

12-1-1999

FOREWORD: How an Expanding Caseload Impacts Federal Appellate Procedures

Hon. Richard J. Cardamone

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Hon. Richard J. Cardamone, *FOREWORD: How an Expanding Caseload Impacts Federal Appellate Procedures*, 65 Brook. L. Rev. 281 (1999).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol65/iss2/1>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

FOREWORD

HOW AN EXPANDING CASELOAD IMPACTS FEDERAL APPELLATE PROCEDURES*

Hon. Richard J. Cardamone[†]

With the third millennium nearly upon us, it is a good time to reflect on several features of appellate judging, some new and some that have evolved over time, and to suggest which practices, at least in my view, are well worth preserving. This Foreword is not written with any scholarly pretensions, but rather is personal in nature, derived from a number of years of service first as a state, and then later as a federal, appellate judge. I view the function of an appellate court as, in short, to entertain and decide appeals in a just and expeditious manner, while maintaining reliable and orderly procedures to accomplish that goal. Further, in those appeals that require a written opinion, it is the duty of the judicial department to declare publicly what the law is. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.). Recently, measures have been taken so that appellate courts may continue to perform these functions efficiently. However, in the steady beat of progress, which in some of its forms greatly aids appellate courts in the performance of their duties, it is of some concern that certain procedures and values, developed over time, not be sacrificed on the altar of efficiency.

The primary imperative that drives the need for changes in our procedures is the burgeoning number of appeals filed in federal appellate courts. *See* CHIEF JUSTICE WILLIAM H. REHNQUIST, *THE 1997 YEAR-END REPORT ON THE FEDERAL*

* ©1999 Richard J. Cardamone. All Rights Reserved.

† Judge Richard J. Cardamone, United States Court of Appeals for the Second Circuit. I acknowledge with gratitude the contributions to the drafting of this Foreword by my most able law clerks: Diana M. Brummer, Kimberly J. Sabo, and Stephen G. Yoder.

JUDICIARY 2 (Jan. 1998) (stating that the “upward spiral” of a “large and expanding workload” threatens to “outstrip [the] resources” of the federal judiciary). This has resulted in pressures to (1) abandon collegiality, (2) eliminate practices like pre-conference voting memoranda formerly thought valuable in the just disposition of appeals, (3) increase the number of law clerks assigned to an individual judge, and (4) make greater use of technology in the process of appellate judging. In this Foreword, I offer my reflections on these topics.

I. COLLEGIALITY

Of the four loosely related pressures I discuss, the decline of collegiality seems to be the most pervasive; thus, I address it first. One modern definition of a good judge, as paraphrased, runs as follows: a good judge must be honest, industrious, courageous, courteous; and, if he or she knows some law, it will help. *See* BERNARD BOTEIN, TRIAL JUDGE 3 (1952) (quoting Lord Chancellor Lyndhurst’s definition). To that definition, particularly in the case of an appellate judge, I would add collegial temperament. A great deal of an appellate judge’s work—unlike that of a trial judge who acts autonomously—is done in concert with colleagues. This work is performed better in a collegial atmosphere.

A collegial atmosphere is difficult to define precisely. There may be friendship between appellate judges, and on some smaller circuits, an intimacy, which approaches a familial closeness, may exist. *See* FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 58 (1980). But intimacy is not a necessary ingredient for collegiality, it may even be a negative one. *See* William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290, 1296 (1996) (taking the position that it is sometimes difficult to disagree with friends). Collegiality also does not mean a lack of competition in the ongoing effort to persuade one’s colleagues to a particular point of view on a given issue. That is a daily constant in appellate work.

Rather, a collegial atmosphere has more to do with the tone of the attempt to persuade—which, most of the time, is professional and not personal in nature—combined with a will-

ingness on the part of every panel member in a given case to consider their colleagues' point of view in an open objective manner, untinged with any resentment or chagrin that a colleague differs from one's own point of view. Collegiality is give-and-take in the discussion of how to dispose of a case the panel is called upon to decide. It is predicated on respect for a colleague's intellectual integrity, knowledge of the law, capacity to engage in insightful analysis of the legal problems presented, and exercise of sound judgment in reaching a satisfactory resolution of an appeal.

