

12-1-1965

Continuing Education for Appellate Judges

Robert A. Leflar
University of Arkansas

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Jurisprudence Commons](#), and the [Legal Education Commons](#)

Recommended Citation

Robert A. Leflar, *Continuing Education for Appellate Judges*, 15 Buff. L. Rev. 370 (1965).
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol15/iss2/12>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

CONTINUING EDUCATION FOR APPELLATE JUDGES

ROBERT A. LEFLAR*

PROBABLY every lawyer in America has some time made the remark that acquiring a legal education is a lifetime job. Every practicing lawyer, every judge and every law teacher works at the job continuously, if he is worth his salt. Most of the time the task is individualized. It consists of the lawyer-learner working on his cases, or reading in the evenings, or gathering knowledge and insight from his fellows as they work with him or against him in their cases. For appellate judges, the process is only slightly changed by point of view. It constitutes the bulk of continuing legal education.

Three years of law school is supposed to give the fledgling lawyer four accomplishments: (1) an understanding of the fundamental rules, principles, policies and organization that make up our legal system as a whole, (2) some mastery of techniques for study of narrow problems in minute detail, (3) appreciation of the law's relation to our society—past, present and future, and (4) an interest in the law sufficient to induce him to spend the rest of his life trying to learn something about it. After he gets that much, if he gets it, he is pretty much on his own. Since self-education is the best education there is, the potentialities for further learning are almost unlimited. Some lawyer-learners go far with them. Holmes and Cardozo, taking maximum benefit from world literature, from conversation and correspondence with friends and from their own daily labors, achieved a self-guided continuing education in law and life that every student must envy.

For most of us the task is harder because we lack either the inspired sense of direction or the consuming personal drive that pervaded the masters. For us trees obscure the forests. We learn much as we go along, but we know that there are gaps in our learning, and we are not sure where the gaps are, nor of the relation of some bits of learning to others. Furthermore, most of us realize that we are not giants enough to draw our own conclusions about the universe of the law, let alone maintain them against the jurists and scholars who rank in our time with Holmes and Cardozo. We need the help of these giants.

A dozen years ago the assumption was common that appellate judges were beyond being helped. Either they could take care of themselves, as the giants did, or they could not. They were limited to what they could do on their own, because they were set apart by the nature of their jobs from ordinary learners who could join forces and help each other. It was less than a dozen years ago that Chief Justice F. G. Hamley of Washington protested¹ that this need not be so, and

* Distinguished Professor of Law, University of Arkansas, and Professor of Law, New York University; Director of Appellate Judges Seminars, New York University; formerly Associate Justice, Supreme Court of Arkansas.

1. Judge Hamley, now a member of the United States Court of Appeals for the Ninth Circuit, discussed the possibilities in the course of an address to the Section of Judicial Administration at the meeting of the American Bar Association at Philadelphia in 1955. He had previously corresponded with Dean Russell D. Niles and with the present writer, at New York University, about a seminar for appellate judges.

induced the School of Law at New York University to sponsor, as a small beginning in a planned program of continuing judicial education, its appellate judges seminars.²

Since then more than two hundred judges from the highest state courts and from the United States Courts of Appeals have attended the seminars. This is nearly half of the approximately 425 American judges at this level. Of the fifty states, forty-four have had their judges in the seminars, as have nine of the eleven federal Courts of Appeals. The entire membership of some state supreme courts has attended, usually one at a time over the years.³ Of the seven judges of the New York Court of Appeals, five have been in the seminars either as members or on the faculty. Charles S. Desmond of New York was a member of the second seminar in 1957, and has been a faculty member each year since then. In these capacities he has had a major part in the seminars' development and success. His participation has had much to do with the current acceptance by most American appellate judges of the idea that group efforts at self-improvement, in seminar form, can be of tremendous value to them.

Judge Desmond's major contribution as a seminar faculty member has been in the area of judicial administration by appellate courts. He has long labored to improve judicial administration in New York, and his experience there, coupled with a widening knowledge of practices elsewhere, have enabled him to discuss problems of administration more comprehensively than can most judges in America.⁴

Though an outline can give only an incomplete idea of problems covered, a list of topics dealt with under the Judicial Administration head in the seminar in 1965 is nevertheless revealing. The list indicates what administrative matters appellate courts are concerned about. The outline printed here is complete only for the first subtopic (A), but this illustrates the similar breadth of items under subtopics B, C and D.

