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## Lessons Learned While Clerking

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## Lessons Learned While Clerking

Darrell W. Clark\*

I graduated from law school in 1993 as the first lawyer in my family. After graduation, I began a two-year clerkship for Judge Schermer. Washington University School of Law taught me how to write, research, and argue the issues, but my clerkship with Judge Schermer offered another type of education.

In my remarks at the April 7, 2017 symposium to honor Judge Schermer's thirty years on the bench, I joked that Judge Schermer taught me "everything" about practicing law and being a professional. I was only half serious. His lessons or observations might more aptly be considered good habits or strong behavioral traits. Sometimes these are termed "soft skills." Below is a list of some of the "soft skills" Judge Schermer taught me while I was serving as his clerk. These lessons often pepper my comments when speaking to younger colleagues.

### 1. PAY YOURSELF FIRST

This economic lesson is hardly one that needs to come from a federal judge. However, working for Judge Schermer was my first professional job: the first time in my life when I was receiving a salary. On the pay scale, there was nowhere to go but up. A first-year clerk's salary was hardly comparable to that of a private firm associate. Also, there were the sorts of financial obligations placed on all new graduates, ranging from repaying student loans to buying clothes suitable for the job. In addition, there was the desire to go out with friends as well as spruce up the one-bedroom apartment that served as home for the three years of law school.

However, Judge Schermer was quite insistent that some small portion of my take-home pay should go to long-term savings. Funding a savings account only with the money left over, after I paid my bills, was not sufficient. The savings had to be deducted first. Judge Schermer helped me set up an automatic withdrawal into a market-based mutual fund. It was a lesson I never forgot. The automatic withdrawal continues to this day — this year I turn fifty years old. After nearly twenty-five years, that

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small regular savings has turned into a tidy sum and I have only Judge Schermer to thank for it.

## 2. ALWAYS HAVE AN ORDER READY WHEN YOU GO TO COURT

Bankruptcy law is a practice built on filing motions with the court: from a motion to sell assets to a motion seeking authority to resolve longstanding disputes. A proposed order is generally required whenever a motion is first submitted to the court. However, when that motion is contested, a different order is required: one that reflects the content of the opposition and the court's rulings. It is an order that may be appealed under the right circumstances.

Following a hearing on the contested motion, the prevailing party is generally tasked with drafting the order. That responsibility can often turn into a chore because the opposing party will not likely move quickly in supplying comments to the proposed order. Also, memories sometimes fade over the exact nature of the ruling.

Judge Schermer's advice was to come to court with an order in hand for the conclusion of the hearing. After the court rules, tender to the court a proposed order that attempts to address (indeed anticipates) the ruling. This serves several useful purposes.

First, it helps to move the bankruptcy process along faster. Whether it is a reorganization style bankruptcy or a straight liquidation of assets, time is money. Interest accrues, fees increase, and the return to creditors dwindles as a result.

Second, handling the order from a contested hearing in this fashion also avoids the lengthy "back and forth" with the opposing party over the content of the order after the parties have returned to their offices. Most litigators have encountered situations where the drafting of an order following a hearing resulted in some post-litigation posturing by the parties. As a result, the order arrives well after the court has ruled. Parties tend to move a lot faster while standing before a court discussing the terms of the order immediately following the court's ruling. The matter is fresh in everyone's mind. Also, it eliminates the behind the scenes bluster that can drag the bankruptcy proceeding to a halt. If there are portions of the order that require editing, the court will interlineate its comments in the

order and it can be immediately resubmitted after quickly incorporating the court's edits.

### 3. DON'T END UP IN THE MIDDLE BOX

In chambers, Judge Schermer's longstanding judicial assistant Barbara Sutton used to maintain a series of inboxes for the Judge's regular consideration. One box was dedicated to routine orders that required his signature. Another involved court administration from travel vouchers to financial disclosures. The "middle box" however was a place where the troubled files were placed. Most middle box files resulted from lawyers who had ignored the rules of procedure or local rules and had filed a pleading that was incomplete in some fashion. The reasons were myriad: improper service of process or a hearing notice that failed to contain the correct language. Sometimes, they reached the absurd, such as the debtor's counsel who sought a refund on the Chapter 11 filing fee when the case he filed was quickly dismissed as an improper filing. The result of the middle box review was that special orders or deficiency notices needed to be drafted by either Barbara or myself for Judge Schermer to review and sign.

Saying that Judge Schermer hated reviewing the middle box may be a little too strong, but not by much. Barbara had to carefully time her suggestion that Judge Schermer review the middle box. The process was both time-consuming and tiresome. It required that Judge Schermer be in a certain mental frame of mind to unwind the procedural insufficiency and then explain the correct steps to counsel in a careful and patient manner. Thus, Barbara would often stake out the time for middle box review well in advance on Judge Schermer's schedule.