A judge and a judge's law clerk expend considerable effort to work out a principled analysis of the issues before the court, one that follows the law, is well reasoned, and does justice in the individual case. And, since one judge's notions on these matters may be different from those of his colleagues, the judge's final job is to persuade two panel members of different backgrounds, ages, genders, temperaments and values that the disposition he has proffered is the right one and—sometimes even more difficult—that the reasons advanced for that disposition are the right reasons. The negotiations that ensue demand the give-and-take described earlier, a sacrifice of one's ego, and a willingness to compromise and make concessions, so long as such concessions do not violate one's sense of legal right and wrong. This, to my mind, epitomizes collegiality's function as the lubricant that keeps the diverse parts of an appellate court functioning smoothly.

Further, collegiality means being able to disagree with a colleague without loss of civility. Although that sounds easy enough, it is not. According to Justice Frankfurter, the Supreme Court in the 1941-45 terms never had "so many of its members influenced in decisions by considerations extraneous to the legal issues that supposedly controlled decisions." See Rudolph J. Gerber, *Collegiality on the Court of Appeals*, 32 ARIZ. ATTY 19, 22-23 (Dec. 1995). Even in our own court there was an apocryphal tale of a feud between Judges Charles Clark and Jerome Frank that prevented the active judges of the court from convening for a group picture for 12 years. Fortunately, even if true, those days are long gone.

The federal judiciary has anchored and stabilized our democracy, safeguarding rights the deprivation of which are deemed so basic that no majority should be able to deny them.

Mass media and technological change have fostered a society where, according to one academic, the vertical authority of parents, clergy, public officials and judges is much diminished. *See generally* LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* (1999). As a consequence, in order for judges to continue to occupy that special place of trust, which they have heretofore held, they must hand down decisions that command the respect—even if not the agreement—of the citizenry. In my experience, that goal is more effectively accomplished on a collegial court.

II. VOTING MEMORANDA

Like collegiality, the use of pre-conference voting memoranda has been a valuable and time-honored tradition in the Second Circuit. In use even prior to the 1920s, the practice reached its peak during Learned Hand's tenure with the court. *See* Gerald Gunther, *Reflections on the Judicial Administration in the Second Circuit*, 60 BROOK. L. REV. 505, 508 (1994). In Judge Hand's era the judicial panel did not meet to discuss the cases until approximately one week after oral argument. Before this conference, each judge was required to write and circulate a brief memorandum on each case discussing the points of law and the judge's tentative conclusions. One of the main purposes of the pre-conference memoranda was to "promote individual consideration of each case prior to giving it collegiate attention." *Id.* Importantly, as another judge later commented, each judge "was not supposed to look at the memoranda of the other judges as they came in, so that each work[ed] independently." Harold R. Medina, *Some Reflections on the Judicial Function at the Appellate Level*, 1961 WASH. U. L.Q. 148, 150 (1961). Judge Medina did admit that "we peek once in a while, but not often." *Id.* This pre-conference memo practice continued unabated for several years, after Learned Hand stepped down as Chief Judge in 1951, receiving strong support from succeeding chief and presiding judges.

Such pre-conference, post-oral argument voting memoranda contributed to the deliberative process and the collegiality of the court. The act of writing, even if only to express a tentative conclusion about a case, in and of itself tended to clarify and focus each panel member's thoughts and to promote great-

er intellectual engagement with the case. And once on paper, it became easier to identify the subtleties of contentious issues both within the case and between panel members. This practice allowed the judges to concentrate at the voting conference on areas of disagreement and thus facilitated the resolution of such differences. Perhaps most importantly, after the voting conference, these memoranda assisted the judge writing the opinion by offering valuable suggestions about the reasoning of an opinion and by defining areas of concern to the other panel members.

Recently, the use of pre-conference voting memoranda has declined significantly; often they are exchanged only in particularly complicated cases. This trend is generally attributed to the burdens of an increasing caseload. Moreover, holding the voting conference a week after oral argument so that the pre-conference memoranda may be drafted and circulated is inconvenient for the growing number of judges who are not based in Manhattan.

