases.

The first problem-solving courts were drug courts, and they continue to be the most prevalent. Beginning in Miami in the late 1980s, the drug courts spread across the county targeting the huge number of non-violent offenders with substance abuse problems. Drug courts vary in their approach, but their goal is to stop legal and clinical recidivism by referring offenders to drug treatment services. These courts use different means of diverting cases, offering pre-plea supervision and treatment, or various forms of post-plea supervision. Mental health courts have similar goals and approaches, and with a 2006 Bureau of Justice Statistics report estimating that more than half of all prison and jail inmates had a mental health problem, the need for services is undeniable. The domestic violence courts are probably the most controversial of the problem-solving courts. With stated goals of victim safety and batterer accountability, DV courts have been criticized by public defenders as “victim’s courts,” and some argue that because of their goals, they are not technically problem-solving courts.

Community courts attempt to address quality-of-life issues in a particular neighborhood. The first community court, the Midtown Community Court, opened in 1993 in the Times Square area of New York City. It targeted low level crimes that had plagued the area such as prostitution, graffiti, vandalism, and shoplifting. Rather than dispensing the short jail sentences that had been typical in those cases, the court combined community service sentences with social service programs. In the last two decades, dozens of jurisdictions have created community courts.

■ The Center for Court Innovation website has a full list of community courts, www.courtinnovation.org.

In 2000, the Conference of Chief Justices and Conference of State Court Administrators adopted a resolution in support of problem-solving courts and efforts to integrate their principles and methods into court operations generally to improve processes and outcomes. Some of the challenges to greater integration of the problem-solving methods include resource allocation, training, and the extent to which standardization may detract from the flexibility these courts have employed. Cost is certainly a concern. As one extern noted, “Problem-solving courts require enormous support structure, which requires substantial funding.” During the experimental phase, many of these specialty courts were subsidized, which meant they were not drawing significant resources from the rest of the court system in their jurisdictions. The support

services associated with problem-solving courts are only one part of the added expense. With greater specialization the courts lose economies of scale.

Money aside, problem-solving courts are not without controversy. Some defense attorneys question the inquisitorial nature of proceedings in problem-solving courts, arguing the process starts with a presumption of guilt. Other critics, while recognizing the generally good intentions of the judges in these courts, express concern about judges imposing their values on people from different backgrounds. The tendency of the courts to continue defendants under their supervision over long periods of time also raises concerns. Mental health and drug treatment professionals have raised concerns in their arenas about the compulsory nature of the treatment available in those courts. Even where a defendant’s participation is voluntary, experts express concern about whether individuals in these specialized courts really understand they have a choice. Judges in the problem-solving courts have specialized support services available to them, but participants in these courts often describe the judge as adding cheerleader, social worker, and therapist to his or her role, raising the question of whether these additional roles add to or detract from the judge’s effectiveness.

The advent and proliferation of problem-solving courts raises more general questions about what role the courts and judges should play in addressing social problems. Courts continue to innovate and study the results of these experiments, but the jury is out on whether or not problem-solving courts are making an appreciable difference toward improved outcomes in the areas they target. Community and problem-solving courts are prime candidates for Evidence Based Decision Making (EBDM). Empirical research on outcomes is a promising tool for courts and judges in their efforts to address social problems and achieve just and lasting results.

Conclusion

Initially, I viewed my externship as a list of requirements to fulfill. Complete the hours, check. Write a journal, check. Impress my Judge, check. I started this journey with the list of tasks I needed to accomplish to satisfy other people. The first week was interesting, but I was wondering if the hype of an externship was about a break from academic pressure. I welcomed that, but I had set my expectations prematurely.

