

Betting on a Clerkship

Ed Stein
Professor of Law

In the last century, when I was a professor of philosophy and well before I went to law school, one of my colleagues was bemoaning how philosophers were both underpaid and underappreciated. Not one to leave a problem unsolved, he had an idea to rectify the situation: make gambling on horse and dog racing illegal but legalize betting on “competitive philosophy.” Skeptical of his proposal, I asked some collegial questions, only to discover that he had an elaborate scheme in mind. His competitive philosophy matches would pit two philosophers against each other debating a preannounced philosophical topic. A panel of scholars would “judge” the match (that is, after hearing the competitors debate the topic, they would pick the winner). Spectators could place bets on the outcome. To determine which philosopher to bet on, spectators would have to read and learn some philosophy, in particular the writings of the two competitors as well as of the panelists (thereby exposing people to philosophy and the writings of philosophers). The panelists and the competitors would get a cut of the money wagered (not to mention increased awareness of their scholarship), with the winner of the match getting a larger cut than the loser.

I thought about this rather odd proposal recently while reflecting on my year on leave from teaching at Cardozo to work as a judicial clerk. In various ways, appellate cases share features of my colleague’s philosophy competitions. Some of the similarities are obvious: a

panel of judges, two competitors, intellectual arguments, winners and losers, financial stakes, etc. Further, both philosophy and appellate court work focus intensely on theoretical issues. As a law clerk exploring the conceptual landscape of a legal question, I felt the same sort of challenge and excitement I had as a graduate student in philosophy working on a paper for an advanced seminar.

My experience as a clerk for Judge Dolores Sloviter of the Court of Appeals for the Third Circuit was especially valuable because I was fortunate enough to work for an experienced, highly intelligent, hard-working, and skilled judge who takes her job very seriously. Additionally, I liked the judge a lot, learned a great deal from her, and found myself agreeing with her on most issues. I also got to work closely with intelligent and friendly clerks: together we had a productive, educational, and pleasant year. My job, like that of most appellate law

the most engaging and rewarding legal questions came up in unexpected places.

I was also surprised by how many of the interesting cases turn on the seemingly mundane questions of jurisdiction and the appellate court's standard of review. In fact, several of the most complicated cases I worked on were all about subject-matter jurisdiction. That was something I never imagined when I was taking civil procedure as a first-year student.

One important difference between my former colleague's competitive philosophy matches and appellate courts is that in competitive philosophy the panel just picks a winner; appellate courts, in addition to deciding on a result, try to agree on the reasons for the result. An important part of a judge's work in an appeals court is to garner the support of the majority of a panel (this is especially evident when the court sits *en banc* and you

Generally, the best part of being a law clerk is to experience and be involved in the process of shaping the law.

clerks, consisted primarily of helping my judge prepare for deciding the cases before her and, once she had made her decisions, to work with her in drafting the opinions she had to write. This process involved reading briefs, statutes, and lots of cases, doing research, writing memoranda, talking with Judge Sloviter and/or the other clerks about cases, and working with the judge on drafts of opinions.

During my year in Philadelphia, Judge Sloviter had a varied docket that included criminal and civil cases, bankruptcy and capital cases, cases involving billions of dollars, and those at which only a couple of hundred dollars were at stake. I read briefs and heard arguments from amazingly skillful lawyers and on occasion from some mediocre ones. The variety of cases was a crucial element of the experience. As a professor, I select the reading assignments in my classes, write and grade the exam questions, and choose my own research topics. As a law clerk, I worked on those cases that are randomly assigned to the panels on which my judge was sitting. Among the statutes that I researched and wrote about this year were the Federal Insecticide, Fungicide, and Rodenticide Act, and the Coal Industry Retiree Health Benefit Act—statutes I do not discuss in any courses I teach. Believe it or not, each of these statutes raised interesting questions of statutory interpretation, and the second involved tricky questions relating to the constitutional “takings” doctrine. In my clerkship sometimes

have to garner a majority of twelve, not just three). Learning the collaborative processes involved in building a majority from the inside was an important part of my experience; it is something that I never learned in law school and something I would have understood less well by just reading about it.

Generally, the best part of being a law clerk is to experience and be involved in the process of shaping the law. For a law professor, chances of shaping the law are limited at best. Perhaps an article or book that I write may change the way some aspect of law is understood, or perhaps one of my students will go on to greatness and be influenced by an idea picked up in my seminar. For a practicing lawyer, chances are similarly limited; perhaps an argument may nudge the law in a certain direction. But a judge, especially a federal appellate judge, is actively engaged in interpreting and applying the law; by their precedential effect, the decisions she makes and the opinions she writes in effect make law. Experiencing that process and playing a role in it were the most rewarding aspects of being a judicial clerk.

Henceforth, my understanding of the judicial process, the common law, constitutional law, and statutory law will be much more nuanced. And I suspect that my teaching, scholarship, and legal skill will greatly benefit from this experience. I might even have a better chance of winning a philosophy competition—if my former colleague's scheme ever gets adopted. ■