

**JUDICIAL CLINIC**  
**MATERIALS FOR INQUIRY AND REFLECTION**

**Table of Contents**

Introduction

Inquiry Suggestions and Journal Pages

- #1 Jurisdiction ... or Where Am I and How Did I Get Here?
- #2 Work of the Court (Trial and Appellate Versions)
- #3 Judging / Deciding
- #4 Judging / Deciding / Advocacy
- #5 Judging / Deciding / Theories
- #6 Courts' Organization and Structure
- #7 Courts' Organization and Bureaucracy
- #8 Adversary System
- #9 From Trial to Appellate Court
- #10 Appellate Courts' Relationship
- #11 Judges — Who Are They?
- #12 Judges — Socialization and Ethics
- #13 Overseeing the Practice of Law
- #14 Settlement and Alternative Dispute Resolution
- #15 Juries

Interim Report Form (1) -- due after one month

Interim Report Form (2) -- due after second month

Final Report Form -- due at conclusion of judicial clinic semester

Time Log -- due at conclusion of judicial clinic semester

## **Introduction**

These Materials for Inquiry and Reflection together with the Orientation Materials have been assembled to introduce you to the Judicial Clinic and to provide some suggestion for what you might observe and inquire about while you are working in the court. These materials should complement the Orientation Meeting. They should help you prepare for (not supplant) the Judicial Process course by raising some of the issues that will be more fully explored in that course. Please read, observe, and (when convenient) discuss the topics with your judge.

The Inquiry Suggestions contain some information and various ideas for observations or questions to ask your judge or his/her clerk. You may wish to use these topics as a basis for an intellectual journal — a place to record your insights, raise questions for yourself, and work through your ideas and feelings. To the extent that you record confidential information (e.g. about a pending case, or general information from the judge which the judge expects to be held in confidence) you should not show those pages to others. If you do not record confidential information, you may wish to share these entries with your instructor and colleagues in the Judicial Process course. This endeavor is intended to help you learn as much as possible from your time with the court, and to be prepared to share, develop and delve into these issues more deeply during the Judicial Process class.

Some of the Inquiry Suggestions are more appropriate for students in one court than those in another. While you are not expected to observe court proceedings in a court other than your own, you are invited to spend a few hours doing so, and to count those hours toward your total commitment. Also, even though some particular questions may not come up in your court's work; you may still want to ask your judge about the issue, since your judge's experience base is broad and includes years of practice as well as, in some cases, experience as a judge in another court.

The Interim Report Forms (1 and 2), and the Final Report Form are included at the end of these materials. The Interim Reports should be submitted to Linda Smith, Clinical Program Director, on a monthly basis. The Final Report and a Time Log should be submitted when you complete your work. Please include name and semester/year on each one of these documents.

Have a good semester!

Linda F. Smith  
Clinical Program Director  
581-4077 (office)  
583-9344 (home)

## **Jurisdiction**

## **Inquiry Suggestion #1**

**or**

### **Where Am I, and How Did I Get Here?**

*What work does your court do? What work does it not handle? How do cases get there? Where do the cases go that are not handled in your court?*

#### **Appellate Court Students:**

Read the Rules of Appellate Procedure

#### **Magistrate, Bankruptcy & Department of Interior Students:**

Research this question

#### **Trial Court Students:**

Where would you go to find out in which court you should file a case...if you had a tort action? if you were a District Attorney prosecution a criminal matter?

**All:** Ask your judge

---

## **The Work of the Court**

## **Inquiry Suggestion #2**

*What does your court do? How does your judge spend his/her time?*

#### **Trial Court Students:**

*How much time does the judge spend trying cases as compared with conducting pre-trial proceedings? post-trial proceedings? handling "magisterial" duties such as arraigning criminal defendants?*

*How does your judge find time to read the pleadings and research the law? How does your judge handle making findings on pre-trial or bench-tried issues?*

#### *What is the mix of criminal and civil cases?*

Read the relevant rules of civil procedure, of criminal procedure, and locate any other relevant rules. Read the pleadings/briefs of a case that will be argued before your judge. (Do this as often as possible when you observe.)

Observe argument(s) of dispositional motion(s) (e.g. motion for summary judgment).

