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LAW CLERKING: 'MY FAVORITE YEAR'

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In the 1982 comedy film "My Favorite Year," Peter O'Toole plays a washed-up movie actor, long accustomed to the luxury of many "takes" in getting his lines right. After improvidently agreeing to give a live performance, he lives in dread that an audience will discover what he regards as the painfully obvious limits of his talent. Ultimately, the performance does in fact go awry, but – this is a comedy, after all – unexpected events make the production a rollicking success.

I suspect that all of us, at one time or another, have feared the exposure of our limits when confronted by challenges for which we felt ill-prepared. Law is, after all, a public and demanding profession. Our capabilities are tested in front of audiences ranging from clients and colleagues to judges and professionals in other disciplines. Our live performances are always under review, whether in offices, courtrooms, boardrooms, or a host of other venues filled with discerning observers. We seldom have the luxury of many "takes" as we strive to perform our duties correctly. We sometimes make mistakes. Yet we find that even when events go awry, our training and professionalism sustain us; they shepherd us toward eventual success and fulfillment.

As members of my generation in the law grow a bit long in the tooth, we occasionally look back at our formative experiences and feel afresh the wonder and excitement of the early days in our careers. For many of us, regardless of how our professional pathways later diverged, the common point of beginning – and the most memorable experience – was the first job right out of law school: the judicial clerkship (aka the "law clerkship"). It was both a heady and humbling time, filled with wise mentoring by seasoned jurists and solemnized by the sense of public responsibility that pervaded the judges' chambers. It was a time when



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the rule of law, the imperative of judicial impartiality, the promise of equal opportunity, and the obligation to provide access to justice became more than phrases; they became compass points for our future journeys as lawyers. It was a time of intellectual growth, as the cases presented fact-framed issues beyond the familiar boundaries of courses in the law school curriculum. It was a time of (judge-constrained) hubris, as we tried nobly to draft opinions better than those we had dissected in the classroom – and learned much about the discipline of clear expression. It was a time of training and professionalism that prepared us for the live performances lying ahead. We were challenged and nourished. It was our favorite year.

Some of these clerkships, of course, lasted more than a single year. Indeed, two-year clerkships (or clerkships for one year plus a second year if mutually agreeable) are common and, most recently, "career clerkships" of indefinite duration have become widespread. Such long-term clerkships offer obvious advantages to young lawyers in economically distressed times, as well as to judges who prefer to retain productive relationships while minimizing the investments of time, and the risks of uncertainty, attendant to annual or biennial law clerk turnover. But I would offer a gentle dissent against these long-term clerkships insofar as they diminish opportunities for new generations of law school graduates. The judicial clerkship is a gateway experience. It inculcates professional values, reinforces a sense of professional identity, and enhances professional skills in research, writing, and analysis. For the sake of our profession and the administration of justice, I respectfully submit that the judiciary should keep the clerkship gateway open wide, making this

unique experience as broadly available as possible.

A Law Clerk's Memories

My own gateway was a clerkship for approximately a year in the chambers of the Hon. Henry F. McQuade, then Chief Justice of the Idaho Supreme Court. While waiting for working space to open up in the Chief Justice's chambers, I also worked for approximately two months in the chambers of Justice Charles R. Donaldson, a kind and collegial member of the Court. Chief Justice McQuade was very thoughtful and supportive toward me. Perhaps it had something to do with the fact that the Chief Justice came from Pocatello, as did I, or with the fact that he, like my parents, had attended the University of Idaho during the Great Depression, when students worked hard and lived meagerly in order to stay in school. Perhaps the Chief Justice hoped that I would exhibit some of the habits and dedication he had seen earlier in my mother and father. I hope he was satisfied in that regard; in any event, I know that I was honored to serve in his chambers.

The Chief Justice allowed his clerks broad discretion in drafting opinions, although he was a stickler for correct procedure and terminology (e.g., appeals in criminal cases must be taken from "judgments of conviction," not from "convictions"). Moreover, he was careful in each case to provide the law clerks his hand-written notes synthesizing the reasoning of the Court as he had gleaned it during the justices' post-argument conference. He watched carefully to make sure the draft opinions followed that guidance. After working on an opinion, if I thought the law pointed in a direction different from the Court's consensus, the Chief Justice would listen carefully to my

views; the final determination, however, remained his. When an issue was vexing, he would ask for copies of all authorities my research had disclosed, and he would (re)read them, along with pertinent parts of the record. He had an uncanny ability to identify cases that counsel had not cited or that my research (unaided in those days by Lexis and Westlaw) had not revealed. He kept at his desk an informal binder labeled "Hidden Authority," containing cases that had not been digested completely or correctly by the editorial writers for the West Publishing Company. If a lawyer relied on headnotes alone in citing any of those cases, the Chief Justice knew it!

