

# JUDICIAL CLERKSHIPS

*Justice Larry M. Boyle*



IN THE SPRING 1991 issue of the *Clark Memorandum*, an article about a visiting professor's experience at the law school discussed the relative worth of a judicial clerkship.<sup>1</sup> The professor was quoted as saying, "If a student is marginally interested in a federal clerkship he or she should consider it" and went on to conclude that "as a federal clerk you get to see the world from the mountain top."<sup>2</sup> Had I not previously experienced what I have perceived to be a federal court emphasis while interviewing BYU law students or in conversations with its graduates over the past 15 years, I would not have been so interested in these comments.

While I enthusiastically agree that judicial clerkships are extremely valuable, there is no reason to assume that only certain federal court clerkships are valuable or worthy of pursuit by even the exceptional law students. Indeed, there are many state court and less emphasized federal court clerkships that can be extremely valuable to a young lawyer. Just like the federal clerkships at the United States Supreme Court or federal circuit courts, these "other," less emphasized, clerkships also provide a wonderful opportunity from which to "see the world from the mountain top," even if the view is from Mt. McKinley rather than from Mt. Everest. **ILLUSTRATION BY MORAY MAGLEBY**

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OTHER  
MOUNTAIN  
TOPS  
FROM WHICH  
TO VIEW  
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WORLD

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## OTHER LOFTY MOUNTAIN TOPS

**I**n a recent essay describing the nature of the clerkship selection process, Judge Alex Kozinski of the Ninth Circuit Court of Appeals chided law schools for not providing adequate information regarding other extremely valuable clerkship opportunities.<sup>3</sup> Judge Kozinski stated that this lack of information "is particularly true about clerkships in the state courts, Claims Court, Tax Court, etc. Few schools

of law State trial and appellate courts and the United States District, Magistrate, Tax, Bankruptcy, and Claims Courts are the courts most frequented by practicing attorneys

Moreover, judicial clerkships help provide a post-graduate education that is invaluable. Throughout my career in private practice and on the bench, I have frequently drawn on the skills and knowledge developed when I clerked for Chief Justice Robert Bakes at the Idaho Supreme Court in 1972. Most appellate clerks develop excellent writing, researching, and other lawyering skills, and a clerkship at a state or federal trial court provides a unique opportunity to learn courtroom procedure, evidence, advocacy skills, and trial tactics in a way that would take years to learn in private practice. This

interest in placing law school graduates in the most promising positions available as they leave school and embark on their respective careers. Clerkships have a significant impact on the prestige of a law school<sup>5</sup> and likewise provide the best start for a young lawyer after graduation. Therefore, it is important that students at all law schools be adequately informed about the many possible clerkship options and opportunities available following graduation.

The responsibility to spread the word about state court and less emphasized federal judicial clerkships cannot rest solely with a law school's placement director. As Judge Kozinski has pointed out, "No one plays a more decisive role in influencing clerkship selection" than law school professors.<sup>6</sup>

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present these as real options to students. Because most law schools largely ignore these clerkships, they get ignored by students, many of whom wind up not clerking at all."<sup>4</sup> In my view, this is most unfortunate and certainly should not be the case at the J. Reuben Clark Law School.

While a purpose of this essay is to equate the value of a judicial clerkship at a state supreme court with that of a federal court of appeals clerkship, I also encourage promising law students and their professors to seriously consider a broader field of clerking opportunities. This is because judicial clerkships have intrinsic value that extends well beyond the opportunities available in various federal circuit courts or the United States Supreme Court. Clerkships of all kinds, and at all levels of the state and federal judiciary, expose young lawyers to challenging legal problems and provide a window into our legal system that can be obtained in no other way. Many of these courts address significant legal issues that will be very helpful to judicial clerks when they enter the practice

unique learning experience is not limited only to the most prestigious federal courts.

Illustrative of my point is the example of Justice Sandra Day O'Connor. Before Justice O'Connor was confirmed a member of the United States Supreme Court she had served as a state trial court judge and an intermediate court of appeals judge in Arizona. There is no reason to believe that her state court clerks in the Court of Appeals of Arizona or the Arizona trial court received any less training, made any less contribution, or had anything less than the same great learning experience that her current clerks receive at the Supreme Court. For schools like the J. Reuben Clark Law School, which has long recognized the value of judicial clerkships, there should be wide agreement and recognition that many state and less emphasized federal judicial clerkships, including those at the trial level, prepare attorneys for the practice of law in a way that cannot be duplicated elsewhere.

In my view, professors, administrators, and students all share a mutual

Perceptive law professors understand that prestigious federal courts are not the only courts that address the important legal issues of our day or provide continuing opportunities for learning and development.

