

# Law Clerk Handbook

*A Handbook for Law Clerks to Federal Judges*

*Third Edition*

Federal Judicial Center  
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This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to develop educational materials for the judicial branch. While the Center regards the content as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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# Preface

This is an updated edition of the *Law Clerk Handbook*, co-authored by Judge Alvin B. Rubin and Anthony DiLeo and first published by the Federal Judicial Center in 1977. It provides an overview of chambers operations and the work of the federal courts; it does not provide detailed procedures on every aspect of a law clerk's daily tasks, nor does it review the procedures of each individual court (largely because law clerks' duties vary from judge to judge). Law clerks should familiarize themselves with local court procedures and inquire about a local chambers manual. The *Guide to Judiciary Policy*, published by the Administrative Office of the U.S. Courts, provides more detailed information on administrative, financial, and personnel matters and is available on the website maintained by the Administrative Office on the judiciary's intranet, called the J-Net.

# Chapter 1: Introduction

## § 1.1 The Function and Role of Law Clerks

Law clerks have no statutorily defined duties; they carry out their judges' instructions. Because each judge decides cases in an individual manner and has developed work habits over the course of a professional career, no two judges use their clerks in exactly the same way. You will need to become familiar with your judge's style and work cooperatively with the other members of the chambers staff, so that you can effectively assist the judge, as a team, in fulfilling his or her judicial responsibilities.

In most chambers, law clerks concentrate on legal research and writing. Typically, a law clerk's broad duties include conducting legal research, preparing bench memos, drafting orders and opinions, editing and proofreading the judge's orders and opinions, and verifying citations. Many judges discuss pending cases with their law clerks and confer with them about decisions. District court law clerks often attend conferences in chambers with attorneys. Often, law clerks also maintain the library, assemble documents, serve as courtroom crier, handle exhibits during trial, and perform other administrative tasks as required by the judge to ensure a smooth-running chambers.

Law clerks for district, bankruptcy, and magistrate judges have much more contact with attorneys and witnesses than their appellate court counterparts do. The primary function of an appellate court law clerk is to research and write about the issues presented on appeal, while law clerks for district, bankruptcy, and magistrate judges may be involved in the many decisions made at every stage of each case. Chapter 4 describes the operations of district, bankruptcy, and appellate courts in some detail.

## § 1.2 Preparation and Reference Material

Familiarize yourself with the federal rules that apply to the cases in your court. Law clerks to courts of appeals, district, and magistrate judges should study the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence. Law clerks to bankruptcy judges will need to know the Federal Rules of Bankruptcy Procedure, and clerks to courts of appeals judges should also study the Federal Rules of Appellate Procedure. Although the judge will have these items in the library and they are available online, a personal copy will better help you become familiar with them. Also carefully study the local rules of court, standing orders, and other operating procedures; clerks to bankruptcy judges should study the Bankruptcy Code as well.

The Federal Judicial Center has numerous publications dealing with federal court operations and with specific subjects such as copyright law, patent law, pretrial detention, employment discrimination, and civil rights litigation. Other Center publications, such as the *Manual for Complex Litigation* (4th ed. 2004) and the *Benchbook for United States District Court Judges* (6th ed. 2013), contain specific information about case management and the judicial process in the trial court. The Center's site on the judiciary's intranet, called FJC.dcn (<http://fjc.dcn>), can help you find publications, audio and video recordings, and web-based resources that are especially helpful to law clerks.

Personal reference books will also be helpful, some of which may be available online through the court library. Law clerks should have a dictionary, a thesaurus, and the current edition of *The Bluebook: A Uniform System of Citation*, published by the Harvard Law Review Association. It is also useful to have a stylebook, such as *The Chicago Manual of Style*, published by the University of Chicago Press; the *Harbrace College Handbook*; or the *Gregg Reference Manual*. Before writing your first assignment, you should read Strunk and White's *The Elements of Style* and periodically reread it.

Law clerks will benefit from courses in federal jurisdiction, federal civil procedure, evidence (including the Federal Rules of Evidence), criminal procedure, and constitutional law. A particular court may

have a high volume of litigation in a particular area, so some judges may suggest that certain courses would be especially helpful. You should also consider doing some background reading on the judicial process. Judge Ruggero J. Aldisert's *The Judicial Process* is a rich collection of readings and analysis. Judge Frank Coffin's *The Ways of a Judge* provides numerous insights into the decision-making process. *How Judges Think*, by Judge Richard Posner, takes a look at legal decision making. Reading these works will help you more fully understand both the judge's role and yours.

## § 1.3 Orientation and Continuing Education

Many courts provide orientation for law clerks, and some have various local educational programs for court personnel generally or for the bar. Ask whether your court has any such programs. Typically, a training specialist in the clerk's office can explain the government-wide and judiciary-wide policies and options.

The Center has an online orientation program for new law clerks on FJC.dcn. It provides an overview of the federal court system and instruction on ethics and legal writing and editing, federal jurisdiction, and sentencing. The Center also has streaming video programs on employment discrimination, constitutional law, and bankruptcy organization and jurisdiction; live and recorded webcasts on substantive legal topics; and other helpful educational resources on FJC.dcn.

Become familiar with the details of employee benefits (such as health insurance), leave policies, and other particulars, which you can find on the J-Net, the site maintained by the Administrative Office on the courts' intranet (<http://jnet.ao.dcn>). Your judge may also have policies and preferences on some matters, such as office hours and leave.

# Chapter 2:

## Conduct, Ethics, and Protocol

### § 2.1 Conduct and Ethics

Law clerks play important roles in the judicial process and must maintain its integrity. Because of the close association between judges and law clerks, your professional and personal actions reflect on your judge and ultimately on the judiciary as a whole. You are held to the very highest standards of conduct. Like judges, you hold a position of public trust and must comply with the demanding requisites of that position.

Many ethics questions can be answered with common sense, but there are some areas in which you need to be aware of specific rules that impose restrictions not intuitively obvious. Law clerks most often encounter ethical issues in the following areas:

- confidentiality
- conflicts of interest
- outside legal activities
- dealings with prospective employers
- outside professional, social, and community activities
- receipt of gifts and honoraria
- political activity
- social media

To avoid embarrassment to yourself and potentially to your judge, it is important that you understand your obligations in these and all other ethical areas.

The Judicial Conference of the United States sets administrative policy for the federal courts. The Conference has adopted the Code of Conduct for Judicial Employees and has made it applicable to law clerks. A copy of the code is in the appendix to this handbook. You should familiarize yourself with the code. You will also need to familiarize yourself with your judge's ethical guidelines. These may differ

from chambers to chambers, and your judge may not permit conduct or activities that would be acceptable under the Code of Conduct.

To help familiarize law clerks with their ethical obligations, the Center, in cooperation with the Judicial Conference Committee on the Codes of Conduct and the Administrative Office, has prepared a pamphlet called *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks* (4th ed. 2013). The Center has distributed the pamphlet widely to judges and to courts. If copies of this pamphlet are not available in your chambers, you can order on FJC.dcn. The FJC has also developed an e-learning program for term law clerks as part of its on-line orientation series on FJC.dcn. But neither the code, the pamphlet, nor the online program can cover every possible situation. If you have a question that is not clearly answered by these resources, you should discuss the matter with your judge.

Guidance on ethical issues is also available from other sources. Volume 2 of the *Guide to Judiciary Policy* focuses on ethics and includes the Code of Conduct and the following helpful resources:

- The Ethics Reform Act of 1989 and Judicial Conference regulations promulgated under it. The provisions applicable to law clerks and judicial assistants deal with receipt of gifts and honoraria.
- Published advisory opinions of the Codes of Conduct Committee. These advisory opinions address issues frequently raised or issues of broad application. Advisory Opinion Nos. 51 (working on a case in which a party is represented by spouse's law firm), 64 (employing a judge's child as law clerk), 73 (requests for letters of recommendation and similar endorsements), 74 (law clerk's future employer), 81 (when law clerk's future employer is the U.S. Attorney's Office), 83 (payments to law clerks from future law firm employers), and 92 (political activities) are of special interest to law clerks.
- The Compendium of Selected Opinions. The Compendium contains summaries of advice given by the Codes of Conduct Committee in response to confidential, fact-specific inquiries. Committee members can answer questions about a particular

opinion without disclosing the identity of the person who solicited the advice.

## § 2.2 Protocol

### *A. Confidentiality and Loyalty*

Law clerks owe judges complete confidentiality. You cannot say anything about a case that is not a matter of public record or otherwise permitted. Canon 3D of the Code of Conduct for Judicial Employees states that employees should not:

- disclose confidential information received in the course of official duties, except as required in the performance of their duties;
- employ such information for personal gain; and
- comment on the merits of a pending or impending action.

Instructions you receive from your judge and discussions about his or her legal assessment of a case should also be treated as confidential. Unless expressly authorized by the judge, you should never comment on the judge's views or offer a personal appraisal of the judge's opinions; the judge is the only one who can or should communicate whatever personal views he or she wishes to have known publicly. After the judge acts, the action or opinion (and if there is an opinion, its reasoning) is a matter of public record. You should neither comment on them nor try to explain them. Further, you must resist the temptation to discuss pending or decided cases with, or in the company of, friends or family. Even discussions of pending cases with staff from other chambers should be circumspect, and some judges forbid it.

Many district courts have rules forbidding court personnel to divulge information about pending cases. The Codes of Conduct Committee has developed a model confidentiality statement for judges to use with their chambers staff. The statement is available on the J-Net as Form AO 306 (<http://jnet.ao.dcn/resources/forms/model-confidentiality-statement>). Even if your judge does not use the confidentiality statement, you should refer to it for guidance on your duty of confidentiality.

## 1. Communication with the Media

Some judges are opposed to having chambers staff discuss anything at all with the media; you should determine your judge's policy in this regard. You should not respond to questions of substance, comment on a pending matter, or reveal judicial confidences, even when a reporter requests information "just for background." You may direct requesters to information that is in the public record and provide comments on technical and administrative matters, if the judge agrees. With the judge's permission, you may also discuss how the court works in general and its rules and procedures.

Some courts have designated employees to handle media inquiries, and written guidelines for press inquiries may be available from your judge or the clerk of court.

## 2. Communication with Attorneys

Law clerks must be firm in resisting any effort by attorneys to gain improper advantage, to win favor, or to enlist sympathy. You should not engage in any discussion with counsel about a pending case or a decision that has been reached by the judge. Indeed, some judges do not permit their law clerks to have any communication with attorneys at all. Regardless of the exchanges permitted, you should never discuss or divulge confidential information.

Law clerks who are permitted to communicate with attorneys should abide by the following:

- Do not give any advice on matters of substantive law.
- If the lawyer asks about either local procedure or general federal procedure for handling a matter, you may read or refer the lawyer to the appropriate federal rule or local court rule. If the question relates to the judge's personal practice in handling matters (e.g., requests for temporary restraining orders), you may tell the lawyer what you know. Do not guess at what the judge does or may do. If uncertain about the judge's policy, say something like, "I don't know what the judge would like a lawyer to do in these circumstances, but I'll be glad to consult the judge about the problem and call you back."

- Do not allow a lawyer to coax you into doing research, even the most minor.
- Do not hesitate to issue a disclaimer on any information you may give. Almost all attorneys understand such a position. (“I can’t give you any legal advice, as you understand. However, you may find it helpful to look at local rule 3.09.”)
- When in doubt, politely decline to give information. (“I’m really sorry I can’t help you, but Judge X has instructed me not to answer that kind of question.”)

All attorneys should be given impartial and equal treatment. You must resist the temptation to do a favor for a family member, former classmate, or an old friend. *See* Advisory Opinion No. 51 (working on a case in which a party is represented by spouse’s law firm).

You should inform the judge of informal communications regarding pending cases. For example, an attorney may call to state that there is no objection to a pending motion, or that both attorneys jointly request the continuance of a hearing. Because of the impact of these events on docket management, the judge may wish to take some action, such as calling a conference of counsel, or devote increased attention to another matter for which immediate preparation is necessary. Informal information can save the judge and the staff wasted time and effort.

Generally, if an attorney asks when an opinion will be rendered, you should indicate that such information is confidential, unless the judge has instructed otherwise. In cases of interest to the general public or media, however, some judges may wish to notify the attorneys in advance when a prospective judgment, opinion, or order is to be filed (except when such information might provide the attorneys and parties with “inside” information of potentially significant economic advantage). Such notice enables counsel to read the opinion at the moment it is filed and notify their clients of the result. Attorneys appreciate the opportunity to be the first to notify their clients, and clients themselves may wish to notify other interested parties of the result. Some embarrassment and confusion may result if the parties first hear of a ruling through the media. Moreover, media reports may be incomplete and misleading.

If you receive specific information about the progress of settlement negotiations in a case in which your judge is to be the trier of fact, you must be guided by the policy of your judge. Settlement proposals or discussions are ordinarily inadmissible at trial, and therefore some judges shield themselves from knowledge of settlement negotiations that might affect their judgment. Other judges either like or are willing to have this information and are confident that it will not influence them.

This caution regarding communication with attorneys and others appearing before your judge must extend to private, off-hours behavior as well, including the use of social media. It may be tempting to think that it is safe to post about a case before your judge on your Facebook page or to tweet about it on Twitter. Maybe your privacy settings only allow your closest friends to read what you share. But the confidentiality of the court must be complete and no matter how close you are to someone or how much you trust them, you should not share information with them that only you are privileged to know.

### *B. Respect*

Law clerks and judges have a special, multifaceted relationship: employee–employer, student–teacher, protégé–mentor, and lawyer–lawyer. In all of these roles, you must respect the judge. Respect does not mean subservience; you should not be afraid to express an opinion contrary to the judge’s when asked—in fact, most judges expect and invite their law clerks to question the judges’ views. They frequently seek their law clerks’ reactions to the issues raised in pending cases, both for the value of being exposed to varying viewpoints and to train their law clerks in the process of legal decision making. If, however, the judge should reach a conclusion that differs from yours, you must carry out the judge’s instructions with the utmost fidelity. In fact you must keep this in mind at every stage of your work. Even if you have a strong conviction about how a case should be decided, you must be objective in your legal research and always provide your judge with relevant arguments and precedents from all points of view. Be careful not to skew your research to lead your judge toward the decision you think is the

right one. The ultimate responsibility for fulfilling the duties of the judge's office falls on the judge. As one judge put it, "The commission from the President issues to me, not my law clerk, and it was I who took the oath of office."

### *C. Courtroom Demeanor*

The law clerk, like the judge, must be impartial. During a jury trial, physical cues within view of the jurors may compromise impartiality and unfairly influence the jury. Even during a motion hearing, bench trial, or appellate argument, avoid movements or expressions that might indicate your reaction to the testimony of witnesses or to the oral arguments of attorneys, because impartiality and objectivity must always be maintained by everyone officially attached to the court. However, litigants are more likely to expect and accept reflections of attitude by the judge, who has a duty to control proceedings and to decide the case, than by the judge's clerks.

### *D. Dress*

Most judges do not have a formal dress code but do expect the kind of dress that would be appropriate in a professional office.

### *E. The Public*

The courts are a public service organization, and the public properly expects efficient and professional service from them. The public generally is unfamiliar with the court system, and opportunities for the public to view the system in operation are infrequent. Make every effort to assist the public, including witnesses or jurors. The brief encounter that jurors or witnesses have with the federal court system may greatly influence their impression of the quality and efficacy of the system.

Courtesy and kindness, however, should not include advice. Absent permission from the judge, you must not answer questions about a case from witnesses or jurors.

# Chapter 3:

## Basic Overview of Litigation Conducted in U.S. Courts

Litigation in the federal courts is governed by nationally applicable rules: the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Bankruptcy Procedure, and the Federal Rules of Evidence. These are supplemented by the local rules of each individual court and standing orders of individual judges. You should keep a copy of these uniform and local rules on hand.

### § 3.1 The Civil Action

#### *A. Federal Jurisdiction*

Federal courts are courts of limited jurisdiction; they may hear only those cases described in Article III, Section 2 of the Constitution and authorized by Congress. Most civil cases in federal court are based on one of two types of jurisdiction: “federal question” jurisdiction (28 U.S.C. § 1331) or “diversity of citizenship” jurisdiction (28 U.S.C. § 1332). In addition, federal courts have exclusive jurisdiction over other special areas, such as bankruptcy cases, trademark and copyright violations, and incidents at sea. *See* 28 U.S.C. §§ 1331–1367.

#### *B. The Litigation Process*

The major steps in civil cases are as follows:

1. The plaintiff commences the action by filing a complaint with the clerk of court.
2. Personal jurisdiction is obtained over the defendant (e.g., by service of process).
3. The parties meet and confer to identify issues, discuss settlement, and prepare disclosure and discovery plans.

4. The court conducts an early pretrial (scheduling) conference or issues a pretrial scheduling order.
5. The defendant may file motions (e.g., motion to dismiss for failure to state a claim for which relief may be granted; certain motions must be filed in the defendant's first responsive pleading, while others may be filed later).
6. The defendant files an answer.
7. The parties disclose documents and discovery proceeds.
8. Either party may file additional motions (e.g., summary judgment or motions in limine to screen evidence, including expert evidence).
9. The final pretrial conference is held.
10. The trial is held.
11. The judgment is rendered, signed, and filed.
12. Post-trial proceedings may occur.
13. Appeal may be taken; the judgment may or may not be stayed.
14. The appeal is considered either on briefs or after oral argument.
15. Judgment is rendered on the appeal.
16. Supplementary proceedings may occur.
17. The judgment is enforced.

In any given case, some of these steps may be omitted because of inaction, agreement of the parties, or court order. See generally the *Civil Litigation Management Manual* (2d ed. 2010), which was prepared under the direction of the Judicial Conference Committee on Court Administration and Case Management, with substantial contributions from the Administrative Office and the Center. For special considerations in complex cases, see the *Manual for Complex Litigation* (Federal Judicial Center, 4th ed. 2004).

Settlement discussions, whether between the parties only or with the assistance of a judge or an ADR neutral, may occur at any time—and more than once—during the lifetime of the case. And, of course, the suit may end by settlement or dismissal at any stage. Fewer than 2% of civil actions filed in the federal courts go to trial, but the court decides motions in many cases that do not make it to trial.

### C. Commencement of Action

A civil action in federal court begins with the filing of a written complaint in the clerk's office (which may, or in most cases must, be filed electronically through the courts' Case Management/Electronic Case Filing (CM/ECF) system). The case is then assigned a number, usually referred to as a *docket number*, containing two parts: the last two digits of the year in which the case was filed and a number that is assigned consecutively as suits are filed in each calendar year. The prefix *Cr.* or *C.A.* (sometimes *Cv.*) indicates whether the case is a criminal or civil action. In a multi-judge court, the clerk's office, through a preestablished random selection process, immediately assigns the case to a particular judge for handling and ultimate disposition. The clerk's office maintains the complete record of the case—a case file and docket sheet (which includes notations to reflect the progress of the case)—using the CM/ECF system.

When the case is filed, the judge begins the process of monitoring and controlling the progress of the case. Some judges briefly review (or have their clerks review) all newly filed complaints to identify those that appear frivolous, lack federal jurisdiction, or are otherwise susceptible to fast-track handling and to flag those that may demand special attention. If there is a request for a temporary restraining order or other immediate emergency relief, or if the case is a class action, early attention is required. Each new case should also be examined for potential conflicts of interest. Although most courts now maintain electronic lists of such things, each chambers should have procedures, including use of conflict-screening software, to ensure that possible financial or other conflicts of interest are identified.

The local rules of court and standard litigation practice usually lead the lawyer who files a class action to indicate its nature by a caption on the first page of the complaint. Federal Rule of Civil Procedure 23(g) calls for the court to appoint counsel for the class and permits the court to designate interim counsel to represent a proposed class before ruling on whether the class may be certified. Rule 23(c)(1)(A) requires the judge to decide whether to certify a case as a class action “at an early practicable time,” so the judge will usually want to be promptly alerted to the filing of class actions. Other proceedings requiring the court's prompt action are discussed in what follows.

### *D. Service of Summons and Complaint and Waiver of Service*

The Federal Rules of Civil Procedure give the plaintiff the option of notifying a defendant of the commencement of a lawsuit by (1) serving the defendant with a summons and a copy of the complaint, or (2) providing the defendant with written notice of the lawsuit, along with a request that the defendant waive service of the summons, in order to avoid the costs of service. Service of a summons or filing a waiver of service establishes jurisdiction over the person of a defendant, subject to the territorial limits upon effective service contained in Federal Rule of Civil Procedure 4(k).

The waiver of service provisions of Rule 4 apply to individuals, corporations, or associations otherwise subject to service under the rule. They do not apply to infants, incompetent persons, the United States, or agencies, corporations, or officers of the United States. These defendants must be served with copies of the summons and complaint in the manner made applicable to them by Rule 4. Rule 4 also contains provisions regulating the manner of service.

### *E. Early Pretrial Conference*

Federal Rule of Civil Procedure 16 gives judges discretion to call for as many pretrial conferences as the case may require. Many judges convene an early pretrial conference, often called a scheduling conference, as contemplated by Rule 16, to meet with the attorneys to narrow the issues, eliminate groundless claims and defenses, discuss alternative dispute resolution (ADR) options, encourage settlement discussions, schedule and plan the pretrial and trial stages of the litigation, and anticipate the procedural and management issues likely to arise in the litigation. Rule 26(f) directs the parties (generally through their attorneys) to meet, confer, and prepare a discovery plan prior to this early pretrial conference. The early pretrial conference generally leads to a pretrial order that identifies the issues and schedules the events necessary to resolve those issues. Judges who choose not to hold early pretrial conferences nonetheless generally issue a scheduling order at an early

stage of the case. This order must be issued within 120 days of the filing of the case.

Many judges require counsel to file and exchange detailed pretrial memoranda regarding the matters to be considered at the conference. The conference itself may be held in chambers, with or without a court reporter, or may be conducted as a formal hearing in open court. Some courts have adopted a local rule describing the pretrial procedure. In other courts, judges issue descriptions of their pretrial procedures. See the *Civil Litigation Management Manual*, at 15–28, for discussion of the Rule 16 conference.

Depending on how comfortable your judge is with using Case Management/Electronic Case Filing (CM/ECF) and other online document systems prior to the pretrial conference, you may want to review the case file, put the documents in sequence, and provide the judge with both the file and a printout of the docket (or any other portion of the record the judge might need for the conference). If your judge would rather download the documents to a laptop, tablet, or other portable device, this paper preparation won't be necessary. This should be done far enough in advance of the conference to give the judge time to look through the file. If a proposed pretrial order has been submitted, place it at the top of the file. Some judges may want the courtroom deputy, the law clerk, or both to attend pretrial conferences. Others permit their law clerks to attend selected conferences of interest. During the first month or two after beginning work, try to attend as often as possible to gain insight into the conference procedure.

Judges generally do not schedule pretrial conferences for the types of cases described in Rule 26(a)(1)(E), such as cases on review of an administrative record, actions brought without counsel by persons in custody of a governmental entity, and actions brought by the United States to collect on a student loan.

Many judges also use their Rule 16 authority to convene a final pretrial conference to focus on issues likely to affect the trial. See section 3.1.N.

### *F. Multidistrict Litigation Problems*

If civil actions involving one or more common questions of fact are pending in different districts, either the plaintiff or defendant may petition the U.S. Judicial Panel on Multidistrict Litigation (JPML) to transfer the cases to a single district and to consolidate them for pretrial proceedings. *See* 28 U.S.C. § 1407. The rules of the panel are found in the rules section of Title 28. If the panel decides that the cases should be consolidated, it enters an appropriate order and all of the cases are transferred to the district designated by the panel. While a petition to transfer a case is pending before the Judicial Panel, the district judge retains full jurisdiction over the case (JPML Rule 1.5).

The district judge may independently invoke intervention of the JPML by writing to the panel at the address listed on the J-Net. The letter should say that the judge has a case that may be related to a case or cases pending in another district, giving the name and docket number of each case, and that it might be worthwhile for the panel to examine these cases to determine whether pretrial consolidation would be appropriate. The judge will attach to the letter a copy of the complaint and any other documents that may be useful to the panel. The judge might also wish to send copies to counsel. The functions of the JPML are described at section 3.5.C.

### *G. Motion Practice Before Answer*

After the complaint is filed, the defendant may respond with motions, an answer, or both. The judge may ask the law clerk to perform any or all of the following duties in connection with a motion:

- Maintain in-office records and call motions that are ready for decision to the judge's attention.
- Read and analyze the motion, any responses, and briefs.
- Perform independent research supplementary to that contained in the briefs of the parties.
- Attend hearings.
- Prepare memoranda regarding factual or legal issues presented by the motion for the judge to use.

- Discuss the motion with the judge.
- Draft, for the judge's approval, an order disposing of the motion.

The motions most frequently filed early in proceedings are those that challenge the court's jurisdiction over the parties or the subject matter, attack venue, raise issues relating to joinder of parties, and test the legal sufficiency of the complaint. Some courts refuse to accept a motion unless a memorandum of law is filed simultaneously. Although some courts do not require reply memoranda, opposing counsel are usually required to file a memorandum of law if the motion is opposed. Upon receipt of a motion or a response to a motion, the clerk of court makes appropriate record entries and then routes the motion and supporting papers to the judge assigned to the case.

The judge's chambers, as well as the clerk of court (through CM/ECF), usually maintains a list of all pending motions. Some motions are perfunctory and can be ruled on without a hearing or oral argument. Some judges require moving counsel to request oral argument in the body of the motion, state the reason why counsel believes oral argument would be helpful to the court, and provide an estimate of the time required for the argument. The court may then, in its discretion, set the motion for argument and notify counsel in writing of the day and time. Other judges decide independently without input from counsel whether to hear argument or decide the matter on the briefs.

The local rules of the district court usually require a party opposing a motion to respond within a certain number of days after the motion is filed, or at least a certain number of days before the date set for hearing. Some motions involve disputed factual issues and therefore require evidentiary hearings. These and all motions for which the judge will hear oral argument must be scheduled at times convenient for the court and, insofar as possible, for counsel and witnesses. Four different approaches to scheduling have been adopted:

1. Selection of a specific date and time by the judge or judge's staff with notice to both counsel
2. Selection of a date and time convenient for all involved after telephone or personal conferences among counsel and court personnel

3. Selection of a date and time acceptable to the court by one attorney who then gives notice to other counsel
4. Permanent scheduling by the court of a weekly or monthly *motion day* at which any motions that are at issue may be heard as a matter of course, or, alternatively, for which particular motions are scheduled through one of the processes described above

In courts that hear oral argument on a number of motions on the same day, it is not unusual for the court to receive requests for a continuance of the argument on motions. Many judges will agree to continue a motion based on a lawyer's telephone request if the lawyer advises the judge that opposing counsel has been informed of the request and has no objection. Other judges require counsel to file a written motion for a continuance, even when opposing counsel has no objection.