—Student Journal

As the student author of the journal quoted above learned, there is so much more to a judicial externship than fulfilling course requirements and impressing the judge. Use this overview of the courtroom as classroom as a starting point for exploration

of the court system. A semester in the courthouse is an opportunity to evaluate the judicial system and consider systemic improvements. The courts are also a rich resource for learning about lawyering and improving a variety of skills. Embrace the boundless opportunities for personal growth. Research, writing, and legal analysis are only a few of the skills a judicial externship can develop. Working with the judge, law clerks, and court personnel can improve interpersonal skills and offer opportunities for collaboration. Observing lawyers at trial and in other court proceedings can develop advocacy skills. And for some externs the opportunity to experience the judicial system may even solidify career goals:

Observing a trial . . . I wanted to tell the lawyer to just let me do it. That was a moment that shook me a little. I no longer felt like an apprentice or an outsider. I wanted to do this. The courtroom pews felt like a bench and I wanted the coach to put me in.

—Student Journal

The opportunities for learning are unlimited. *Carpe diem.*

FURTHER RESOURCES

General Materials

LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES (Sylvan A. Sobel, Fed. Jud. Ctr. ed., 2d ed. 2007).

CALVERT G. CHIPCASE, FEDERAL DISTRICT COURT LAW CLERK HANDBOOK (2007).

David J. Richman, *How to Be a Great Law Clerk*, LITIG., 16 (Summer 2009).

JUDGE D. BROCK HORNBY, WORKING EFFECTIVELY WITH YOUR JUDGE: AN OUTLINE FOR REMARKS (Federal Judicial Center 2008).

VICTOR E. FLANGO & THOMAS M. CLARKE, REIMAGINING COURTS: A DESIGN FOR THE TWENTY-FIRST CENTURY (2014).

Ethics for Judicial Externs

Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks (Federal Judicial Center, 4th ed. 2013), [http://www.fjc.gov/public/pdf.nsf/lookup/Maintaining-Public-Trust-4D-FJC-Public-2013.pdf/\\$file/Maintaining-Public-Trust-4D-FJC-Public-2013.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Maintaining-Public-Trust-4D-FJC-Public-2013.pdf/$file/Maintaining-Public-Trust-4D-FJC-Public-2013.pdf).

NATIONAL CENTER FOR STATE COURTS, *Ethics Resource Guide*, <http://www.ncsc.org/Topics/Judicial-Officers/Ethics/Resource-Guide.aspx>.

Code of Conduct for Judicial Employees, U.S. COURTS, <http://www.uscourts.gov/rulesandpolicies/codesofconduct/codeconductjudicialemmployees.aspx>.

JAMES J. ALFINI, STEVEN LUBET & JEFFREY M. SHAMAN, JUDICIAL CONDUCT AND ETHICS (4th ed. 2007).

Research and Writing for Judges

Jennifer Sheppard, *The “Write” Way: A Judicial Clerk’s Guide to Writing for the Court*, 38 U. BALT. L. REV. 73 (2008).

JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES (Fed. Judicial Cetr., 2d ed. 2013).

Ruth C. Vance, *Judicial Opinion Writing: An Annotated Bibliography*, 17 J. OF THE LEG. WRITING INST. 197 (2011).

Michael G. Walsh, *Learning to Write as Judges are Taught to Write* (Part 1) 59 No. 4 PRAC. LAW. 5 (Aug. 2013).

Michael G. Walsh, *Learning to Write as Judges are Taught to Write* (Part 2) 59 No. 5 PRAC. LAW. 5 (Oct. 2013).

The Judge’s Role as Decision Maker

Corey Rayburn Yung, *A Typology of Judging Styles*, 107 Nw. U. L. REV. 1757 (2013).

BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

RICHARD A. POSNER, REFLECTIONS ON JUDGING (2013).

FREDERIC BLOCK, DISROBED: AN INSIDE LOOK AT THE LIFE AND WORK OF A FEDERAL TRIAL JUDGE (2012).

JUDGES ON JUDGING: VIEWS FROM THE BENCH (David M. O’Brien, ed., 4th ed. 2013).

The Judge's Role as Case Manager

Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013).

NATIONAL CENTER FOR STATE COURTS, COURTOOLS, <http://www.courttools.org/>).
Civil Litigation Management Manual, Fed. Judicial Ctr., 2d ed. 2010, <http://www.uscourts.gov/FederalCourts/PublicationsAndReports/CivilLitigationManagementManual.aspx>).