I recently attended a senior appellate judicial conference at the New York University Law School along with 20 selected state supreme court justices from 13 states.<sup>7</sup> Dean John Sexton of that law school opined that the most important judicial work in the nation today in the area of individual rights is taking place at the state supreme courts. He told us that in his opinion one of the darkest hours of the United States Supreme Court was when it declined to protect the First Amendment rights of the Mormons over a century ago.<sup>8</sup> He indicated that it was the state supreme courts that filled that void and ultimately restored civil rights to members of the LDS Church.<sup>9</sup> Dean Sexton concluded that state courts today are preserving essential civil liberties by recognizing these rights under their respective state constitutions, when,

in his view, the United States Supreme Court is narrowing and limiting those rights

Whether or not one agrees with Dean Sexton's comments and opinions is not important. What is important is the reality that state supreme courts are in fact dealing with many of the most significant legal issues of our day and that the judicial clerks who are fortunate enough to work for these high courts will have a key role in the development and direction of the law.

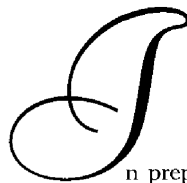
Another reason for expanding the number of judicial clerkships considered is a practical concern close to all students' hearts—employment opportunities! Yet if law students restrict their search solely to judicial clerkships in the most sought after federal courts, the students' opportunities will obviously be limited. There are many excellent clerkships available when one broadens the potential field to include trial and appellate courts from all 50 states and the federal District, Magistrate, Bankruptcy, Tax, and Claims Courts throughout the nation. A comparison of clerkships in the federal courts and state courts in Idaho is illustrative. While there are nine federal judges in Idaho who employ 14 clerks, there are 41 state court judges who employ 49 clerks.<sup>10</sup>

Securing a clerkship position in a state appellate court is extremely competitive. This year's law clerks at the Idaho Supreme Court came to us from several fine law schools, including Washington, Idaho, Yale, BYU, Minnesota, and Gonzaga. Law students should be encouraged early in their law school experience to seek judicial clerkships of all kinds and at all levels in both the state and federal judiciaries.

Unfortunately, a comparison of BYU law clerks at the state and federal courts reveals a far fewer number of clerks going to state courts than I would expect. This year, 20 graduates of the J. Reuben Clark Law School are serving clerkships. Of these 1991 graduates, 10 are clerking at state courts and 10 are clerking at federal courts. Over the past five years, 62 graduates have clerked at state courts and 50

graduates have been federal law clerks.<sup>11</sup> These numbers include clerkships of all kinds and at all levels in both the state and federal judiciaries. These figures demonstrate a need for more awareness of the clerkship opportunities available at state courts. Considering the overall number of state clerkships available, the number of graduates serving state clerkships is substantially out of proportion to the number of graduates clerking at federal courts. If adequate emphasis is placed on the value of state court clerkships, the number of clerkship opportunities will increase correspondingly and, I am convinced, significantly more students will become judicial clerks. In the process they will become better attorneys, educators, or jurists.

## HOW HIGH IS THE MOUNTAIN? MEASURING THE VALUE OF A JUDICIAL CLERKSHIP



n preparation for this essay I inquired of Elder Dallin H. Oaks of the Quorum of the Twelve, a former justice of the Utah Supreme Court, concerning his personal views regarding the relative value of state supreme court clerkships vis-à-vis federal court clerkships. While emphasizing that his opinion is not an institutional position, he stated:

*Having had a clerkship in a federal court myself, and having served in a state supreme court, and having served on a law faculty where we helped to arrange clerkships for students, I have some well-formed views on this subject*

*The most important thing in dictating the quality of a clerkship is not whether the court is state or federal, but the quality of the judge and the way he or she uses law clerks*

*The second most important consideration, in my view, is what I call the "menu" of the court—the kinds of cases it handles. This is very different from one district or circuit court to another and from the federal courts to the state courts. Personally, I prefer the menu of a state supreme court because of its comparatively larger proportion of common law issues and its comparatively smaller proportion of administrative or regulatory issues. I surely agree that state supreme court clerkships tend to be underestimated in their quality and that some federal clerkships tend to be overestimated.<sup>12</sup>*

I fully agree that the two considerations mentioned by Elder Oaks are the most important criteria for measuring the value of a judicial clerkship.

The first consideration mentioned by Elder Oaks is composed of two parts that go hand in hand: the quality of the judge and the way the judge uses law clerks. Beyond personal characteristics, the quality of a judge refers largely to the quality of the judge's decisions. The "correctness" of the decision is only one consideration because many judicial decisions involve issues that could be decided in several different ways. As a result, attributes such as whether the judge is scholarly in his or her approach to the law, as well as fair, impartial, unbiased, thoughtful, and wise in properly assessing the conflicting legal, equitable, and policy considerations at issue in a case, are at the heart of assessing the quality of a judge's decisions and the value of a clerkship with that judge. It is in this process of making a judicial decision that the law clerk, working closely with the judge, plays a significant role.