In an attempt to adjust to these modern time constraints while preserving the value of these memoranda, some judges have adopted a practice of sending memoranda exploring difficult legal issues before oral argument has been heard. Although this practice is intended to be helpful, it may have unwanted negative effects. Because such a memorandum is circulated and often read before each judge has conducted an independent review of the case—for instance, even before the bench memorandum has been studied or oral argument has been heard—it influences other judges' views before they are fully formed and perhaps stunts other avenues of thought. Supreme Court Justice Louis D. Brandeis, for example, felt so strongly about outside influences on his thought process prior to hearing an appeal that he is said to have looked at the briefs of an appeal only when he took the bench for oral argument.

The importance of each member of a panel coming to an independent conclusion before reading other judges' memoranda is obvious. Judge Medina, writing on this subject in a piece entitled *The Decisional Process*, 20 N.Y. COUNTY LAW. ASS'N BULL. 94, 97 (1962), said:

Almost always you will find that [by] putting those three memoranda together, [that] each one of them makes a real contribution to the

case. One judge will notice this; another judge will notice that; another one will notice something different. So that when you get those memoranda together you have got a composite view of each case.

Thus, a great deal of the value of the pre-conference voting memoranda derives from the fact that they force judges to distill their thoughts into writing before they are influenced by others, a process that ensures that the final opinion benefits from the unique perspectives of all three judges.

Because of its history as an invaluable tool, the use of post-argument, pre-conference voting memoranda should be preserved so far as possible. To the extent that these memoranda may not be possible with panels often changing personnel daily, post-conference memoranda (presently used from time to time) also serve a beneficial issue or rationale discernment function. Although the outside influence factor is perhaps gone with the loss of the pre-conference memoranda, the post-conference memoranda, to my mind, should be strongly encouraged.

III. LAW CLERKS

Another feature that has changed over time is the number, role, and use of law clerks in an appellate judge's chambers. Law clerks did not become a fixture in the federal judiciary until the 1930s, when Congress provided each circuit court judge with one law clerk. *See* Act of June 17, 1930, Pub. L. No. 373, ch. 509, 46 Stat. 774; Act of Feb. 17, 1936, Pub. L. No. 449, ch. 75, 49 Stat. 1140. Since that time their number has greatly increased: presently, Supreme Court justices generally employ four clerks; circuit court judges, two to four (depending on whether they have active or senior status); and district court judges, two. Given the number of clerks now involved in the administration of justice, their management is an increasingly important issue. Accepting that the caseload explosion requires appellate judges to have help, my focus is on what seems to me the proper method of utilizing this assistance, without infringing on those responsibilities that belong exclusively to an Article III appellate judge.

According to the Law Clerk Handbook, published by the Federal Judicial Center: "The law clerk is an assistant to the

judge and has no statutorily defined duties. Rather, the clerk serves at the direction of the judge and performs a broad range of functions." ANTHONY M. DILEO & ALVIN B. RUBIN, *LAW CLERK HANDBOOK: A HANDBOOK FOR FEDERAL DISTRICT AND APPELLATE COURT LAW CLERKS* § 1.100 (1977). With respect to appellate clerks specifically, the Handbook says their function is "to research the issues of law and fact in an appeal and to draft a working opinion for the judge, pursuant to his directions." *Id.* § 1.200. Other than these very broad generalizations, there appears to be no agreement regarding the role of an appellate clerk. Since this piece is personal in nature, I attempt here to set forth the responsibilities of my own law clerks and briefly note the rationale behind the duties assigned them.

My law clerks' work centers around each "sitting," the several days during which I, along with two other judges, hear oral arguments at our Foley Square Courthouse in Manhattan. The clerks divide among themselves the cases for each sitting, which allows them to work in individual areas of either special interest or expertise. Once the clerks select the cases on which they will work, they prepare a bench memorandum for me on each one. This memorandum is based on the clerk's reading of the briefs, appendices, statutes, and relevant case law. It consists of a brief factual and procedural history of the case, a summary and analysis of the arguments raised by counsel, and the clerk's recommendation regarding its disposition. Independent of my clerks' work, I also read the briefs and the opinion below, if any, and judgment appealed from. Initially, however, the clerks, having divided the usual 15 to 20 appeals, dig more deeply into each of the cases on which they work. This system works well because it alerts me to those appeals that involve novel or complex issues and will therefore require a greater amount of effort than appeals presenting more familiar or simpler issues.