A law clerk usually assists the judge during the motions day arguments by making available to the judge materials relevant to particular motions, by noting any new authority cited by either counsel, and, if the judge decides the motion from the bench, by making notes of the judge's decision (though the courtroom deputy officially records the court's judgment or decision, and the judge later signs a summary order prepared by that deputy or submitted by prevailing counsel). Helping to ensure that the judge is prepared whenever he or she takes the bench is one of the law clerk's most important duties. Accordingly, you must keep abreast of the motion calendar and be familiar with time limits under local rules.

### *H. Opinions on Motions Under Submission*

Whenever the judge hears argument on a motion and does not rule from the bench, it is necessary to prepare an order disposing of the motion. If the judge instructs you to do this, start with samples of orders previously issued that can serve as guides, but take care to tailor your draft to the case at hand. A common mistake when using a previous document is failing to make all the changes necessary to adapt it. The judge may instead direct one of the parties to prepare the order for court approval. *See* section 5.2.E.6. After an order ruling on the motion has been signed, it is sent to the office of the clerk of court, where

appropriate record entries are made. The clerk's office then notifies all attorneys of record of the judge's ruling and usually sends them a copy of the order.

Matters taken under consideration must be carefully followed to ensure they are decided as promptly as possible. Chambers staff should keep a list of matters under consideration, deleting cases as the ruling on each is completed. This list can be kept electronically using CM/ECF and other document management systems.

### *I. Temporary Restraining Orders*

The procedural rules governing applications for temporary restraining orders are set forth in Federal Rule of Civil Procedure 65. When such orders are sought, the plaintiff's counsel may assert that the matter is of such urgency as to require an ex parte restraining order, that is, without giving the defendant prior notice or an opportunity to be heard. If the judge is not in chambers at the time, the plaintiff's counsel may urge chambers staff to bring the order to the judge in open court, to locate the judge, or assist in some other way. Early on you should ask about the judge's policy on such emergency matters so that you are prepared to handle them. You may, for example, be told to advise the lawyer that the judge does not ordinarily sign temporary restraining orders without hearing what the lawyer for the other side has to say. This may be done by arranging for the judge to see both counsel in person or by a telephone conference, depending on the judge's policy. While the conference is being arranged, the law clerk should attempt to read all documents pertinent to the request, collect and examine authorities, and be prepared to brief the judge about the request or take such other action as the judge may require.

### *J. The Answer*

Except when the United States is the defendant, 20 days after the complaint is served, or 10 days after notice of disposition of a preliminary motion, the defendant must answer the complaint. If the defendant fails to do so, the plaintiff may have the defendant's default made a matter of record in the clerk's office and then proceed to obtain

a default judgment in the manner pursuant to Federal Rule of Civil Procedure 55.

In addition to answering the complaint, the defendant may assert a counterclaim against a plaintiff or a cross-claim against another defendant. The party against whom a counterclaim or cross-claim is made has 20 days after service or 10 days after disposition of a motion relating to the counterclaim or cross-claim in which to reply. In the event of a failure to answer, the defendant may obtain a default judgment in accordance with Rule 55.

Many courts and individual judges permit counsel, by agreement, to extend the time for answering. Others require an appearance by counsel—even if only to obtain an extension of time—so that the judge can be promptly informed of counsel’s identity and determine what progress is being made.

Motions relating to third-party practice or to jurisdiction over or sufficiency of a counterclaim or cross-claim may be filed at this stage of the proceedings. They are processed in the same manner as preliminary motions.

### *K. Alternative Dispute Resolution*

Courts have developed several forms of court-annexed alternative dispute resolution (ADR) to assist parties in resolving their case. (Litigants may, of course, agree to avail themselves of private ADR programs that are not affiliated with the court.) Section 651(b) of Title 28 of the U.S. Code directs each district court to “authorize, by local rule . . . the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy.”

Some ADR programs may be more suitable for certain types of cases than others. Following is a brief description of the principal types of ADR. For more information on ADR procedures in the courts and the judge’s role, see *ADR in the Federal District Courts: An Initial Report* (Federal Judicial Center 2011) (available on FJC.dcn) and the *Guide to Judicial Management of Cases in ADR* (Federal Judicial Center 2001).

### *L. Dormant Actions*

Most federal courts do not permit actions to remain dormant for an indefinite period of time. Each court, and sometimes the judges within each court, will have a different policy with respect to this. Counsel have their own priorities for processing litigation, and these frequently relate to their internal office demands and other personal matters. In general, however, the policy of the federal courts is that litigation is not merely the lawyers' business but also the public's business, and the court is responsible for monitoring it.

All courts adopted civil justice expense and delay reduction plans under the Civil Justice Reform Act of 1990 (and many courts have incorporated provisions from these plans into their local rules). The courts are also required to report semiannually for each judge, for publication by the Administrative Office, motions that have been pending and bench trials that have been submitted for more than six months and cases that have not been terminated within three years after filing. 28 U.S.C. § 476. Many courts have the docket clerk or someone in the clerk's office periodically call to the judge's attention cases that have been dormant for more than six months (or some other period of time) because either no answer was filed or, after pleadings were filed, no further action was taken. Many judges will have a periodic "docket call," at which counsel will be asked to report on the status of cases that have been dormant for a certain period of time and explain the lack of progress. In some instances, failure of counsel to appear at the docket call results in dismissal of the case. For more on case management in civil litigation, see section 4.3 and the *Civil Litigation Management Manual*.

### *M. Motion Practice After Answer*

#### 1. Discovery Motions and Schedules

The purpose of discovery is to allow each party to obtain relevant evidence or sources of relevant evidence from other parties and to avoid evidentiary surprises at trial. General provisions governing discovery are set forth in Federal Rule of Civil Procedure 26, which requires parties to disclose to each other certain types of information without wait-

ing for a formal discovery request. These disclosures must be exchanged at or soon after the attorneys' meet-and-confer session mandated by Rule 26(f), which should take place prior to the initial pretrial conference. At the Rule 26(f) meeting, the parties are to confer to develop a discovery plan, which they must submit to the court before the Rule 16 conference. Rule 26 permits each judge to decide (and the parties to stipulate), in respect to a given case, whether to apply certain of its disclosure requirements. Otherwise, Rule 26 requires disclosure of the specified documents to all categories of cases not exempted in Rule 26(a)(1)(E).

The following are specific discovery methods available to a party:

- deposition on oral examination (Rule 30)
- deposition on written questions (Rule 31)
- interrogatories to parties (Rule 33)
- production of documents and things (Rule 34)
- permission to enter upon land and other property for inspection and other purposes (Rule 34)
- physical and mental examinations (Rule 35)
- requests for admission of fact (Rule 36)

A variety of motions may arise as a result of discovery proceedings, including those

- to compel answers or other compliance with discovery rules;
- to obtain protective orders against undue harassment, unreasonable demands, or disclosure of confidential or protected information;
- to obtain additional time to comply with discovery requests;
- to terminate a deposition;
- to pose objections to written interrogatories or other discovery requests; and
- to impose sanctions for failure to comply with discovery requests.

Some district judges handle discovery motions by telephone. In other courts, all motions pertaining to discovery are referred to a magistrate judge, who is then responsible for overseeing discovery procedures and ruling on discovery motions. The magistrate judge's orders may be appealed to the district judge.

For discussion of the special problems posed by discovery of electronically stored information, see *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (Federal Judicial Center, 2d ed. 2012).

## 2. Summary Judgment and Amended Pleadings Motions

During discovery or after its completion, other motions may be filed. These tend to fall into three categories:

1. motions for summary judgment as to some or all of the issues raised in the case on the grounds that there is no genuine dispute as to any material fact (Rule 56)
2. motions to amend pleadings or to add or remove parties (Rule 15)
3. motions to exclude or limit the introduction of scientific or other evidence that fails to meet the standards of the Federal Rules of Evidence

Such motions usually arise out of information the moving party obtains during discovery. They are processed in the same manner as other motions.

### *N. Final Pretrial Conference*

The final pretrial conference is governed by Federal Rule of Civil Procedure 16 and is intended to simplify the subsequent trial. Whether to hold a conference in a specific case is up to the judge, and the practice varies substantially throughout the federal judiciary. Many judges hold pretrial conferences routinely in every case; others hold conferences only when requested by counsel or on their own order when a case seems likely to proceed to trial.

During the conference, the judge and counsel may consider any “matters that may aid in the disposition of the action.” The following matters are most commonly considered:

- simplification of the issues
- necessary or desirable amendments to the pleadings
- the avoidance of unnecessary evidence at trial by obtaining admissions of uncontested facts
- limiting the number of expert witnesses
- limiting the time for each side to present its case
- referring issues to a special master, court-appointed expert, or other judicial adjunct
- exchanging lists of witnesses
- the marking of exhibits
- final discovery procedures
- using procedures that might resolve the case through settlement
- ruling on some if not all evidentiary objections to exhibits

### *O. Pretrial Orders*

In civil cases other than those involving simple issues of law or fact, Federal Rule of Civil Procedure 16 requires a scheduling order (within 120 days of filing) and specifies matters to be discussed at any pretrial conference held pursuant to the rule, followed by a pretrial order. Almost all district courts have adopted a form for the pretrial order. Usually the court requires the pretrial order to contain a concise summary of disputed issues of fact and law, a succinct statement of the position of each party, and a list of the witnesses and documents expected to be introduced at trial. In some districts, the final pretrial order must be presented to the court at least 24 hours before the face-to-face pretrial conference, which is held with all lawyers and the judge. Other courts require only that counsel bring the pretrial order with them to the conference.

Most judges consider a properly prepared pretrial order essential to an orderly and efficient trial of a complicated case. In simpler cases, judges may require counsel to prepare only a list of witnesses and exhibits. An individual judge may want the lawyers to incorporate something other than what the local rules require.

### *P. Sanctions*

Provisions of Rules 11, 16, and 37 of the Federal Rules of Civil Procedure authorize the judge to impose sanctions on attorneys or parties or both if, for example, papers filed are not well grounded in fact and supported by a reasonable argument of law. Judges differ in their propensity to impose sanctions and in their view of the proper severity of sanctions. Law clerks should be familiar with the rules regarding sanctions and with the jurisprudence of the circuit court of appeals concerning their interpretation and application.

### *Q. Trial*

Law clerks often do not attend trials because they are engaged in other activities relating to the case or in other matters that require their attention. However, you may be called on to attend a trial and perform one or more of the following duties:

- assist in jury selection (see section 4.3.D for more information on jury selection and management)
- check the case file (or online document management systems) before trial to ensure that the judge is aware of all necessary documents and submissions
- serve as court crier
- act as a messenger for the judge
- take notes of the testimony
- research matters that arise during the course of the trial
- assist in the preparation of jury instructions
- in nonjury cases, assist in drafting findings of fact and conclusions of law

Trials offer valuable experience for law clerks, and most judges encourage their clerks to attend interesting and skillfully presented trials when this does not interfere with their other responsibilities. A convenient alternative is for the court to have an audio connection from the courtroom microphones to the law clerk's office so the law clerk can listen when time is available.

### *R. Post-Trial Motions and Enforcement of Judgments*

Most post-trial motions involve attacks on the verdict or the judgment and are governed by specific provisions in the Federal Rules of Civil Procedure. Included are the following:

- motion for new trial (Rule 59)
- motion to alter or amend a judgment (Rule 59(e))
- renewal of motion for judgment after trial (Rule 50(b))
- motion for attorneys' fees when authorized by statute or rule
- motion for relief from a judgment on the ground of a clerical mistake (Rule 60(a)) or the following grounds under Rule 60(b): inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, void judgment, or satisfaction, release, or discharge

These motions are processed like pretrial motions; however, the judge may prefer to handle them without oral argument because of his or her familiarity with the issue from earlier proceedings.

The procedures for execution and for supplementary proceedings in aid of judgment and execution are generally those of the state in which the court sits. Fed. R. Civ. P. 69. The most common procedures are execution, attachment, garnishment, sequestration, proceedings against sureties, and contempt. During the course of these proceedings the judge may be called on to conduct evidentiary hearings, rule on motions, and supervise discovery in the same manner as during the original litigation on the merits.

### *S. Appeals from Decisions of Administrative Agencies*

Some districts are presented with a large numbers of appeals from the decisions of administrative agencies, and have created special procedures to handle them. One example is a petition for review of adverse decisions of the Social Security Administration (SSA). Some district judges refer these to magistrate judges. Others handle these cases themselves with the assistance of their law clerks. District court review is statutorily limited to a deferential examination of the record to determine whether adequate procedures were followed, whether the SSA relied on correct legal standards, and whether substantial evidence supports the decision of an administrative law judge. Most districts have a general procedural order for the review procedure in such cases. This order requires the assistant U.S. attorney (AUSA) to file a motion for summary judgment to affirm the SSA's decision. The claimant may file a reply brief within a period fixed by the local rules, and the matter is then automatically taken under submission without oral argument, unless the judge orders otherwise. Once the matter is under submission, the law clerk typically prepares a draft order or opinion affirming the SSA's decision (the most common result because of the limited scope of review), reversing it, or remanding it either for a new hearing (because of a procedural or legal error) or to take new evidence. You should obtain sample opinions rendered by the judge in other Social Security cases and use them as models.

## § 3.2 The Criminal Action

In federal law there are no common-law crimes, only statutory offenses. Most federal crimes are defined in Titles 18 and 21 of the U.S. Code, but some criminal penalties are set forth in other statutes. The procedure in criminal cases is governed by the Federal Rules of Criminal Procedure; misdemeanor cases are governed by Federal Rule of Criminal Procedure 58. Much of the law clerk's involvement in criminal cases is similar to his or her responsibility in civil cases.

The following materials outline the major stages in a criminal case. This outline is only a generalization to aid in understanding the process. Individual cases may proceed in a different manner, and cases can terminate at various stages, such as when the defendant enters a guilty plea, the court grants a motion to dismiss the indictment, or the jury finds the defendant not guilty. See the *Benchbook for U.S. District Court Judges* (Federal Judicial Center, 6th ed. 2013) for more information on criminal proceedings.

### *A. Proceedings Before a Magistrate Judge*

A criminal case may begin in any of the following ways:

- arrest without warrant followed by filing of a complaint (Fed. R. Crim. P. 3); appearance before a magistrate judge (Fed. R. Crim. P. 5); commitment or release on bail (18 U.S.C. §§ 3141–3151); preliminary hearing before a magistrate judge (Fed. R. Crim. P. 5.1); and grand jury presentment (Fed. R. Crim. P. 6)
- arrest on warrant issued upon a complaint (Fed. R. Crim. P. 4) followed by appearance before a magistrate judge; commitment or release on bail; preliminary hearing before a magistrate judge; and grand jury indictment (Fed. R. Crim. P. 6)
- arrest on warrant issued upon indictment (Fed. R. Crim. P. 9) followed by appearance before a magistrate judge and commitment or release on bail
- issuance of summons (Fed. R. Crim. P. 9), which directs the defendant to appear without being arrested

Upon arrest a defendant must be brought before a magistrate judge “without unnecessary delay.” Federal Rule of Criminal Procedure 5 requires that at the initial appearance before the magistrate judge, the defendant must be advised of the following:

- the charges contained in the complaint or the indictment and the content of any affidavits filed with the complaint
- the right to retain counsel

- the right to have counsel appointed if he or she is financially unable to retain counsel
- the right to a preliminary hearing
- the fact that the defendant is not required to make a statement and that if the defendant does so, it may be used against him or her

The magistrate judge may take the following additional actions:

- if the defendant cannot afford to retain counsel, appointing counsel unless the defendant declines the assistance of counsel (18 U.S.C. § 3006A(b))
- determining bail or other conditions for release (18 U.S.C. § 3142)
- if the defendant is unable to post bail or meet the conditions for release established by the magistrate judge, committing the defendant to custody (18 U.S.C. § 3142(e))

### *B. Indictment*

The Fifth Amendment guarantees a person charged with a serious federal crime the right to have the charge presented to a grand jury.

District courts empanel grand juries as needed. A grand jury consists of not fewer than 16 nor more than 23 members, selected in accordance with the jury selection plan of the district court. Fed. R. Crim. P. 6. The jury continues to serve until discharged by the court, but it may not serve for more than 18 months, with an extension for up to six months if the court determines that an extension is in the public interest.

Rule 6(c) states that the court “shall appoint one of the jurors to be foreperson and another to be deputy foreperson.” The foreperson is responsible for recording the number of jurors concurring in the finding on each indictment and for filing that record with the clerk of court.

Grand jury proceedings are usually secret with limited exceptions, including disclosure authorized by the judge. Fed. R. Crim. P. 6(e). Government counsel, the witness, and necessary court reporters and

interpreters may be present while evidence is being presented, but only the jurors themselves may be present during deliberation and voting. Grand jury indictments are presented to a judge or magistrate judge in open court.

A defendant who is entitled to be prosecuted by indictment may waive that right in open court. In that case, prosecution is by information. Fed. R. Crim. P. 7(b).

### *C. Arraignment and Plea*

The purpose of an arraignment is to ensure the defendant is informed of the charges and has a chance to enter a plea. The defendant may plead guilty, not guilty, or nolo contendere. The court may refuse to accept a plea of guilty or nolo contendere. If the defendant pleads guilty or nolo contendere, the court must be satisfied that the defendant understands the nature of the charge and the maximum and minimum mandatory penalties, and must determine that the plea is made voluntarily. Fed. R. Crim. P. 11(c) and (d).

At the time of arraignment, the defendant will usually plead not guilty. This gives counsel time to research the legal rules governing the charges, investigate the evidence against the client, ascertain whether any of the evidence may be suppressed, and determine whether a plea bargain is desirable or possible. Thereafter, a plea of guilty or nolo contendere is frequently entered as a result of plea bargaining between the prosecution and the defense. Plea bargaining is a process through which the defendant agrees to enter a guilty plea on the condition that the prosecution reduce the charge, dismiss some of a group of multiple charges, or grant some other concession. When the defendant pleads guilty, the judge must inquire of the defendant whether there has been any agreement or plea bargain, and if so, the understanding or agreement must be fully set forth in the record. Fed. R. Crim. P. 11(b).

If the defendant pleads not guilty and does not thereafter change the plea, the case proceeds to trial.

### *D. The Speedy Trial Act*

The Speedy Trial Act of 1974 (18 U.S.C. §§ 3161–3174) has an important impact on proceedings in criminal cases. The Act requires the court “at the earliest practicable time . . . after consultation with the counsel for the defendant and the attorney for the Government” to set the case for trial “on a day certain, or list it for trial on a weekly or other short-term trial calendar.” 18 U.S.C. § 3161(a). Each district has adopted a plan for the disposition of criminal cases pursuant to the Act.

Under the Act, the prosecutor must file an information or indictment within 30 days of arrest or service of summons. 18 U.S.C. § 3161(b). An additional 30 days is allowed if no grand jury has met in the district within the first 30-day period. That begins an inexorable movement toward trial. Further time limits are prescribed in § 3161, along with exclusions for delays that will not violate speedy trial requirements.

Because criminal trials must take place within the Act’s time limits, criminal trials generally take precedence over civil cases. Judges and chambers staff must pay close attention to the time limits and exclusions when scheduling criminal cases. Failure to meet the prescribed time limits requires dismissal of the charges.

### *E. Pretrial Motions*

Motions are most frequently filed before trial for the following reasons:

- to challenge the sufficiency of the indictment or information, by way of a motion to dismiss
- to challenge the jurisdiction or venue
- to suppress evidence, usually on the ground that it was obtained in a manner that violated the defendant’s constitutional rights
- to discover evidence
- to obtain release of the defendant on reduced bail or the defendant’s own recognizance while awaiting trial

In cases involving indigent defendants, motions or ex parte applications are often filed to request that specialized services such as psychiatric examinations, special investigations, or expert services be provided at the expense of the United States and to obtain the appointment of counsel if this has not already been done.

Motions are sometimes filed late in the proceedings. For example, a motion for severance of a trial from the trial of a codefendant may be filed three or four days before the pretrial conference, which may be set only a week or two before trial. The assistant U.S. attorney charged with the prosecution of the case may not respond until the pretrial conference. Therefore, when a motion is filed in a criminal case, it usually requires prompt attention, and often the law clerk will brief the judge orally or write a memo summarizing the motion and the law on the subject before the opposition papers are filed.

### *F. Discovery and Pretrial Hearing*

Traditionally, discovery in criminal cases has been extremely limited. However, Federal Rule of Criminal Procedure 16 permits the defendant to discover some of the evidentiary material in the government's possession. If the defendant does seek discovery under Rule 16, the government is entitled to a limited amount of discovery in return. The matters that are subject to such discovery are set forth specifically in that rule. Moreover federal prosecutors are obliged under the U.S. Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose exculpatory matter to the defense, even in the absence of a defense request for such material. The Court held that to not do so would violate the defendant's due process rights under the Fifth Amendment to the U.S. Constitution.

Many courts conduct a pretrial hearing to determine what motions will be filed, to simplify issues, and to expedite disclosure of the government's evidence.

### *G. Trial and Post-Trial Detention*

The jury in a criminal case consists of 12 jurors and as many alternates as the court thinks necessary. At trial, the jury is impaneled, evidence is

presented, and the jury renders a verdict. If the verdict is “guilty,” the court must decide whether to alter the custody of the defendant pending sentencing and must set a date to impose sentence. If the defendant is not in custody, the judge usually inquires whether the defendant should be at large on the same bond, pending imposition of sentence. A person found guilty and awaiting imposition of sentence must be detained unless the judge finds “by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community” if released. 18 U.S.C. § 3143(a). The judge usually orders a presentence investigation. The defendant either is notified to appear for sentencing on a fixed date or is informed that the court will give notice by mail of the date the sentence is to be imposed.

## *H. Sentencing*

### 1. Sources

Sentencing and sentencing procedures in federal court are guided by four main sources: the statutory maximums and minimums prescribed for the offenses in Titles 18 and 21 and other sections of the U.S. Code; the Sentencing Reform Act of 1984 and various subsequent amending statutes; the federal Sentencing Guidelines that are set forth in the Guidelines Manual issued by the U.S. Sentencing Commission pursuant to the Sentencing Reform Act; and the Federal Rules of Criminal Procedure, especially Rule 32 (“Sentence and Judgment”) and Rule 35 (“Correction or Reduction of Sentence”).

Since their inception in 1987, the Sentencing Guidelines were mandatory, with exceptions to a guideline sentence allowed only under limited circumstances. In 2005, however, the Supreme Court ruled that, in order to avoid violating the Sixth Amendment, the provisions of the Sentencing Reform Act that made the Sentencing Guidelines mandatory must be excised. *United States v. Booker*, 125 S. Ct. 738 (2005). Although the Sentencing Guidelines are now “advisory,” they must still be “considered” along with the other sentencing factors listed in 18 U.S.C. § 3553(a). Courts must continue to calculate the guideline range, and determine whether a departure from that range may be

warranted under the guidelines, before deciding whether other factors in § 3553(a) call for a different sentence. A sentence will be upheld if it is not “unreasonable” under an abuse-of-discretion standard.

Each judge’s chambers has a copy of the Commission’s Guidelines Manual. Other instructional material that the Commission or the Federal Judicial Center may distribute should also be kept on hand and can be found on their respective websites.

The Sentencing Guidelines—strictly defined and identified as such in the Guidelines Manual—are used to calculate a defendant’s guideline sentencing range. The Sentencing Reform Act also authorized the Commission to issue “policy statements” to explain the guidelines and their application. In its guidelines document, the Commission has also provided “commentary” and application notes, which further explain the guidelines and the Commission’s intent.

In keeping with the Sentencing Reform Act, the Commission established numerous categories of offense conduct to which it assigned levels according to the seriousness of the offense. The levels are to be adjusted based on the particular characteristics of the offense (such as use of a weapon), so that the sentence reflects the “total offense conduct,” not simply the offense charged in the indictment. Also in keeping with the statute, the Commission established criminal history categories, based on the number and seriousness of a defendant’s prior offenses. A defendant’s sentencing range, in months, is based on the combination of offense level and criminal history category. However, if a statutory mandatory minimum sentence applies to an offense, and the guideline sentence is lower than the mandatory minimum, the mandatory minimum sentence must be used (subject to exceptions outlined in U.S.S.G. § 5C1.2). Similarly, a statutory maximum will limit a guideline sentence.

The applicable sentencing range may be adjusted up or down if “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” Circumstances that may warrant such a departure are set forth in several of the guidelines, policy statements, and application notes. A judge who departs from the sentence determined by the application of the

guidelines must state “the specific reason” for not following the guidelines. 18 U.S.C. § 3553(c).

Whether the judge decides to impose the applicable guideline sentence or depart from it, *Booker* requires the judge to also consider the other sentencing factors in § 3553(a). If circumstances warrant, the judge may impose a sentence that, subject to statutory minimums and maximums, is outside of the guideline range or is a guideline departure. A judge is required by § 3553(c) to “state in open court the reasons for . . . imposition of the particular sentence.” Either the defendant or the government may appeal a sentence imposed as a result of an incorrect application of the guidelines, 18 U.S.C. § 3742(f), or, after *Booker*, a sentence that is alleged to be “unreasonable.” The sentence imposed will be the length of time actually to be served, except that 54 days of good time credit may be earned on a sentence greater than one year. The guidelines also tell how to determine the fine to be imposed in addition to any statutorily required restitution, and they indicate when probation or some other sentence instead of incarceration may be imposed. Although the Sentencing Reform Act does not provide for parole, the sentence may include a term of supervised release to follow the prison sentence.

## 2. Sentencing Procedures

In most courts, the basic document the judge uses to determine the sentence is the presentence report prepared by a probation officer. Federal Rule of Criminal Procedure 32(d) prescribes the contents of the presentence report. The report presents the facts of the case relevant to sentencing, including information relevant to the factors in 18 U.S.C. § 3553(a); explains the results of the officer’s application of the sentencing guidelines; and provides the officer’s confidential sentencing recommendation. It may contain an addendum listing statements in the report to which one of the parties objects and also the officer’s comments on those objections. Officers use a standard form for the presentence report, which is available from the Administrative Office on the J-Net (<http://jnet.ao.dcn/resources/forms/worksheet-presentence-report>).

Federal Rule of Criminal Procedure 32(e)(2) requires disclosure of the presentence report to the defendant at least 35 days before sentencing, unless the defendant waives that period. This early disclosure

allows the attorneys to review the report and discuss their objections with the probation officer. The probation officer can revise the report to take account of legitimate objections and summarize and comment on unresolved objections in an addendum to the revised presentence report, as mentioned earlier. Some courts have adopted local rules that do not involve the probation officer so extensively in the fact-finding process. They direct the parties to file a motion or memorandum discussing unresolved issues directly with the judge.