Others have recognized that judges render higher quality decisions by working with their clerks effectively. Judge Patricia M. Wald, chief judge of the D.C. Circuit Court of Appeals, recently wrote:

*Indeed, a judge sometimes decides whether to file a separate opinion or to dissent in a case based—at least in part—upon the support she can anticipate from her clerks. Or she may ask for, or beg off, responsibility for a particular opinion assignment because of the availability or nonavailability of a particular clerk to work on the case. Judges talk about it being a “good” or “bad” year, not just in terms of results they have achieved, or in the importance of matters before the court, but also in terms of teamwork and the dynamics of work within their chambers*<sup>13</sup>

At the Supreme Court of Idaho, I give my clerks extensive responsibility. While closely monitoring what they do, these bright, capable young lawyers are given the freedom to advise, critique, submit draft opinions, and counsel with me in most of my important decisions. I work with my clerks in much the same way a law firm operates. We hold regular office meetings where work assignments are made, projects submitted, and cases discussed. The end result of closely working with the clerks is a better finished product.<sup>14</sup>

The second consideration mentioned by Elder Oaks that contributes to the quality of a clerkship is the “menu” of the court, which varies greatly from one court to another. The bulk of most attorneys’ practice is with state law issues such as torts, contracts, property, corporate, wills, trusts, estates, family, water, natural resources, employment, criminal, agency, and other legal issues that are all routinely addressed in state courts. In addition, because state courts are courts of general jurisdiction, many federal issues such as constitutional law and other significant issues are frequently brought to state courts. Therefore, in my view, state supreme courts offer the widest possible exposure to the law most attorneys will use in practice.

In selecting the best clerkship available, discerning law students should first consider and determine the area of the law in which they desire to practice and then focus on securing a judicial clerkship at a court

where those interests can best be served. Students desiring to see the broad scope of the law or who desire to perfect their analytical, research, and writing skills should pursue a judicial clerkship at a state or federal appellate court. The benefits of a state supreme court clerkship are not limited to those who plan to remain in a particular state or practice that state’s law. Because the skills learned in an appellate clerkship can be taken to any state or type of practice, students should not avoid state appellate clerkships solely because they plan to practice elsewhere.

Those students desiring to be educated as to the litigation process should focus on a state trial court or the United States District or Magistrate Court because it is in those courts that general civil and criminal trials are conducted. In many jurisdictions the felony case

it is not just the specific court where a judicial clerkship is served, but also the judge or justice with whom the clerk works and the process involved in the clerkship, that measures the complete value of the judicial clerkship experience.

## CONCLUSION

*A*s law students quickly realize, the law school experience is not the final step in a lawyer’s education and development. Rather, it is only the theoretical introduction to the law and the beginning of a career path. The real education process continues after graduation when former

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load of the federal District Courts is so significant that the United States Magistrate Court has recently assumed a significant civil docket. As a result, a clerkship at a federal District Court or a United States Magistrate Court in many jurisdictions can be especially attractive to students desiring to understand civil trial practice in the federal system.

One of the best learning experiences available for those law students interested in a commercial or transactional practice will be found clerking for a judge in the United States Bankruptcy Court. If patent law is the area of the law most attractive to the law student, then the United States Claims Court is a great place to start a legal career in that specialty. A law student interested in tax law should consider the value of a clerkship in the United States Tax Court. However, as discussed above,

students begin their law practice and are required to make a practical application of the theories and discipline learned in law school. One of the best places to start the continuing post-graduate legal education process is in a court under the direction of an experienced judge or justice who will allow the clerk to grow and develop. In addition, a judicial clerkship provides a one- or two-year buffer period between law school and practice during which young lawyers can continue to refine their legal skills in an environment conducive to growth and development. Clerks may also use this year to focus on the particular area of law that will be most interesting to them. They may also decide from among the lawyers and law firms observed in the clerking process, the law firm that would best further their professional goals and development.

It is a significant responsibility and opportunity to be involved in the judi-

cial system shortly after graduation. Because of the personal growth and development that accompanies such responsibility, judicial clerkships at all levels of the state and federal judiciary are worth considering. The law school will also benefit as more of its students accept judicial clerkships and are better prepared to serve their clients. Just as in the English tradition that has been captured in the American Inns of Court, a judicial clerkship provides a tutoring and mentoring experience that comes to a law school graduate in no other way. If law students will take advantage of this opportunity by considering all of the possible judicial clerkships available,<sup>13</sup> they will be off to the best possible start in their professional careers and in the best position to select from which mountain top they want to view the world.