One of my duties as a law clerk was to read the advance sheets, looking for any publication anomalies. One of the most memorable occurred in the important case of *State v. Tinno*.¹ There, the Court upheld a district court judgment acquitting a member of the Shoshone-Bannock Tribes of a crime allegedly committed by exercising a treaty fishing right in violation of state law. The opinion of the Court was written by Justice Joseph J. McFadden. Chief Justice McQuade added a special concurrence focusing on the supremacy clause of the United States Constitution and underscoring the modern importance of treaty rights. The concurring opinion referred at one point to fishing streams that had been "dammed, depleted or polluted." West Publishing Company printed the word "dammed" as "damned,"² producing no small amount of consternation when the advance sheets arrived in the Chief Justice's office! We asked West to correct the error in the bound versions of the Idaho Reports and Pacific Second Reports, but we were unsuccessful. Type-set products in those days were not easily changed. Technology may seem like a mixed blessing today, but I wish word processing had arrived in time for that case!

The Supreme Court's law clerks also prepared pre-argument memoranda, and the Chief Justice's clerks occasionally provided assistance on matters of judicial administration. At the Chief Justice's request, I worked on matters relating to the Idaho Judicial Council, chaired by the Chief Justice. Under Idaho Code § 1-2102, one of the functions of the Judicial Council – in addition to its well-known responsibilities for judicial merit selection and for judicial discipline – was, and is, to conduct studies

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on improvement in the administration of justice. At the Chief Justice's direction, I organized statewide hearings on implementation of Idaho's judicial reform that had created the Magistrate Division of the District Court, superseding all of the police courts, probate courts, and justice of the peace courts in Idaho's 44 counties. The Judicial Council project, culminating in a report entitled *Idaho Justice at the Grass Roots* (December, 1972),³ provided a unique introduction to the Idaho judicial system for a young law graduate from Pocatello.

Several justices of the Supreme Court, including Chief Justice McQuade, enlisted the help of their law clerks in reviewing law clerk applications and in making recommendations for hiring the next set of law clerks. When I undertook this task for the Chief Justice, it appeared to me that the Court had not yet hired a woman as a law clerk. I suggested that the law clerk applications, which contained full names and photographs of the applicants, might be made gender-neutral, at least at the outset of the selection process, by substituting initials for first and middle names, and by deleting the photographs. Although the Court as a whole did not adopt this practice, Chief Justice McQuade allowed me to apply this practice on the applications that came to him. The Chief Justice selected two new law clerks, one man and one woman, in the next hiring cycle.

Clerking from the Appellate Judge's Point of View

In 1981, I was appointed by Governor John V. Evans to join the Hon. Jesse Walters and Hon. Roger Swanstrom as judges of the newly created Idaho Court of Appeals, effective in January, 1982. Like the public performance in Peter O'Toole's motion picture, this judicial service would prove to be a daunting experience in which I was grateful for the quality of my colleagues but, at the same

time, keenly aware of my personal limits. I needed top-quality help, and I began looking at the judge-clerk relationship from a new perspective. The judges of the Court of Appeals were authorized one law clerk each; the number later was increased to two. During my work at the Court from 1982 to mid-1990, I hired ten law clerks, nine of whom served (the tenth tragically being rendered unable to serve by an automobile accident). The clerks were hired on a "one year plus one" basis and many served two years. As it turned out, and not by design, the ten consisted of equal numbers of men and women. They came from the University of Idaho College of Law as well as other law schools across the country. I hired them based on academic excellence and demonstrated writing ability, as well as good character and professionalism (including civility), as gleaned from interviews and letters of recommendation. I did not impose a political or "favored viewpoint" criterion because it potentially could have deprived me of the opportunity to engage first-class minds.

The law clerks were utilized in a way that reflected the reason the Court of Appeals was created: to solve a backlog problem in Idaho's appellate system. The Idaho Constitution, at Article I, § 18, provides that the state courts shall deliver "right and justice ... without sale, denial, delay, or prejudice." The new Court's task was to deliver "right and justice" by deciding cases carefully while also disposing of cases expeditiously in order to reduce "delay."⁴ Consequently, during the 1980s, the Court of Appeals judges generally did not ask the law clerks to write pre-argument memoranda. We were reading the briefs and relevant portions of the record before argument anyway, so it appeared to us that there would be greater productivity value in having the clerks focus on helping with opinions.