Aside from the time and energy involved, I think the main reason Judge Schermer disliked dealing with the files in the middle box was that it disappointed him. Attorneys were not paying close enough attention to procedure and the clients' cases were being adversely affected as a result. I also think it offended his notion of the well-organized movement of cases through the bankruptcy system. He devoted a lot of time to making that system work efficiently. He expected the same dedication from the bar.

A typical middle box file review went something like this: Barbara would sit with Judge Schermer at a large table while the Judge looked at each troubled file individually. I was generally at my desk in the next office. Eventually Judge Schermer would say, “Darrell come out here.” My arrival at his elbow would be greeted with phrases such as “Look at this file,” and “don’t do this when you are practicing . . . draft an order denying the motion for failure to consult Bankruptcy Rule . . . .” The rest of the afternoon was spent working on the orders resulting from his review.

Barbara received more of the middle box grief than I did. She was at his side the entire time, carefully taking notes on how the problems could be resolved. Barbara could probably write a small book about the hours spent on the middle box. To me, seeing Judge Schermer’s reaction — a mixture of disappointment and frustration — has colored how I submitted matters to courts. Filing pleadings in court requires more than simply drafting the motion. The Bankruptcy Code and associated rules have notice requirements, hearing requirements, filing fees, and service obligations.<sup>1</sup> The attorney needs to think through these things. They are not issues that should be delegated to an administrative assistant without clear instruction and oversight. Ultimately, it is the lawyer, and not his or her staff, that draws the judge’s attention in the middle box.

#### 4. BE PREPARED, STAY PREPARED

This sounds more like a Boy Scout motto than a legal lesson, but there is no shortage of examples of Judge Schermer’s adherence to these principals. In court, he seems to be moving quickly, making a prompt decision and then moving to the next case. To the untrained eye, he appears to be moving too quickly. What I observed, however, was a man who took his job very seriously and moved quickly only because he already had been considering the cases and issues for hours. Below are some examples.

My tenure as clerk took place in the days before electronic case filing. To prepare for hearings, the paper files for the next week of hearings

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1. 11 U.S.C.A. §§ 101-1532 (West 2017) [hereinafter the "Bankruptcy Code"].

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would be arranged in a large basket on wheels. The basket was then wheeled to chambers at the end of each week.

Whether it was over the weekend or early Monday morning, Judge Schermer reviewed the files for the upcoming week of hearings. The Judge's printed docket for the following week, where each case before the court was listed out by name, was often littered with notes, facts, or Bankruptcy Code sections pertaining to the particular case on the docket. This early review sometimes required me to locate the cases for Judge Schermer to consider before the hearing or to find the exact Eighth Circuit language upon which his ruling would be based.

I did not appreciate how unique Judge Schermer's preparedness was until we traveled. During my tenure I was fortunate to travel with Judge Schermer to a judicial district in another state where he was serving as a visiting bankruptcy judge due to the death of the judge serving that court. It was a single-judge district and bankruptcy judges from around the country volunteered to fill the void. During that trip, at a regular motions docket the "Smith" case was called for hearing. As the parties introduced themselves, Judge Schermer acknowledged counsel and proceeded with a comment such as, "This is the case with the disputed property on Main Street." I remember the looks on the faces of the attorneys when they discovered that the court had read the entire file and considered the positions of the parties in their papers. I imagine those "bulk filing" attorneys — those with many consumer clients or those representing a bank with several debtor cases — sitting in court felt a small lump in their throats when they realized that Judge Schermer was better prepared for their cases than they were.

We made the trip to that single-judge district twelve times in my two years working for Judge Schermer. I saw the surprised looks from the bar often at first, but eventually word got around that you had better come to court expecting that the Judge knew your case and your motion. I think the court hearings moved faster as a result.

Judge Schermer's extensive preparation was also reflected in his teaching. On many occasions, I witnessed Judge Schermer fervently preparing for teaching his basic bankruptcy class. Here is a man who has spent most of his life practicing, teaching, and ruling on bankruptcy issues. In my estimation he could teach that course from memory. Yet, he spends

hours in advance of class preparing for the best way to teach bankruptcy concepts to law students.

Judge Schermer's review of bankruptcy law advance sheets further demonstrates his "stay prepared" trait. The federal court library was rich on resources to keep the judges up-to-date and Judge Schermer made every effort to stay apprised on the latest developments. When he traveled, and during my tenure he was Chief Judge and serving on several committees, his briefcase was littered with the latest newsletters, law journals, and case updates. He was quick to adopt Westlaw and other electronic research. He would direct me to run regular searches and supply him with the results. One Westlaw search that he still runs daily identifies every decision issued that day by the Eighth Circuit Court of Appeals.