If there are disputed factual issues that could affect the sentence, the judge may find it necessary to hold an evidentiary hearing before imposing a sentence. (The Federal Rules of Evidence do not apply at the sentencing hearing.) In addition, if there is a dispute concerning the correct interpretation of the guidelines, the court may wish to hear argument from the attorneys. After resolving the disputes, the judge imposes sentence. Title 18 U.S.C. § 3553(c) requires the court to state the reasons for the sentence on the record in order to facilitate appellate review. The statement of reasons may also be contained in the order of judgment and commitment (AO Form 245B, rev'd Sept. 2011, <http://jnet.ao.dcn/resources/forms/judgment-criminal-case>), which provides the details of a defendant's conviction and sentencing and the findings of the court. Both must be furnished to the probation office and to the Sentencing Commission and, if the sentence includes imprisonment, to the Bureau of Prisons (BOP). The Sentencing Commission uses the information for statistical analysis and its ongoing research on the administration of the Sentencing Guidelines. For sentencing after *Booker*, the information will also be used to analyze sentences imposed outside of the now-advisory guidelines. The Bureau of Prisons uses the judgment and commitment order, along with the presentence report, in its classification and designation decisions, and it is particularly important for the BOP to receive the statement of reasons in case the court has made findings that differ from the information in the presentence report.

### 3. Appellate Review

Either the defendant or the government may appeal the sentence on the ground that it was imposed in violation of law or represents an

incorrect application of the guidelines. Also, guideline departures are appealable by the defendant if the sentence is above the guidelines or by the government if it is below. *See* 18 U.S.C. § 3742(a) & (b). Following *Booker*, a sentence may also be appealed as “unreasonable.” If the appeals court reverses the sentence, the case is remanded to the district court for resentencing, unless the same sentence would have been imposed absent any invalid factors.

#### 4. Role of Law Clerks

District judges vary as to what they require of their law clerks in respect to sentencing. Law clerks who are asked to review the presentence report to assess the correctness of the probation officer’s guidelines application will have to become thoroughly familiar with the Commission’s Guidelines Manual and guidelines case law in their circuit. The guidelines, policy statements, and commentary can be quite complex and sometimes yield more than one plausible interpretation. Simply consulting the guideline for the type of offense in question will rarely produce a correct offense-level determination. A correct determination will also reflect, for example, how much of the offender’s actual conduct should be taken into account in applying the specific offense characteristics. You must, moreover, be familiar with the entire structure of the guidelines in order to apply them to any particular case. Sample sentencing worksheets prepared by the Commission are found as an appendix in the *Federal Sentencing Guidelines Manual*, on the Sentencing Commission’s website at [http://www.ussc.gov/sites/default/files/pdf/training/online-learning-center/supporting-materials/Worksheets\\_for\\_Individuals.pdf](http://www.ussc.gov/sites/default/files/pdf/training/online-learning-center/supporting-materials/Worksheets_for_Individuals.pdf), as well as distributed by West Publishing Company. You also should pay special attention to the effective dates for the relevant legislative and guideline provisions to determine which provisions apply to the offense in question.

Some judges may wish their law clerks to draft a tentative statement of reasons for the sentence. Bear in mind that the sentence, and thus the statement of reasons, may depend on the resolution of disputed issues of law or fact; these issues may appear in the addendum to the presentence report or may be raised at the sentencing hearing.

### *I. Post-Trial Motions*

The usual post-trial motions in a criminal case are for a new trial, for arrest of judgment, or to correct or reduce the sentence. Federal Rule of Criminal Procedure 35 limits the judge's authority to correct or reduce the sentence. Post-trial motions are generally processed in the same manner as other motions. Motions under 28 U.S.C. § 2255 are discussed in the next subsection.

### *J. Handling Prisoner Petitions*

Federal courts receive many petitions from prison inmates requesting relief from their sentences or protesting their conditions of confinement. The majority of petitions are from state prisoners alleging state officials' violation of the prisoners' federally protected procedural rights and seeking release from state custody under the federal habeas corpus act, 28 U.S.C. § 2254. These are to be distinguished from petitions seeking damages or injunctive relief for violation of a prisoner's civil rights under 42 U.S.C. § 1983. Both § 2254 and § 1983 actions are civil proceedings.

Federal prisoners may seek release from custody under 28 U.S.C. § 2255. Although § 2255 is similar to habeas corpus, and is also a civil proceeding, it requires the petition to be filed in the sentencing court rather than in the court having jurisdiction over the place of incarceration (a § 2255 proceeding is considered a continuation of the original criminal action). This eliminates problems of transferring case files and usually permits ready access to witnesses and other evidence.

Prisoner petitions are frequently handwritten and poorly drafted. As a result, they may be difficult to read and understand. The rules governing cases under § 2254 and § 2255 may be found in the United States Code Annotated following the statutory sections. Pro se petitioners in such cases must complete a standard form in order to make the alleged facts and the nature of the claim more intelligible. The forms assist prisoners and the court by ensuring that critical information is provided in a coherent format. In a further attempt to process the large volume of prisoner petitions, some courts have created the position of motions law clerk or pro se law clerk. Some district courts also have

standard forms for use in pro se petitions based on § 1983. (Additional discussion of prisoner correspondence can be found in section 4.1.C.) Judges can decide many of the post-conviction petitions by examining the papers, but if material factual issues are raised, the judge must conduct an evidentiary hearing.

## § 3.3 Bankruptcy Proceedings

### *A. General Structure and Jurisdiction*

Article I, Section 8 of the U.S. Constitution authorizes Congress to enact “uniform Laws on the subject of Bankruptcies throughout the United States.” The primary source of such law is Title 11 of the U.S. Code, commonly referred to as the Bankruptcy Code. In addition, Title 28, the Judicial Code, contains provisions on bankruptcy judges and bankruptcy courts, jurisdiction and venue, appeals, the U.S. trustee system, and bankruptcy fees.

The district court in which a bankruptcy case is commenced has original and exclusive jurisdiction of the bankruptcy case and of all property of the debtor, wherever located, as of the commencement of the case. 28 U.S.C. § 1334(a),(e). The district court also has original but not exclusive jurisdiction of all civil proceedings “arising under Title 11” or “arising in” or “related to” cases under Title 11. 28 U.S.C. § 1334(b). A “case” refers to the entire matter relating to a particular debtor. A “proceeding” is any disputed matter arising in the course of a case. Thus a single case may involve many proceedings.

Each judicial district has a bankruptcy court, which constitutes a unit of the district court. 28 U.S.C. § 151. The district court may refer all bankruptcy cases and proceedings (28 U.S.C. § 157(a)), except those involving personal injury tort and wrongful death claims (28 U.S.C. § 157(b)(5)), to the bankruptcy court. Currently, each district court has a general order referring all eligible bankruptcy cases and proceedings to the bankruptcy court. The district court may withdraw the reference of a case or proceeding, in whole or in part, for cause, and is required to do so under certain limited circumstances. 28 U.S.C. § 157(d).

Bankruptcy judges are appointed by the court of appeals for a term of 14 years and may be removed from office by the circuit judicial council only for incompetence, misconduct, neglect of duty, or physical or mental disability. They may be reappointed for additional terms. If the district has more than one bankruptcy judge, judges of the district court designate a chief bankruptcy judge. Each bankruptcy judge is entitled to a staff consisting of either a judicial assistant and a law clerk, or two law clerks. 28 U.S.C. §§ 152, 154, 156.

In almost all districts, the bankruptcy court has its own clerk of court. In a few districts, the clerk of the district court also serves as clerk of the bankruptcy court. The functions of the bankruptcy clerk's office are similar to those of the clerk of the district court. As a practical matter, bankruptcy cases and proceedings are filed in the bankruptcy court clerk's office, not in the district court clerk's office. Most bankruptcy courts permit or require documents to be filed electronically, except those filed by pro se debtors. 28 U.S.C. § 156.

### *B. The Authority of the Bankruptcy Judge, Core Versus Noncore, and Jury Trials*

The Judicial Code draws an important distinction between core and noncore bankruptcy proceedings. Core proceedings are those “arising under Title 11” or “arising in a case,” whereas noncore proceedings are those that are “related to a case.” 28 U.S.C. § 157(b)(2) contains a non-exclusive list of 16 types of proceedings that are core. The bankruptcy judge has an independent duty to determine if a proceeding is core or noncore, which can be a complex matter. A helpful discussion is found in the treatise *Collier on Bankruptcy* (16th rev. ed. 2009).

The bankruptcy judge may “hear and determine . . . and may enter appropriate orders and judgments” relating to cases and core proceedings arising under Title 11 referred to that judge. 28 U.S.C. § 157(b)(1). A bankruptcy judge may hear a proceeding that is not a core proceeding but can only submit proposed findings of fact and conclusions of law to the district court. 28 U.S.C. § 157(c)(1). After considering the bankruptcy judge's proposed findings and conclusions, and after reviewing de novo those matters to which any party has timely and specifically objected, the district judge enters the final judgment. 28 U.S.C. § 157.

*Stern v. Marshall*, 131 S. Ct. 2594 (2011), introduced the possibility that a proceeding defined as core under the Bankruptcy Code (“counterclaims by the estate against persons filing claims against the estate”) may nevertheless lie beyond the constitutional power of a bankruptcy judge to adjudicate finally. The Court expressly stated that its decision should be interpreted narrowly and that Congress had exceeded constitutional limitations “in one isolated respect.” Nonetheless, owing to broad language in *Stern*, its implications seemed to be uncertain to some at the time.

The Court tried to clarify its ruling in *Stern* when it decided *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). There the Court held that because of the severability provision of the Federal Judgeship Act of 1984, *Stern* claims—that is, claims that were statutorily defined as core claims, but which the Court found bankruptcy courts could not finally adjudicate without violating Article III of the Constitution—could be adjudicated in the same manner as non-core claims under § 157(c)(1) of the statute. Hence *Stern* claims could be treated as noncore claims, for which the bankruptcy court could only issue proposed findings of fact and conclusions of law that the district court could review de novo. If the right to jury trial applies to a proceeding the bankruptcy judge is authorized to hear, the bankruptcy judge may conduct the jury trial if specially designated to do so by the district court and with the express consent of all the parties. 28 U.S.C. § 157(e). Jury trials in bankruptcy court, however, are extremely rare. When they do occur, the bankruptcy court works closely with the district court, since it has the necessary jury procedures in place and may need to provide a courtroom equipped with a jury box.

### *C. Relationship to Other Courts*

Because federal jurisdiction over bankruptcy proceedings is nonexclusive, other federal and state courts are not deprived of jurisdiction over matters to which bankruptcy jurisdiction extends. However, bankruptcy jurisdiction, even when nonexclusive, is paramount. Litigation in other courts is generally automatically stayed by the filing of a bankruptcy petition under 28 U.S.C. § 362, or may be enjoined by an affirmative injunction issued under 28 U.S.C. § 105(a). Moreover, actions

in other courts may be removed to the district court sitting in bankruptcy. 28 U.S.C. § 1452.

It is frequently desirable to permit litigation to proceed elsewhere, even though the bankruptcy court has jurisdiction to hear it. Thus, the district court or the bankruptcy court may for various reasons choose (or may occasionally be required) to abstain from hearing a particular proceeding (28 U.S.C. § 1334(c)); may remand an action removed to it (28 U.S.C. § 1452); or may authorize an action to be filed originally in some other court.

### *D. Appeals*

Law clerks in the bankruptcy courts, district courts, and courts of appeals may face issues related to bankruptcy appeals, so all need to be familiar with the structure of the bankruptcy appellate system.

Appeals from final judgments, orders, and decrees of the bankruptcy court are ordinarily taken to the district court or to the bankruptcy appellate panel (BAP), if one has been established in the circuit. In the district court, a single judge decides the appeal; in the BAP, a panel of three bankruptcy judges does so, sometimes with and sometimes without oral argument. The district court and BAP also have discretion to review interlocutory appeals. Further appeals from district court and BAP decisions are taken to the circuit court of appeals. 28 U.S.C. § 158.

In addition, 28 U.S.C. § 158 provides that the courts of appeals may hear appeals from final and interlocutory orders directly from bankruptcy courts under certain circumstances, bypassing review by a district court or BAP. The availability of this appellate route requires a certification by the bankruptcy court, district court, or bankruptcy appellate panel or a joint certification by all the appellants and appellees that one of the following three conditions is met:

1. The judgment, order, or decree involves a question of law for which there is no controlling authority by the court of appeals or the Supreme Court, or it involves a matter of public importance.
2. The judgment, order, or decree involves a question of law requiring resolution of conflicting decisions.

3. An immediate appeal may materially advance the progress of the case or proceeding.

Upon certification of a direct appeal, the court of appeals has discretion whether it will accept the appeal.

### *E. Chapters of the Bankruptcy Code*

Chapters 1, 3, and 5 of the Bankruptcy Code cover issues that are relevant to all bankruptcy cases. Chapter 1 defines who may file bankruptcy, includes an important general provision about the power of the court, and contains definitions, rules of construction, and other general rules. Chapter 3 describes how a case is begun (voluntary and involuntary petitions); deals with officers and their compensation; and contains various administrative provisions and powers, including the automatic stay (§ 362), the use, sale, and lease of property (§ 363), and the assumption or rejection of executory contracts (§ 365). Chapter 5 contains much of the substantive bankruptcy law concerning creditors, debtors, and the estate. The provisions found in Chapters 7, 9, 11, 12, 13, and 15 of the code apply only to cases brought under each particular chapter, with one exception. Section 901 of Chapter 9 makes some of the Chapter 11 provisions applicable to cases filed under Chapter 9. (Chapters 2, 4, 6, 8, and 10 do not exist.)

A case in bankruptcy court usually begins with the debtor filing a petition under a specific chapter of the code. Creditors may initiate involuntary cases against debtors, but only under Chapters 7 and 11. With some exceptions, cases can be converted from one chapter to another.

Under Chapter 7 (entitled “Liquidation”), which is available to individuals, partnerships, and corporations, a trustee is appointed to liquidate (i.e., reduce to cash) the debtor’s property and make distributions to creditors, subject to an individual debtor’s right to retain certain exempt property and the rights of secured creditors. In most cases, the debtor’s assets are not actually liquidated because all of the debtor’s assets are exempt. If the individual debtor has complied with applicable law, he or she will receive a discharge within a few months after the petition is filed that releases him or her from personal liability for the dischargeable debts. A creditor may object to the discharge of the

debtor or to the discharge of a particular debt. The Bankruptcy Code requires application of a “means” test to determine whether individual consumer debtors qualify for relief under Chapter 7; if the debtor’s income exceeds certain thresholds, the debtor may not be eligible.

Chapter 9 (“Debts of Municipalities”) gives municipalities and smaller government entities such as water districts a breathing spell from debt collection efforts so that they can work out a repayment plan for creditors. It is invoked relatively infrequently.

Chapter 11 (“Reorganization”) permits a business to restructure its finances so it can continue to operate. A trustee usually is not appointed in a Chapter 11 case; instead, the debtor is allowed to remain in possession (as a debtor-in-possession, or DIP) of its property. A plan for reorganization is developed that permits a debtor to discharge some of its debt and to, for example, rescale its operations, terminate burdensome contracts and leases, and recover assets. The Code requires full disclosure to interested parties and confirmation of the plan by the court. As an alternative to reorganization, the code permits liquidating plans so as to maximize distributions to creditors. Individuals may also file a Chapter 11 bankruptcy case, but this is not common.

Chapter 12 (“Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income”) is structured like a Chapter 13 case in that the family farmer or fisherman files a plan to repay debts over a period of time—no more than three years, unless the court approves a longer period, not to exceed five years—and receives a discharge after all payments are made. The farmer or fisherman can continue to operate the business while the payments are being made.

Chapter 13 (“Adjustment of Debts of an Individual with Regular Income”) is designed for individuals or married couples with regular income whose debts do not exceed specified amounts. The debtor files a plan in which the debtor agrees to pay a portion of future earnings to a Chapter 13 trustee, who makes payments to creditors. Usually over three to five years, the debtor makes regular payments on all secured debts and pays a portion of unsecured debts. In exchange, the debtor gets a discharge or release of personal liability from most debts. The debtor’s incentive to propose a plan rather than use Chapter 7 stems from the ability of the debtor to retain all property rather than turn it

over to a trustee for liquidation and from the somewhat broader discharge provisions.

The purpose of Chapter 15 (“Ancillary and Other Cross-Border Cases”) is to provide effective mechanisms for dealing with cases of cross-border insolvency.

## *F. Bankruptcy Procedure*

### 1. Rules and Forms

The Federal Rules of Bankruptcy Procedure contain detailed procedures for bankruptcy cases as well as for the proceedings that are connected to them. These must be considered in tandem with the Bankruptcy Code, which also sets forth some procedural requirements. The rules are organized into parts that correspond to various aspects of bankruptcy procedure.

Compared to practice in other areas of law, bankruptcy practice relies to a greater degree on standard forms. Bankruptcy Rule 9009 states that the official bankruptcy forms prescribed by the Judicial Conference must be used to file and take action in bankruptcy cases, although some variation in format is allowed. The rule also provides that the director of the Administrative Office may prescribe additional forms for use under the code, although it does not make use of these forms mandatory. The official forms and director’s procedural forms are published as an appendix to the Federal Rules of Bankruptcy Procedure.

In addition to the Federal Rules of Bankruptcy Procedure, each judicial district may adopt its own set of local bankruptcy rules to facilitate administration of bankruptcy cases. Local bankruptcy rules must be consistent with the federal rules, but they may add additional requirements.

### 2. Applications and Motions

Federal Rule of Bankruptcy Procedure 9013 provides that a request for an order from a judge is obtained by the filing of a motion, unless the rules authorize the request to be made by application. The rules authorize the use of an application in only a few situations that gen-

erally concern matters for which there is no apparent adverse party at the time of filing. For example, requests for the employment of professional persons and for their compensation are made by application. The procedural rules governing motions practice are found primarily in parts VII and IX of the Federal Rules of Bankruptcy Procedure. If there is opposition to an application or motion (outside the context of an adversary proceeding), the resulting procedure is a contested matter governed by Bankruptcy Rule 9014. See below concerning adversary proceedings and contested matters.

Compared to other federal judges, bankruptcy judges often handle very large numbers of unrelated matters in one session of court and may group them by the relief being sought and whether or not an evidentiary hearing is necessary. Judges will differ in the type of matters they hear and how they calendar and otherwise manage them, but they all are likely to call on their law clerk to assist them in preparing for potential hearings and drafting opinions.

### 3. Contested Matters and Adversary Proceedings

Procedurally, proceedings to resolve disputes in bankruptcy cases fall into two categories: contested matters and adversary proceedings. The Bankruptcy Rules establish the types of matters that fall into each category and the procedures that govern each.

Adversary proceedings are literally civil lawsuits within bankruptcy cases. They are initiated by complaint and require a filing fee, case number, and docket sheet separate from the main bankruptcy case, and they are conducted much like a civil case in the district court. Bankruptcy Rule 7001 sets out the 10 types of actions that must be brought as an adversary proceeding. *See also* Rules 3007 & 9025. These include actions for money judgments, actions to determine the validity, extent, or priority of a lien or other interest in property, objections to discharge, dischargeability actions, requests for injunctions unless provided for by the plan, and matters removed from other state or federal courts. Adversary proceedings and motions filed within them are governed by part VII of the Bankruptcy Rules, which incorporates by reference most of the Federal Rules of Civil Procedure, either verbatim or with modification.

Whenever there is an actual dispute other than an adversary proceeding before the bankruptcy court, the litigation to resolve that dispute is a contested matter. Additionally, specific Bankruptcy Rules expressly provide that requests for certain types of relief, whether opposed or not, are contested matters. *See, e.g.*, Rules 1017(d) (dismissal, conversion, or suspension of case); 3020(b)(1) (objection to the confirmation of Chapter 9 or Chapter 11 plan); 4001 (relief from the automatic stay, use of cash collateral, obtaining credit); 4003(d) (avoidance by debtor of lien or other transfer of exempt property); and 6006(a) (assuming, rejecting, or assigning an executory contract or unexpired lease). Contested matters are governed by Bankruptcy Rule 9014, which provides that part VII Rules 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7062, 7064, 7069, and 7071, which incorporate certain civil rules or modifications thereof, generally apply in contested matters. The court may order, as it deems appropriate, that one or more of these rules will not apply or that other part VII rules will apply. Contested matters do not have a separate case number or docket sheet. Only certain contested matters, such as motions for relief from the automatic stay, require an additional filing fee.

The functions of the bankruptcy judges' law clerks in adversary proceedings (and to varying extents in contested matters) are essentially the same as those of district court law clerks in civil cases. *See* section 3.1.

### *G. U.S. Trustees and Private Trustees*

The U.S. Trustee Program is part of the federal government's Department of Justice, not a part of the courts. It was established to handle the administrative functions of bankruptcy cases and to ensure the integrity of the bankruptcy system across the nation. The program operates with 21 regional offices and 94 field offices, which are headed by U.S. trustees and assistant U.S. trustees, respectively. *See* 28 U.S.C. §§ 581–589b. In the six judicial districts in Alabama and North Carolina, the Bankruptcy Administrator Program, rather than the U.S. Trustee Program, handles the administrative functions. *See* § 302(d)(3)(1) of the Bankruptcy Judges, United States Trustees, and Family Farmer

Act of 1986, P.L. 99-554, 100 Stat. 3119, 3123 and § 317(b) of the Federal Courts Study Committee Implementation Act of 1990.

The functions of the U.S. trustees (USTs) are enumerated in 28 U.S.C. § 581(a), and primarily include (1) appointing and supervising the private trustees who collect and disburse funds to creditors in Chapter 7, 12, and 13 cases; (2) ensuring compliance with the Bankruptcy Code with respect to information provided in schedules, disclosure statements, reorganization plans, and other filings; (3) reviewing fee applications of professionals, such as attorneys and accountants, who serve in Chapter 11 reorganization cases; and (4) monitoring bankruptcy cases for fraud and referring criminal matters to the U.S. attorney for prosecution. A trustee does not have independent enforcement powers; rather, he or she must request the court to rule on matters of administration for which there is no voluntary compliance.

The UST is responsible for establishing a panel of private trustees to serve in Chapter 7 cases. When a bankruptcy petition is filed under Chapter 7, the UST appoints a disinterested person from this panel to serve as interim trustee. At the first meeting of creditors, the creditors may elect another person as trustee, although such elections are rare. The UST is also responsible for appointing one or more “standing” trustees to administer all Chapter 12 and 13 cases filed in a geographic region. In Chapter 11 cases, no trustee is appointed unless the court orders the appointment after notice and a hearing. If the court orders an appointment, the UST designates the person who will serve, unless a party-in-interest timely requests that the trustee be elected by the creditors. In Chapter 7, 12 and 13 cases, the UST may act as trustee if a private trustee is unavailable, although this is rarely done. The code does not provide for the appointment of a trustee in Chapter 9 cases. 28 U.S.C. § 586, 11 U.S.C. §§ 701–704, 1202, 1104–1106, 1302.

## § 3.4 Appeals

### *A. Processing Appeals*

The steps in an appeal are as follows:

1. filing a notice of appeal

2. preparing the record on appeal
3. docketing the appeal
4. filing of the appellant's brief
5. filing of the appellee's brief
6. filing of the appellant's reply brief
7. deciding if the court dispenses with oral argument, or scheduling of oral argument
8. hearing oral argument
9. deliberating by the court
10. filing of the opinion
11. filing of a petition for rehearing
12. issuing of the mandate (the mandate is the final stage in the appellate process unless the party applies to the Supreme Court for a writ of certiorari)

The Federal Rules of Appellate Procedure establish certain procedural uniformity among the 13 courts of appeals. However, there are still some differences in the procedures in the various circuits. Each court has local rules and internal operating procedures that describe the precise procedure to be followed when there is any variation from the rules and, in some instances, that elaborate on or amplify the rules. *See* section 4.2.

### *B. Notice of Appeal*

The timely filing of a notice of appeal is a jurisdictional requirement for any appeal. Appeals may be filed to challenge decisions of the district court, an administrative agency, or a bankruptcy appellate panel. Appeals of agency decisions may be classified as original proceedings in the court of appeals. The notice of appeal is filed in the district court. The purpose of the notice is to inform opposing counsel and the court that an appeal is being taken. The clerk of that court is required by

Federal Rule of Appellate Procedure 3(d) to forward a copy of the notice to the clerk of the court of appeals.

The time for filing commences when the judgment or order is entered in the district court from which the appeal is taken. The running of that time is tolled by the filing of certain post-trial motions in the district court, and the filing of such motions after a notice of appeal has been filed may vitiate the notice, requiring a new notice of appeal to be filed after the motion is decided. Fed. R. App. P. 4(a).

Rule 4 provides the following time periods for filing notices of appeal:

- private civil cases: 30 days
- civil cases in which the United States is a party: 60 days
- criminal cases: 10 days
- criminal cases in which appeal by the government is authorized by statute (such as appeals from sentences under the 1984 Sentencing Reform Act): 30 days

Upon receipt of the notice of appeal, courts of appeals take steps to ensure that all procedural requirements have been met. The clerk's office may send counsel a case-opening letter to establish schedules for record preparation and briefing. Circuit mediators may conduct initial mediation/settlement conferences to discuss the issues in the case, with a view to eliminating the briefing of frivolous issues and to discuss the possibility of settlement. *See* Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers (Federal Judicial Center, 2d ed. 2006).

### *C. Record Preparation*

For an appellate court to review the proceedings in a trial court, the appellate judges must have a record available of what occurred in the trial court. Local court rules prescribe the requirements for counsel to provide the district court the record or excerpts of the record (sometimes referred to as a short record), which may include original papers and exhibits filed in the trial court plus a reporter's transcript of any relevant proceedings. The Sentencing Reform Act (18 U.S.C. § 3742(d))

requires that the record in a criminal case must also include “(1) that portion of the record . . . that is designated as pertinent by either of the parties; (2) the presentence report; and (3) the information submitted during the sentencing proceeding.” This information will often be under seal, because it is confidential.

The Federal Rules prescribe time limits (deadlines) for providing the record on appeal to the court of appeals. During this time the appellant must order a transcript of proceedings if one is needed and make arrangements to pay the court reporter for services or, in courts using electronic sound recording for the official record, the clerk of court. The district court clerk assembles the other papers or electronic files that constitute the record on appeal. The district court has the power to extend for an additional 50 days the time for preparing and sending the record on appeal, after which the court of appeals itself may grant extensions. Additional time may be needed if the court reporter has not finished transcribing the proceedings or if counsel has failed to order the transcript in a timely manner.

To prevent undue delay, the appellate courts have the discretion to refuse to grant time extensions and may impose sanctions on the appellant or the reporter for unreasonable delays in preparing the record on appeal.

### *D. Docketing the Appeal*

When the record is completed, or earlier if desired, the appellant must docket the appeal. This is primarily a clerical process and is performed in the office of the clerk of the court of appeals. Unless the appellant is exempt from payment, a docket fee is charged. The clerk of court opens an appropriate file and record and sends a notice to the parties. Frequently, docketing takes place when the record on appeal is filed.

The filing of the record provides the base date for most subsequent proceedings in the case.