Observe argument(s) of discovery dispute(s).

Observe argument(s) of post-trial proceeding(s) (e.g. motion for a new trial, a garnishment hearing, contempt?).

If you can, observe a trial — bench or jury; observe jury selection, jury charging.

#### **Appellate Court Students:**

*How much time does the judge spend deciding cases as compared with addressing motions or other pre-disposition issues? When are oral arguments scheduled? What is the process for the court handling an appeal? How much time does your judge spend listening to argument, conferencing, researching, drafting, redrafting? What is the mix of criminal and civil cases? What are the nature of the issues the court must decide? How likely is it for a case to be reversed on appeal?*

Read the Rules of Appellate Procedure.



## **Judging / Deciding**

## **Inquiry Suggestion #3**

NOTE: It is said that most of the disputes a trial court sees are disputes about fact rather than disputes about what the law is. Most cases settle prior to trial. (Estimates range from 80%-95% of cases settle.) Most cases are not appealed. Of course, cases with novel issues of law all start in the trial court. But the trial court judge spends most of the time applying established law rather than trying to figure out what the law is.

Court watchers have concluded that an appellate court has two jobs: correcting errors and making law. Often the appellate court will only review the case to determine whether an error was made by the trial court, and no new legal principle will be enunciated. Less frequently the appellate court will be presented with a novel question of law. In between these extremes are many appeals where the opinion will clarify a legal doctrine or add to an area of law.

*How would your judge describe his or her work in judging? How would your judge see the cases breaking down as among: Pure factual disputes, minor legal disputes, and novel legal cases?*

*Is this categorization useful? How does your judge make sure s/he has "put" the case in the right category?*

---

## **Judging / Deciding / Advocacy**

## **Inquiry Suggestion #4**

*Given your judge's view of the nature of disputes in the court (see Inquiry # 3) what are the most important things the judge would advise you to remember in litigating a case?*

Observe your judge in court.

*What seems to bother your judge the most? What seems to be the most effective way to convince your judge?*

Read the pleadings/briefs of a case that will be argued before your judge. (Do this as often as possible when you observe.)

*What was your impression of the case from the pleadings/brief?*

*What questions did you have about the case?*

*How do your impressions and questions compare to those of your judge?*

*What explains any differences in your and your judge's response?*

Ask your judge about the importance of oral argument.

*How important is the argument in comparison with the memoranda or briefs?*

NOTE: In deciding a case, commentators have said that the judge should aim to produce a "reasoned opinion." That is, to give the ruling with justifications; to explain how and why the court has reached the conclusion it has.

Courts enunciate the common law, and they interpret statutes and constitutions. In doing this courts rely upon "precedent." A trial court must follow "controlling precedent" — rulings on point from an appellate court with the authority to decide the matter. The highest court may overturn precedent and adopt a new rule of law. However, all courts must decide which precedent is relevant when there is more than one way to conceptualize an issue.

In the absence of such controlling precedent, a judge may focus upon various other things. In questions of common law, the judge may look at parallel precedent — how have other states dealt with this new theory of tort? The judge may look at the purpose behind the rule of law and how circumstances are the same or different so that the purpose is either promoted or hindered by the rule of law. The judge may consider other areas of law that are related. Should the law protect consumers of rental housing in a similar way to the way in which consumers of retail goods are protected? Should principles of law in the areas of tort, contract, property, etc. make sense in relation to one another?

When interpreting a statute (or a constitution), a court may focus on the words themselves, may inquire into the legislative history (or the history of the constitutional convention/amendment). The court may focus on the general purpose of the statutory scheme. The court may look down the road, and imagine how any interpretation will affect the behavior of people and businesses.