After each round of arguments I would meet with the clerks and discuss the cases assigned to me. In a manner similar to the approach earlier taken by Chief Justice McQuade, I would broadly outline the direction my colleagues and I believed each opinion should go. We would also discuss whether the opinion was likely to be individually signed or issued *per curiam*, the latter designation being used primarily when a case called for a statement of well-settled law and a garden-variety application of the law to the facts. I was fully involved in crafting the substance of the *per curiam* opinions, but my stylistic editing was lighter than my treatment of signed opinions. In all cases I asked the law clerks to do independent research, and we developed a checklist to assure consistency in the organization and scope of the research effort. If the research caused a clerk to question the guidance earlier given about the direction of an opinion, the law clerk usually would write either a memorandum on a particular issue or an entire opinion reflecting the clerk's view, for my consideration. Ultimately, the "call" on which direction to pursue was mine alone.

During my eight-and-one-half years on the Court, I wrote for publication, with my law clerks' help, 441 majority opinions (including *per curiam* opinions), along with 46 substitute majority opinions, 60 specially concurring opinions, and 29 dissents. My colleagues on the Court had similar records of high productivity in generating published opinions and, of course, each of us read and commented on the others' work. I mention publication because in those days the Court of Appeals seldom decided cases without a published opinion; indeed, I do not recall ever writing an unpublished opinion. The reason was not that we were enamored of seeing our words in print, but rather that we thought explaining the basis of each decision was a foundational element of appellate justice. Moreover, we thought accountability (what commentators today might call "transparency in government") required that those explanatory statements be written and publicly accessible.⁵ Of course, our caseloads, while challenging, were smaller than those facing Idaho's appellate judges today.⁶

The Court of Appeals, in its early years, developed templates of analysis for commonly recurring issues, such as sentence reviews in criminal appeals and

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standards for reviewing summary judgments in civil cases. The templates did not dictate the outcomes of particular cases, but they did promote consistency in the language chosen by the Court to articulate well-settled legal principles. We believed this consistency was helpful in signaling stability and predictability in the law to trial courts as well as to lawyers advising clients. The consistency also minimized any inadvertent "language drift" in draft opinions due to the turnover of law clerks, and it freed up the clerks and judges to devote time to careful crafting of language in the cases presenting novel or nuanced issues.

In every case, I asked the clerks to develop their analyses in written memoranda and to write draft opinions carefully enough to merit publication in the official reports – even though the writings almost never would be published without substantial revision or wholesale rewriting. I made this request because I had found in my own work that there is an iterative relationship between thought and expression.⁷ That is to say, cogency of thought is tested by coherency of expression. I also told my clerks that they should imagine a law professor or sharp-eyed law review student focusing on one of our opinions some day and writing a critical article or comment about it. We needed to make sure our analysis could pass the test of academic as well as professional scrutiny. My clerks may have thought at times that I embraced these tests too eagerly, and that I re-wrote (and re-wrote again) our opinions more often than necessary; but the clerks remained unfailingly gracious and hard-working. I was proud of all of them, and today I am profoundly grateful for their contributions to the quality of the Court's work.

Law clerking has been described as "the culmination of a great period of schooling for the young graduate.... Having seen the judicial process firsthand, the clerk ... will have a sense of

how fragile some judgments really are. But [s]he will realize that they are, nonetheless, our only promise. In this discovery lies the beginning of ... wisdom.⁸ Those evocative words capture the experience I had as a clerk and the experience I sought to provide the clerks who later served me. The clerkship is a distinctive passage toward a life of fulfillment in the law. That is why it is vitally important to the profession and why, for me, it remains "my favorite year."

About the Author

Dean Donald L. Burnett, Jr., a native of Pocatello, has served as the University of Idaho's law dean and as Foundation Professor of Law since 2002. He is a former President of the Idaho State Bar, Judge of the Idaho Court of Appeals, and Dean of the Louis D. Brandeis School of Law at the University of Louisville. He received his legal education at the University of Chicago (J.D.) and University of Virginia (LL.M.)

Endnotes

¹ 497 P.2d 1386, 1394 (1972).

² *Id.* at 1395.

³ Available in hard copy from this author, the Idaho Judicial Council, or the Administrative Office of the Courts.

⁴ See generally, "Right and Justice ... without Delay" – Report of the Task Force on Idaho's Court of Appeals: The Next Quarter Century and Beyond" (Dec. 2007), available in hard copy from the Administrative Office of the Courts.

⁵ See generally, Paul D. Carrington, Daniel J. Meador, & Maurice Rosenberg, *Justice on Appeal* (West Publishing Co. 1976).

⁶ See "Right and Justice ... without Delay," note *iv, infra*.

⁷ For further discussion of this point, see "The Discipline of Clear Expression" (short essay), 32 *The Advocate* 8 (Idaho State Bar, June 1989).

⁸ Hon. Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 *VAND. LAW REV.* 1179, 1185-96 (1973).