### *E. Briefs and Joint Appendices*

Because the appellant has the burden of establishing that the trial court erred, it files the opening brief. The appellee then files a brief in re-

sponse; if the appellant wishes, it may file a reply brief responding to new matters raised in the appellee's brief. The Federal Rules of Appellate Procedure establish standards for format, color of brief covers, content, methods of reproduction, number of copies, and times for filing of briefs. The local rules for a circuit may impose further requirements regarding the brief. The schedule for filing briefs is as follows:

- appellant's brief: 40 days after filing the record
- appellee's brief: 30 days after service of appellant's brief
- reply brief: 14 days after service of appellee's brief

Some courts of appeals have modified the requirements and standards of the federal rules in certain cases or classes of cases. One of the more common modifications permits parties appealing in forma pauperis to file fewer copies of their briefs. While the briefs are being prepared, the parties are required to determine which portions of the record on appeal are relevant to the issues raised; the appellant is required to reproduce these portions as an appendix to the briefs. There may be only one appendix containing the portions relied on by both the appellant and the appellee, which would be referred to as a *joint appendix*. If any relevant material is omitted from the appendix, the court is free to refer to the original record. Multiple copies of the appendix may be filed so that each judge and, if needed, each law clerk may have one. Some courts of appeals have eliminated the requirement of an appendix and permit the substitution of photocopies of relatively few parts of the record, usually called record excerpts. The local rules of those courts describe the substitute requirements. Local rules also address procedures for electronic filing. You should become familiar with the rules and procedures in your court.

### *F. Oral Argument*

If the court does not decide a case exclusively on the basis of the briefs and written record (see section 4.6.B on screening cases to select those appeals to be decided without oral argument), the parties are given an opportunity to present their arguments to the court orally. Federal Rule of Appellate Procedure 34 permits the court to fix the time allowed for oral argument. Courts may allow counsel to file a request in advance

for additional time, and the courts have the discretion whether to grant these requests. Generally, not more than two attorneys are permitted to argue for each side. Some court rules encourage argument by only one attorney for each party.

Many appellate judges require their law clerks to prepare a memorandum on each case (called a bench memo) for the judge to review before hearing oral arguments. In some circuits, the law clerk for one judge may prepare a memorandum to be circulated among the three judges on the panel prior to oral argument. The judges will study the briefs in advance of oral argument.

The appellant begins the argument. Because the judges have read the briefs and are therefore familiar with the issues, they sometimes begin questioning the attorney shortly after the argument begins. After the appellant's argument is completed, the appellee responds, followed by any reply by the appellant (if the appellant reserved time for rebuttal).

Although the arguments are recorded, so that the judges and their law clerks may later review them, some circuit judges may request one of their law clerks to attend oral argument and take notes of important matters, citations of new authority, and concessions made during the argument.

Most cases are heard by a panel of three judges, but a case may be heard en banc in cases involving a question of exceptional importance or in order to secure or maintain uniformity of decisions. A case heard en banc is heard by all of the active judges on the court and any senior judge of the circuit who sat on the panel that originally heard the case (or, in the Ninth Circuit, by a *limited en banc*, consisting of the Chief Judge and 10 additional judges selected by lot). En banc hearings are held only when ordered by a majority of the active judges on the court.

Some courts hold hearings in only one location, but most hold court in a number of locations within the circuit.

### *G. Deliberation*

After a case has been argued and submitted to the court, the panel of judges who heard the argument meets to arrive at a decision. In most courts, these meetings are held immediately after the completion of each day's arguments.

Appellate courts perform three distinct functions. First, they decide the controversies before them. Second, they supervise the courts within their jurisdiction. Third, they determine the growth and development of the common law and the interpretation of federal statutory and constitutional law within their jurisdiction. Each of these functions can become important during the decisional phase of an appeal because the court must not only reach the correct result but also explain in its opinion the rationale for its decision.

In most cases, the court arrives at a tentative decision at the first meeting. At that time, the presiding judge (the senior active circuit judge sitting on the panel) assigns the case to one member of the panel, who later writes an opinion to be submitted to the others for approval. When the judges do not reach agreement so readily, panel members may exchange memoranda about the case and schedule additional meetings or telephone conferences for further discussion. Law clerks for appellate judges should know and follow the court's internal rules and its customs concerning communications between chambers.

### *H. Opinion and Judgment*

The final product of the court in most appeals is a written opinion setting forth the decision and the reasoning behind it. The increased number of cases and the burden of writing formal opinions in every case has caused appellate courts to use alternatives to formal opinions (such as memorandum, order, or summary opinions) in many cases—such as those involving only the application of settled principles to a specific fact situation. Local rules or policies may guide the members of the court in deciding which cases deserve full opinions and which opinions should be published.

When a panel has agreed on an opinion, the authoring judge electronically transmits it to the clerk of court for public docketing and release. All courts post opinions on the court's public website. In some courts, before opinions are released, they are circulated to all active judges on the court with a time limit for making suggestions. Sometimes when a judge or a group of judges disagrees with the majority decision reached by their colleagues and they feel strongly enough about it, the judge or judges will write a dissenting opinion explaining

what aspects of the decision they disagree with and why. Even though they express opinions that did not prevail, dissents can contribute to the legal debate over the issues at hand and provide judges in similar cases with different perspectives.

### *I. Rehearing*

The party who loses an appeal may file a petition for rehearing within 14 days after judgment is entered. That petition attempts to persuade the panel that the decision was erroneous and should be withdrawn or revised. The prevailing party may not file a response to the petition unless one is requested by the court. Most petitions for rehearing are denied.

The losing party may also move for a rehearing en banc. That motion is circulated to all members of the original panel and all active judges who did not sit on the panel. Only the active circuit judges and any senior judge who was a member of the original panel may request a vote on the suggestion to rehear the appeal en banc; only the active circuit judges may vote on whether the appeal should be reheard en banc; and, if a rehearing en banc is granted, only active circuit judges and senior circuit judges from the circuit who were members of the original panel may sit on the rehearing. By local rule, a circuit may impose time limitations within which a member of the court may request an answer to a petition for rehearing or rehearing en banc or a vote on such a petition.

### *J. Mandate*

The mandate is the document by which the court of appeals formally notifies the district court of its decision and by which jurisdiction for any necessary additional proceedings is conferred upon the district court. The mandate is issued by the clerk of court seven calendar days after the time to file a petition for rehearing expires, or seven calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. These times may be shortened or lengthened by court order. Fed. R. App. P. 41(b). The losing party may request by motion that the issuance of the mandate be stayed in order to maintain

the status quo during the pendency of an application for a writ of certiorari to the Supreme Court. The court of appeals may require that a bond be posted as a condition to staying the issuance of the mandate.

### *K. Motions*

During the course of an appeal, the parties may file a variety of motions. Most of these are procedural and, to the extent permitted by the Federal Rules of Appellate Procedure, some courts have authorized their clerks of court or other court unit executives to act on motions, for example, motions

- for extensions of time to perform any of the acts required by local rules or the Federal Rules of Appellate Procedure;
- for relief from specific requirements of the local rules or the Federal Rules of Appellate Procedure;
- for permission to alter the form or content of the record on appeal;
- for leave to file amicus curiae briefs;
- for delay in the issuance of the mandate; and
- for voluntary dismissal of the appeal.

Motions requiring action by a judge or panel of judges are those

- relating to criminal cases or suits for post-conviction relief such as motions for appointment of counsel, leave to appeal in forma pauperis, certificates of probable cause, and bail pending appeal;
- for stays or injunctions pending appeal;
- for leave to file interlocutory appeals;
- relating to stays granted in the district court;
- for permission to file a brief containing more pages than the number fixed by the rules;
- relating to the time to be allowed for oral argument; and
- to dismiss an appeal filed by the appellee.

In most courts, the staff attorney's office is responsible for reviewing motions and referring them to judges for appropriate disposition.

### *L. Emergency Proceedings*

Both district courts and courts of appeals are frequently asked to make decisions on an emergency basis. In the appellate courts, these occasions usually arise when a litigant or a lower court is about to take some action that may cause irreparable injury. The potentially aggrieved party seeks redress by motion for stay or injunction pending appeal or by petition for writ of mandamus or prohibition. In the district courts, these matters usually arise through a request for a temporary restraining order.

Each court has developed internal procedures for handling these matters efficiently, but the procedures vary among courts. Courts have also established special procedures for handling emergency appeals of capital (death penalty) cases. Law clerks should become familiar with the procedures established by the local rules and the judge's own practices.

## § 3.5 Courts of Specialized Jurisdiction

You may also encounter litigation from one of the various special courts established by Congress. The term *special courts* derives from their specialized jurisdiction.

### *A. Court of Appeals for the Federal Circuit*

The Court of Appeals for the Federal Circuit, based in Washington, D.C., has jurisdiction over appeals from the following: district courts in cases involving patents and certain claims against the United States; the U.S. Court of Federal Claims; the Court of International Trade; the Court of Veterans Appeals; the Merit Systems Protection Board; the Patent and Trademark Office; the boards that decide government contract issues; and a few other Article I agencies.

### *B. Court of International Trade*

The Court of International Trade, based in New York City, hears cases concerning the value or classification of imports. Its judges may sit by designation on other Article III courts.

### *C. U.S. Judicial Panel on Multidistrict Litigation*

This panel was created to consider transferring civil actions involving one or more common questions of fact pending in different districts to a single district for coordinated or consolidated pretrial proceedings. The panel consists of seven district and circuit judges who are appointed by the Chief Justice and sit on the panel in addition to their regular judicial assignments. The panel maintains a roster of transferee judges to whom it assigns the cases it certifies for transfer. For discussion of multidistrict litigation problems, see section 3.1.F.

### *D. Foreign Intelligence Surveillance Court*

The Foreign Intelligence Surveillance Court (FISC), or the FISA court, as it is popularly called (after the Act that created it), is composed of 11 federal judges, selected by the Chief Justice to a non-renewable seven-year term. The court's job is to review applications for governmental surveillance of persons within the United States whom the government suspects of having connections to foreign governments and/or terrorist organizations. A Foreign Intelligence Court of Review also was established to review applications denied by the FISA court.

## § 3.6 Article I Courts

Congress has created many tribunals to assist it in meeting its legislative responsibilities under Article I of the Constitution. These courts do not exercise judicial power conferred by Article III, and the judges are appointed for fixed terms rather than given life tenure. They include the many administrative law judges serving in the executive

agencies who hear disputes over claims and benefits, subject to review by agency officials.

### *A. U.S. Tax Court*

The U.S. Tax Court has jurisdiction over controversies involving deficiencies determined by the commissioner of internal revenue in income, estate, and gift taxes, as well as other tax-related disputes between taxpayers and the Internal Revenue Service. The principal office of the court is located in Washington, D.C., and it conducts trial sessions in other cities throughout the United States.

### *B. U.S. Court of Federal Claims*

The U.S. Court of Federal Claims was originally called the U.S. Claims Court. The court has jurisdiction over claims brought against the U.S. government. The court is located in Washington, D.C.; however, its jurisdiction is nationwide, enabling it to conduct trials in locations convenient to the parties involved in the case.

### *C. U.S. Court of Appeals for the Armed Forces*

Congress established the U.S. Court of Appeals for the Armed Forces as an appellate criminal court, hearing all cases involving military courts-martial. It is located in Washington, D.C.

### *D. U.S. Court of Appeals for Veterans Claims*

The U.S. Court of Appeals for Veterans Claims has exclusive jurisdiction to review the decisions of the Board of Veterans Appeals. The court's principal location is in Washington, D.C., but it may hold court anywhere in the United States.

# Chapter 4:

## Chambers and Case Management

### § 4.1 Chambers Administration

This chapter gives you a broad overview of some of your responsibilities as law clerks in maintaining a well-run chambers. Such responsibilities include helping to ensure chambers security; answering telephones and mail; maintaining the judge's motion, hearing, and trial calendars; and other miscellaneous matters. Discussing all such duties would, of course, be impossible, and some judges have chambers manuals detailing how they expect their chambers to operate. Understanding and accommodating the judge's preferences is key to maintaining an efficient chambers, and regardless of the general guidance offered in this chapter, you should always follow the particular policies and practices of your judge.

Effective management is essential to the efficient administration of justice. While judicial assistants often have principal responsibility for managing various aspects of chambers administration, as a law clerk you should be familiar with the standard operating procedures in your chambers and be available to pitch in when needed.

#### *A. Security*

The safety and security of federal buildings and the people who work in and visit them are major concerns for the U.S. Marshals Service (USMS). Attorneys and other members of the public must pass through magnetometers and have their briefcases and other items screened by an x-ray machine to enter most courthouses and other federal buildings. In addition, all judges' chambers are equipped with an entry control system that consists of a security camera and monitor and a door release strike. Courthouse employees may be issued keycards enabling them to enter the courthouse without passing through metal detectors and to access secured, nonpublic sectors of the building, including

judges' chambers, depending on the individual court's access control security plans. Employees may also have after-hours and weekend access to the building through use of these keycards, which should be kept in a secure place and reported immediately if lost. All courthouse employees should carefully follow security procedures and report potential problems to the USMS.

The U.S. Marshals Service is principally responsible for security of the court and its personnel, though most courthouse security functions are performed by court security officers (CSOs), who are funded by the judiciary's Court Security Program and by the Federal Protective Service on a limited basis. Become familiar with the court's Occupant Emergency Plan and other related USMS security plans in your courthouse, and help to maintain a secure chambers. Do not let unauthorized strangers into secure areas of the courthouse, and report suspicious mail or threatening telephone calls. During security-sensitive proceedings, a judge may request that a deputy from the U.S. Marshals Service or a CSO be present in the courtroom.

Because federal judges are occasionally the targets of terrorists or disgruntled litigants, be careful when opening mail. Mail received in the courthouse is routinely screened by the USMS before distribution to chambers and offices. Still, it pays to be alert to suspicious-looking items. Common recognition points for letter and package bombs include the following:

- foreign mail, air mail, and special delivery
- restrictive markings (e.g., "confidential," "personal")
- excessive postage
- handwritten or poorly typed addresses
- incorrect titles
- titles, but no names
- misspelled common words
- oily stains or discolorations
- no return addresses
- rigid envelopes
- lopsided or uneven envelopes

- protruding wires or tinfoil
- excessive securing material such as masking tape or string
- drawings, diagrams, or illustrations

If a letter or package arouses attention, do not attempt to open it. Instead, immediately notify the marshals' office or a CSO.

### *B. Telephone*

Practices for dealing with incoming calls (e.g., how to answer the telephone, how to take messages, and when and if to transfer a call to the judge) will vary from chambers to chambers. In general, however, answer calls promptly, identify the office (e.g., "Judge Smith's chambers"), and treat all callers courteously. And, of course, hold personal calls to a minimum, both in length and in number. *See* section 2.2.A.1 on communication with the news media.

### *C. Correspondence, Email, and Other Mail*

In addition to correspondence by U.S. postal and messenger service, many chambers now correspond by email with a wide variety of people, including counsel. While email has in some ways made communicating easier and more efficient, it has also made it even more important to stay on top of organizing and processing the mail. Email also presents serious potential problems relating to the accidental forwarding of messages, either to unintended parties or containing information not intended for the recipient. And bear in mind how easily emails can be broadly disseminated through forwarding and posting on Internet sites. Take special care to avoid sending and forwarding email messages that may result in embarrassment, a breach of confidence, or worse, and review and carefully proofread any outgoing messages (and fight the temptation not to proofread email as carefully as paper correspondence).

Most chambers have practices and procedures for handling incoming and outgoing mail, including email (whether and when to delete email messages, how to store important messages for future reference, and other matters of email retention and organization). Quickly be-

come familiar with these practices to help mitigate complications arising from the enormous number of emails that many chambers receive.

Depending on office procedure, either a judicial assistant or a law clerk will open and review correspondence and make an initial decision concerning how it should be handled. Many judges receive their own emails directly, though some may ask staff to review messages first. Incoming mail and emails should be reviewed as soon as they are received because they may relate to matters scheduled for that day. When correspondence referring to a pending suit is forwarded to any counsel of record over the signature of the judge, law clerk, or judicial assistant, copies should be sent to all other counsel of record to avoid inappropriate ex parte contact. Appellate judges seldom correspond directly with counsel on case-related matters, because appellate judges work on cases as part of a panel or court rather than individually. Instead, appellate judges will send instructions to the clerk of court on how to respond to counsel.

Correspondence from the general public that is not related to a case is still important because citizens have a right to courteous treatment. Also, the public's opinions about the fairness, responsiveness, and effectiveness of the judiciary are influenced by the promptness and appropriateness of the court's answers. In the district court, some of the correspondence from the public involves requests to be excused from jury service. That subject is dealt with in section 4.3.D.2. Some correspondence contains character references on behalf of an offender who is scheduled for sentencing. Judges differ in their handling of such correspondence. Many simply acknowledge receipt of the letter and refer the letter to the probation office.

Other correspondence from the public may express reactions to a judge's ruling. Whether positive or negative, expressions of opinion by members of the public generally call only for courteous acknowledgment, not for an explanation or justification of the judge's action. If a letter requests information about a ruling, many judges simply acknowledge receipt of the letter and send a copy of the opinion, if there is one. If more information is requested, many judges refer the writer to the record in the clerk of court's office.

Some judges may wish to respond to a letter that indicates a misunderstanding concerning a significant fact, proceeding, or legal con-

clusion. Judges who adopt this policy may ask law clerks to prepare a draft of a response for the judge to review. The response should not be argumentative or defensive; it should merely state the relevant facts or legal conclusion as necessary to alleviate the misunderstanding.

Prisoners and persons who have been convicted and are awaiting sentence frequently write district and appellate judges. Handle the correspondence of a prisoner represented by counsel the same way as that of any other litigant. Ask your judge how to handle correspondence from prisoners who are proceeding pro se. In some instances, this correspondence may be handled by district court pro se law clerks or, in the appellate courts, either the clerk's office or staff attorney's office. In other instances, your judge may have a form letter explaining, for example, that federal law prohibits judges from giving legal advice and suggesting that the prisoner communicate with a lawyer, or a form letter for responding to requests for transfers to another penal institution (which only the Bureau of Prisons can grant). You should never write anything in a letter that would give a prisoner false hope or compromise the position of the court.

#### *D. Internet and Electronic Research*

New law clerks will receive a Westlaw and/or a LexisNexis password, which may come with additional electronic research training and certain usage guidelines. All computer-assisted legal research use via judiciary contracts is to be limited to official judiciary-related research purposes. In addition to these research services, the Internet also offers more informal avenues of research, including access to nearly every newspaper and magazine in the country, as well as to government and law school websites, Internet search engines, and myriad other sources. Contact the circuit library computer-assisted legal research (CALR) coordinator for assistance with CALR access or training. The CALR coordinators and reference librarians are also available to assist with your research questions.

Become familiar with FJC.dcn (<http://fjc.dcn>), the Federal Judicial Center's site on the judiciary's intranet. It provides access to manuals, monographs, desk references, and other publications, as well as to web-based training and orientation programs, streaming media programs,

discussion forums, and other resources. The J-Net (<http://jnet.ao.dcn>), the intranet site maintained by the Administrative Office of the U.S. Courts, offers information and forms on a range of topics relevant to judicial employees, including benefits, court security, emergency preparedness, human resources, information technology, legal and general research, and travel. The Internet has also posed some serious security and usage challenges for employees and information technology departments in courthouses across the country. The judiciary provides you with a computer and Internet access to help you do your work. Depending on the policy in your court or chambers, you may use it on a limited basis for personal needs if doing so does not interfere with your work and does not cause congestion, delay, or disruption of service to any government system. You should not do anything on your office computer that would embarrass you or the court if it were made public.

### *E. Electronic Filing*

The federal judiciary's Case Management/Electronic Case Filing (CM/ECF) system allows courts to maintain case documents in electronic form and provides enhanced and updated docket management services. It also gives each court the option to permit case documents—pleadings, motions, petitions—to be filed electronically with the court.

CM/ECF uses an Internet connection and a browser and accepts documents in Portable Document Format (PDF). It is easy to use. Filers prepare documents using conventional word processing software and save them as PDF files. After logging on to the court's website with a court-issued password, the filer enters basic information about the case and document being filed, attaches the document, and submits it to the court. CM/ECF automatically generates a notice verifying that the court received the filing, and it also sends an email to other parties in the case notifying them of the filing.

There are no added fees for filing documents using CM/ECF, but existing document filing fees do apply. Litigants receive one free copy of documents filed electronically in their cases, which they can save or print for their files. Public electronic access to court data is available through the Public Access to Court Electronic Records (PACER) pro-

gram. Additional copies are available for a small fee to attorneys and the general public for viewing or downloading.

The process for receiving and reviewing daily filings in the cases filed before the judge may vary among courts and chambers; you should quickly learn the process in your chambers and your role in implementing and maintaining it. Although familiarity with the workings of the system is helpful, you should refer counsel's questions to docketing clerks or others in the clerk's office who deal with the system on a daily basis.

### *F. Judge's Chambers Calendar*

The judicial assistant is usually in charge of maintaining the chambers calendar covering the judge's scheduled court proceedings and other activities. If the calendar is maintained online, other staff on the chambers network may also have limited access to the judge's schedule. In appellate courts, the clerk of court advises the judge of panel assignments and hearing dates. The judicial assistant, in consultation with the judge, will then schedule all other engagements and commitments around the hearings. In trial courts, the judicial assistant usually confers with the judge and then typically advises the courtroom deputy in charge of scheduling the court calendar of the dates on which trials and hearings are to be set. The judicial assistant then schedules the judge's remaining commitments around the trials and hearings. Some judges choose not to have a judicial assistant, which allows them to have an additional law clerk. In these instances, a law clerk may maintain the chambers calendar.

### *G. Opening Court*

In district courts, a law clerk or courtroom deputy usually opens court. One common method is for the clerk or deputy to rap on the door before the judge enters, open the door, then call out, "All rise." The judge then enters and walks to the bench. The law clerk or deputy walks to the front of the bench and says: "The United States District Court for the \_\_\_\_ District of \_\_\_\_ is now in session. The Honorable \_\_\_\_\_ presiding." The judge usually stands during this call, then says, "Please be seated," and sits.

### *H. Maintaining the Library; Office Supplies, Equipment, and Furniture*

Many chambers maintain their own libraries, though electronic databases and Internet research reduce the need for access to hard-copy sources and have enabled chambers in the same courthouse to share libraries. In any event, the employee who maintains the library, either a law clerk or a judicial assistant, should regularly file any advance sheets, pocket parts, slip opinions, replacement volumes, and inserts for loose-leaf services that arrive in the mail. File materials daily so that library maintenance does not become burdensome and the materials are current.

Procurement and ordering of all law books is done by the circuit library; contact the librarian if you have questions. Promptly rubber-stamp every incoming library book to identify it as U.S. property. Keep track of books borrowed by attorneys for courtroom use and make sure that books are not taken outside the chambers and courtroom. Promptly reshelve books used during the course of research. They will then be easier to find, and the library will be neater. Also be sure that legal pads, book markers, pencils, and pens are always available in the library.

Requests for supplies, equipment, and furniture ordinarily are handled in the clerk of court's office.

### *I. Maintaining Office Records and Files*

You may have to maintain some of the records in the judge's office, including the following:

- case files
- trial schedules or calendars
- “tickler” records to remind the judge about future case activities
- indices to the judge's prior decisions
- indices to slip opinions
- work papers relating to cases in progress

Such materials may be stored in hard copy, electronically, or both. Some chambers may also maintain office form books, either in hard copy or electronically. The form books may contain office procedure checklists and frequently used forms, such as samples of letters, orders, opinions, jury charges, minute entries, and office or file memoranda written by prior law clerks. The books describe the format and method for written documents issued by the judge or presented to the judge by chambers staff. The form books provide continuity and consistency in office administration and can help educate new law clerks.

If case records are being used in the judge's chambers, be certain that the records are not misplaced and are returned to the office of the clerk of court as soon as the judge or staff member has finished with them.

### *J. Statistical Reporting*

The JS-10 form, "Monthly Report of Trials and Other Court Activity," is a report of the trials and nontrial proceedings that a district judge conducted during the month. The clerk of the district court submits a JS-10 form to the Administrative Office for each active or senior district judge, plus any visiting district judges or appellate judges, who conducted trials or proceedings in the district during the month. The form reports both the number and type of trials and proceedings and the amount of time the judge spent conducting them. Some judges fill out the forms themselves, but usually a member of the chambers staff or the courtroom deputy fills out the form for the judge. The CM/ECF systems in some courts can automatically generate the JS-10 reports based on additional information about the trials and proceedings entered during the normal docketing process. Data on magistrate judge workloads and activities are collected through the MJSTAR function in district CM/ECF systems, which stores that data in the NewStats database. This includes not only the number of tasks completed by magistrate judges, but the time burden of many of these duties, including time spent with attorneys and parties. Bankruptcy courts report trials and other court activity on a monthly basis using the B-102 form. Courts of appeals use the JS-30 form to report the number of appellate cases, interlocutory appeals, and petitions for rehearing each month.

### *K. Out-of-Town Trips*

Some judges must travel to other cities to attend court sessions and may require a chambers staff member to travel with them if the court to which they are traveling does not provide staffing. Judges may also travel on court-related business. Judicial assistants usually arrange travel (although when the judge has chosen to have an additional law clerk in lieu of a judicial assistant, a law clerk may have to make travel arrangements).

If the judge is traveling to hold court in another location, prepare for the judge to take along necessary case files and materials; any personal notes or memoranda relating to the cases to be heard; the judge's robe; paper, pencils, stationery, and other needed supplies (if the site for the out-of-town session is one frequently used by the court, there may be a permanent stock of stationery and supplies); necessary equipment such as a gavel, recording or dictating equipment, and a laptop or tablet computer; the briefs and any other case materials; and mailing labels and envelopes for returning material that the judge does not wish to carry back.

Judges and chambers staff who travel on court business will be reimbursed for transportation, food, lodging, and related expenses according to the detailed rules set forth in the *Guide to Judiciary Policy*. These rules generally reimburse either a flat dollar amount per day, regardless of actual expenses, or itemized actual expenses not in excess of a fixed dollar amount. The judicial assistant should have forms for travel reimbursement—these forms can also be found on the J-Net. Judges must also report non-case-related travel under regulations found in Volume 19, section 270, of the *Guide to Judiciary Policy*.

### *L. Assisting with Judges' Extrajudicial Activities*

Many judges engage in teaching, writing, lecturing, and other extrajudicial activities. While law clerks may be called on to assist judges in these activities, the Code of Conduct for United States Judges says that judges should not use staff "to any substantial degree" to engage in extrajudicial activities to improve the law, the legal system, and the

administration of justice; and judges should not use staff to engage in other extrajudicial activities, “except for uses that are de minimis.”

### *M. Preserving Chambers Papers for Historical Purposes*

The chambers papers of a district or appellate court judge have historical significance as an essential supplement to the official court record. Many papers in judges’ chambers are widely considered valuable, such as correspondence and background material concerning a case, including memoranda between judges and law clerks and judges on an appeals panel; drafts of orders and opinions (particularly draft opinions that have handwritten comments on them, or that have been circulated to other judges and returned with their comments); and correspondence/memoranda concerning court administration, legal activities in the community, and issues of governance, politics, and law.

