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clerking to excess?

The case against second (and third and fourth) clerkships

By Gregg Costa

There can be too much of a good thing. We know that's true for food and drink, but we haven't yet realized it's also true for judicial clerkships. There has been a lot of talk recently about the new clerk hiring plan. Time will tell if it succeeds, though the smart money is on the collective action problem continuing its unbeaten streak. But the rise of the double clerkship is a more significant development in the clerkship world. Although the double clerkship has had a swift ascent — even a trifecta is not unheard of these days — little has been said about this transformation.

This is the case against it. This article discusses the impact of the double clerkship on clerks, judges, and the profession. For clerks, a single clerkship provides an unrivaled opportunity to hone the legal analysis, research, and writing skills gained in law school while working with a judge to decide real cases. Yet there are diminishing returns to spending additional years focusing on just those skills when there are so many others lawyers need to learn.

For judges, hiring those with prior experience risks even greater delegation to clerks. The rise of double clerkships is thus another step away from the traditional advisory role of clerks towards a role in which they do much of the judge's work.

The most troubling effect of double clerkships is that they reduce the number of lawyers who get to clerk. Every time a judge hires someone who has already clerked, another new lawyer misses out on having this special opportunity. My biggest problem with second clerkships thus stems not from the deficiencies of clerkships but from their considerable worth. The profession benefits when judges give as many future lawyers as possible the training and mentorship that a clerkship provides. So while two clerkships may be too many and none too few, one is just right.

AN UNMISTAKABLE TREND

The rise of the double clerkship is unmistakable for anyone involved in the process. A significant percentage of the applications any judge receives comes from people who have already secured one or even two clerkships. The legal market recognizes this trend. Recruiting websites for many major law firms list bonuses for second clerkships. The second is typically worth only 40 percent of the first, indicating the market's agreement with my view that second clerkships have diminishing returns.[1]

Although there are no statistics to quantify the overall trend, the clerkships for which this data is available — those at the Supreme Court — reveal the rapid ascent of double clerkships in the lower courts. Twenty years ago, in the 1997–98 term, only two out of the 36 clerks had worked for more than one lower court judge.[2] Ten years ago, in the 2007–2008 term, only three out of the 36 clerks had worked for more than

one lower court judge.[3] In the 2017–18 term, 15 out of the 34 clerks had worked for more than one lower court judge.[4]

Noticing the multiple lower court clerkships of some recent Supreme Court hires, Professor Orin Kerr tweeted that "By OT2038, a typical SCOTUS clerk will have clerked for a magistrate judge, a bankruptcy judge, a district judge, and six different circuit court judges before doing a Bristow, and then finally, clerking. They will then accept a firm clerkship bonus, work two years, and retire."[5] If the trendlines continue, that may not be much of an exaggeration.

This recent rise of second clerkships in the lower courts is the latest phase of a long-term trend. Even into the 1960s, law students could clerk at the Supreme Court right out of law school.[6] After about four decades in which one lower court clerkship was standard for Supreme Court clerks, two or even three is becoming the new normal. To be sure, Supreme Court clerks are a tiny sliver of the clerk population. I cite their changing clerkship experience because it highlights the broader development of young lawyers pursuing multiple clerkships.

IS IT GOOD FOR THE CLERKS?

Although the trend towards multiple clerkships is apparent, its consequences are not. Why do I view it as a negative development? Let's start with the young lawyers doing two clerkships. *A* clerkship is an invaluable experience for a new lawyer. I certainly hope my clerks have a highly rewarding experience. But I also hope it is not the best job they ever have as a lawyer. That idea — promoted by the elite legal community (and especially law schools)[7] — is regrettable.[8] What does it say if the best job in a lawyer's career is merely working as an aide to the decisionmaker as opposed to the times later in a career when the lawyer is the one winning the trial, or negotiating the deal, or inspiring students in a law school classroom, or perhaps one day deciding the case as the judge?