A. Internal Administration of the Court.⁵

- (1) "Breaking in" the new judge (acquainting him with the internal history and practices of the court; specific orientation techniques).
- (2) Efficient and appropriate use of law clerks and other professional assistants: their (a) selection, (b) tenure, (c) pay, and (d) duties; use of clerks for criticism and analysis of

2. For descriptions of the seminars' inception, and of their work, see Burger, *School for Judges*, 33 F.R.D. 139 (1963), and short articles in 9 J. Legal Ed. 359 (1956), 4 J. Soc'y Public Teachers of Law (n.s.) 150 (1958), and 10 Prac. Law. 7 (Dec. 1964).

3. During recent years, two appellate judges from Canada have been invited each year to be Seminar members, in addition to judges from the United States. Justices Judson, Cartwright, Ritchie and Martland of the Supreme Court of Canada have been members, as have eight judges of the high courts of Alberta, Manitoba, Ontario and Saskatchewan.

4. See Desmond, *Current Problems of State Court Administration*, 65 Colum. L. Rev. 561 (1965).

5. See generally A.B.A. Section of Judicial Administration, *The Improvement of the Administration of Justice* (4th ed. 1961); A.B.A. Section of Judicial Administration, *Internal Operating Procedures of Appellate Courts* (1961); Karlen, *Appellate Courts in the United States and England* (1963).

- draft opinions; relationships between judge and law clerk; special need for high level clerical assistance in handling increasing mass of indigent prisoner appeals; assistance from other staff employees.
- (3) Efficient use of the court's own manpower: (a) relative efficiency of courts with different numbers of judges; (b) splitting the court into panels or divisions, and correlating their work; (c) desirability and value of intermediate appellate courts, allocation of functions between intermediate and top appellate courts; (d) use of retired judges, trial judges, commissioners as "extra judges."
 - (4) Form of appellate records (excessive and useless printing costs):⁶ (a) function of record and transcript; (b) abstracted material; (c) form, content and length of briefs.
 - (5) Status of appealed cases:⁷ (a) discretionary selection of cases for appellate review, selection of cases for full-dress opinions, memorandum and *per curiam* opinions; (b) advancing cases of special public importance, other bases for categorizing cases for special handling; (c) time interval between hearing case and handing down opinion, majority and dissents together; (d) withholding less important opinions from publication (the growing law library problem).
 - (6) Hearing and determining cases: (a) advance or later reading of briefs and of summary memoranda on them; (b) pre- and post-submission conferences; (c) oral argument, its function and value; function and value of questions directed to counsel; (d) the decision conference, when it should be held and how it should be conducted; (e) assignment of cases: when case should be assigned, method of assignment—by presiding judge, by various rotation techniques, or to "specialist judges," reassignments, same judge writing for both majority and dissent; (f) the opinion conference: pre-circulation of drafts and redrafts, avoidance of "one-man opinions"; (g) techniques for achieving improvements in brother judges' opinions; (h) keeping court's docket current.
 - (7) Extrajudicial conduct (misconduct): (a) outside employment ("moonlighting"), important public service assignments,⁸ arbitration of labor disputes, relations with former clients and law partners; (b) political relationships, campaigning for office, non-judicial offices, (c) charitable fundraising, membership on boards of charitable and other civic organizations; (d) private business relationships, investments, membership on corporate boards; (e) personal associations, contacts with lawyers, with prospective litigants, serving as character witness for friends, wife's associations; (f) laziness, inefficiency, failure to perform duties—what colleagues can do