Chambers papers are the personal property of the judge. Each judge has the prerogative to make final decisions about the preservation of chambers papers and the terms of access. Judges can preserve their personal papers and make those papers available for eventual study by donating them to a manuscript repository.

An FJC publication, *A Guide to the Preservation of Judges’ Papers* (2d ed. 2009), reviews the organization and preservation of historically significant records created by federal judges. The Federal Judicial History Office at the Center will also provide assistance on issues concerning judges’ papers and can be reached at (202) 502-4180.

### *N. Rules Regarding the Media in Court*

Guidelines for allowing cameras and electronic reproduction equipment in the courtroom are published in Volume 10 of the *Guide to Judiciary Policy*. The guidelines allow the photographing, recording, or broadcasting of appellate arguments. In trial courts, a presiding judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom during ceremonial proceedings. For nonceremonial proceedings, such activities may be allowed for presenting ev-

idence, perpetuating a record of the proceedings, and for security or judicial administration purposes. Federal Rule of Criminal Procedure 53 prohibits photographing and radio broadcasting of criminal proceedings.

Some circuit judicial councils have adopted specific instructions for the use of cameras in the courtroom. Although local rules restrict the means by which news may be reported (e.g., no cameras or broadcasting from the trial courtroom or environs), “there is nothing that proscribes the press from reporting events that transpire in the courtroom.”

## § 4.2 Local Court Rules and Administrative Policies

Section 2071 of Title 28 of the U.S. Code authorizes federal courts to adopt their own rules, which must be consistent with the national rules and available to the public; it also authorizes the circuit judicial council to abrogate district and bankruptcy courts’ local rules, and authorizes the Judicial Conference to abrogate rules of courts of appeals. Federal Rules of Appellate Procedure 47, Bankruptcy Procedure 9029, Civil Procedure 83, and Criminal Procedure 57 provide additional requirements for local rule adoption and characteristics. The local rules of almost all courts follow the same numbering sequence as the corresponding national rules.

These local rules include the procedures for setting cases for trial, scheduling pretrial conferences, setting motions for oral argument, serving memoranda of law, and other details relating to trial. They may also state the procedure for admission of attorneys to practice in the specific district or circuit, the term of the court, the functions of the clerk of court, the rules for filing motions, and more specific data, such as the number of copies required to be filed, limitations on the length of memoranda, the time within which memoranda must be filed, and restrictions on page length, typeface, and margin size.

Each court of appeals has local rules concerning procedures for ordering transcripts; filing and docketing the appeal; calendaring; motions; summary disposition of appeals; setting cases for oral argument;

time limits on oral argument; petitions for rehearing; petitions for en banc consideration; and stay of mandate. The local rules and internal operating procedures of the courts of appeals are printed in the United States Code Annotated following Title 28 of the Judicial Code and are available on the courts' websites.

A court's local rules and any internal operating procedures it adopts establish specific procedures for the court and litigants to follow. You should get these rules and procedures from the court's website or the clerk's office and become familiar with them. Keep them available for reference and be alert for any modifications the court may adopt.

## § 4.3 Case Management: The Trial Court

Many judges believe that the responsibility for moving a case through the trial court is not solely that of the attorneys, and the function of the court is not simply to be available if and when counsel want a hearing. The disposition of all cases as speedily and economically as is consistent with justice is of paramount importance. The Federal Rules of Civil Procedure are to be "construed to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. The courts are also required to report semiannually (on April 30 and September 30) for each judge the motions that have been pending and the bench trials that have been submitted for more than six months, and cases that have not been terminated within three years of filing, for publication by the Administrative Office. 28 U.S.C. § 476.

Effective docket control means that, early in a case, the judge assumes responsibility for guiding the case to a conclusion. This may include establishing deadlines for filing motions, a time limit for discovery, a date for counsel to take the next step in its prosecution, and a trial date. For specific techniques of case management, consult the *Civil Litigation Management Manual*. See also Schwarzer & Hirsch, *The Elements of Case Management: A Pocket Guide for Judges* (Federal Judicial Center, 2d ed. 2006). Note that many of the same considerations apply in criminal cases, with the additional complication of computations required by the Speedy Trial Act. 18 U.S.C. §§ 3161–3174. Law clerks should be familiar with the requirements of the Act,

since failure to bring a case to trial within the Act's time limits can have serious repercussions.

### *A. Office Status Sheets*

Some judges maintain an office status sheet and post it where it is accessible to chambers staff. Its purpose is to keep the judge, the law clerks, and judicial assistants apprised of legal matters under advisement and awaiting disposition. When a matter has been taken under advisement, the assistant or law clerk assigned to the case should indicate it on the status sheet.

Keep a personal status list, which can be revised each week, listing all matters for which you are responsible. It will help you make effective use of your time and remember all pending assignments. Some judges require their law clerks to submit personal status lists weekly.

Some judges require their judicial assistants to keep a list of all pending matters, the initials or name of the law clerk assigned to work on the matter, and any other pertinent information. If so, keep the assistant advised of all matters assigned, matters completed, and other relevant status information.

CM/ECF helps judges use computers for docket control and to maintain case inventories and case-status records. Other systems may also be employed. Regardless of which system is used, it is important that it be regularly maintained and continually monitored.

### *B. Calendaring Systems*

Multi-judge trial courts need a system for determining which judge is responsible for each case. In an individual calendar system, each case is randomly assigned to a particular judge at the time it is filed, or soon thereafter, and that judge has complete responsibility for the case until it is terminated. There are also standard procedures for reassigning cases in which the original judge is disqualified, for ensuring that related cases are all assigned to the same judge, and for special assignment of unusual and protracted cases. Local rules usually describe these procedures.

### *C. Trial Scheduling*

A single trial may be set for a specific date, or the court may set multiple cases for trial on the same day. Some courts use the *trailing calendar* or *trailing docket*, in which the court schedules a number of cases for trial beginning on a stated date. The cases are tried in the order reflected by the schedule. Counsel must obtain information from the court and from the attorneys whose cases precede them on the calendar about the progress of those cases, so that they can go to trial whenever the court reaches their case.

Most civil cases do not go to trial; rather, they are disposed of in some other manner, including dispositive motions and settlement. Judges differ in their approach to encouraging settlement, but the decision whether to settle or proceed to trial is the parties' alone. If settlement is to be reached, negotiations should be timely completed. Last-minute settlements may disrupt the court's schedule, leaving the judges, and sometimes jurors, with unscheduled time. The trailing calendar and other multiple-case-setting devices alleviate some problems caused by last-minute settlement by providing substitute cases to replace those that do not go to trial. Although this relieves the court's problems, it does not reduce the problems caused to litigants and counsel by eve-of-trial settlements.

Criminal cases take priority on the court's calendar because they must be tried within the time limits set forth in the Speedy Trial Act. While criminal cases do not "settle," the vast majority of them are disposed of by way of plea bargaining and guilty pleas, which again make multiple-case-setting an important calendaring device for the court.

### *D. Jury Management*

#### 1. Random Juror Selection

The selection of grand and petit jurors in both criminal and civil cases is governed by 28 U.S.C. §§ 1861–1878, under which each district must have a jury selection plan that has been approved by a panel comprising the circuit judicial council and the chief district judge or the chief judge's designee.

The statutory goal of the selection process is to ensure “grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes” (28 U.S.C. § 1861), and to avoid excluding any citizen “from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status” (28 U.S.C. § 1862).

The clerk of court usually manages the process of selecting prospective jurors, under the supervision and control of the court. Although the jury selection process may differ slightly in each district, it is generally as follows:

- The clerk’s office performs a random selection of prospective jurors’ names by computer or manually, using voter registration lists or other sources specified by the court’s plan, and places the names selected in a master *jury wheel*, which is usually a computer file. The minimum number of names in the master jury wheel must be one-half of 1% of the number on the source lists, or 1,000, whichever is less.
- As needed by the court, the clerk’s office draws names publicly at random from the master jury wheel and sends jury-qualification questionnaires to those persons whose names are drawn.
- From the responses to the questionnaires, a determination is made as to which persons are qualified for jury service and which persons are disqualified, exempt, or excused.
- The names of those determined to be qualified are placed in a second jury wheel consisting of qualified jurors.
- As needed, the clerk’s office selects names from the qualified jury wheel and prepares lists of the names selected.
- The clerk’s office issues summonses to the necessary number of persons needed for the jury venire several weeks in advance of each trial calendar advising those summoned of the time and place to report for jury service.

Some district courts qualify and summons jurors in one step and do not establish a qualified jury wheel.

## 2. Exemptions, Disqualifications, and Excuses

A person is qualified for jury service unless the person

- is not a citizen of the United States;
- is unable to read, write, and understand English with a degree of proficiency sufficient to complete the juror qualification form satisfactorily;
- is incapable of rendering satisfactory service because of mental or physical infirmity; or
- is charged with or has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year without subsequent restoration of civil rights.

28 U.S.C. § 1865.

Some district courts have adopted other grounds for exemptions, which are specified in the court's jury selection plan. Section 1863 of Title 18 requires the plan to provide for the exemption of members of the armed forces in active service; members of state or local fire or police departments; and public officers of the federal, state, and local governments who are actively engaged in the performance of official duties.

Jury service is a citizen's duty as well as a privilege, and courts do not readily grant excuses. A person may, however, be excused from jury service temporarily if the plan states that such service would result in undue hardship or extreme inconvenience. In such a case, the name of an excused juror is placed back in the qualified jury wheel. If a prospective juror approaches you about an excuse, do not express any opinion regarding the request, but simply refer the requester to the clerk's office or jury administrator for action. Treat persons called for jury service with courtesy; they are providing an important service to the court and the public.

Judges in multi-judge courthouses often begin jury trials at different hours to obtain maximum use of people summoned for jury service, sending persons examined and not selected to another courtroom so they can be examined for selection on another jury, and sometimes using jurors who have served in one trial in a succeeding trial. When

prospective jury panels report for possible selection in a case, they should be segregated from other people in the courtroom. Law clerks may be responsible for clearing a portion of the spectator section for the jury panel's exclusive use.

### 3. Juror Orientation

Most courts conduct a juror orientation program to inform jurors of their responsibilities and to explain the trial process. Orientation videos, including the Federal Judicial Center's *Called to Serve*, are available in most courts.

### 4. Voir Dire

In most courts, the judge personally conducts voir dire examination. Federal Rule of Civil Procedure 47 and Federal Rule of Criminal Procedure 24, however, authorize the judge to permit the lawyers to conduct voir dire. If the judge conducts voir dire, the rules authorize counsel to submit specific questions or areas of inquiry that they want the judge to probe. In some courts, magistrate judges conduct voir dire. The law in most circuits permits this in civil cases, though some require consent of the parties. The Supreme Court has held that a magistrate judge may conduct voir dire in a criminal case if the defendant consents (*Peretz v. United States*, 501 U.S. 923 (1991)), but not if the defendant objects (*Gomez v. United States*, 490 U.S. 858 (1989)).

### 5. Jury Supervision

In most courts, a deputy clerk is responsible for jury supervision. However, sometimes law clerks have this responsibility. If so, you should be present early enough in the morning to accommodate those members of the jury who arrive before the normal court time. The jury room should be open and available for use by the jurors as they arrive.

If the judge permits the jury to take notes, either you or the deputy clerk should provide pads of paper and pencils for distribution to the jurors before the trial begins. Extra pads and pencils should also be placed in the jury room for use during deliberations.

If you are responsible for jury supervision, ensure that there is no communication—in the courtroom, jury room, or hallways adjacent

to the courtroom and chambers—between jurors and litigants, lawyers, witnesses, or others attending court.

Jurors are usually free to go where they wish during recesses, and they may go home at night. Occasionally, however, when there is unusual publicity about the trial or there is reason to believe that someone will attempt to exert improper influence on jurors, the judge may direct that the jury be sequestered. When this occurs, deputy marshals keep the jurors together at all times and supervise them when court is not in session. Jurors in criminal and civil cases are sometimes sequestered from the time they begin deliberating until they reach a verdict.

Judges sometimes have law clerks steward the jury during deliberations. Some judges require the law clerk to take a special oath with respect to this duty just before the jury retires. Once the oath is taken, the law clerk assumes primary responsibility for guarding the jury until relieved of this duty by the judge. Remain outside the jury-room door during the entire deliberation process and take every reasonable precaution to ensure that the jurors do not come into contact with other people, especially the litigants, their attorneys, or witnesses. You must never comment on the evidence, the litigants, the attorneys, or the witnesses to any juror (or, for that matter, to anyone else). If a juror has any questions about the trial, at any stage, you should simply state that such questions should be addressed to the judge in writing. Do not answer the question, however simple it may appear.

### *E. Distributing Opinions*

Federal Rule of Civil Procedure 52(a) requires the judge to make findings of fact and conclusions of law in all actions tried without a jury or with only an advisory jury. The rule permits the judge to do this orally on the record or in writing in an opinion or memorandum. The judge may also write a formal opinion to explain rulings on particular motions. The judicial assistant sends the original of the findings or the opinion and the original of any order for judgment to the docket clerk for filing in the official record. Then the judicial assistant or clerk of court sends a copy of each set of findings or the opinion to each counsel of record, making and distributing other copies in accordance

with the judge's instructions. In most district courts, the clerk of court handles the distribution of opinions, but in a few district courts, this responsibility falls to the law clerk or judicial assistant. The judge decides whether the opinion or findings are to be published. If you are responsible for distributing opinions, check with the judge to determine whether the judge wishes the opinion to be published and make such distribution as the judge directs. In each case, the opinion should be accompanied by a cover letter from the judge; the judge may have a form letter for this purpose.

## § 4.4 Special Duties of Law Clerks to Bankruptcy Judges

The duties of law clerks to a bankruptcy judge are generally similar to the duties of those working for district judges. The volume of cases and proceedings in bankruptcy court is generally greater than in other trial courts, and the chambers must be organized to handle this volume effectively. Bankruptcy judges hold more, and faster, hearings than do district judges. For the chambers staff, that means more scheduling problems, more substantial prehearing preparation of memoranda, and shorter time limits. It also means more pressure from attorneys telephoning to ask for expedited schedules and to ask about procedures, the disposition of motions, and various other matters. Like district judges, bankruptcy judges differ in their attitudes about direct contact between law clerks and attorneys.

Some bankruptcy judges hold court in more than one place. Law clerks and judicial assistants to those judges usually have substantial duties in preparing for travel, including assembly of materials (such as appropriate portions of case records necessary for the trip). The judge's staff will usually have extra duties in the additional places of holding court because the other staff available may not be as complete as in the home court.

## § 4.5 U.S. Magistrate Judges

The authority of magistrate judges derives primarily from the Federal Magistrates Act of 1968 and as amended numerous times since. 28 U.S.C. §§ 631–639. Significant Supreme Court cases interpreting the Act include *Mathews v. Weber*, 423 U.S. 261 (1976) (upholding magistrate judge authority to hear social security appeals on a report and recommendation basis); *United States v. Raddatz*, 447 U.S. 667 (1980) (upholding magistrate judge authority to conduct hearings on motions to suppress evidence in felony cases on a report and recommendation basis); *Peretz v. United States*, 501 U.S. 923 (1991) (upholding magistrate judge authority to conduct felony voir dire proceedings with the parties' consent); and *Roell v. Withrow*, 538 U.S. 580 (2003) (holding that parties' consent to disposition of a civil case by a magistrate judge under 28 U.S.C. § 636(c) could be inferred from the parties' conduct during the case). A general outline of the duties performed by magistrate judges is set forth below.

### *A. Initial Proceedings in Criminal Cases*

Under 28 U.S.C. § 636(a), a magistrate judge may perform various duties and conduct proceedings in criminal cases, including the following:

- accept criminal complaints
- issue arrest warrants and summonses
- issue search warrants
- conduct initial appearance proceedings and detention for criminal defendants, informing them of the charges against them and of their rights
- set bail or other conditions of release or detention under the Bail Reform Act, 18 U.S.C. §§ 3141–3145
- appoint attorneys for defendants who are unable to afford or obtain counsel
- hold preliminary examinations, or “probable cause” hearings

- administer oaths and take bail, acknowledgments, affidavits, and depositions
- conduct extradition proceedings

### *B. References of Pretrial Matters from District Judges*

Under 28 U.S.C. § 636(b), district judges may delegate a wide variety of duties to magistrate judges that will assist the district judges in expediting the disposition of civil and criminal cases, including the following:

- hearing and determining any non-case-dispositive pretrial matters, such as procedural and discovery motions
- hearing case-dispositive motions (such as motions for summary judgment or dismissal, or for suppression of evidence), and submitting findings and a recommended disposition of such motions to a district judge
- reviewing and recommending disposition of social security appeals and prisoner litigation (including state habeas corpus petitions under 28 U.S.C. § 2254, federal habeas corpus matters under 28 U.S.C. §§ 2241 and 2255, and prisoner civil rights actions under 42 U.S.C. § 1983), and conducting necessary evidentiary hearings in prisoner cases
- conducting calendar calls, pretrial conferences, and settlement conferences
- serving as a special master in complex cases under Federal Rule of Civil Procedure 53

### *C. Disposition of Petty Offense and Class A Misdemeanor Cases*

Under 28 U.S.C. § 636(a) and 18 U.S.C. § 3401, magistrate judges have the authority to dispose of all federal petty offense and Class A misdemeanor cases (the maximum terms of imprisonment are six

months or less and one year, respectively). In all petty offense cases, including cases involving juveniles, a magistrate judge may conduct the trial and impose the sentence without the consent of the defendant. In a Class A misdemeanor case, the magistrate judge may conduct the trial, either with or without a jury, and impose the sentence only when the defendant has consented to disposition of the case by a magistrate judge and has waived his or her right to disposition of the case by a district judge.

### *D. Disposition of Civil Cases*

Under 28 U.S.C. § 636(c), a full-time magistrate judge may conduct the trial, either with or without a jury, and dispose of any federal civil case with the consent of the litigants. In such cases, a magistrate judge sits in lieu of a district judge on stipulation of the parties and on reference from a district judge. In this capacity, a magistrate judge exercises case-dispositive authority and may order the entry of a final judgment.

### *E. Additional Duties*

Under 28 U.S.C. § 636(b)(3), a magistrate judge may also be assigned any “additional duties as are not inconsistent with the Constitution and the laws of the United States.” In light of this provision, several courts have authorized magistrate judges to conduct allocution proceedings to accept felony guilty pleas under Federal Rule of Criminal Procedure 11. A magistrate judge may also be called on to assist the district court in administrative matters.

For additional information on matters that may be referred to magistrate judges, see the *Benchbook for U.S. District Court Judges* (Federal Judicial Center, 6th ed. 2013), at sections 1.13 and 6.09; the *Inventory of United States Magistrate Judge Duties*, available online at <http://jnet.ao.dcn/court-services/judges-corner/magistrate-judges/authority-magistrate-judges/inventory-united-states-magistrate-judge-duties>; and *A Procedures Manual for United States Magistrate Judges*, available at <http://jnet.ao.dcn/court-services/judges-corner/procedures-manual-united-states-magistrate-judges>. The last two are Administrative Office publications.

Under 28 U.S.C. § 636(b)(4), each district court is required to “establish rules pursuant to which the magistrate judges shall discharge their duties.” In some courts, magistrate judges are used to the full extent permitted by the Federal Magistrates Act. For example, many courts delegate pretrial management of all civil cases to magistrate judges, while in other courts matters may be referred to magistrate judges on a case-by-case basis.

## § 4.6 Case Management: The Appellate Court

Each appellate court has a system for assigning cases, managing motions, and scheduling hearings. In contrast to district court practices, most appellate case-management functions are performed in the clerk’s office, not in judges’ chambers. Check your court’s specific procedures and internal operating procedures.

### *A. Motions*

The processing of motions on appeal is described in the appellate court’s internal operating procedures. Federal Rule of Appellate Procedure 27 describes the prescribed form for motions. Some motions are decided by a panel of judges, some by a single judge, and some are delegated by court rule to the clerk of court or another court officer. The local rules list those motions on which a single judge or the clerk of court may act. Courts of appeals differ on procedures for deciding motions. Some courts assign panels specifically to decide motions. Although the court may hear oral presentation on motions, more commonly motions are decided on the papers. Each court has procedures for handling emergency motions exigently.

### *B. Screening*

Federal Rule of Appellate Procedure 34(a) allows oral argument in all cases unless, pursuant to local rule, a panel of three judges, after examination of the briefs and record, unanimously decides that oral argument is not needed. The rule provides that oral argument is to be allowed unless (1) the appeal is frivolous; (2) the dispositive issue or

set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. In keeping with this rule, most courts employ a procedure known as *screening* to review jurisdictional issues and to select those appeals to be decided without oral argument (i.e., on the briefs and written record alone). Screening may be done within the clerk's office, by staff attorneys, or by a judge.

Other methods are used to manage the court's caseload. Every court of appeals has a circuit mediation program. The circuit mediators (also referred to as conference attorneys or settlement counsel) assist the court in settling cases on appeal, thereby conserving judicial resources. Court local rules outline the practices of each mediation office. *See* Niemic, *Mediation and Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers* (Federal Judicial Center, 2d ed. 2006).

### *C. Order of Assignment of Appeals for Oral Argument: Calendar Preparation*

In the courts of appeals, cases are sent to appellate panels for disposition, with or without oral argument.

There are two separate procedures in the assignment of cases to panels of judges that together maintain the integrity of the case-assignment process. Typically, the clerk of court or the circuit executive sets up a calendar of three-judge panels, generally a year or more in advance. Independent of the assignment of judges to panels, there is a separate process for the assignment of cases to particular panels for oral argument or summary disposition. Generally, once a case has been designated for panel disposition, someone in the clerk's office (e.g., a calendar clerk) will randomly assign the case to a panel. Court practices vary as to the timing of the announcement of panel members and the assignment of cases to particular panels. Typically, this information is disclosed to the litigants and the public a short time prior to the date of oral argument. Courts that sit in more than one location try to schedule an appeal for hearing at the location most convenient to counsel.

Whoever makes the assignments for a particular session operates under court guidelines to determine the number and kinds of appeals to be scheduled for each day. Some courts try to equalize the workload for each day of the session and, if more than one panel is sitting, to equalize the workload among the panels. Others try only to equalize the workload for a week of sitting. In some courts, the person making the assignments also schedules appeals with related issues or facts for the same panel. Alternatively, if a controlling appeal is awaiting decision by another panel in the court, the hearing may be delayed until the other panel decides the controlling appeal. In most courts, the fact that the Supreme Court has granted certiorari in an appeal presenting the same issue is not sufficient reason to postpone assignment, although panels, after hearing argument, often await the Supreme Court's decision before preparing an opinion.

The senior active judge on the panel is the panel's presiding judge and controls the proceedings during the hearing. The courtroom deputy, under the supervision of the judge, opens and closes court and maintains order and decorum. Each judge's law clerk or the courtroom deputy has responsibility for supplying the courtroom with materials needed by the judge and counsel.

Each court has its own rules and customs regarding protocol, dress, and courtroom behavior.

Courts of appeals do not have reporters, although they record oral argument for the use of the court. Litigants who want transcripts must request court approval and arrange for a reporter or some other person to prepare the transcript. Many courts maintain lists of qualified persons for this purpose.

### *D. Order of Opinion Writing*

Most courts issue signed opinions in only a minority of cases. Although there is no statutory requirement that opinions be issued within a fixed time or in any particular order, judges generally determine priority based on three criteria: the importance and urgency of the decision; the nature of the appeal, giving direct criminal appeals priority over

civil cases; and the order in which appeals were argued to the court (or in which briefing was completed).

At any time, each judge will have drafts of opinions in various stages of preparation. The length of time between preparation of the initial draft and issuance of the final opinion varies greatly depending on the number and complexity of issues that must be treated, the extent of suggested revisions and additions by other members of the appellate panel, and whether concurring or dissenting opinions are also issued.

### *E. Distributing Opinions*

After an opinion is issued, the original is filed with the clerk of court. When the opinion is filed, the clerk of court prepares a judgment in accordance with the operative language of the opinion. Fed. R. App. P. 36. The judgment is usually quite simple, merely stating whether the judgment of the trial court is affirmed, reversed, or otherwise modified, and giving directions on remand.

The clerk of court arranges for posting the opinion on the court's website and distributes copies, in accordance with court procedures, to attorneys and parties. The public availability of the opinions on the Internet offers access to the posted opinions to legal publishers and interested parties. In addition, each court has its own practices for printing opinions, either in-house or through a contract printer.

You may be responsible for assisting the judge in proofreading and editing opinions prior to publication. The judge may also direct you to submit opinions to publishers or other individuals in accordance with local practices and procedures.

Law clerks should be aware that when creating and editing files with standard computer applications, those applications store document revisions, comments, and other information within the files. This private information, known as metadata, remains in documents when they are finalized and distributed, and can be accessed with publicly available software. Follow procedures in your court for creating and transmitting electronic documents to ensure that metadata has been removed before sending files outside of the court.

# Chapter 5:

## Legal Research and Writing

### § 5.1 Research

Legal research is perhaps the most important task of any law clerk. You must make sure the judge has the material needed to understand the jurisprudence related to the case. Adequate judicial research includes not only checking the authorities cited in the lawyers' briefs to determine their relevance and the accuracy of the citations, but also conducting independent research to determine whether the lawyers have overlooked controlling precedent or any helpful authority that may not be precedential.

The following suggestions may be of assistance.

- Understand the purpose of the research project. For example, the extent and depth of research for a bench memo is less than that for an opinion.
- Understand the facts. Judges apply law to specific factual situations, and if the facts of prior cases are distinguishable, those decisions may have little relevance, even if the same legal principle is at issue.
- Understand the legal issue. It helps to restate the issue in writing; articulation helps to clarify the issue and often indicates whether the researcher's understanding is adequate and precise.
- If the legal area in which the issue arises is unfamiliar, perform a preliminary survey of the field using secondary sources such as specialized treatises and texts (e.g., the Federal Judicial Center's series of monographs); ALR annotations; law review articles; loose-leaf services; and legal encyclopedias. Call or email your local court librarian for help identifying appropriate research tools and for help in designing your research strategy. When using secondary sources, such as those noted above, be certain

that you are distinguishing between the actual decisions being cited and the author's characterization or opinion of them.