JUDGE BARBARA J. ROTHSTEIN, CHAMBERS AND CASE MANAGEMENT (Fed. Judicial Ctr., 2009).

ROBERT C. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE TRIAL COURT CASELOADS, NAT'L CTR. FOR ST. CTS. (2014), http://www.courtstatistics.org/~media/Microsites/Files/CSP/NCSC_EWSC_WEB_NOV_25_14.ashx.

The Judge's Role in Settlement

Roselle L. Wissler, *Judicial Settlement Conferences and Staff Mediation: Empirical Research Findings*, DISP. RESOL. MAG. 18 (Summer 2011).

Peter Robinson, *Opening Pandora's Box: An Empirical Exploration of Judicial Settlement Ethics and Techniques*, 27 OHIO ST. J. ON DISP. RESOL. 53 (2012).

Official Airline Guides, Inc. v. Goss, 6 F.3d 1385 (9th Cir. 1993).

Donna Stienstra, *ADR in the Federal District Courts: An Initial Report* (Fed. Judicial Ctr. 2011).

Selection and Evaluation of Judges

NATIONAL CENTER FOR STATE COURTS, *Judicial Selection and Retention Resource Guide*, <http://www.ncsc.org/topics/judicial-officers/judicial-selection-and-retention/resource-guide.aspx>.

NEW YORK CITY BAR ASSOCIATION, *Judicial Selection Methods in the State of New York: A Guide to Understanding and Getting Involved in the Selection Process*, <http://www2.nycbar.org/pdf/report/uploads/20072672-GuidetoJudicialSelection-MethodsinNewYork.pdf>.

AMERICAN BAR ASSOCIATION COALITION FOR JUSTICE, *Judicial Selection: The Process of Choosing Judges*, http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf.

U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *Promoting "Merit" in Merit Selection, A Best Practices Guide to Commission-Based Judicial Selection*, <http://ilr.iwssites.com/uploads/sites/1/meritselectionbooklet.pdf> (2009).

Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229 (2008).

NEW YORK STATE BAR ASSOCIATION, JUDICIAL SECTION, *Judicial Diversity in New York State: A Work in Progress* (Sept. 14, 2014), <http://www.nysba.org/judicialdiversityreport/>.

Oversight and Review

ELIZABETH SMITH & MARK THOMPSON, NEW YORK JUDGE REVIEWS AND COURT DIRECTORY (2013).

ALMANAC OF THE FEDERAL JUDICIARY (Aspen Publishers ed., 2013).

Robert Anderson IV, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeals*, 76 MO. L. REV. 315 (2011).

Jordan M. Singer, *Gossiping About Judges*, 42 FLA. ST. U. L. REV. 427 (2014).

AMERICAN BAR ASSOCIATION JUDICIAL DIVISION, *Judicial Performance Resources*, http://www.americanbar.org/groups/judicial/conferences/lawyers_conference/resources/judicial_performance_resources.html.

AMERICAN BAR ASSOCIATION, *Black Letter Guidelines for the Evaluation of Judicial Performance* (February 2005), http://www.americanbar.org/content/dam/aba/publications/judicial_division/jpec_final.authcheckdam.pdf.

Jordan M. Singer, *Attorney Surveys of Judicial Performance: Impressionistic, Imperfect, Indispensable*, JUDICATURE 20 (July/Aug. 2014).

Judges, Courts, and the Public

NATIONAL CONSORTIUM ON RACIAL AND ETHNIC FAIRNESS IN THE COURTS, RESEARCH & RESOURCES, <http://www.national-consortium.org/Research-and-Resources.aspx>.

Mark Soler, *Reducing Racial and Ethnic Disparities in the Juvenile Justice System*, in NATIONAL CENTER FOR STATE COURTS, *TRENDS IN STATE COURTS: 2014*, 27 (Carol R. Flango, Deborah W. Smith, Nora E. Sydow, Charles F. Campbell, & Neal B. Kauder, eds., 2014), <http://www.ncsc.org/~media/Microsites/Files/Future%20Trends%202014/2014%20NCSC%20Trends%20Report.ashx>.