6. Willcox, Karlen & Roemer, *Justice Lost—By What Appellate Papers Cost*, 33 N.Y.U. L. Rev. 934 (1958).

7. See Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211 (1957).

8. See Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 Harv. L. Rev. 193 (1953).

CONTINUING EDUCATION FOR APPELLATE JUDGES

- about this; (g) sanctions: impeachment, special courts or commissions on the judiciary, internal pressures.
- (8) Disqualification for particular cases: relationships requiring it, justifying it; sound standards.
- B. Administration of an entire judicial system:⁹ integrated court systems, court administrators, correlation with work of intermediate appellate divisions, assignment of trial judges, control over congested trial dockets, collection and publication of judicial statistics, check-up on actual performance of trial judges; the rule-making power as applied both to the internal operation of lower courts and to procedural law applicable throughout the judicial system,¹⁰ judicial councils and conferences.
- C. Appellate courts as supervisors of the legal profession:¹¹ integration of the bar or other control of bar organization, enforcement of codes of legal ethics, client-reimbursement funds or insurance, prevention of unauthorized practice of law, rule-making power as to law practice generally, control over disciplinary proceedings, admissions to the bar.
- D. External relationships: with the legislature—on institutional matters and on law generally, with legislative councils and law revision commissions on improvement of the law, with the press in reporting cases and in public relations, with the law schools in all areas where their activities touch the work of the courts, with agencies administering programs of continuing legal education for bench and bar, with the variety of bar organizations, with other agencies.

Broad knowledge and wise leadership on the mass of administrative matters just enumerated is not as common among American appellate judges as it should be. This is not surprising, in view of the complete absence of judicial training and experience with which most appellate judges come to the bench. The training is not available anywhere to judicial candidates, nor is it likely to be under our traditional American systems of election and appointment. Such education will for the most part be available only after the candidate has been named to his court. And then it can come only from teachers such as Chief Judge Desmond—older judges who can speak with the authority of forward-looking experience, and from academic legal specialists.

It is of course not only in the field of administration that new appellate judges need to learn more about their jobs. Administration in fact is one of the simpler areas of appellate judicial functioning, regardless of its importance. Several other aspects of the judge's job demand more of his time and labor, yet

9. Institute of Judicial Administration, *Court Administration* (1955, with 1959 supp.); Brennan, *After Eight Years: New Jersey Judicial Reform*, 43 A.B.A.J. 499 (1957); Shafroth, *Improving Judicial Administration in the State Courts*, 8 Mo. L. Rev. 5 (1943).

10. Levin & Amsterdam, *Legislative Control Over Judicial Rule Making*, 107 U. Pa. L. Rev. 1 (1958).

11. See McCracken, *The Maintenance of Professional Standards: Duty and Obligation of the Courts*, 29 So. Cal. L. Rev. 65 (1955); Niles, *Rule-Making Power of Appellate Courts with Respect to the Legal Profession* (Institute of Judicial Administration, 1960). Cf. Desmond, *Integrate the New York Bar?*, 13 Syracuse L. Rev. 201 (1961).

are often just as distant from his prior experience. The topics to be discussed at any one of the Appellate Judges Seminars are selected by the members, from a long list of just about all matters of general judicial interest prepared by the Director, and therefore indicate what subjects the judges themselves are most anxious to work on. The topics that received the highest votes and were included in the 1965 program, aside from Appellate Judicial Administration, were:

- Nature and Function of the Judicial Process¹²
- Preparation of Judicial Opinions¹³
- State Courts and the Federal System¹⁴
- Appellate Review of Criminal Cases¹⁵
- Appellate Control over the Judge-Jury Relationship
- Free Press and Free Trial
- Appellate Review of Decisions of Administrative Agencies
- Current Trends in Negligence Law
- New Developments in Conflict of Laws
- Appellate Control over the Rules of Evidence
- Principles and Techniques of Statutory Construction.

Some of these topics were discussed at only a single hour-and-a-half seminar session, others took up four or five sessions. Judge Desmond was a panel member for several of the topics. Other panel members who taught throughout all or a part of the seminar were Justice William J. Brennan of the United States Supreme Court, Judge Warren E. Burger of the United States Court of Appeals, District of Columbia Circuit, Chief Justice Frank R. Kenison of the Supreme Court of New Hampshire, Justice Walter V. Schaefer of the Supreme Court of Illinois, and Chief Justice Roger J. Traynor of the Supreme Court of California. Edward McConnell, Director of the Office of Administrator of Courts in New Jersey, also assisted, as did several law teachers from the faculties of New York University and other law schools.