- On Westlaw, identify useful West key numbers pertinent to the subject through cases cited in the parties' briefs; cases or key numbers located through the preliminary survey of secondary sources referred to above; and examination of the appropriate key number outlines of the West Digest System.
- On LexisNexis, use the headnote and legal topics to gather similar cases on a given point of law.
- Use LexisNexis or Westlaw to search for additional authorities. The court librarian is a great resource to help formulate your research strategy.
- In cases involving federal statutes, examine the annotations to the appropriate statutes in United States Code Annotated. In cases involving state statutes, refer to the annotations in the state statute source.
- Read the opinions in full. Carefully examine the actual opinions to determine their applicability to the problem.
- Distinguish the holding of the case from dicta.
- Read all dissents and concurrences. These special opinions may be particularly helpful in understanding complex or novel legal questions.
- Find binding precedent. Distinguish carefully between controlling and persuasive precedents. A state court decision on a procedural matter is usually not binding on a federal court, but a substantive decision of a state court may be controlling in a diversity case. Check to find whether there is conflicting authority within the circuit.
- Shepardize or KeyCite (on LexisNexis or Westlaw) any cases found to be on point to locate or determine their continued authority; more recent decisions; similar cases from a controlling jurisdiction; and more authoritative or better-reasoned decisions.

- Exhaust all sources. If you have not located appropriate precedents, turn to secondary sources, or Shepardize or KeyCite similar but noncontrolling cases or analogous cases with the hope of locating more controlling precedents, or ones at least more similar to the one to be decided. Be sure to look up cases cited within your primary case; often, the cases on which an opinion relies are more on point than the primary opinion itself.
- Search legal periodicals and use a periodicals index. Law reviews can provide a thorough explication of an area of law with citation to the essential primary legal authority. In addition to searching the full-text law review and periodical databases on Westlaw and LexisNexis, try using the major indices: the Legal Resource Index and the Index to Legal Periodicals. (These are likely also available at your library in paper format.) You can search by topic or by case (to find a case note).
- Do not overlook the American Law Institute's Restatements of the Law, both in final and draft form, and the model and uniform codes. (The Uniform Acts can be found in Martindale–Hubbell.)
- If you are spending more than 15 minutes doing online research without success, stop and call your local court librarian for assistance.
- Use the judge's files. If the judge maintains an indexed file of his or her prior opinions (as many do), consult these files. They may be extremely helpful if they contain work on a case similar to the one being researched.

You will usually relay the results of your research to the judge in writing, by either a memo or a draft opinion. However, judges will sometimes want an oral briefing, particularly when the information is needed quickly.

In addition to research on specific cases, law clerks have a professional responsibility to keep up with developments in the law. Examine all Supreme Court opinions as promptly as possible. The Supreme

Court usually issues opinions on days it is in session, which can be determined from its calendar posted on its website. The Supreme Court posts its opinions to its website the day they are issued. Both appellate and district court law clerks must examine all slip opinions published by their circuit as soon as possible; they are mandatory precedent to district courts and law of the circuit for other panels of the circuit court. The law clerk should immediately call to the judge's attention any opinion bearing on a pending case. District court law clerks should also review all opinions of their district that appear in the advance sheets of the Federal Supplement.

If time permits, law clerks should review decisions published in the Federal Reporter and Federal Rules Decisions. Because of the large number of opinions now being published, it is impossible to read the full text of all opinions. After reviewing the headnote of each case, you should examine in full at least those opinions applicable to cases pending before the judge or presenting issues frequently occurring in the court, as well as other decisions of particular interest.

## § 5.2 Writing

### *A. General Rules*

Decision making remains exclusively the judge's responsibility, but judges vary widely in how much writing they do personally and how much they expect law clerks to do.

You may be assigned writing tasks for some or all of these kinds of documents:

- memoranda to the judge
- orders and minute entries (in the district court); orders and short per curiams or other brief dispositions (in the courts of appeals)
- opinions including findings of fact and conclusions of law (in the district court); both memorandum orders and opinions (in the courts of appeals)
- correspondence

Law clerks must write clearly, concisely, and logically. Certain general rules of good writing style are as follows:

- Prepare an outline before starting. The best way to organize your thoughts and ensure that everything pertinent is included is to prepare a logical sentence or topical outline before beginning to write. Such an outline is essential before writing a draft opinion or any long document.
- Introduce the subject. At the outset, let the reader know the subject of the document. When preparing a memorandum on a specific issue, begin with a precise statement of the issue, followed by your conclusions as to its resolution. If preparing an opinion or a memorandum summarizing an entire case, identify the parties, explain at the outset the history of the case, and state the issues, their resolution, and the action taken by the court (e.g., judgment vacated, motion for summary judgment denied, affirmed). While it is critical to state the relevant and material facts, do not include inconsequential information that does not bear directly on the question to be decided.
- Avoid the use of generic terms as specific identifiers. Federal Rule of Appellate Procedure 28(d) requires that designations such as “appellant” and “appellee” be kept to a minimum in briefs and oral arguments. The rule says that it is clearer “to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as ‘the employee,’ ‘the injured persons,’ ‘the taxpayer,’ ‘the ship,’ ‘the stevedore.’” This is a good policy to follow in all judicial writing as well.
- Follow the proper format. The judge may require a special organization and arrangement of intraoffice written materials and may have standardized formats for other written materials. Learn these standard formats and follow them. (Examples from past cases can be found in the judge’s files.) The judicial assistant or career law clerk may be able to advise you whether the judge has a prescribed format.

- Be accurate and give appropriate references. Be careful to quote accurately from a cited authority. Be certain that cited authority has not been overruled or qualified. Some judges require their law clerks to give citations to the sources of factual statements. Thus, if a particular fact is established by Smith's deposition, its statement is followed with "(Smith dep. p. 10)." This reference allows the judge to locate the statement easily, read it in context, and verify its accuracy. Often, lawyers will support their statements of fact in a brief by citing a deposition, a transcript of trial, or an exhibit. You should verify those citations before incorporating them.
- Write succinctly, clearly, and precisely. Good legal writing is simple, brief, and clear. Unnecessarily abstract or complex words and phrases, flowery language, or literary devices may interfere with the reader's ability to understand the point. Unless the judge instructs otherwise, leave embellishment to the judge.
- Subdivide. In a lengthy opinion or order, the reader may find it easier to follow if the material is divided into subparts, each labeled with letters, numbers, or short subtitles.

### *B. Editing*

The four primary goals of editing are as follows:

1. To correct errors in grammar and punctuation.
2. To eliminate ambiguities and promote clarity.
3. To improve the manner and order of presentation of the law or facts.
4. To improve the writing style.

Editing includes deleting words and phrases that may create confusion, eliminating redundant material, and correcting verbosity.

Similar principles apply whether you are editing your own work or that of another law clerk or the judge.

- If you are editing your own work, you should set the draft aside and work on something else for a while before beginning editing. A fresh view may suggest improvements that might not otherwise occur to you.
- Read the material to be edited aloud; this may disclose previously unnoticed problems.
- Ask a co-clerk to read and comment on the draft, especially if he or she has not worked on it.
- Brevity and clarity are both important. Short, simple sentences are generally better than lengthy, compound, or complex sentences. However, strings of sentences of the same length are monotonous; a series of short sentences should be broken with an occasional longer one.
- The use of excessive punctuation may indicate that the sentence should be broken into two or more sentences.

### *C. Style*

Each judge has a different writing style. Some prefer simple declarative sentences and use plain language. Others employ complex sentences and a varied vocabulary. Some use metaphor and simile to make a point. Whatever the judge's personal style, most judges prefer that their law clerks try to write in the manner that the judge has adopted. The judge issues opinions year after year; continuity in style is desirable. Read several of the judge's prior opinions to become familiar with his or her style. If in doubt, ask the judge what stylistic embellishment he or she desires.

Avoid using masculine pronouns when speaking generally or hypothetically, using non-gender-specific language instead (e.g., "he or she" or "the defendant" instead of "he"). Acquaint yourself with your judge's preference in regard to gender-specific language, and keep in mind the federal judicial system's commitment to gender fairness.

### *D. Suggested Reference Materials*

All chambers should have a comprehensive dictionary, thesaurus, and *The Bluebook*. In addition, the following references will help you with your writing assignments.

- *Judicial Writing Manual* (Federal Judicial Center 2013)
- Ruggero J. Aldisert, *Opinion Writing* (Carolina Academic Press 3d ed. 2012)
- Wilson Follett, *Modern American Usage: A Guide* (E. Wensberg ed., Hill & Wang 1998)
- Bryan A. Garner, *The Elements of Legal Style* (2d ed. 2002)
- Bryan A. Garner, *The Redbook: A Manual of Legal Style* (3d ed. 2013)
- Joyce J. George, *Judicial Opinion Writing Handbook* (5th ed. 2007)
- William D. Popkin, *Evolution of the Judicial Opinion: Institutional and Individual Styles* (2007)
- Antonin Scalia and Bryan Garner, *Making Your Case: The Art of Persuading Judges* (Thomson West 2008)
- William Strunk, Jr. & E.B. White, *The Elements of Style* (4th ed. 2000)
- Bernard E. Witkin, *Manual of Appellate Court Opinions* (1977)
- Richard C. Wydick, *Plain English for Lawyers* (Carolina Academic Press 5th ed. 2005)
- *U.S. Government Printing Office Style Manual* (30th ed. 2008)

### *E. Specific Writing Assignments*

#### 1. Jury Instructions

Many district judges expect their law clerks to assume a major role in preparing proposed jury instructions. Instructions must be finished before the end of the presentation of evidence.

The judge will indicate whether the case will be submitted to the jury for a general verdict or on special interrogatories. The use of special

interrogatories may substantially affect the content of the instructions. In addition, the judge will decide whether the trial of one or more issues is to be separated; for example, it is common in tort cases to try the liability issue separately and to ask the jury first to reach a verdict on this issue. If the jury decides for the defendant, it will be unnecessary for it to decide damages. If it decides for the plaintiff, the parties may reach a compromise without going to trial on damages.

The judge will have told trial counsel to submit proposed jury instructions. Most local court rules require that proposed instructions be submitted at the beginning of the trial or at some earlier time. They may, of course, be supplemented if unforeseen matters arise during the course of the trial. Counsel are instructed to prepare each proposed instruction on a separate, numbered page with the description at the top. For example: Plaintiff's Requested Jury Instruction No. 1, with a citation of authority, such as a case or statute, at the end. (The citations are not read to the jury, but enable the judge or law clerk to determine quickly whether the requested instruction is correct.) Most likely, the judge will review counsel's requested instructions and will give the law clerk preliminary reactions.

Most circuits have developed pattern or model jury instructions. Each judge in those circuits has a copy of the pattern instructions and most judges use them as a starting point. If your circuit does not have pattern instructions, refer to the pattern instructions in other circuits whose law is the same as the law in your circuit.

Federal Rule of Civil Procedure 51 and Federal Rule of Criminal Procedure 30 require that, before closing arguments, the judge inform counsel which jury instructions will be given. Some judges hold a conference with counsel (usually in chambers, but on the record), discuss the proposed instructions, and permit counsel to argue for their requests. Other judges do not hold conferences, but provide copies of their proposed instructions to all counsel and give counsel an opportunity to comment, object, or request additional instructions in writing.

In any event, before the jury is instructed, each counsel must be given an opportunity to make objections to the proposed instructions. This can be done in conference or in open court, but must be out of the presence of the jury. Some judges require counsel to write their objections directly on a copy of the proposed charge and then file this

copy in the record for purposes of appellate review. If changes are made after a lawyer voices objections, the charge is retyped and a copy of the charge as delivered is filed in the record. This procedure accurately records the instructions requested, any objections, and the charge delivered, in order to provide a complete and accurate record to the appellate court.

Once a final set of jury instructions has been prepared for a specific type of case, a copy should be retained in the chambers files. Those instructions can be used as a starting point for the next case involving similar issues.

## 2. Memoranda of Law or Fact

A memorandum is an informal document intended to communicate the results of a research assignment or a summary of a case. All memoranda should indicate the following:

- the person who prepared the memo (some judges want the law clerk to use initials only)
- the date it was prepared
- the type of memo, or a short summary of the subject discussed

What follow are some of the most common memoranda.

### *The Bench Memorandum*

This is a document prepared by a law clerk for the judge to use during oral argument. Most judges want bench memos to be brief, often only a page or two, and do not expect a significant amount of independent research by the law clerk. The bench memo is most often a summary of the briefs of the parties, together with (when requested) analysis of the validity of the respective positions of the parties and identification of issues that require further inquiry.

One commonly used organizational format for a bench memo contains the following:

- the docket number, a short caption of the case, and names of members of the panel
- in an appeal, the district court and the name of the judge from whom the appeal is taken

- a statement of the case, reflecting how the case arose, the procedural history and status, and in appellate cases, the trial court's ruling and which party appealed
- a brief statement of the facts of the case
- a statement of the issues raised by the parties
- a summary of the arguments raised by the parties
- matters that should be clarified, expanded upon, or explained during oral argument
- if requested by the judge, the law clerk's views on the merits of the case, supported by analysis and explanation, and recommendations on disposition of the case (some judges do not wish their law clerks to express any views; others discourage any conclusory language until after the case has been argued and thoroughly researched)

### *The Statement of Facts*

Frequently, a judge wants the facts in a particular case, or the facts relating to a specific issue, summarized in writing. In an appellate court, the sources for this kind of memo are the briefs and appendix or record excerpts. In a trial court, the sources are the case file, trial exhibits, the law clerk's notes taken during hearings, and, when necessary, the court reporter's notes or transcripts.

In preparing a statement of facts, strive for accuracy and objectivity, and, if there are disputed factual issues, present the evidence supporting each position. It is essential that you neither allow a personal opinion to shade the statement of facts nor present a partisan view of the evidence. A narrative statement of the facts, arranged chronologically, is usually the easiest to understand. Depending on the status of the case, the judge may ask you to express a view about how any conflicts in the evidence should be resolved.

### *The Single-Issue Memorandum*

The need for a memo dealing with a single issue may arise from 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. This memo may have to be prepared under

extreme time pressure during trial but must nevertheless be completed with accuracy and care.

### *The Full-Case Memorandum*

This type of memo is usually preliminary to an opinion, and, unless otherwise instructed, you should approach it in that manner. It is usually better to overwrite this kind of memo, including facts of borderline relevancy and legal research that, although not directly on point, may have some bearing on the outcome of the case—it is easier to delete unnecessary material than to insert material omitted from an earlier draft. Some judges like this memo in the form of an opinion.

Legal problems often repeat themselves. After completing a research memorandum or upon reading a brief submitted to the court that is unusually thorough, you should file a copy in the judge's legal memoranda files for future use. Such files can be an invaluable resource and prevent needless duplication of effort.

## 3. Resolution of Motions in Trial Courts

The resolution of motions often constitutes a substantial part of the trial court's work on a case. Some motions may require an opinion equivalent in substance and length to a final opinion after trial. In most, the judge may write only a short opinion or order, dictate reasons into the record, or simply indicate disposition with a single word: *Granted* or *Denied*. The law clerk is usually the member of the judge's staff charged with responsibility for knowing which motions are pending, what memoranda or other pleadings have been filed with respect to each motion, and the status of each motion. The judge will instruct the law clerk about the type of memorandum or order indicated. Motion management is discussed in more detail in Chapter 3.

Some judges want their law clerks to prepare a memorandum on every motion. Others require memoranda only on certain matters or for certain types of cases. If you are required to prepare a memorandum, first examine the briefs or memoranda from both the moving party and the opposition. The legal standard or rule that applies is often fairly clear; the difficulty is in applying the rule to the facts. The facts are almost always incompletely presented, or at least slanted in the party's favor. You must examine and compare each party's version and

then check them against the exhibits, declarations, or other materials in the record.

Look for samples of predecessors' memos on motions and use them as guides. There is no one style or format for such memos, but certain features are common:

- Name and number of the case, perhaps the category of case (e.g., antitrust, diversity tort case), date of the memo, and the writer's initials
- Statement of the nature of the motion or motions now under consideration, identifying the moving party
- Recommended disposition, summarized
- Statement of facts and procedural posture. This should include a description of the parties and their relationships to one another, key events, and a notation of facts in dispute. The memo should indicate the source of the facts stated, particularly when they are controverted or perhaps intentionally vague, such as the paragraph of the complaint, the identification of the relevant affidavit and paragraph number, or the number of the exhibit from which the fact stated is derived.
- Discussion of the parties' chief arguments, the legal standard set by controlling statutes, rules, or precedent, and a succinct explanation of your reasons for recommending a particular result on each point

Some judges may also wish to have a draft of a proposed order or judgment disposing of the matter along the lines recommended by the law clerk.

Law clerks should avoid two common errors: (1) failing to pay attention to the procedural status of the case, and (2) writing a law review style piece rather than a memorandum that meets the judge's needs.

#### 4. Memos for Criminal Motions

The law clerk is not usually required to prepare a memo for each motion in a criminal case. In some districts, motions are made in an omnibus pleading. In others, they may be made separately, but without

a predetermined schedule because the Speedy Trial Act requires that a criminal defendant be brought to trial within 70 days of the initiation of proceedings, and there is little time for briefing schedules.

Before writing a memorandum, check with the courtroom deputy (or, if the judge's policy permits, with opposing counsel) to determine whether opposing counsel will oppose the motion. The judge may handle last-minute evidentiary or procedural motions personally, as they often surface first during the pretrial conference. When a memo must be written, the process is essentially the same as that used in preparing memos in civil cases.

## 5. Findings of Fact and Conclusions of Law

A district judge who sits as the trier of fact in an evidentiary hearing or trial may prepare either a conventional opinion or findings of fact (a statement in separately numbered paragraphs of each material fact that the judge concludes was proved) and conclusions of law (these follow the findings of fact, and state in separate paragraphs the principles of law the judge finds applicable to the facts).

Arranging findings of fact and conclusions of law in separately numbered paragraphs, each consisting of one or two relatively brief declarative statements, helps the parties understand the opinion and makes appellate review easier. The judge may direct the law clerk to prepare a draft of either the opinion or the findings of fact and conclusions of law.

In some cases, the court requires the plaintiff's counsel to prepare proposed findings of fact and conclusions of law and requires defense counsel to respond. Other judges may require each counsel to prepare a separate proposal. The court reviews the proposals and makes necessary revisions or additions before adopting any of them.

If proposed findings of fact are based on transcribed testimony (either by deposition or of the trial), the court may insert citations to page numbers of the various transcripts at the end of each paragraph of conclusions of fact. The judge may ask the law clerk to review those citations and to review legal authorities cited by the parties in their trial briefs to determine whether the proposed conclusions of law are correct.

## 6. District Court Orders

Federal Rule of Civil Procedure 58 requires that unless the court orders otherwise, the clerk of court promptly prepare, sign, and enter a judgment when the jury returns a general verdict, when the court awards only costs or a sum certain, or when the court denies all relief. If, however, the court grants other relief, or the jury returns a special verdict or a general verdict accompanied by answers to interrogatories, the clerk of court prepares a form of judgment, and “the court must promptly approve the form of the judgment.”

Routine orders are usually prepared in the office of the clerk of court. In some cases, however, it may be necessary for the court to prepare an order that states the relief to be granted. These orders are prepared in the judge’s chambers and are sometimes drafted by the law clerk. In some courts, judges direct the prevailing party to prepare an order and submit it to opposing counsel for approval.

Most courts have a standardized format for orders, and the judicial assistant or career law clerk will be familiar with that format. This usually includes the name of the court, the docket number of the case, the caption of the case with the names of the parties, and a descriptive title indicating the nature of the order. The order should include a paragraph stating the date of the hearing (if any), appearances of counsel, and the nature of the matter decided by the order.

An order has two functional parts: (1) the factual or legal basis for the determination; and (2) a statement that tells the parties what action the court is taking and what they must do as a result of that action.

No specific language is required to make an order effective. Use simple and unambiguous language. The purpose of the order is to tell the person to whom the order is directed precisely what to do and to allow others to determine whether that person has done it correctly and completely.

The parties may submit a proposed order or judgment for the district judge’s signature in the following circumstances: The judge ruled from the bench on a legal matter and asked the prevailing party to submit an appropriate order for the judge’s signature; the judge decided a nonjury case, announced from the bench his or her findings or reasons

and grounds, and asked the prevailing party to submit an appropriate judgment; or the parties stipulated to a result in a particular case, with or without the judge's prior involvement, and submitted a proposed order, accompanied by their stipulation, for the judge's approval and signature. In other cases, pursuant to Federal Rule of Civil Procedure 58, the clerk of court may submit a prepared form of judgment for court approval.

When these documents arrive at chambers, a law clerk is usually responsible for their detailed review and should take the following steps:

- If the order or judgment is submitted after the judge has made a determination in court with all parties present, check to be certain that the losing party agrees that the order or judgment conforms to the judge's decision. Such approval is usually indicated by the signatures of counsel for the losing party (e.g., "Approved as to form. Signed J. Attorney, Counsel for Defendant").
- If the parties agreed or stipulated to the decision, with or without the judge's prior involvement, confirm that the submitted order or judgment is accompanied by the stipulation, signed by the parties, and that the order or judgment itself has been approved as to form and substance by all parties.
- Check the substance of the order or judgment to be certain that it complies with the judge's directions on the stipulation or agreement.

## 7. Opinions

Opinion writing involves five basic steps.

First, become thoroughly familiar with the arguments from both sides. Carefully review the briefs. Listen to the oral arguments. If you weren't present for oral arguments obtain recordings or transcripts if available. Annotate briefs or make your own notes, as you should refer back to the briefs during the following steps. Discuss the proposed opinion with the judge, examining the structure, the rationale, and the result to be reached.

Second, research. See section 5.1 for specific pointers. Frequently, additional research is necessary as the opinion is drafted.

The third step is planning the opinion. Write a clear statement of the facts and legal issues presented in the case. Then, determine which issues must be decided. If the case turns on a procedural issue, any discussion of substantive issues raised by the parties may be gratuitous. Occasionally, if the same result would have been reached after considering the substantive issues, so stating may strengthen the opinion.

Determine which parts of the opinion raise issues to be treated in detail. If there is a circuit decision directly on point, a lengthy analysis of the precedents and principles related to that particular issue has little value.

Fourth, outline the opinion. In opinions, as in any other kind of writing, a good outline will help the writer produce a clear, complete, and well-organized product.

The fifth and final step is writing the opinion. Opinions usually have the following components:

- The introduction (opening paragraph). The introduction should establish clearly who the parties are and, if the case is on appeal, what agency or court decisions are being reviewed. In addition, many judges like to state at the outset the principal issues and the decision made by the writing court. This practice has the advantage of immediately informing the reader of the result in the case.
- The facts. State the facts developed at the trial or in the record in chronological order. Do this in a narrative style, using short sentences. Recite all of the relevant facts but omit everything else. Avoid verbatim quotations of excerpts from the pleadings or the transcript. In an appellate opinion, this part of the opinion may conclude with a summary of the trial court's or agency's reasons for its decision and a statement of the issues on appeal.
- Applicable law. Discuss the legal principles applicable to the case. (In appellate opinions, the applicable law usually includes the standard of review.) Avoid lengthy quotations from cases

or treatises. Cite the authorities for these principles, but avoid string citations. Meritless points do not require detailed discussion. Many lawyers will present a smorgasbord of issues in a brief, hoping that the judge may find some tempting morsel among the offerings. In such cases, mention these issues so the lawyers will know they were noticed and simply say they are without merit (e.g., “Considering the testimony of the informant, the argument that the evidence was insufficient to warrant conviction merits no discussion”).

- Disposition. Apply the legal principles to the facts.
- Closing. Close with a specific statement of the disposition: judgment is rendered for the plaintiff for a specific dollar amount; the judgment appealed is affirmed, revised and rendered, or reversed and the case is remanded, with appropriate instructions to the lower court. These instructions should not leave the lower court any doubt as to what is required on remand.

When reviewing a heavily footnoted opinion, the reader’s eyes must constantly move from text to footnotes and back again. This is distracting and wastes time. For this reason, some judges object to any footnotes. Others use footnotes only for citations. Some judges use them to expand on the text of an opinion, to explain an inference in the opinion, or to discuss authorities. Follow your judge’s practice.

Finally, remember that this is a judicial opinion, not an essay or a law review article. Avoid personalized argument (and abuse of other judges). Write simply. Stick to the active voice where possible. Avoid excessive use of adjectives and adverbs. Make the meaning clear by using verbs and nouns. Do not clutter the opinion by citing every case you have read. Pare the message to its essentials. The opinion should cogently state the court’s decision and the basis for it.

### *F. Correspondence*

Some district judges prohibit law clerks from corresponding with lawyers; the judges either draft their own correspondence, direct their law

clerks or judicial assistants to prepare drafts of correspondence for their signature, or delegate correspondence entirely to their judicial assistants. Other judges, however, direct their law clerks to correspond with lawyers from time to time on various matters, for example, inquiring about the progress of a case, scheduling a trial or hearing date, or requesting compliance with the court's procedural requirements. The judicial assistant can provide a sample of letters written or approved by the judge. Refer to these samples or consult the judicial assistant about technical matters like the form of the letter heading and opening address. The following suggestions relating to court correspondence may be helpful:

- Let the reader know immediately what the letter refers to. In a large law firm, someone must sort the mail to see that it is delivered to the proper lawyer, and once that lawyer receives it someone must determine to which case the letter relates. You can simplify these tasks by addressing your letter to a specific lawyer rather than to a firm and by placing the case title and docket number near the top of the page.
- Let the reader know why you, rather than the judge, are writing. A lawyer may wonder why a staff member is giving him or her instructions or requesting information, so use a simple introductory phrase such as "Judge Smith has asked me to advise you . . ." or "Judge Smith has directed . . ."
- Remember that although the letter may bear your signature, it is written on behalf of the judge. Excessive formality is not required, but undue familiarity is inappropriate.
- Get to the point. For example, it may be helpful to the reader to know that this is in response to a letter the addressee wrote earlier. You can do this by simply starting with, "In response to your letter of May 1, Judge Smith has asked me to advise you that matters of this kind must be raised by written motion served upon opposing counsel."
- Remember that you, like the judge, are a neutral party dealing with advocates. Unless the judge specifically directs otherwise, send copies of case-related correspondence to all counsel in the

case. Even though you may believe that a letter is of significance only to the addressee, the court has an obligation to avoid ex parte communications.

See section 4.1.C for special considerations when corresponding by email.

### 1. Official Business Envelopes

Court envelopes and postage meters should be used only for court business—they should not be used to mail personal items.

### 2. Juror Letters

Some district judges send a letter to each of the jurors after service on a given case, expressing the court's appreciation. If the judge follows this practice, the office files will contain sample letters. The jury clerk can furnish a list of the jurors and their addresses. If the judge directs you to prepare such a letter, select a form for the letter, or compose a new one, and send a letter to each member of the jury, including alternates. If a particular juror serves a second or third time, make sure that the letter is different each time.

## § 5.3 Proofreading Documents and Checking Citations

The need for accuracy in every document issued by the court cannot be overemphasized. A document that contains misspelled words or inaccurate citations indicates a lack of care in its final preparation. Every document must be proofread meticulously both for substantive correctness and to eliminate typographical and grammatical errors.

Proofreading demands painstaking care. In checking citations, be certain of the following:

- The cases cited in the opinion stand for the proposition of law for which they are cited.
- The parties' names are spelled correctly and the volume, court, page number, and year of the decision are correctly given.