Judge Steve Leben, *The Procedural-Fairness Movement Comes of Age*, in NATIONAL CENTER FOR STATE COURTS, *TRENDS IN STATE COURTS: 2014*, 59 (Carol R. Flango, Deborah W. Smith, Nora E. Sydow, Charles F. Campbell, & Neal B. Kauder, eds., 2014), <http://www.ncsc.org/~media/Microsites/Files/Future%20Trends%202014/2014%20NCSC%20Trends%20Report.ashx>.

NATIONAL CENTER FOR STATE COURTS, *Public Trust and Confidence Resource Guide*, <http://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide.aspx>.

Technology

ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *Long Range Plan for Information Technology in the Federal Judiciary* (Fiscal Year 2014 Update, September 2013), <http://www.uscourts.gov/uscourts/FederalCourts/Publications/2014-IT-long-range-plan.pdf>.

Mary-Rose Papandrea, *Moving Beyond Cameras in the Courtroom: Technology, the Media, and the Supreme Court*, 2012 BYU L. REV. 1901.

NATIONAL CENTER FOR STATE COURTS, *Technology in the Courts Resource Guide*, <http://www.ncsc.org/Topics/Technology/Technology-in-the-Courts/Resource-Guide.aspx>.

Rochelle Klempner, *The Case for Court-Based Document Assembly Programs: A Review of the New York State Court System's "DIY" Forms*, 41 FORDHAM URB. L.J. 1189 (2014).

Judge Herbert B. Dixon Jr., *PowerPoint Jury Instructions*, JUDGES' J. 37 (Winter 2011).

James J. Sandman & Glenn Rawdon, *Technology Solutions to Increased Self-Representation*, in NATIONAL CENTER FOR STATE COURTS, *TRENDS IN STATE COURTS: 2014*, 55 (Carol R. Flango, Deborah W. Smith, Nora E. Sydow, Charles F. Campbell, & Neal B. Kauder,

eds., 2014), <http://www.ncsc.org/~media/Microsites/Files/Future%20Trends%202014/2014%20NCSC%20Trends%20Report.ashx>.

RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013).

Social Media

Meghan Dunn, *Jurors' Use of Social Media During Trials and Deliberations, A Report to the Judicial Conference Committee on Court Administration and Case Management* (Fed. Judicial Ctr., 2011).

Judge Antoinette Plogstedt, *E-Jurors: A View from the Bench*, 61 CLEV. ST. L. REV. 597 (2013).

Judge Amy J. St. Eve, Judge Charles P. Burns, & Michael A. Zuckerman, *More From the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64 (2014).

NATIONAL CENTER FOR STATE COURTS, *Social Media and the Courts Network*, <http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/Social-Media/Home.aspx>.

John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487 (2014).

Specialized Courts

Jennifer Koshan, *Investigating Integrated Domestic Violence Courts: Lessons from New York*, 51 OSGOODE HALL L.J. 989 (2014).

Judge Joyce Cram, *Elder Court: Enhancing Access to Justice for Seniors*, in NATIONAL CENTER FOR STATE COURTS, *TRENDS IN STATE COURTS: 2014*, 77 (Carol R. Flango, Deborah W. Smith, Nora E. Sydow, Charles F. Campbell, & Neal B. Kauder, eds., 2014), <http://www.ncsc.org/~media/Microsites/Files/Future%20Trends%202014/2014%20NCSC%20Trends%20Report.ashx>.

Daniel M. Fetsco, *Reentry Courts: An Emerging Use of Judicial Resources in the Struggle to Reduce the Recidivism of Released Offenders*, 13 WYO. L. REV. 591 (2013).