***In deciding a case, where does your judge's analysis begin?***

***Will it make a difference whether the issue is one of common law or of the application of a statute or the interpretation of the constitution?***

***Does your judge identify himself/herself as having a particular approach to statutory interpretation? to constitutional interpretation?***

***What do you think of these famous quotes from famous judges on the next page?***

## FAMOUS QUOTES:

"The fallacy . . . is the notion that the only force at work in the development of the law is logic. . . . The process of analogy, discrimination, and deduction are those in which [lawyers] are most at home. The language of judicial decisions is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. . . ."For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." Excerpts from Oliver Wendell Holmes, Jr. *The Path of the Law* 10 HARV. L. REV. 39 (1897)

"The first thing [the judge] does is to compare the case before him with the precedents. . . . If they are plain and to the point, there may be need of nothing more. . . . Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But of course, no system of living law can be evolved by such a process, and no judge of a high court worthy of his office views the function of his place so narrowly. . . . It is when the colors do not match, when the references of the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must fashion the Law for the litigants before him. In fashioning it for them, he will be fashioning it for others. . . . Every judgment has a generative power. It begets its own image. . . . The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . . Logic and history and custom have their place. We will shape the law to conform with them when we may; but only within bounds. . . . I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and distance. . . ."

Excerpts from: Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* (1921)

## Courts' Organization and Structure

## Inquiry Suggestions # 6

NOTE: In general American trial courts are "general jurisdiction" courts. In Continental Europe it is entirely different — most courts are "specialist" courts. We do have some specialist courts in this country — the U.S. Bankruptcy Court is fairly specialized, the Juvenile Court in Utah has a limited jurisdiction (delinquency, children in need of services, abuse/neglect of children, parental termination). Some attorneys and judges here believe we should establish a Family Court with jurisdiction encompassing, in addition, divorce, child support, paternity, and adoption.

In some states there is only one level of trial court. In other states there are trial courts which handle "bigger" cases (felonies, civil claims over some jurisdictional amount) and other trial courts which handle "smaller" cases. In Utah there are local "Justice of the Peace" courts conducted by local cities and towns to handle minor criminal and civil matters, there are Small Claims courts to handle small disputes involving limited amounts of money, and there are state-run District Courts which handle "bigger" cases. The District Courts also hear "de novo" criminal cases appealed from Justice of the Peace Courts. Recently the Utah Third District Court has arranged itself so that some judges currently hear only civil cases and other judges hear only criminal cases (some judges continue to hear both civil and criminal cases).

*What are your judge's views about the importance of generalist courts? the benefits of specialist courts?*

*What does your judge think about the current configuration of courts? What are the problems? Are there other solutions that would be better?*

It is said that "justice delayed is justice denied."

NOTE: Judicial law clerks have assisted appellate courts for decades. Generally an individual judge's clerks ("elbow clerks") are thought to make the court's operation more efficient while allowing the judge to retain control over the decision and the actual work product. But that view is not universally held. Some say that clerks make the judges more verbose, and in some instances may actually do the deciding and writing for an infirm judge. (This has been said about U.S. Supreme Court Justices Marshall and Warren toward the end of their years on the Court.) In addition to personal clerks, most appellate courts have "staff clerks" or "staff attorneys" who do other tasks, such as screening cases for the Supreme Court to accept on certiorari, categorizing cases as to whether they should be granted oral argument, summarily affirmed, or decided without the issuance of an opinion. All of these tasks are done in order to maximize efficiency — to allow the most experienced person (the judge) to spend time on the most serious issues, and to get the simpler issues dealt with expeditiously.

Trial courts today often have law clerks as well. Trial courts have taken other steps to enhance efficiency: the appointment of magistrate judges or commissioners, the promotion of alternative dispute resolution, the court's active "management" of its docket to insure that the litigants go forward on their cases to settlement or to trial in a timely fashion.

During recent years commentators and judges have both promoted and criticized the "bureaucratization" of the courts. One school of thought is that judges spend too much time on minor, ministerial tasks — e.g. conducting arraignments, taking guilty pleas. A solution has been to appoint judicial officers to assist in these tasks. For example, magistrates may decide discovery questions, on the theory that this frees the judge up to handle major matters. Commissioners may conduct the initial hearing in domestic relationship cases on the theory that specialists in family law will be able to assist litigant to reach a settlement through these meetings. Others argue that these tasks are central to the administration of justice. Hence they should be done by someone who is a judge. Moreover, it is argued, delegating any decision to a less experienced assistant risks that the decision will be made less well than if made by the judge him/herself. There is even a constitutional dimension to this issue.

Finally, it is worth noting that many judges are active in administrative matters serving in the role of "presiding" judges, or working with the Administrative Office of the Courts or the Judicial Council on various issues.