- The style of the citation is consistent with the style usually followed by the court. (Most judges use *The Blue Book: A Uniform System of Citation* as a guide. Others may use *The Chicago Manual of Legal Citation*.)

It is a good idea for a law clerk other than the one responsible for an opinion to check the citations in the last draft of the opinion. A fresh pair of eyes is more likely to catch errors—occasional errors occur no matter how carefully the judge and the law clerk try to avoid them.

### A. Checking an Opinion

The law clerk may be asked to review an opinion drafted by the judge. As a preliminary matter, verify the following:

- The court has jurisdiction.
- The procedural status of the case is correctly stated.
- The court's ruling—the *holding* of the opinion—is stated clearly and succinctly.
- The facts supporting the losing party have been stated.
- The arguments of the losing party have been stated and adequately addressed.
- The cases cited stand for the propositions for which they are asserted.
- The conclusions are supported by clear reasoning and authorities.

You should also seek to eliminate any errors that may have occurred in preparation. An opinion may be checked by following these four steps:

1. Check the formal elements. Compare the case title to the docket sheet in the clerk's office. Compare the listing of counsel who appeared in the case to the briefs and minute order or submission order in the file (in appellate courts, this is usually done in the office of the clerk of court). If the hearing was before a multi-judge panel, compare the judges' names and the order in

which they are listed to the records of the clerk of court or the judges' notes.

2. Check all factual statements. Check factual statements against the original transcripts, if any, and documents. Do not rely on factual representations in the briefs or appendix. Factual statements may be supported by citations to the original depositions, transcripts, or exhibits in the following manner: "(Smith dep., p. 10)." Proofread, word for word, each direct quotation from an exhibit or a witness's testimony. Be certain all omissions from quotations have been indicated by ellipses or asterisks. Verify all dates and numbers.
3. Check the accuracy of citations and quotations.
4. Review the briefs to be certain all issues have been covered.

### *B. Final Proofreading*

After an opinion has been checked and edited, the working draft may have interlineations, marginal inserts, strikeouts, and sections that have been moved around by a word processor. Proofread the final draft to be certain that it is identical to the working draft.

Proofreading is important and must be done with care and accuracy. It is most accurate when one person reads aloud from the copy being verified to another person who follows on the correct, master copy. The reader should read all punctuation, spell out all proper nouns and foreign or technical words and phrases, and indicate whether numbers are spelled out or in figures. This technique minimizes the risk that typographical errors will be missed.

# Chapter 6:

## Court Governance and Administration

### § 6.1 Overview of Federal Judicial Administration

Each of the 94 federal district courts and 13 federal courts of appeals is responsible for its own management. However, each is subject to statutory restrictions and policies set by national and regional judicial administrative agencies. The national agencies are the Judicial Conference of the United States and its agent, the Administrative Office of the U.S. Courts (AO). The Federal Judicial Center has educational and research responsibilities, and the U.S. Sentencing Commission has guideline-promulgating authority, but neither has administrative responsibilities for the federal courts. To the degree possible, administrative policy making is decentralized. Judicial councils in each regional circuit, with staff assistance by circuit executives, set administrative policy for the courts within the circuit, but the individual courts are responsible for most of the day-to-day administration. Clerks of the district courts (and district court executives in a few of the larger courts) and clerks of the bankruptcy courts provide staff assistance to their respective courts. *See generally* Wheeler, *A New Judge's Introduction to Federal Judicial Administration* (Federal Judicial Center 2003).

### § 6.2 The Chief Justice of the United States

The Chief Justice, who is presiding officer of the Supreme Court, presiding officer of the Judicial Conference of the United States, and chair of the Board of the Federal Judicial Center, often speaks for the federal judiciary on major matters in its relations with the other branches of government and with the public at large. The Chief Justice appoints

an administrative assistant, the counselor to the Chief Justice, to help with both internal Supreme Court administrative matters and matters related to the entire judiciary.

## § 6.3 The Judicial Conference of the United States

The Chief Justice presides over the Judicial Conference, which is composed of the chief judges of the courts of appeals, one district judge from each circuit, and the chief judge of the Court of International Trade. The Chief Justice is directed by statute to call at least one annual meeting; the practice is to hold two meetings each year, one in the spring and one in the fall. The Executive Committee of the Conference proposes the agendas for the meetings and acts on the Conference's behalf on limited matters between meetings.

The Conference is generally referred to as the federal courts' principal policy-making body for administration on the national level, but its organic statute (28 U.S.C. § 331) does not describe or suggest so broad a role. The statute directs the Conference to "make a comprehensive survey of the condition of business" in the federal courts, prepare plans for temporary assignment of judges, receive certificates of judicial unfitness from judicial councils, study the operation of federal procedural rules, and submit suggestions for legislation through the Chief Justice's report on Conference proceedings. Although Congress has vested relatively little authority in the Judicial Conference directly, the Conference has considerable practical authority, which arises from its statutory responsibility to supervise and direct the Administrative Office of the U.S. Courts, including the Administrative Office's control of the distribution of funds appropriated by Congress.

The committees of the Conference perform a vital role in the Conference's policy-making process. Normally, committees meet in person twice each year for one or two days to discuss and prepare materials for submission to the Conference prior to its next meeting; these meetings are supplemented by telephone conference calls, written memoranda, and occasional subcommittee meetings.

Most of the judges who serve on committees are life-tenured (district and circuit) judges rather than term-appointed (bankruptcy and magistrate) judges. In addition, some committees include Justice Department officials, state supreme court justices, law professors, and practicing lawyers. The Chief Justice makes committee appointments after receiving information from several sources, including applications from judges and advice from the Administrative Office.

## § 6.4 Circuit Judicial Councils and Circuit Executives

Congress created circuit judicial councils in 1939. The chief judge of the circuit is the presiding officer of each circuit judicial council. In addition to the chief circuit judge, each circuit judicial council consists of an equal number of circuit and district judges as determined by majority vote of active circuit and district judges of the circuit. 28 U.S.C. § 332(a)(1). Creation of the councils reflected a commitment to decentralized administration of the courts. The circuit judicial councils review numerous district court operational plans (for jury utilization and representation under the Criminal Justice Act, for example) and take action as appropriate. A council may also review final orders of the chief judge regarding complaints of judicial misconduct if requested to do so by the person who filed the complaint or the judge complained against. Each circuit judicial council also reviews all local rules within its circuit to be certain they do not conflict with the national rules.

Each circuit judicial council has appointed a circuit executive and assigned that person duties specified in the statute. 28 U.S.C. § 332(e). The circuit executive's role is discussed at section 7.1. The circuit council, by statute, meets at least twice a year.

## § 6.5 Chief Judges

Each court of appeals and each district court has a chief judge. A vacancy in the chief judgeship of a court of appeals or district court is filled by the active judge who, at the time of the vacancy, is senior in

commission, is under 65 years of age, has served on the court at least a year, and has not previously served as chief judge. A chief judge's term is limited to seven years unless no eligible judge is available to serve as chief judge. In bankruptcy courts with more than one judge, the district judges, by majority vote, designate one of the bankruptcy judges as chief judge. The chief district judge makes the designation if a majority of the district judges cannot agree.

Chief judges have no authority over the actual decision of cases by other judges. In judicial matters, their authority is exactly the same as that of any other judge.

### *A. Courts of Appeals*

The chief judge for the court of appeals for any circuit is referred to as the chief judge of the circuit. He or she supervises the staff and most administrative matters for the court of appeals. Among numerous other responsibilities, the chief judge also presides at judicial council meetings and the circuit's judicial conferences; serves as one of the circuit's two representatives to the Judicial Conference; assigns circuit and district judges in the circuit to temporary duty on other courts in the circuit; certifies to the Chief Justice the need for temporary assistance from additional judges from other circuits; and reviews complaints of judicial misconduct. Chief judges often appoint committees of judges or individual judges to assist in various administrative matters.

### *B. District Courts*

The chief judges of district courts have much of the responsibility for the administration of the court. Usually they supervise the clerk's office, the probation office, the pretrial services office (if there is one), and the administration of the magistrate judge system. They also exercise some oversight responsibility for the bankruptcy court. By statute, the chief judge is responsible for carrying out the rules and orders of the court that divide the court's business between the judges. 28 U.S.C. § 137. In most courts, the allotment of cases to judges is made randomly by the clerk of court, but the chief judge may, on occasion, make a special assignment for an unusual case, such as one of considerable length or

complexity. Once the cases are assigned to another judge, however, the chief judge has no jurisdiction over them.

### *C. Bankruptcy Court*

Chief bankruptcy judges have a more specific statutory mandate than circuit or district chief judges, but their duties are similar to those of chief district judges. 28 U.S.C. § 154(b).

## § 6.6 Circuit Judicial Conferences

The circuit, district, bankruptcy, and magistrate judges of each circuit may attend the annual or biennial circuit judicial conference to consider ways of improving the administration of justice in the circuit. 28 U.S.C. § 333. The statute mandates the court of appeals to prescribe rules for participation by the bar. The conferences vary considerably from circuit to circuit but usually feature programs relating to the administration of justice in the circuit.

## § 6.7 Federal Agencies of Judicial Administration

### *A. Administrative Office of the U.S. Courts*

Congress established the Administrative Office (AO) in 1939, at the request of the judiciary, to create an “administrative officer of the United States courts . . . under the supervision and direction” of the judicial branch rather than the executive branch. 28 U.S.C. §§ 604–612. The director of the AO carries out the AO’s statutory responsibilities and other duties under the supervision and direction of the Judicial Conference.

The AO’s duties include: supervising administrative matters; gathering caseload statistics; procuring supplies and space; and preparing and administering the budget, with all the attendant financial management duties.

The AO’s *Annual Report of the Director*, published along with the *Report of the Proceedings of the Judicial Conference of the United States*,

provides detailed statistical data on all aspects of federal court operations. The AO publishes the *Guide to Judiciary Policy*, which includes rules and guidance on most administrative matters in the judiciary, including human resources, procurement, and travel. The AO maintains a site called the J-Net on the judiciary's intranet at <http://jnet.ao.dcn>. The J-Net contains a wealth of information about judiciary activities, initiatives, and policies, and it is a good idea to be familiar with it. The AO also maintains the judiciary's Internet site at <http://www.uscourts.gov>.

### *B. Federal Judicial Center*

In 1967, Congress created the Federal Judicial Center, at the request of the Judicial Conference, to provide research and education for the federal courts in a single, independent agency. The Center's policies are set by a board, chaired by the Chief Justice, that consists of seven judges elected by the Judicial Conference and the director of the Administrative Office as an ex officio member. The Center and the Administrative Office are separate but maintain a close working relationship. The Center is responsible for designing and conducting programs for the orientation and continuing education and training of judges and other court personnel, policy planning and research on matters of judicial administration, promoting study of the history of the federal courts, and assisting judges of foreign judicial systems in learning about the federal judiciary. It produces various publications and audiovisual materials available to judges and other judicial branch employees (some of these materials have been mentioned above). The organization of the Center is explained in its annual report. Current listings of available materials as well as other information about the Center can be found on its site on the judiciary's intranet at <http://fjc.dcn>, or on the Internet at <http://www.fjc.gov>.

### *C. United States Sentencing Commission*

Congress created the U.S. Sentencing Commission in 1984 and directed it to establish federal sentencing policies and practices to guide judges in sentencing criminal offenders. 28 U.S.C. § 991. The Commission's

seven voting members, appointed by the President, may include up to three federal judges. The Commission has the authority to submit annual guideline amendments to Congress, which automatically take effect 180 days after submission unless a law is enacted to the contrary. The Commission's Internet site (<http://www.ussc.gov/>) contains extensive information about the guidelines and Commission activities.

## § 6.8 Active and Senior Judges; Retirement

At the age of 65, district and circuit judges may elect to become senior judges provided they meet the “rule of 80”—that is, if the combined total of the judge's age and years of service equals or exceeds 80. 28 U.S.C. § 371(c). Taking senior status is at the discretion of the judge. A judge who elects senior status creates a vacancy, which is filled in the usual manner by presidential appointment and senatorial confirmation. Judges on senior status have retired “from regular active service” (28 U.S.C. § 371(b)), but continue to receive the salary of an active judge on the same court if they are certified by the chief circuit judge as having met certain workload requirements. Senior judges who are certified by the circuit council as performing substantial judicial service are entitled to chambers and an office staff equivalent to that of active judges or to a lesser number of assistants as their work may require. Some circuits have adopted guidelines for staff requirements.

Senior judges often continue to serve their courts, usually taking a reduced caseload and sometimes requesting that they not be assigned certain types of cases. Particularly in recent years with the increasing caseloads in the federal courts, the services rendered by senior judges have been vital.

Judges who meet the “rule of 80” may also “retire from the office,” in which case they are no longer judicial officers. Retired judges may not continue to hear cases, but they are entitled to an annuity equal to their salary at the time of retirement. 28 U.S.C. § 371(a). Of course, judges who do not meet the requirement of the “rule of 80” may simply resign from office, thereby forfeiting all future pay and benefits.

## § 6.9 Budget Appropriations and Administration

The director of the Administrative Office, under supervision of the Judicial Conference, provides the Office of Management and Budget with the federal judiciary's annual requests for legislative appropriations to fund the various court operations for the forthcoming fiscal year. These are incorporated unchanged into the President's annual judiciary budget request, which is submitted to Congress, which in turn enacts a statute providing the courts with appropriations for the fiscal year.

Although the director of the AO has statutory responsibility for how the courts spend their appropriated funds, the AO has implemented an extensive program that delegates this spending responsibility to the courts themselves, under AO supervision. Clerks of court and other court unit executives are responsible, under the chief judge's supervision, for receiving and disbursing funds and managing the budget. For example, the clerk of court disburses funds appropriated for the court's normal operation and maintenance, and collects moneys received for court services and court-imposed fines, penalties, and forfeitures. Court expenditures are generally subject to the same fiscal laws as the rest of the federal government. In addition, under the direction of the Judicial Conference, the AO has promulgated rules for expenditures. All court employees have a responsibility to ensure that government funds, and the supplies, equipment, and services they buy are used wisely and appropriately.

# Chapter 7:

## Relations with Other Court and Justice System Personnel

Law clerks work closely with other court personnel. Familiarity with the other personnel and what they do will help run a smooth office.

### § 7.1 The Circuit Executive

Each circuit's judicial council appoints a circuit executive. Specific duties of circuit executives vary from circuit to circuit. Tasks in the courts of appeals may include administering nonjudicial matters, especially the personnel system and budget. Circuit-wide tasks may include conducting studies and preparing reports on the work of the courts; serving as the circuit's liaison to state courts, bar groups, the media, and the public; and arranging circuit judicial council and conference meetings. The circuit executive may also maintain an accounting system or establish a property-control and space-management system. Most circuit executives provide advice and assistance on automation and circuit-wide training; others assist judges and committees in delicate areas such as processing judicial complaints.

### § 7.2 The Clerk of Court (Court of Appeals)

Each court of appeals has a clerk who is appointed by and serves at the pleasure of the court. The clerk of court appoints necessary deputies and clerical assistants with the approval of the court.

The primary duties and responsibilities of a court of appeals clerk are as follows:

- Receiving and maintaining the files and records of the court.
- Ensuring that all papers filed comply with the Federal Rules of Appellate Procedure and the rules of the court.
- Entering all orders and judgments of the court.

- Scheduling cases for hearing under guidelines established by law, rules, and orders of the court.
- Distributing needed case materials to the members of the court.
- Collecting, disbursing, and accounting for required fees.
- Arranging for distribution of the court's opinions.
- Giving procedural assistance to attorneys and litigants.
- Maintaining the roster of attorneys admitted to practice before the court.
- Administering oaths.
- Providing clerical staff for courtroom services.
- Providing necessary statistical case information to the court and the Administrative Office.

In addition, the court may authorize the clerk of court to act on certain kinds of uncontested procedural motions.

## § 7.3 The Clerk of Court (District and Bankruptcy Courts)

The clerk of a U.S. district court is appointed by and serves at the pleasure of the court. The clerk of court serves as the chief administrative officer (except in the handful of districts that have a district court executive; *see* section 7.4), implementing the court's policies and reporting to the chief district judge. The clerk's responsibilities include the following:

- Receiving the pleadings, papers, and exhibits that constitute case filings and developing and implementing a records management system to properly maintain and safeguard the official records of the court.
- Recruiting, hiring, classifying, training, and managing the staff of the clerk's office.
- Developing and maintaining a system to ensure the proper collection, accounting, and disbursement of funds and securities in the court's custody.

- Developing budgetary estimates of future staffing requirements and other substantive expense items, such as supplies, equipment, furniture, services, and travel.
- Collecting and analyzing statistical data that reflect the performance of the court.
- Managing the jury selection process, including the responsibility for making a continuing evaluation of juror utilization.
- Maintaining liaison with all branches of the court and related government agencies.
- Preparing and disseminating reports, bulletins, and other official information concerning the work of the court.
- Coordinating the construction of court facilities and periodically inspecting such facilities.

The judges of the bankruptcy court may appoint a clerk of the bankruptcy court, upon certification to the circuit judicial council and the Administrative Office that the court's business justifies it. 28 U.S.C. § 156(b). (In some courts, the clerk of the district court also serves as the bankruptcy court clerk.) With the approval of the bankruptcy judges, the clerk may appoint deputies. The bankruptcy clerk is accountable for bankruptcy fees and costs collected pursuant to 28 U.S.C. § 1930, and is the official custodian of the records and dockets of the bankruptcy court.

## § 7.4 District Court Executives

A few districts have district court executives or a position such as "court administrator" that performs the overall management responsibilities that would otherwise be assigned to the clerk of court. In such districts the clerk's duties are related primarily to the management and monitoring of the cases filed with the court.

## § 7.5 The Courtroom Deputy and the Docket Clerk

A courtroom deputy's duties and responsibilities vary significantly from court to court. The deputy, sometimes called a "case manager," is an employee of the clerk of court's office, although the deputy serves the judge to whom the deputy is assigned and may have a desk in chambers. It is important to remember that although a courtroom deputy may over time become so much a part of a judge's judicial "family" that he or she seems to be another member of chambers' staff, that person is ultimately answerable to the clerk of court.

Courtroom deputies assist the judge with scheduling trials or hearings on motions. The deputy must keep the judge aware of all calendar activity. The deputy handles communication with the attorneys and schedules their appearances for hearings.

Other duties of courtroom deputies include the following:

- Administering oaths to jurors, witnesses, and interpreters.
- Maintaining custody of trial exhibits.
- Entering or causing to be entered on the permanent records of the clerk's office a description of all relevant actions taken in open court or in chambers (usually called a minute entry).
- Serving as liaison between the judge's chambers and the clerk of court's office.
- Performing routine clerk's office duties as needed and when available.

The docket clerk (sometimes called the "case administrator") works in the office of the clerk of court and is responsible for maintaining the official records for each case pending before the judge. The docket clerk also makes the docket entries, recording all filings in a case with the clerk of court. In most courts, these dockets are now automated. Whenever a court employee needs to remove a court record from the clerk's office files, the record must be signed out so that the clerks' office can identify where the record is at all times.

## § 7.6 Other Law Clerks

While it is important for law clerks to know the roles of and establish sound professional relations with various personnel in the judicial system, it is especially important to know the roles of the other members of the chambers staff and to enjoy a healthy working relationship with them.

Most judges have all of their law clerks perform the same functions. Some judges have a combination of permanent and (one- or two-year) term law clerks. A permanent law clerk, already thoroughly familiar with the judge's practices and office administration, may play a more significant role than a term law clerk.

Each judge has a system for assigning work to law clerks, and each makes an effort to balance the workload. In order to equalize the work among the law clerks, allocations may be made on the basis of how much work will be required on a particular case. If a law clerk has a preference for a particular subject matter, a judge may try to accommodate that preference.

Although there are sometimes salary differences between law clerks due to variations in experience and prior salary history, the responsibilities are usually the same. In district courts, the law clerks may, during alternate weeks, exchange the primary responsibility for administrative matters such as opening court, assembling files and records for the motion day, or preparing the conference room for a pretrial conference. Such assignments are flexible, and each law clerk should be cooperative in assisting the others when there is more work than can readily be completed in the time available.

## § 7.7 Judicial Assistants

In general, most judicial assistants (or secretaries, in some chambers) help in the day-to-day conduct of court business. In addition to traditional secretarial duties, a judicial assistant often deals with lawyers and members of the public on behalf of the judge. Judicial assistants also help maintain the chambers collection of law books, assemble documents, assist with case management, serve as courtroom crier, and

provide general assistance to the judge. Judges may hire an additional law clerk in lieu of a judicial assistant and many judges do so. In such circumstances, one or more of the law clerks assumes administrative duties that would have been performed by a judicial assistant.

## § 7.8 Pro Se Law Clerks and Staff Attorneys

District courts with heavy prisoner filings may request funding for the appointment of pro se law clerks to review civil cases filed by prisoners, including petitions for writ of habeas corpus and complaints for violations of civil rights under 42 U.S.C. § 1983. 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, including orders of dismissal. Many pro se law clerks also work on nonprisoner pro se cases.

Each circuit has a staff attorneys' office that serves as a centralized legal staff for the court of appeals. The manager of the office is usually called the senior staff attorney or the director of the staff counsel's office. One or more of the staff attorneys also may be assigned supervisory duties.

Although the precise duties assigned to the staff attorneys' office vary from circuit to circuit, the following tasks are generally assigned:

- Working on pro se prisoner and other pro se cases, including reviewing correspondence from pro se litigants in order to determine whether any communications are legally sufficient to constitute an appeal or a request for mandamus. Many of the letters or purported pleadings are prepared without legal assistance and consist of incomplete handwritten papers that are difficult to read and understand. When deciphered, they may be sufficient to constitute an appeal or petition for writ. If the correspondence, however, does not present an issue that may be considered by the court, the staff attorney may be authorized to so advise the author. If the correspondence is sufficient to invoke the court's jurisdiction, the staff attorney is usually directed to prepare a memorandum stating the issues in the case and, after doing any necessary research, to brief the issues.

- Reviewing appeals and applications for mandamus involving collateral attacks on state or federal criminal convictions and sentencing guidelines issues. The staff attorneys' office usually reviews each such petition, analyzes the legal issues, prepares a memorandum of law concerning each issue raised, and recommends the disposition of the case. In some instances, the district court may have denied the certificate of probable cause (Certificate of Appealability) that is the prerequisite for an appeal in forma pauperis or may have failed to act on a request for such a certificate. If so, the staff attorney makes a recommendation concerning whether such a certificate should be issued. In many instances, the case will be sent to a panel of the court for decision on the merits without oral argument. In others, when the appellant is proceeding pro se, the staff attorney may recommend to the panel of judges to whom the case will be assigned that counsel be appointed. A panel of the court, however, makes the final decision in each case.
- Identifying and analyzing cases for recommended summary disposition.
- Screening counseled and pro se cases.
- Screening cases to identify jurisdictional issues.
- Reviewing, analyzing, and recommending disposition of substantive and procedural motions, including emergency matters.
- Preparing memoranda of law concerning the issues in and recommended disposition of motions.
- Preparing memoranda of law concerning the issues in and recommended disposition of criminal and civil cases, and, in some courts, capital (death penalty) cases.
- Assisting in case management.
- Carrying out other duties assigned by the court.

The staff attorneys' office may work under the supervision of the chief judge, a committee of judges, a single judge, a senior attorney, the circuit executive, or the clerk of court. Some staff attorneys are employed for terms of one or two years in duration; others serve for longer periods.

## § 7.9 The Court Reporter

Each district court has permanent court reporters in numbers approved by the Judicial Conference. The standard ratio is one reporter per active judge. Judicial Conference policy requires court reporters to work for the court (in a pooling arrangement) rather than for individual judges, although the implementation of this arrangement varies with the number of judges and the places of holding court in the district. In practice, in some courts, individual court reporters work primarily in the courtroom of a specific judge. However, a court reporter must adhere to the court's plan for pooling reporters and is not assigned to work only for a specific judge.

The duties of the court reporter include the following:

- Recording all court proceedings verbatim by stenographic methods, electronic sound recording, or other methods (such as real-time reporting technologies) subject to Judicial Conference regulations and the court's approval.
- Transcribing all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases, or filing a voice or sound recording of the proceedings (28 U.S.C. § 753).
- Transcribing any proceedings upon request of a judge or any party to a proceeding.

Court reporters are federal court employees subject to the supervision of the court, but they also collect personal fees for transcripts prepared for parties at rates determined by the Judicial Conference. Transcripts are usually prepared only after a trial is completed and an appeal filed. Litigants may, however, request daily transcripts by notice in advance. Because they earn private income, court reporters must provide their own equipment and supplies and may not use government postage for their correspondence.

The reporter must file a copy of every transcript with the clerk of court. This is a public record that may be inspected by any person without charge during the business hours of the clerk's office.

Subject to Judicial Conference regulations, district judges and bankruptcy judges may direct the record to be taken by electronic sound recording rather than by a court reporter. If the court does so, an employee of the clerk of court is responsible for operating the equipment and seeing to the preparation of any requested transcripts. Statutes and rules govern the process of recording specific proceedings before magistrate judges. Electronic sound recording is used more extensively by magistrate and bankruptcy judges than by district judges.

## § 7.10 The Circuit Librarian

Each court of appeals maintains a library at its headquarters, and all circuits (except D.C. and the Federal Circuit) have additional branch libraries at other locations. These libraries are primarily for the use of the judges and their staffs, but may also be open to members of the bar, employees of other governmental agencies, and the public.

Each library is managed by a librarian appointed by and serving at the pleasure of the court. The librarian may be responsible to the chief circuit judge, a committee of judges, the circuit executive, or the clerk of court, as determined by the court.

Each circuit library has a staff of librarians who have special training in legal research and can help law clerks and judges in all aspects of legal and general research. Many of the U.S. court librarians also have a J.D. In some circuits, for example, the library staff will prepare a legislative history of a statute for a judge upon request. For help with computer-assisted legal research (CALR), you should contact the circuit library CALR coordinator. If your judge is not in a city that has a main or branch library, librarians will mail books to a judge or a law clerk working in another city or will photocopy, scan, or download materials needed for research and deliver them via fax, email, or regular mail. They will also try to borrow materials from other libraries that are not available in their own.

The Law Library of Congress offers assistance for hard-to-locate materials, and research librarians are able to search the library's databases for unique collections, some of which can be borrowed through special loan privileges via the court's library. Additionally, the law library

provides access to foreign, international, and comparative law material. Your first point of contact for research assistance should be your own circuit or satellite librarian. A full list of all U.S. court librarians is available on the J-Net.

## § 7.11 The Probation and Pretrial Services Offices

Each district court appoints probation officers, including a chief probation officer. Larger offices generally also have a deputy chief probation officer. Some probation offices—for example, those with many probationers with drug-related or organized-crime convictions—establish specialized supervisory units. Probation officers serve at the pleasure of the court.

The responsibilities and duties of a probation officer include the following:

- Conducting presentence investigations and preparing presentence reports on convicted defendants.
- Supervising probationers and persons on supervised release.
- Overseeing payment of fines and restitution by convicted defendants.
- Supervising persons transferred under the Victim and Witness Protection Act.