Section 5 Administrative Capacity

	A	B	C	D	F	DK/DNA
a. Is punctual for court. (5.1)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Is prepared for court. (5.1)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Maintains control over the courtroom. (5.2)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Appropriately enforces court rules, orders, and deadlines. (5.3)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Makes decisions and rulings in a prompt, timely manner. (5.4)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Manages the court's calendar efficiently. (5.5)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Uses settlement conferences and alternative dispute resolution mechanisms as appropriate. (5.6)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. Demonstrates appropriate innovation in the use of technology to improve the administration of justice. (5.7)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Fosters a productive work environment with other judges and court staff. (5.8)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
j. Acts to ensure that disabilities and linguistic and cultural differences do not limit access to the justice system. (5.10)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Section 6 Background and Demographic Information

- a. How long have you been a practicing attorney?
- Less than 1 year
 - 1-2 Years
 - 3-5 Years
 - 6-10 Years
 - 11-20 Years
 - More than 20 years
- b. Which of the following areas of law best describe your practice (select up to 2 items)
- Civil Tort—Defense
 - Civil Tort—Plaintiff
 - Criminal—Defense Attorney
 - Criminal—Prosecution
 - Commercial & General Civil
 - Juvenile Offender or Dependency

- Domestic Relations/Family Law
 - Estate/Probate
 - Government Practice
 - Other (Please Specify)
- c. Which of the following best describes your work setting?
- Prosecuting Attorney's Office
 - Attorney General's Office
 - Public Defender/Department Of Assigned Counsel
 - Legal Aid
 - In House Corporate Counsel
 - Private Practice
 - Other (Please Specify)
- d. How many attorneys are employed by your firm?
- Sole Practioner
 - 2-5 Attorneys
 - 6-10 Attorneys
 - 11-20 Attorneys
 - Greater than 20 Attorneys
- e. What best describes your racial background? (Please check all that apply)
- Caucasian/White
 - African American/Black
 - Asian/Pacific Islander
 - Native American
 - Other (Please Specify)
- f. Are you Hispanic/Latino?

h How many times have you appeared in Judge's court over the past year?

- Never
- Once
- 2–3 times
- 4–10 times
- More than 10 times

Comments:

Please provide any additional comments, clarifications, or details related to either the items raised in this questionnaire or the judge's performance on the bench in the space below. You may use the back of this page or add additional pages if needed.

Thank you very much for your time and effort.

APPENDIX 19.2

Perceptions of the Courts Survey

Adapted from David B. Rottman, et al., *Perceptions of the Courts in Your Community: The Influence of Experience, Race and Ethnicity (Final Report) (National Center for State Courts 2003)*, <https://www.ncjrs.gov/pdffiles1/nij/grants/201302.pdf>

1. On a scale from 1 to 5, with 1 being least favorable and 5 being most favorable, how would you rate how you feel in general about the courts in your community? If you feel neutral, use 3.

2. How often do you think people receive fair outcomes when they deal with the courts? Would you say:

(1) always, (2) usually, (3) sometimes, (4) seldom, (5) never, or (6) don't know?

3. How often do you think the courts use fair procedures in handling cases?

Would you say:

(1) always, (2) usually, (3) sometimes, (4) seldom, (5) never, or (6) don't know?

4. For each of the following statements about courts in your community, indicate how strongly you agree or disagree with each. Would you say you strongly agree, somewhat agree, somewhat disagree, strongly disagree, or don't know?

a. The courts are concerned with people's rights.

(1) strongly agree, (2) somewhat agree, (3) somewhat disagree,
(4) strongly disagree, (5) don't know.

b. The courts treat people with dignity and respect.

(1) strongly agree, (2) somewhat agree, (3) somewhat disagree,
(4) strongly disagree, (5) don't know.

c. The courts treat people politely.

(1) strongly agree, (2) somewhat agree, (3) somewhat disagree,
(4) strongly disagree, (5) don't know.

d. The courts make decisions based on the facts.

- (1) strongly agree, (2) somewhat agree, (3) somewhat disagree,
(4) strongly disagree, (5) don't know.

e. The judges are honest in their case decisions.

- (1) strongly agree, (2) somewhat agree, (3) somewhat disagree,
(4) strongly disagree, (5) don't know.

f. Courts take the needs of people into account.