*Justice Boyle is a 1968 graduate of BYU and received his juris doctorate at the University of Idaho in 1972 where he served on the Law Review. He is currently an associate justice of the Idaho Supreme Court and serves on the J Reuben Clark Board of Visitors. In January 1992, Justice Boyle was nominated to be a United States Magistrate Judge in the federal District of Idaho*

## NOTES

1 "David Campbell Enjoys Sabbatical at BYU," *Clark Memorandum* (Spring 1991), 40

2 *Id* (quoting David Campbell)

3 Alex Kozinski, "Confessions of a Bad Apple," 100 *Yale L. Rev.* 1707, 1724-29 (1991)

4 *Id* at 1727 n 38

5 See Kozinski, *supra* note 3 at 1725

6 *Id* at 1728 (emphasis in original)

7 Justices from the Supreme Courts of several states attended, including California, Washington, Wisconsin, Florida, Tennessee, Kentucky, Hawaii, Virginia, Georgia, Michigan, Minnesota, Texas, and Idaho. In addition, a justice from the Supreme Court of Canada attended

8 See *Reynolds v. United States*, 98 U.S. 145 (1878)

9 The case of *Toncray v. Budge*, 14 Idaho 621, 95 P. 26 (1908), is a prime example of a

state supreme court that provided constitutional protections to the Mormons. In *Toncray*, the Idaho Supreme Court restored many rights to the Mormons in Idaho. In that case the appointment of Alfred Budge, a practicing Mormon, as a judge on a state trial court was challenged because the state Constitution specifically provided that persons entering into "celestial marriage" could not hold public office. The Idaho Supreme Court quoted from numerous early Church authorities in upholding the appointment. *Id* at 645-55. Judge Budge was appointed years later to the Idaho Supreme Court and wrote in excess of 1000 opinions during his 34 years on the bench, the longest period served by any Idaho Supreme Court justice.

10 Although there are 14 possible federal clerkships in Idaho, nearly half of these positions are currently staffed by "career law clerks." In 1989, the Executive Committee of the Federal Judicial Conference authorized implementation of the Judicial Salary Plan which reclassified career law clerk positions. This change significantly improved the salary that accompanies these positions and has resulted in increasing numbers of federal judicial clerks who work with a judge on a permanent basis. Similarly, some states hire significant numbers of career clerks. For example, the majority of law clerks employed at the California Supreme Court are career employees. The Chief Justice of that court has seven career clerks but only a single one-year law clerk. The Associate Justices of the California court likewise have only a single one-year law clerk in addition to four career judicial clerks. This trend toward employing career law clerks, particularly in the federal court system, makes it even more important for law students to seriously consider all clerkship opportunities available in the state trial and appellate courts.

11 Letter from Associate Professor Kevin J. Worthen to Justice Larry M. Boyle dated October 28, 1991.

12 Letter from Elder Dallin H. Oaks to Justice Larry M. Boyle dated November 6, 1991.

13 Patricia M. Wald, "Selecting Law Clerks," 89 *Mich. L. Rev.* 152, 153 (1990).

14 Other judges echo the same sentiment. Judge Patricia Wald, Chief Judge of the D.C. Circuit, recently stated:

*The judge to whom the opinion is assigned is expected to produce a draft for her colleagues to*

*critique. If she is in doubt, troubled, or just plain frustrated, the clerk is her wailing wall. Most of us are not Holmes or Cardozo; we are often unsure of our analyses or even our conclusions. We need to test ideas before exposing them to the hard probing of colleagues. We need assurances, but even more important, criticism from knowledgeable persons who are loyal and unambiguously committed to us. We have, on occasion, to let our guard down, to speculate, to experiment, to argue, even to make frank and sometimes uncharitable appraisals of our colleagues' drafts and suggestions. Despite trendy criticism of undue law clerk influence over judges, my view is that our jurisprudence is better for the give and take among judges and law clerks than if judges had to go it alone.*

Wald, *supra* note 13, at 153-54.

Judge Kozinski agrees. In his recent essay he stated that

*[i]n chambers, the success or failure of the one-on-one relationship is everything: A clerk gives the judge advice, debates with him, serves as his eyes and ears, lobbies for him, travels with him and may draft his opinions. The two work side by side every day for a year and need to function as a highly integrated unit.*

Kozinski, *supra* note 3, at 1723.

15 I am not intending to be critical of the professors or faculty for counseling exceptional law students to pursue clerking opportunities at the federal circuit courts. I recognize that many of the professors served as federal law clerks and their counsel is based on that experience. My judicial clerkship experience was in a state supreme court and thus I also have a perspective that is admittedly biased. This diversity of views should demonstrate that there is no right or wrong choice, but rather a multitude of good alternatives available to the discerning student that will lead to many promising future opportunities.

*The author gratefully acknowledges the assistance of Robert T. Smith, 1991 graduate of the J. Reuben Clark Law School and former editor in chief of the BYU Law Review, in preparation of this essay. Smith now works with Justice Boyle as a judicial clerk and plans to practice tax law in Chicago, following his clerkship.*