***How much "deciding" does the judge do each day? How much of your judge's day is filled with administrative chores?***

***What efficiency enhancing mechanisms does your court use?***

***Who else does your judge rely upon — clerks, commissioners, magistrates — to do his/her work? Is this system efficient and effective?***

***What involvement has your judge had in helping make various administrative decisions about the courts?***

## Adversary System

## Inquiry Suggestion # 8

NOTE: The U.S. court systems are probably the most "adversarial" in the world. By that I mean they are run by the adversary model where two sides define the issues as they see fit, present them as best they can. This conflict is supposed to result in the fact-finding/law-decider being fully informed and able to render a fair decision. In continental Europe the court system is more "magisterial" or "inquisitorial." The judge plays an important role in defining the issues, and in deciding what investigation should be done and what evidence should be brought forward. In our country, the judge's role is decidedly more "hands off."

*What does your judge think of the way our system works? Do clients with poor lawyers get harmed more under the adversary system? How do pro se clients fare?*

*Does your judge do things to "level the playing field" for the parties where the lawyers are mismatched? Does your judge intervene to help a less capable lawyer? to raise a legal issue the lawyer hasn't seen? to ask a question that the lawyer should, but hasn't, asked a witness?*

*Is our system too adversarial? Are lawyers too apt to fight upon inconsequential things, obfuscate rather than illuminate the issues, even lie or present false evidence to "win" the battle? If your judge is concerned about this "over-litigiousness," what does s/he do about it?*

## From Trial Court to Appellate Court

## Inquiry Suggestions # 9

NOTE: There are a few ways to get from the trial court to the appellate court — generally there is an appeal as of right after a final judgment/order is entered. Prior to that there may be the possibility of an interlocutory appeal with permission of either the trial judge or the appellate court. Rarely the court has done something illegal and an original action (e.g. mandamus) will be possible. **Read the Rules of Appellate Procedure.**

The first important thing to think about when deciding whether to appeal a case is "What is the standard of review?" The appellate court will not re-try the facts. It will only reverse the trial court's judgment if the factual findings are "clearly erroneous"; it may remand the case for further findings if the trial judge's findings (in a non-jury case) were inadequate to support the judgment. The appellate court may reverse the trial court if the court made an error of law (the appellate court give no deference to the trial court in deciding issues of law). Similarly, if the trial court made a procedural error that prejudices the outcome, the appellate court will reverse. **(But...when the appeal is from a U.S. agency, the court may owe deference to the agency's legal interpretation of the statute. DOI people, explore this issue.)**

The second issue to consider before appealing is whether you objected to the error which was made by the trial judge. (Typically the appellant must have objected in a timely fashion, and made sure the objection was recorded. Otherwise the appellate court won't even reach the issue.)

The third thing to think about is what relief is available on appeal. Will the appellate court reverse and enter a judgment for the appealing party (very unusual), or reverse and remand for further proceedings (more typical)?

*What does your appellate court judge view as the most frequent mistake in appellate litigation? What would s/he do to correct it?*

*Does your trial court judge see attorneys being effective at simultaneously litigating their cases both to win at trial and also to be successful on appeal?*

*Ask your judge to comment on the practice of having the winning party write up the findings. How does this work when the case is appealed? Is this an efficient approach or does it lead to inadequate findings or unsupported findings by the less competent attorneys?*

## **Appellate Courts' Relationship**

## **Inquiry Suggestion # 10**

Read the Rules of Appellate Procedure.

NOTE: Our Utah appellate court structure is, in many ways, unique. Every case has one court to which the appeal goes. (For example, in general Juvenile Court cases and family law cases from the District Court go to the Court of Appeals; other cases from the District Court go the Supreme Court.) However, the Supreme Court has the authority to "pour over" most of its cases to the Court of Appeals. The Court of Appeals has the authority to report cases it has not yet decided to the Supreme Court because they present issues that the Supreme Court should decide. Finally, after the Court of Appeals has issued a decision, if the losing party petitions the Supreme Court, the Supreme Court can grant the case certiorari. The five justices of the Supreme Court all sit on any appeal, and the Supreme Court, of course, has the ability to over-rule prior decisions it has made. The seven Court of Appeals judges sit in panels of three, and are not authorized to sit, all together, en banc. One panel is obligated to follow the decision of another panel, given the principle of stare decisis.