- (1) strongly agree, (2) somewhat agree, (3) somewhat disagree,
(4) strongly disagree, (5) don't know.

g. Courts listen carefully to what people have to say.

- (1) strongly agree, (2) somewhat agree, (3) somewhat disagree,
(4) strongly disagree, (5) don't know.

h. Courts are sensitive to the concerns of the average citizen.

- (1) strongly agree, (2) somewhat agree, (3) somewhat disagree,
(4) strongly disagree, (5) don't know.

i. Court cases are resolved in a timely manner.

- (1) strongly agree, (2) somewhat agree, (3) somewhat disagree,
(4) strongly disagree, (5) don't know.

5. Some people say that the courts treat everyone equally, while others say that the courts treat certain people differently than others. How often are each of the following groups of people treated worse than others by the courts? Are they always, often, sometimes, rarely, or never treated worse than others?

a. An African-American?

- (1) always, (2) often, (3) sometimes, (4) rarely, (5) never, (6) don't know.

b. A Latino or Hispanic?

- (1) always, (2) often, (3) sometimes, (4) rarely, (5) never, (6) don't know.

c. A Non-English speaker?

- (1) always, (2) often, (3) sometimes, (4) rarely, (5) never, (6) don't know.

d. Someone with a low income?

- (1) always, (2) often, (3) sometimes, (4) rarely, (5) never, (6) don't know.

6. How important are the following sources of information to your overall impression of how the courts in your community work? Are they very important, somewhat important, or not at all important?

a. Your prior experience in court?

- (1) very important, (2) somewhat important,
(3) not at all important, (4) don't know.

b. Court experiences by a member of your household?

- (1) very important, (2) somewhat important,
(3) not at all important, (4) don't know.

c. Court experiences of a close relative?

- (1) very important, (2) somewhat important,
(3) not at all important, (4) don't know.

d. Court experiences of a friend?

- (1) very important, (2) somewhat important,
(3) not at all important, (4) don't know.

e. Court experiences of someone you work or go to school with?

- (1) very important, (2) somewhat important,
(3) not at all important, (4) don't know.

f. Your past or current educational experiences?

- (1) very important, (2) somewhat important,
(3) not at all important, (4) don't know.

g. What you see on television news?

- (1) very important, (2) somewhat important,
(3) not at all important, (4) don't know.

h. What you read about court cases in newspapers?

- (1) very important, (2) somewhat important,
- (3) not at all important, (4) don't know.

i. What happens during television programs such as Judge Judy or Judge Joe?

- (1) very important, (2) somewhat important,
- (3) not at all important, (4) don't know.

The previous questions asked your perception, in general, of the courts in your community. Now consider your preliminary perceptions and understanding of the court and judge for whom you will extern. Identify at least five significant roles that your judge performs as part of his or her official duties:

1. _____
2. _____
3. _____
4. _____
5. _____

How would you rate the competence and judicial temperament of the judge for whom you will extern? Use a scale of 1 to 5 with 1 being the lowest and 5 the highest rating; use 3 if you feel neutral.

1. Does the judge possess a general working knowledge of the substantive law in the fields that are likely to come before the judge?
2. Does the judge possess a good working knowledge of the procedural and evidentiary law of the jurisdiction?
3. Are the judge's decisions well reasoned and well thought out?
4. Does the judge ask relevant, perceptive questions about matters before him or her?
5. Does the judge issue timely rulings and judgments?
6. Does the judge generally start trials on the first day they are scheduled to start?

7. Is the judge consistently courteous in his or her dealings with others, including counsel, litigants, jurors and staff?

How would you rate the integrity of the judge for whom you will extern? How would you rate the competence of the judge for whom you will extern? Use a scale of 1 to 5 with 1 being the lowest and 5 the highest rating; use 3 if you feel neutral.

1. Does the judge decide cases on the facts and law, without consideration of public appeal?
2. Does the judge recuse himself or herself whenever his or her impartiality might reasonably be questioned?

From what primary sources do you draw your information for your ratings on competence and integrity?

1. _____
2. _____
3. _____
4. _____
5. _____