There were many practice pointers for me in observing Judge Schermer in this fashion. Be on time, but, better yet, arrive early. Arrive prepared, having read the file and ready to respond to a court's question. Do not let court hearings sneak up on you. Keep a calendar and continually look at that calendar for events that are arriving in the coming weeks.<sup>2</sup>

Preparing for court can be a little like cramming for a final exam: because one does not always know how the hearing will turn, one needs to be prepared for everything. For this reason, attorneys do not always make money going to court. Clients sometimes object to the time charged for preparing for court. All the client sees is the outcome from the hearing and not the attorney running through the matrix of "what ifs" that might come from the court's possible questions. However, from Judge Schermer, I observed that there is no better way to make a positive impression on a judge — from written product to oral presentation — than when you have the court's attention on your client's file.

## 5. LEARN HOW TO DELEGATE

For those who know Judge Schermer, the fact that I am writing on how the Judge taught me to delegate may make them choke on their morning coffee. Here is a man with a near encyclopedic knowledge of the

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2. In chambers, the calendars were posted in three month increments so there were no surprises when you turn the page from one week to the next.

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Bankruptcy Code and who prides himself on making good decisions. Why would he trust others with his work?

Judge Schermer does, in fact, delegate. To me, he emphasized that skill as the only way to grow and succeed in a law firm. I remember our conversation on this subject. Several years after I completed my clerkship, I was a young partner working with a new associate. In a telephone call with Judge Schermer, I had indicated my struggles watching someone draft routine motions that I could more efficiently do myself. His advice was simple: “You need to learn this, and, if you do not learn to delegate, you will never grow as a partner.”

Judge Schermer was right. I did need to learn this skill. It was not easy, but his words of instruction and telephone calls offering encouragement worked. He was right on the result, too. It has helped me to grow as a partner in my firm.

Delegating to others, however, is not the end of the chore. There is a responsibility that comes from being the one to hand off a project and the one who receives it. When clerking, oftentimes in court we would see counsel stand before Judge Schermer and offer an excuse for a requested adjournment or procedural mishap such as “my secretary screwed up,” or “this is not my file, but . . .” or “I am just filling in for . . . .”

Ultimately, delegating to others or accepting a delegated assignment means owning that assignment to the court. Just like the problems from the dreaded middle box, the counsel that offered up another individual as the reason for a mistake were often met with a comment from Judge Schermer to me: “Darrell, when you are in private practice, do not do that.”

#### 6. BREAK A DIFFICULT PROJECT INTO SMALL MANAGEABLE PIECES

Sometimes in life you hear someone make a comment and you just do not forget it. To me, Judge Schermer’s advice to break a large complex project into bite sized pieces in an organized logical fashion struck me for its simplicity and brilliance. It is advice I never forgot. In fact, this is the one Judge Schermer saying that I have repeated most often over the years. The advice goes beyond the law. In fact, I think I have said this more frequently to my teenaged children than to clients or colleagues. Whether



it is trial preparation or helping a high school student with her term paper, it is the type of expression that turns the insurmountable obstacle into something that can be tackled with a bit of planning and diligence.

#### 7. DEMONSTRATING RESPECT AND COURTESY

When consumers come to the bankruptcy court, they are financially broken individuals. Having represented consumers, I know that many feel a sense of failure in seeking bankruptcy protection. Financial stress tests the bonds of marriage. Often, a job loss, an accident, or a health problem is partly to blame for the insolvency. Stated succinctly, you are not encountering people on their best day.

The issues in a consumer bankruptcy case can also be given short attention. It is usually “small dollar” stuff — for example fighting over car payments or retrieving rented furniture. However, what is small dollars to the lender is life-altering to the consumer debtor. Judge Schermer recognizes this tension.

While I was his clerk, I witnessed Judge Schermer treating the consumer debtors with patience. He may expect a lot from those representing clients, but to the consumers themselves, his demeanor conveys a sense of understanding. He recognizes that this may take the form of a missed car payment, but the individual is fighting for his means of transportation to work. In his use of honorifics in addressing the consumer debtors, Judge Schermer shows that the court holds them in high regard notwithstanding the financial circumstances that brought them to court.

Judge Schermer demonstrates this quality outside of court as well. Since my service as his law clerk, Judge Schermer has visited my office in Washington, D.C. several times. He is on a first name basis with our receptionist. While I was with him at an airport in St. Louis, on the very day he was scheduled to receive an award for his service to Washington University School of Law, he stopped to help a flustered airline employee who had dropped dozens of papers.

This soft skill is something which I try to emulate. Outside of the clerkship, this is not just a skill exhibited with consumer debtors or strangers. Attorneys sometimes do not appreciate that support staff form opinions about them, and failing to practice courtesy within the workplace

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can lead to a reputation of being "grouchy," "impatient," or worse. As with any skill that requires a constant focus, it is a developing skill.

#### CONCLUSION

When I told Judge Schermer that the law school had asked me to speak about "Judge Schermer as a teacher" at the symposium, he commented that all he taught me were "practical lessons." This, of course, is not true. We had many discussions on the Bankruptcy Code, litigation skills, and trial techniques. For me, however, as someone looking for a mentor in the law, I landed in the right place. What I needed most at that time was someone to teach me how to be a professional. I got exactly that and a lifelong friend to boot.