The 1982 Pretrial Services Act directed that pretrial services be provided in all federal judicial districts. The services include evaluating persons proposed for pretrial release, monitoring and assisting those released, and reporting to the court on these activities. *See* 18 U.S.C. § 3154. Most district courts provide pretrial services through their probation office; others have separate pretrial offices. The circuit judicial council must approve creation of a separate office.

## § 7.12 Public Defenders

The Criminal Justice Act of 1964 requires each district to have a plan to ensure that federal defendants are not deprived of legal representation because they cannot afford it. 18 U.S.C. § 3006A. In some districts, this need is met entirely by assigning cases to private attorneys who are paid under the Criminal Justice Act (CJA). Districts in which at least 200 appointments are made annually, however, may establish either public defender organizations or community defender organizations to take no more than 75% of the cases.

Federal public defender organizations are staffed by attorneys who are federal employees; the court of appeals appoints the federal public defender, who appoints assistant federal defenders. Although federal public defender office attorneys and staff are federal employees paid by funds administered by the Administrative Office, they are not part of the district court staff. Their location in the judicial branch is primarily for the purpose of administrative convenience. Community defender organizations are nonprofit defense-counsel-service groups authorized by the court's CJA plan to provide representation. Their personnel are not federal judicial branch employees.

## § 7.13 U.S. Attorneys

In all cases in which the United States is a party, a representative of the Department of Justice is the attorney for the government. The representative is usually the U.S. attorney or an assistant U.S. attorney for the district in which the case is pending, but in some cases the representative will be a special assistant from the Department of Justice headquarters in Washington, D.C., also sometimes referred to as Main Justice. In some situations, such as federal tax refund suits against the United States, a lawyer from Main Justice may have primary responsibility for defense of the case, and the U.S. attorney may serve as co-counsel of record. When the government party is a federal agency, such as the Equal Employment Opportunity Commission, agency counsel will usually represent the government party.

Each judicial district has a U.S. attorney, appointed by the President with the advice and consent of the Senate. The U.S. attorney is appointed for a term of four years, but is subject to removal by the President. Assistant U.S. attorneys are appointed by, and may be removed by, the Attorney General.

The authority of a U.S. attorney is set forth in 28 U.S.C. § 547. The responsibilities generally include the following:

- Prosecuting all criminal offenses against the United States.
- Prosecuting or defending for the government all civil actions in which the United States is a party.
- Defending collectors or other officers of the revenue or customs in actions brought against them for official acts.
- Prosecuting proceedings for the collection of fines, penalties, and forfeitures owed to the United States.

In connection with prosecutorial duties, the U.S. attorney (or an assistant U.S. attorney) is always present during sessions of a federal grand jury but may not remain while the grand jury is deliberating or voting.

## § 7.14 United States Marshals Service

The President, with the advice and consent of the Senate, appoints for each judicial district a U.S. marshal who serves for a term of four years, but who, like the U.S. attorney, is subject to removal. The marshal, in turn, appoints deputies.

The U.S. Marshals Service is part of the Department of Justice and is responsible for moving prisoners, supervising the department's Witness Security Program, apprehending federal fugitives, executing all writs, processes, and orders issued by the courts, and, of most direct interest to chambers' staff, providing security to the court and its personnel.

The marshal develops a court security plan, subject to review and approval by each district court's security committee, providing basic security services to judges and supporting personnel in that district.

Under some plans, judges have emergency buzzer buttons beneath their desks and beneath their benches in the courtroom; if the button is pressed, an alarm sounds in the marshal's office. The marshal also has a deputy present in court whenever the judge so requests. Marshals and their deputies are authorized to carry firearms and may make arrests without a warrant within statutory and constitutional limits. Marshals and their deputies may exercise the same powers as sheriffs of the state in which they are located.

Although the parties themselves are ordinarily responsible for the service of process and subpoenas in civil cases, Federal Rule of Civil Procedure 4(c)(3) provides that a summons and complaint shall, at the request of the party, be served by the marshal on behalf of a person authorized to proceed in forma pauperis, on behalf of the United States or an officer or agency of the United States, or by order of the court in special cases.

In many courts, the marshal or the marshal's deputy is in complete charge of the jury. Law clerks are sometimes told to avoid all contact with the jurors. You should inquire about and become familiar with the procedures in your court. *See also* section 4.3.D.5 on jury supervision.

## § 7.15 The Federal Bureau of Prisons

The Federal Bureau of Prisons manages the penal and correctional institutions maintained by the United States. Its director is appointed by the Attorney General.

When the judge sentences a person convicted of a federal crime, the order of commitment consigns the defendant to the custody of the Attorney General. Although the judge may recommend a preferred place of imprisonment, the Attorney General has the final authority to designate the actual place of confinement.

The bureau must provide suitable quarters, care, subsistence, and safekeeping for all persons held under the authority of the United States; provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States; and provide technical assistance to state and local correctional institutions and officials. Each judge has a pamphlet describing all insti-

tutions maintained by the Bureau of Prisons, their facilities, and their programs.

In most judicial districts, there is no federal jail for the confinement of persons awaiting trial or after sentencing, so federal prisoners are confined in a state institution, under a contractual arrangement.

A judge may permit a sentenced defendant to report directly to the place of confinement. This avoids interim detention in state institutions that may be crowded or otherwise undesirable, and it saves the government the expense of housing, feeding, and transportation. If the prisoner is deemed to be a danger to himself or the community or is judged to be a flight risk, is not likely to report on time, or cannot afford transportation, the judge is likely to require the marshal to maintain custody of the prisoner and to transport the prisoner to the institution designated by the bureau.

## § 7.16 Federal Law Enforcement Agencies

Apart from the U.S. attorney's office, the U.S. Marshals Service, and the Bureau of Prisons, there are other federal law enforcement agencies that you may come in contact with, particularly during criminal trials. A brief description of them follows.

- *Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)*. Enforces and administers firearms and explosives laws as well as those laws covering the production, use, and distribution of alcohol and tobacco products. The ATF is a bureau of the Department of Justice.
- *Bureau of Customs and Border Protection (BCBP)*. Manages, controls, and protects the nation's borders and performs inspections related to customs, immigration, and animal and plant health inspection laws. The BCBP is a bureau of the Department of Homeland Security.
- *Bureau of Immigration and Customs Enforcement (ICE)*. Provides investigative and security services including enforcement of immigration and customs laws. Also includes the Federal Protective Service (FPS), which provides security at federally

owned and leased buildings nationwide, including courthouses. It is a bureau of the Department of Homeland Security.

- *Drug Enforcement Administration (DEA)*. The primary narcotics enforcement agency for the United States. It is a bureau of the Department of Justice.
- *Federal Bureau of Investigation (FBI)*. Investigates violations of certain federal statutes, collects evidence in which the United States is or may be an interested party, and performs other duties imposed by law or presidential directive, such as performing background checks on judicial nominees. The FBI is a bureau of the Department of Justice.
- *Internal Revenue Service (IRS)*. Administers and enforces federal internal revenue laws and related statutes, except those relating to alcohol, tobacco, firearms, and explosives. The IRS is a bureau of the Treasury Department.
- *International Criminal Police Organization—U.S. National Central Bureau (INTERPOL—USNCB)*. Facilitates international law enforcement cooperation as the U.S. representative to INTERPOL, an intergovernmental organization of over 150 country members. INTERPOL—USNCB is a bureau of the Department of Justice.
- *U.S. Citizenship and Immigration Services (USCIS)*. Administers immigration and naturalization adjudication functions and establishes immigration services policies and priorities. These functions include adjudication of immigrant visa and naturalization petitions; adjudication of asylum and refugee applications; and other adjudications formerly performed by the U.S. Immigration and Naturalization Service (INS). It is a bureau of the Department of Homeland Security.
- *U.S. Secret Service*. Not only provides security to high government officials, but enforces federal laws relating to currency, coins, and obligations or securities of the United States or a foreign government. The Secret Service is a bureau of the Department of Homeland Security.

## § 7.17 State Courts

Many cases that are brought in federal court may also be brought in state court. Although some cases must be brought in federal court, many more must be brought in state court. Some federal courts have established working relationships with state and local courts to help resolve scheduling conflicts, to share some services (such as jury rolls), and to promote cooperation in addressing common problems.

State–federal judicial councils facilitate good relations between the federal and state courts. Such councils are usually created by orders of the state supreme court and the federal district court or court of appeals.

# Appendix:

## Code of Conduct for Judicial Employees

### § 310 Overview

#### § 310.10 Scope

- (a) This Code of Conduct applies to all employees of the judicial branch including interns, externs, and other volunteer court employees, except it does not apply to Justices; judges; and employees of the United States Supreme Court, the Administrative Office of the United States Courts, the Federal Judicial Center, the Sentencing Commission, and federal public defender offices.
- (b) Justices and employees of the Supreme Court are subject to standards established by the Justices of that Court. Judges are subject to the Code of Conduct for United States Judges (Guide, Vol 2A, Ch 2). Employees of the AO and the FJC are subject to their respective agency codes. Employees of the Sentencing Commission are subject to standards established by the Commission. Federal public defender employees are subject to the Code of Conduct for Federal Public Defender Employees (Guide, Vol 2A, Ch 4). Intermittent employees [HR Manual, Sec 5, Ch 4.7] are subject to canons 1, 2, and 3 and such other provisions of this code as may be determined by the appointing authority.
- (c) Employees who occupy positions with functions and responsibilities similar to those for a particular position identified in this code should be guided by the standards applicable to that position, even if the position title differs. When in doubt, employees may seek an advisory opinion as to the applicability of specific code provisions.

- (d) Contractors and other nonemployees not covered above who serve the judiciary are not covered by this code, but appointing authorities may impose these or similar ethical standards on such nonemployees, as appropriate.

## § 310.20 History

- (a) With the adoption of the Code of Conduct for Judicial Employees on September 19, 1995, the Judicial Conference repealed the Code of Conduct for Clerks (and Deputy Clerks), the Code of Conduct for United States Probation Officers (and Pretrial Services Officers), the Code of Conduct for Circuit Executives, the Director of the Administrative Office, the Director of the Federal Judicial Center, the Administrative Assistant to the Chief Justice, and All Administrative Office Employees Grade GS-15 and Above, the Code of Conduct for Staff Attorneys of the United States, the Code of Conduct for Federal Public Defenders, and the Code of Conduct for Law Clerks. JCUS-SEP 95, p. 74.
- (b) This Code of Conduct for Judicial Employees took effect on January 1, 1996.
- (c) In March 2001, the Conference revised Canon 3F(4). JCUS-MAR 01, pp. 10–12.
- (d) The Conference revised the following provisions in March 2013: “Scope” (§ 310.10(a) and (d)); “Definitions” (§ 310.30(a)); Canon 1; Canon 3F(2)(a)(ii); Canon 4A; and Canon 5B. JCUS-MAR 13, p. 9.

## § 310.30 Definitions

- (a) Member of a Judge’s Personal Staff

As used in this code in canons 3F(2)(b), 3F(5), 4B(2), 4C(1), and 5B, a member of a judge’s personal staff means a judge’s secretary or judicial assistant, a judge’s law clerk, intern, extern, or other volunteer court employee, and a courtroom deputy clerk or court reporter whose assignment with a particular

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judge is reasonably perceived as being comparable to a member of the judge's personal staff.

(b) Third Degree of Relationship

As used in this code, the third degree of relationship is calculated according to the civil law system to include the following relatives: parent, child, grandparent, grandchild, great grandparent, great grandchild, brother, sister, aunt, uncle, niece and nephew.

§ 310.40 Further Guidance

- (a) The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this code. Employees should consult with their supervisor and/or appointing authority for guidance on questions concerning this code and its applicability before a request for an advisory opinion is made to the Committee on Codes of Conduct.
- (b) In assessing the propriety of one's proposed conduct, a judicial employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations (e.g., receipt of a gift may implicate canon 2 as well as canon 4C(2) and the Ethics Reform Act gift regulations).
- (c) Should a question remain after this consultation, the affected judicial employee, or the chief judge, supervisor, or appointing authority of such employee, may request an advisory opinion from the Committee. Requests for advisory opinions may be addressed to the chair of the Committee on Codes of Conduct by email or as follows:

Chair of the Committee on Codes of Conduct  
c/o Office of the General Counsel  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Washington, D.C. 20544

## § 320 Text of the Code

### *Canon 1*

A judicial employee should uphold the integrity and independence of the judiciary and of the judicial employee's office

An independent and honorable Judiciary is indispensable to justice in our society. A judicial employee should personally observe high standards of conduct so that the integrity and independence of the Judiciary are preserved and the judicial employee's office reflects a devotion to serving the public. Judicial employees should require adherence to such standards by personnel subject to their direction and control. The provisions of this code should be construed and applied to further these objectives. The standards of this code do not affect or preclude other more stringent standards required by law, by court order, or by the appointing authority.

### *Canon 2*

A judicial employee should avoid impropriety and the appearance of impropriety in all activities

A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office. A judicial employee should not allow family, social, or other relationships to influence official conduct or judgment. A judicial employee should not lend the prestige of the office to advance or to appear to advance the private interests of others. A judicial employee should not use public office for private gain.

### *Canon 3*

A judicial employee should adhere to appropriate standards in performing the duties of the office

In performing the duties prescribed by law, by resolution of the Judicial Conference of the United States, by court order, or by the judicial employee's appointing authority, the following standards apply:

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- A. A judicial employee should respect and comply with the law and these canons. A judicial employee should report to the appropriate supervising authority any attempt to induce the judicial employee to violate these canons.

Note: A number of criminal statutes of general applicability govern federal employees' performance of official duties. These include:

- 18 U.S.C. § 201 (bribery of public officials and witnesses);
- 18 U.S.C. § 211 (acceptance or solicitation to obtain appointive public office);
- 18 U.S.C. § 285 (taking or using papers relating to government claims);
- 18 U.S.C. § 287 (false, fictitious, or fraudulent claims against the government);
- 18 U.S.C. § 508 (counterfeiting or forging transportation requests);
- 18 U.S.C. § 641 (embezzlement or conversion of government money, property, or records);
- 18 U.S.C. § 643 (failing to account for public money);
- 18 U.S.C. § 798 and 50 U.S.C. § 783 (disclosure of classified information);
- 18 U.S.C. § 1001 (fraud or false statements in a government matter);
- 18 U.S.C. § 1719 (misuse of franking privilege);
- 18 U.S.C. § 2071 (concealing, removing, or mutilating a public record);
- 31 U.S.C. § 1344 (misuse of government vehicle);
- 31 U.S.C. § 3729 (false claims against the government).

In addition, provisions of specific applicability to court officers include:

- 18 U.S.C. §§ 153, 154 (court officers embezzling or purchasing property from bankruptcy estate);

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- 18 U.S.C. § 645 (embezzlement and theft by court officers);
- 18 U.S.C. § 646 (court officers failing to deposit registry moneys);
- 18 U.S.C. § 647 (receiving loans from registry moneys from court officer).

This is not a comprehensive listing but sets forth some of the more significant provisions with which judicial employees should be familiar.

- B. A judicial employee should be faithful to professional standards and maintain competence in the judicial employee's profession.
- C. A judicial employee should be patient, dignified, respectful, and courteous to all persons with whom the judicial employee deals in an official capacity, including the general public, and should require similar conduct of personnel subject to the judicial employee's direction and control. A judicial employee should diligently discharge the responsibilities of the office in a prompt, efficient, nondiscriminatory, fair, and professional manner. A judicial employee should never influence or attempt to influence the assignment of cases, or perform any discretionary or ministerial function of the court in a manner that improperly favors any litigant or attorney, nor should a judicial employee imply that he or she is in a position to do so.
- D. A judicial employee should avoid making public comment on the merits of a pending or impending action and should require similar restraint by personnel subject to the judicial employee's direction and control. This proscription does not extend to public statements made in the course of official duties or to the explanation of court procedures. A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties, nor should a judicial employee employ such information for personal gain. A former judicial employee should observe the same restrictions on disclosure of confiden-

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tial information that apply to a current judicial employee, except as modified by the appointing authority.

- E. A judicial employee should not engage in nepotism prohibited by law.

*Note:* See also 5 U.S.C. § 3110 (employment of relatives); 28 U.S.C. § 458 (employment of judges' relatives).

- F. Conflicts of Interest

(1) A judicial employee should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a judicial employee knows that he or she (or the spouse, minor child residing in the judicial employee's household, or other close relative of the judicial employee) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the judicial employee's ability properly to perform official duties in an impartial manner.

(2) Certain judicial employees, because of their relationship to a judge or the nature of their duties, are subject to the following additional restrictions:

(a) A staff attorney or law clerk should not perform any official duties in any matter with respect to which such staff attorney or law clerk knows that:

(i) he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(ii) he or she served as lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law had served (during such association) as a lawyer concerning the matter (provided that the prohibition relating to the previous practice of law does not apply if he or she did not work on the matter, did not access confidential information relating to the matter, and did not practice in

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- the same office as the lawyer), or he, she, or such lawyer has been a material witness;
- (iii) he or she, individually or as a fiduciary, or the spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceeding;
  - (iv) he or she, a spouse, or a person related to either within the third degree of relationship (as defined above in § 310.40), or the spouse of such person (A) is a party to the proceeding, or an officer, director, or trustee of a party; (B) is acting as a lawyer in the proceeding; (C) has an interest that could be substantially affected by the outcome of the proceeding; or (D) is likely to be a material witness in the proceeding;
  - (v) he or she has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.
- (b) A secretary to a judge, or a courtroom deputy or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff, should not perform any official duties in any matter with respect to which such secretary, courtroom deputy, or court reporter knows that he or she, a spouse, or a person related to either within the third degree of relationship, or the spouse of such person
- (i) is a party to the proceeding, or an officer, director, or trustee of a party;
  - (ii) is acting as a lawyer in the proceeding;
  - (iii) has an interest that could be substantially affected by the outcome of the proceeding; or

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- (iv) is likely to be a material witness in the proceeding; provided, however, that when the foregoing restriction presents undue hardship, the judge may authorize the secretary, courtroom deputy, or court reporter to participate in the matter if no reasonable alternative exists and adequate safeguards are in place to ensure that official duties are properly performed. In the event the secretary, courtroom deputy, or court reporter possesses any of the foregoing characteristics and so advises the judge, the judge should also consider whether the Code of Conduct for United States Judges may require the judge to recuse.
- (c) A probation or pretrial services officer should not perform any official duties in any matter with respect to which the probation or pretrial services officer knows that:
  - (i) he or she has a personal bias or prejudice concerning a party;
  - (ii) he or she is related within the third degree of relationship to a party to the proceeding, or to an officer, director, or trustee of a party, or to a lawyer in the proceeding;
  - (iii) he or she, or a relative within the third degree of relationship, has an interest that could be substantially affected by the outcome of the proceeding.
- (3) When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such matter so as to avoid a conflict or the appearance of a conflict of interest. A judicial employee

should observe any restrictions imposed by his or her appointing authority in this regard.

- (4) A judicial employee who is subject to canon 3F(2)(a) should keep informed about his or her personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of a spouse or minor child residing in the judicial employee's household. For purposes of this canon, "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:
  - (a) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the employee participates in the management of the fund;
  - (b) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
  - (c) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
  - (d) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.
- (5) A member of a judge's personal staff should inform the appointing judge of any circumstance or activity of the staff member that might serve as a basis for disqualification of either the staff member or the judge, in a matter pending before the judge.

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*Canon 4*

In engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with disclosure requirements

A. Outside Activities

A judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves. Subject to the foregoing standards and the other provisions of this code, a judicial employee may engage in such activities as civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, and recreational activities, and may speak, write, lecture, and teach. If such outside activities concern the law, the legal system, or the administration of justice, the judicial employee should first consult with the appointing authority to determine whether the proposed activities are consistent with the foregoing standards and the other provisions of this code. A judicial employee should not accept a governmental appointment that has the potential for dual service to and/or supervision by independent branches of government (including state courts) or different governments during judicial employment.

B. Solicitation of Funds

A judicial employee may solicit funds in connection with outside activities, subject to the following limitations:

- (1) A judicial employee should not use or permit the use of the prestige of the office in the solicitation of funds.
- (2) A judicial employee should not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign. A member of a judge's personal staff should not solicit any

court personnel to contribute funds to any such activity under circumstances where the staff member's close relationship to the judge could reasonably be construed to give undue weight to the solicitation.

- (3) A judicial employee should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, except as an incident to a general fund-raising activity.

C. Financial Activities

- (1) A judicial employee should refrain from outside financial and business dealings that tend to detract from the dignity of the court, interfere with the proper performance of official duties, exploit the position, or associate the judicial employee in a substantial financial manner with lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, provided, however, that court reporters are not prohibited from providing reporting services for compensation to the extent permitted by statute and by the court. A member of a judge's personal staff should consult with the appointing judge concerning any financial and business activities that might reasonably be interpreted as violating this code and should refrain from any activities that fail to conform to the foregoing standards or that the judge concludes may otherwise give rise to an appearance of impropriety.
- (2) A judicial employee should not solicit or accept a gift from anyone seeking official action from or doing business with the court or other entity served by the judicial employee, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties; except that a judicial employee may accept a gift as permitted by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder. A judicial employee should endeavor to prevent a member of a judicial

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employee's family residing in the household from soliciting or accepting any such gift except to the extent that a judicial employee would be permitted to do so by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder.

*Note:* See 5 U.S.C. § 7353 (gifts to federal employees). See also 5 U.S.C. § 7342 (foreign gifts); 5 U.S.C. § 7351 (gifts to superiors).

- (3) A judicial employee should report the value of gifts to the extent a report is required by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

*Note:* See 5 U.S.C. App. §§ 101 to 111 (Ethics Reform Act financial disclosure provisions).

- (4) During judicial employment, a law clerk or staff attorney may seek and obtain employment to commence after the completion of the judicial employment. However, the law clerk or staff attorney should first consult with the appointing authority and observe any restrictions imposed by the appointing authority. If any law firm, lawyer, or entity with whom a law clerk or staff attorney has been employed or is seeking or has obtained future employment appears in any matter pending before the appointing authority, the law clerk or staff attorney should promptly bring this fact to the attention of the appointing authority.

### D. Practice of Law

A judicial employee should not engage in the practice of law except that a judicial employee may act pro se, may perform routine legal work incident to the management of the personal affairs of the judicial employee or a member of the judicial employee's family, and may provide pro bono legal services in civil matters, so long as such pro se, family, or pro bono legal work does not present an appearance of impropriety, does not take place while on duty or in the judicial employee's workplace,

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and does not interfere with the judicial employee's primary responsibility to the office in which the judicial employee serves, and further provided that:

- (1) in the case of pro se legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings);
- (2) in the case of family legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings) and does not involve the entry of an appearance in a federal court;
- (3) in the case of pro bono legal services, such work
  - (a) is done without compensation;
  - (b) does not involve the entry of an appearance in any federal, state, or local court or administrative agency;
  - (c) does not involve a matter of public controversy, an issue likely to come before the judicial employee's court, or litigation against federal, state or local government; and
  - (d) is reviewed in advance with the appointing authority to determine whether the proposed services are consistent with the foregoing standards and the other provisions of this code.

Judicial employees may also serve as uncompensated mediators or arbitrators for nonprofit organizations, subject to the standards applicable to pro bono practice of law, as set forth above, and the other provisions of this code.

A judicial employee should ascertain any limitations imposed by the appointing judge or the court on which the appointing judge serves concerning the practice of law by a former judicial employee before the judge or the court and should observe such limitations after leaving such employment.

*Note:* See also 18 U.S.C. § 203 (representation in matters involving the United States); 18 U.S.C. § 205 (claims against the

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United States); 28 U.S.C. § 955 (restriction on clerks of court practicing law).

E. Compensation and Reimbursement

A judicial employee may receive compensation and reimbursement of expenses for outside activities provided that receipt of such compensation and reimbursement is not prohibited or restricted by this code, the Ethics Reform Act, and other applicable law, and provided that the source or amount of such payments does not influence or give the appearance of influencing the judicial employee in the performance of official duties or otherwise give the appearance of impropriety. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by a judicial employee and, where appropriate to the occasion, by the judicial employee's spouse or relative. Any payment in excess of such an amount is compensation.

A judicial employee should make and file reports of compensation and reimbursement for outside activities to the extent prescribed by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Notwithstanding the above, a judicial employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States, provided, however, that court reporters are not prohibited from receiving compensation for reporting services to the extent permitted by statute and by the court.

*Note:* See 5 U.S.C. App. §§ 101 to 111 (Ethics Reform Act financial disclosure provisions); 28 U.S.C. § 753 (court reporter compensation). See also 5 U.S.C. App. §§ 501 to 505 (outside earned income and employment).

*Canon 5*

A judicial employee should refrain from inappropriate political activity

A. Partisan Political Activity

A judicial employee should refrain from partisan political activity; should not act as a leader or hold any office in a partisan political organization; should not make speeches for or publicly endorse or oppose a partisan political organization or candidate; should not solicit funds for or contribute to a partisan political organization, candidate, or event; should not become a candidate for partisan political office; and should not otherwise actively engage in partisan political activities.

B. Nonpartisan Political Activity

A member of a judge's personal staff, lawyer who is employed by the court and assists judges on cases, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, and district court executive should refrain from nonpartisan political activity such as campaigning for or publicly endorsing or opposing a nonpartisan political candidate; soliciting funds for or contributing to a nonpartisan political candidate or event; and becoming a candidate for nonpartisan political office. Other judicial employees may engage in nonpartisan political activity only if such activity does not tend to reflect adversely on the dignity or impartiality of the court or office and does not interfere with the proper performance of official duties. A judicial employee may not engage in such activity while on duty or in the judicial employee's workplace and may not utilize any federal resources in connection with any such activity.

*Note:* See also 18 U.S.C. chapter 29 (elections and political activities).

## **The Federal Judicial Center**

### **Board**

The Chief Justice of the United States, *Chair*

Judge Curtis L. Collier, U.S. District Court for the Eastern District of Tennessee

Magistrate Judge Jonathan W. Feldman, U.S. District Court for the Western District of New York

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Chief Judge C. Ray Mullins, U.S. Bankruptcy Court for the Northern District of Georgia

Judge George Z. Singal, U.S. District Court for the District of Maine

Judge David S. Tatel, U.S. Court of Appeals for the District of Columbia Circuit

James C. Duff, Director of the Administrative Office of the U.S. Courts

### **Director**

Judge Jeremy D. Fogel

### **Deputy Director**

John S. Cooke

## **About the Federal Judicial Center**

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training for judges and court staff, including in-person programs, video programs, publications, curriculum packages for in-district training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and informs federal judicial personnel of developments in international law and other court systems that may affect their work. Two units of the Director's Office—the Information Technology Office and the Editorial & Information Services Office—support Center missions through technology, editorial and design assistance, and organization and dissemination of Center resources.