Some say there is value in doing both a trial and appellate clerkship. Indeed, having served in recent years as both a trial and appellate judge, I always tell students what is now a statement against interest: working for a trial court will teach them more things they did not learn in law school. So if one is going to do two clerkships, they should be for different types of courts (trial versus appellate, or state versus federal, or a generalist court versus a specialized one like the Federal Circuit). Yet the desire for two clerkships is becoming so strong that it is not uncommon to see applicants wanting to do a second clerkship for a regional court of appeals. And even for those doing clerkships for different types of courts, there are diminishing returns from a second (and certainly a third) clerkship. Whatever the court, the day-to-day work of a clerk largely involves the legal research, analysis, and writing skills that are the focus of law school. Beyond the refinement of those skills, the additional benefits a clerkship brings, like gaining a mentor and insight into judicial decisionmaking, mean less the second time around.

So what is driving many top students to want to double up on the clerkship experience? For starters, consider the main professional influence on students when they are applying for clerkships: law professors — for some of whom clerking is one of the only, if not the only, legal job they have held outside of academia. No wonder many of them view it as the be-all-and-end-all of career opportunities for a lawyer.[9]

Another significant factor may be that clerking keeps the recent law school graduate in her comfort zone. Clerking is challenging work. But it is challenging work in an area in which the clerk already has demonstrated ability. Excelling at analytical reasoning, and to a lesser extent writing, is what led to good law school grades, which is what led to the clerkship. But those are far from the only skills practicing lawyers need. Good interpersonal skills are of course essential. Successful lawyers must develop good relationships with clients, witnesses, colleagues, and opposing lawyers, among others. Law clerks spend most of their days typing away at a computer; there is not much interaction with other people, especially people who aren't lawyers. Practicing lawyers in contrast routinely deal with people who are not lawyers. Depending on one's practice area, that may include businesspeople, or criminal defendants (or businesspeople who are criminal defendants!) and police officers, or recent immigrants.

There is a long list of other skills successful lawyers must develop. Lawyers in just about every field negotiate in one form or another. Many have to develop a strong understanding of business, which involves accounting and financial concepts. Others have to learn how to dig for evidence. Anyone in private practice has to develop an understanding of the economics of law practice. The list goes on and on. The law school exams that clerks excelled at taking do not test these skills. Nor do the clerkships that those good grades earned. So learning these different skills presents a new challenge. And for some, new is intimidating. Better to keep doing what one has already shown a knack for. But there is a significant cost: missing out on opportunities to start developing the other important skills that are the main ingredients of success for a practicing lawyer.

Perhaps more than all these other causes, the rise of the double clerkship

may reflect dissatisfaction with modern law practice, or at least clerks' perception of it. In other words, the appeal of a second clerkship may not be so much about its value as it is about a lack of enthusiasm for entering the big-firm law practice that most clerks pursue. Indeed, some clerks have told me that part of the interest in multiple clerkships stems from a desire to avoid the grunt work that low-level law firm associates are often assigned. The idea is that by entering a law firm three years after graduating law school, the lawyer will miss out on some of the drudgery. That premise is concerning. Excelling at a high level in most areas of life requires starting at the bottom. Think of the major league All-Star who spent years riding buses in the minors, the Hollywood actor who started out in local theater, or the high-tech mogul who started selling a product out of the garage.

But even accepting the notion that there is a way to avoid "document review" and other mundane tasks yet still become a successful lawyer, there is a better path than stacking clerkships on top of one another. If the recent graduate can afford to bypass a few years of private practice — which she apparently can if she is pursuing multiple clerkships — why not follow a year of clerking with a couple years working as an assistant district attorney, a public defender, or a legal aid attorney? The young lawyer would gain some of the new skills mentioned above, in addition to providing valuable service to society. I've seen former clerks who pursued these options rather than a second year with the courts win trials and help set important precedents within a year of leaving chambers. Unlike a second clerkship, however, this requires a willingness to tackle new challenges, often with little supervision. And then of course there is the whole "prestige thing." But does anyone really think that the legal community is going to be more impressed that a lawyer clerked for the Third *and* Fourth Circuits instead of just one of those courts?

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IS IT GOOD FOR THE JUDGES?