The law clerks and I review together all the appeals for a particular sitting at least twice. Before the sitting we have a roundtable discussion where the clerks present the factual background and their legal analysis of each of their cases. At this time, I raise any questions I have, which may require more research into a particular area, and indicate whatever reservations I harbor respecting the clerk's proposed disposi-

tion of the appeal. Because this conversation involves all the clerks, it permits those clerks who did not prepare the bench memorandum to give their impressions and be more engaged in the process. Later, should that appeal require a written opinion, these clerks' background knowledge is helpful in the preparation of the draft opinion that is circulated by my chambers to the other members of the panel.

The cases are considered internally for the second time when I meet with the law clerks each morning of a sitting to analyze that day's cases. This second discussion helps me "warm up" for the oral hearing or debate presented by appellate counsel and serves to remind me of the lingering questions I may want to ask counsel. In fact, these conversations can sometimes develop into an internal adversary-like process in which clerks of opposing perspectives articulate their opinions, often mimicking the eventual oral argument. At this time I also raise issues that have come to mind after our first roundtable discussion.

The clerk responsible for a particular case attends oral argument and takes notes. After oral argument and before the panel changes personnel, the panel members conference the appeals just argued, particularly to determine those that can be resolved by a summary order and those that will require a formal opinion. Following that conference, the members of the panel occasionally exchange memoranda that present each member's views of a given appeal to the other members of the panel. This memorandum is usually drafted by the clerk responsible for the case, and I edit it to ensure that it reflects my views.

At the conference following a panel's sitting, tentative votes in each appeal are cast and opinions are assigned. For those appeals assigned to me, the law clerk who produced the bench memorandum then prepares the initial draft of the opinion. Through the process of discussing the case prior to oral argument, listening to oral argument, and exchanging post-argument memoranda, the direction of the opinion is generally clear before the drafting begins. If doubts exist about what direction to take on a given case, such may prompt a later memorandum to the other members of the panel to obtain their thoughts on an issue not previously explored in depth.

Once a draft is complete, I make substantial revisions to ensure that the final opinion reflects not only my views, but also the style in which I prefer to write. During this editing process, I read all the cases cited in the draft, might ask the clerk to do additional research on a subject raised in one of those cases, and add cases or outside material that appears to me to be pertinent based on my experience. The drafting clerk then reviews my revisions, and we discuss any questions he or she may have about the edits. Once the two of us are satisfied with the draft, it is passed along to a second law clerk who reviews its substance, its organization and its technical aspects, such as bluebooking. This second clerk also brings a fresh perspective, serving as an additional check on the logic and rationale of the draft.

The draft opinion is then circulated to the other members of the panel, who respond with their own suggested corrections, additions or deletions. The drafting clerk is responsible for taking down these suggestions, and we discuss them together. If I agree with the changes, they are incorporated into the draft. Once consent has been obtained from the other panel members and the necessary changes have been made, the opinion is filed in the clerk's office.

A similar process also takes place when my chambers receives an opinion authored by another judge. Usually I forward consent to file with a memorandum suggesting changes of a substantive or technical nature to the writing judge. If a mutually agreeable opinion cannot be negotiated with the other members of the panel, I occasionally ask the clerk involved in the case to draft a concurrence or dissent.

This system has worked well for me because I try to keep in mind several principles. Judges, of course, know law clerks serve only as an aid in an appellate court's overall goal, that is, the just and expeditious resolution of appeals. If the law clerk assumes too much responsibility in the decision-making process, he or she is no longer an aid, but a hindrance. Because a judge must not abdicate his or her judicial responsibilities, it is essential that an opinion represent both the views and the writing style of the judge.

The increase in the number of law clerks, with their inevitable inexperience, may contribute, as some say, to the increase in the number of concurrences, dissents, and *en banc*

polls requested in appellate courts. Unlike a seasoned judge, a recent law school graduate is unlikely to have the practical experience necessary to temper his or her reaction to a position that does not match perfectly the law clerk's analysis of a case. The youthful idealism of a typical clerk—while important in their role as an intelligent sounding board—may distract at times from the appropriate resolution of an appeal. Judges therefore must strive to exercise prudence and care in their reliance on these invaluable legal assistants.