Bankruptcy, Magistrate Judge and Department of Interior students:

What is the appellate structure in your court?

*What are the mechanisms that make the system work? Is it efficient?*

*Are there any problems with the system? Are there alterations that should be made to the system?*

## **Judges — Who Are They?**

## **Inquiry Suggestion # 11**

Research your judge's bio.

Utah state judges are selected through a "merit" selection system where a committee (bar/public) reviews applicants, interviews, and nominates a handful of candidates, and the governor selects among those publicly nominated. The Utah Senate confirms the appointment. To date, there has been little if any controversy in the Utah State Senate over the nominees of the governor. Although none of you work for JP (Justice of the Peace) courts, you should know that JPs are elected — and often are not law-trained.

You may be more familiar with the federal selection system in which the president nominates one candidate and the Senate confirms the appointment. You may have read news reports on the nomination of new federal judges and conflicts between the president and the Senate.

*How did your judge come to be a judge? To what does your judge attribute his/her appointment?*

*How are judges selected in your court system? Are there other systems? What does your judge think about the selection process?*

*What does your judge think are the most important attributes of a good judge? Is it different in trial and appellate courts? Is diversity important? How about consistency in judges' interpretation of the law?*

*Does your judge think our (state) systems of retention elections and discipline works to retain the good judges? to encourage less able judges to retire or resign?*

---

## **Judge — Socialization and Ethics**

## **Inquiry Suggestion # 12**

*How does the life of a judge compare to the life of an attorney?*

Read the Code of Judicial Conduct

NOTE: Note the ethical provisions about conflicts of interest, the prohibition of political activity, the need to avoid even the "appearance of impropriety". Some judges have been very active in political life prior to appointment, and becoming "apolitical" must be an adjustment. Other judges will curtail their close friendships with former law partners, so that no "favoritism" could be alleged. Some see the resulting life of a judge as very solitary, like that of a monk or priest.

Other judges find other aspects of the transition from lawyer to judge to be more challenging. Some mention that the hardest part is becoming a generalist (after having been a specialist in some area of law), or learning entire new areas of law. Other judges find the administrative duties a new sort of responsibility.

*What has your judge's experience been in the "socialization" to being and learning the job of a judge?*

## Overseeing the Practice of Law

## Inquiry Suggestions # 13

NOTE: The state supreme court has the ultimate authority and responsibility to oversee the practice of law. The Court admits and disciplines lawyers. But each court has inherent authority to oversee the practice of law before it. Judges can hold attorneys in contempt for violating court orders. They can fine the lawyers for bringing frivolous cases, motions, or appeals. And judges are obligated to report unethical conduct by attorneys to the bar association for investigation.

*What is the quality of lawyering your judge sees? What does your judge find most troublesome about the lawyers practicing before him or her?*

*What has your judge done in the way of disciplining lawyers or enforcing better practices? Why has your judge taken these actions? When has your judge declined to intervene?*

---

## Settlement and Alternative Dispute Resolution

## Inquiry Suggestion # 14

*What does your judge do to encourage settlement?  
How does your judge view his/her role in the settlement process?*

Trial court students, if you can, observe a pre-trial settlement conference.

*What does your judge think about Alternative Dispute Resolution?  
What ADR programs does your court use?*

Observe, if you can, any court-annexed ADR that the judge may identify for you.

---

## Juries

## Inquiry Suggestion # 15

Trial court students, if you can, observe a jury selection (voir dire), observe the judge charging the jury.

*What does your judge think of the jury system? of the competence of juries? in complex cases?*

*How does your judge conduct voir dire? Is your judge committed to judge-conducted voir dire?*

*If your judge could change the system or the law, is there anything your judge would change to insure disinterested, unbiased and competent juries?*

*How does your [trial] judge deal with the jury? Does your judge allow the jurors to take notes? to ask questions (in writing, through the judge)? to receive the instructions in writing? to take written instructions to the deliberations? to receive instructions at the outset of the case?*

*If your judge could change the system or the law, is there anything your judge would change to insure*

*that the jury is as well prepared as possible to decide the issues presented?*