Well, one might say, even if a second clerkship brings diminishing returns to the clerk, it probably results in efficiency gains for the judge who works with the experienced clerk. If judges were cookie cutters that would certainly be the case. Practice makes perfect and all that. But judges are idiosyncratic. So a judge who has a clerk with one clerkship already under her belt may spend much of the year undoing the first judge's quirks and imposing her own. If the judge doesn't take the time to do that, the result may be an even greater increase in the clerk-driven homogeneity of judicial opinions.[10]

That ceding of power is the threat that the rise of experienced clerks poses to the judiciary. Not so long ago, "experienced law clerk" was as an oxymoron. The point of law clerks was that they *weren't* experienced. Giving rise to the job title that confuses most outside the profession, the first law clerks did only clerical work. Justice Oliver Wendell Holmes, for example, called the recent law graduate he hired each year his "secretary"; that person had no input on the content or style of opinions and spent time handling other tasks like balancing the Justice's checkbook.[11] But long after they started assisting with substantive legal work — a helpful development driven in part by increased caseloads — clerks mainly functioned ▸

as advisors who discussed cases with the judge, researched the law, and edited the judge's opinions. Many modern clerks are now one step beyond that, essentially functioning as adjunct judges, given the predominant role many have in drafting opinions. The rise of multiple clerkships, along with other developments like the use of permanent clerks (an even greater departure from the traditional model), entrenches this third stage in the evolution of clerkships.[12]

Chief Justice John Roberts recently voiced the concern that experienced law clerks will be less likely to fit the traditional subordinate role. He was talking about another pro-experience trend towards more people clerking after first having practiced law for a few years. But his point also applies to those who have had multiple clerkships: "We always proudly say we are the only branch of government where we still do our own work. If you get somebody who is a little too good at producing whatever you want them to produce, it makes it harder for you to kind of find your way into the writing sometimes."[13] So even if experience improves the efficiency and quality of clerk work, that may reduce the role of the person who, for better or worse, is the decisionmaker selected through the constitutional process.[14]

There is one other reason hiring someone with a prior clerkship may not be good for the judge, and it's a selfish one. The traditional clerkship model, in which the clerk comes to work for the judge straight out of law school, gives the judge who wants it a special role as the clerk's first legal employer. It's hard to replicate the enthusiasm someone right out of law school brings to the clerkship and the special mentoring role the judge can have working with the young lawyer in her first job in the profession.

IS IT GOOD FOR THE PROFESSION?

All this has been prelude to my main problem with second clerkships. It's an irrefutable point of arithmetic: *for everyone who does a second clerkship, another young lawyer misses out on the experience.*

And it's not just about the numbers. By reducing the number of young lawyers who have the opportunity to clerk, second clerkships also likely contribute to concerns about the lack of diversity in clerkship hiring. Most obviously, second clerkships likely further concentrate these jobs among graduates from elite schools. If Harvard/Stanford/Yale students have the easiest time getting one clerkship, it stands to reason they will maintain that competitive edge when applying for a second one (they may be even more advantaged at that point because of the many judges who prefer to hire, or exclusively hire, those with a prior clerkship). Concentration of clerkships in a handful of elite, coastal schools doesn't just limit opportunities for talented law students at other law schools. It also may reduce the variety of legal perspectives clerks bring to chambers. The desire for a robust exchange of ideas is of course one of the main reasons for having clerks.

The reduction in the number of people clerking that results from multiple clerkships also likely contributes to the lack of demographic diversity among clerks. Minorities and women are significantly underrepresented in clerkships.[15] One solution to this problem may be the most basic: make more clerkships available, which is what a return to the tradition of one-and-done clerking would do. In addition to this overriding point that double clerkships reduce the number of people clerking, the norm it is creating has a significant economic impact that may deter talented students with fewer financial resources. For a student with significant debt — most of them these days — even a single clerkship is a financial sacrifice given the pay disparity between clerkships and private practice. But the second clerkship is much more of a financial hit, not just because the clerk foregoes two years of a firm salary but also because the firm bonus for the additional clerkship makes up less of the difference. And when two clerkships are in different cities, there is the additional economic hit of more moving costs. For judges who prefer or even require prior clerkship experience, candidates with these financial concerns may be out of contention.