IV. TECHNOLOGY

Probably the most recent change affecting appellate judging is the advent of technology. Technology serves as a useful tool, but, as history has amply demonstrated, like any other tool, it may be a constructive or destructive instrument. In our own century, technology led to the development of television and the personal computer, but it also made possible the development of the atomic bomb, whose mushroom cloud symbolizes technology's destructive potential. These lessons from history help lend perspective to the current euphoria over recent advances in technology, especially in information and communications technology. It should be emphasized that there is a great need to retain a sense of the human element as appellate courts adjust to the ever-changing role of technology. Within this general theme, I will comment on the following stages in the judicial decision-making process: initiation of an appeal, oral argument, deliberation among the panel members, and filing of a written opinion.

At the initiation of an appeal, advances in technology can be employed to ease the process and thus to open the courthouse doors a little wider for potential appellants who might otherwise be deterred by institutional obstacles. For example, rather than requiring an appellant to submit six print copies of all briefs and appendices, as our Circuit presently does, it might be possible in the future to permit an appellant to file electronically one copy that could be stored in a central database, from which a judge or his staff could then download and print the appropriate texts prior to oral argument. Of course, since we cannot expect all litigants to have the technical knowledge or hardware necessary to take advantage of such an

electronic filing system, we might provide assistance and resources through our clerk's office. At the same time, attention would obviously need to be paid to having safeguards in place that maintain privacy and confidentiality.

The practice of permitting attorneys to appear before the bench via televised video conferences at oral argument has become increasingly common in recent years. To the extent this practice reduces unnecessary financial and time constraints on busy lawyers from locales remote from our courthouse (our Circuit encompasses all of New York, Connecticut, and Vermont), it is a distinct advantage. But, in my own experience, this practice also comes at some cost to the quality of an argument. Not only may the video technology distort the visual appearance of appellate counsel or the tone of his or her voice, but the fact that our current system permits only one-way transmission of sound severely curtails the give-and-take of questions and answers that would otherwise flow more naturally in an argument presented by an attorney present in person. While our Circuit's practice of permitting video arguments should be continued as a helpful aid to out-of-town counsel, an attorney choosing this option presently should consider carefully whether it best serves his client's interests.

Technology also makes its presence felt during the process of deliberation. At the sound of the ringer on the fax machine, it is not uncommon for one or more of my clerks to leave their desks and run to see what surprises have newly arrived from other chambers. The advance of e-mail systems may eventually decrease this Pavlovian response to the fax ringer, but I doubt it will impact the considerable volume of material exchanged among chambers.

More significant, in my estimation, will be advances in methods of recording trial proceedings. A transcript of the trial stored electronically on disk, or even better, a "virtual record" of the trial complete with video footage, may well foster the deliberative process among appellate judges, since each could have equal access to all the details of the trial, stored electronically on a common database. (The current practice is often to entrust the written record, and the accuracy of any references to that record, to the judge assigned to write the opinion in the case.) Yet, the increased access to these details of the trial may increase the danger that appellate judges will review factual

findings *de novo*, when previously they would have reviewed only for clear error. Such temptations will test the ability of appellate courts to adhere to their present institutional role of correcting trial errors, rather than attempting to retry cases on appeal.

Finally, technology has an important role to play in the filing of the written opinion in a case and in the dissemination of that case to the public. Currently, the U.S. Supreme Court and all of the federal courts of appeals make their published opinions available to the public on the World Wide Web, often through cooperation with a law school or similar institution. This widespread dissemination of the law as issued from the courts can only promote the health of our democratic society insofar as it equalizes access to information by all members of the public.

In addition, it may only be a matter of time until the search and retrieval technologies now employed at sites like *www.yahoo.com* are applied to these various legal databases, in competition with the present private suppliers of online legal services. This is not to suggest that the Internet is a panacea for all of our societal ills, since mere access to information is relatively unhelpful unless coupled with an educated sense of judgment capable of discerning the worth of that information. Nevertheless, from the perspective of an appellate judge, these developments are definitely grounds for hope that technology will continue to assist in streamlining the appellate process and making our work more efficient, while also making its product more easily and readily available to the public. Guided by common sense, these worthwhile goals are attainable.