Despite everything I've said about the diminishing returns of additional clerkships, one is a great experience. We should be dedicated to giving that opportunity to as many qualified students as possible. Hiring someone who has already clerked is at odds with that goal and means there will be fewer practicing lawyers who have had the valuable experience of clerking.

Giving as many new lawyers as possible that mentoring and training is perhaps more important than ever as those opportunities are becoming rarer in private practice. The increased mobility of lawyers in private practice reduces the incentives for partners to mentor associates: the partner may not be at the firm long enough to see the benefits of that mentoring, and the associate

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will likely not remain at the firm long enough to provide it with the benefits of that tutelage. The traditional clerkship model in which the clerk spends one year as a valued advisor and gains a mentor thus serves a more important role than it ever has. The more young lawyers have that opportunity, the better off the profession will be.

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With all these criticisms, are there any arguments to be made in favor of the double clerkship? I can think of four: the excellent clerks who worked for me with one clerkship already under their belts. Mea culpa!

[1] *See, e.g.*, Cravath, Swaine & Moore LLP, *Benefits*, https://www.cravath.com/benefits/ (last visited May 29, 2018) (noting that incoming associates who complete one clerkship receive a $50,000 bonus while those that complete two get a $70,000 bonus).

[2] Wikipedia, *List of Law Clerks of the Supreme Court of the United States*, https://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States (last visited May 29, 2018).

[3] *Id.*

[4] David Lat, *Supreme Court Clerk Hiring Watch: October Term 2017 Is Done; Let's Turn to 2018*, Above the Law (Jan. 11, 2017, 4:26 PM), https://abovethelaw.com/2017/01/supreme-court-clerk-hiring-watch-october-term-2017-is-done-lets-turn-to-2018/.

[5] Orin Kerr (@OrinKerr), Twitter (May 17, 2018, 8:23 PM), https://twitter.com/OrinKerr/status/997316730530578432.

[6] Richard A. Posner, Reflections on Judging 41–42 (2013).

[7] Nicholas Alexiou, *To Clerk or Not to Clerk . . . It's Actually Not Much of a Question*, Above the Law (June 7, 2018, 11:33 AM), https://abovethelaw.com/2018/06/to-clerk-or-not-to-clerk-its-actually-not-much-of-a-question/?rf=1 (arguing that clerks learn more that year than during the same period in any other legal job).

[8] *See generally* Paul Horwitz, *Clerking for Grown-Ups: A Tribute to Judge Ed Carnes*, 69 Ala. L. Rev. 663 (2018).

[9] *Id.* at 664 (discussing the glorification of "clerkship culture" in the legal profession, especially in the academy); *see also id.* at 667 n.25 (noting that the career-advancing power of clerkships has not faded much for law professors (citing William H. Simon, *Judicial Clerkships and Elite Professional Culture*, 36 J. Legal Educ. 129, 132–33 (1986))).

[10] *See* Posner, *supra* note 6, at 245 (calling the "managerial" style of chambers organization — in which clerks take the lead drafting opinions — "a risk-averse strategy" that tends to "bleach creativity and individuality from the final product"); *see generally id.* at 238–55.

[11] *See, e.g.*, Thomas Healey, The Great Dissent: How Oliver Wendell Holmes Changed His Mind — and Changed the History of Free Speech in America 49 (2013).

[12] Posner, *supra* note 6, at 41–43.

[13] Tony Mauro, *Chief Justice Roberts Misses Solo Lawyers with "Battered Briefcases,"* Law.com (June 6, 2016, 12:03 AM), https://www.law.com/supremecourtbrief/almID/12027593424 98/.

[14] J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 Emory L.J. 1147, 1171 (1994) (noting that the increased role of clerks in writing opinions "deprives the parties of their right to have the designated decision-maker be one who is fully engaged").

[15] *Increasing Diversity of Law School Graduates Not Reflected Among Judicial Clerks*, NALP, Inc. (Sept. 2014), https://www.nalp.org/0914research (noting that minority law graduates made up roughly 17% of judicial clerks in 2013, though the percentage of such graduates overall was about 25%); *see also* Tony Mauro, *Diversity and Supreme Court Law Clerks*, 98 Marq. L. Rev. 361, 364 (2014) (noting that only 111 of 342 recent Supreme Court clerks were women).