On the topic "Nature and Function of the Judicial Process,"¹⁶ the judicial faculty members were Schaefer, chairman; Brennan, Desmond, Kenison and Traynor. Four sessions were devoted to the topic. The problems discussed were

12. See *infra* notes 16-24 and accompanying text.

13. Generally, see Wigmore, *Evidence*, § 8(a) (3d ed. 1940); Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960); Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U.L. Rev. 915 (1961); Leflar, *Some Observations Concerning Judicial Opinions*, 61 Colum. L. Rev. 810 (1961); Reid, *Doe Did Not Sit—The Creation of Opinions by an Artist*, 63 Colum. L. Rev. 59 (1963); Smith, *The Current Opinions of the Supreme Court of Arkansas—A Study in Craftsmanship*, 1 Ark. L. Rev. 89 (1947).

14. See Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. Rev. 761 (1961); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423 (1961); Fordham, *The States in the Federal System—Vital Role or Limbo?*, 49 Va. L. Rev. 666 (1963); Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1 (1956).

15. At the Appellate Judges Seminars, short advance reading lists and longer comprehensive ones are distributed on each topic. The advance reading lists are to be read before the judges come to the seminars.

16. Generally, see Cardozo, *The Nature of the Judicial Process* (1921); Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960); Traynor, *No Magic Words Could Do It Justice*, 49 Calif. L. Rev. 615 (1961).

in sharp contrast to those dealt with under "Judicial Administration." A list of them, though less susceptible to accurate outline, is equally revealing as to decisional techniques and methods that appellate judges need to be acquainted with. Matters dealt with included:

- (1) The function of precedent under *stare decisis*,¹⁷ the problem without precedent, the creative function of appellate courts and the proper limits of this function, making "new law."
- (2) Techniques of overruling¹⁸ and distinguishing: narrow distinction of the new case which takes it outside the established rule, narrow distinction of the old case leaving little or nothing of the old rule; non-citation of a relevant precedent; outright overruling based on changed conditions, on the lessons of experience, on later authorities in opposition; are there other acceptable reasons for overruling; how is the problem different from that which confronts a legislature when it is considering a new statute?
- (3) Prospective overrulings:¹⁹ when is retroactivity unfair—compare property, contract and torts cases in terms of reliance on past decisions; techniques: the *caveat* device (*dictum* only), giving benefit of change to present litigant but prospectively only to others, setting future date to permit legislative action; effect of making courts readier to overrule old decisions; special appropriateness of this technique in constitutional overrulings.
- (4) *Sua sponte* consideration of unargued issues:²⁰ request that counsel brief the unargued issue; compare cases where issue was noted by counsel but inadequately understood or briefed; asserted right of counsel to conduct case in their own way with issue omitted.
- (5) Relation of court and legislature:²¹ the separation of powers, what constitutes "judicial legislation," potentialities of statutory "interpretation"; statutes as precedents (reasoning by analogy from statutes,²² as from prior cases) sustaining results beyond the letter of the statute.
- (6) Unstated grounds for decision: the confusion they produce, possible justification for, the process of discovering the unstated grounds, types of cases in which they may exist.

17. Schaefer, *Precedent and Policy* (U. of Chi. Press, 1956); Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463 (1962); Reid, *Chief Justice Doe and Chief Justice Vanderbilt: A Comparison in the Techniques of Reform*, 46 A.B.A.J. 278 (1960); Tate, "Policy" in *Judicial Decision*, 20 La. L. Rev. 62 (1959); Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 Utah L. Rev. 157 (1960).

18. Cf. Israel, *GIDEON v. WAINWRIGHT: The "Art" of Overruling*, 1963 Supreme Court Review 211 (1963); Traynor, *La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law*, 29 U. Chi. L. Rev. 223 (1962).

19. See Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 Calif. L. Rev. 11, 17 (1965).

20. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 Fordham L. Rev. 477 (1959).

21. Baker, *Legislating Judicially: Should the Power of Judicial Review Be Curbed?*, 35 A.B.A.J. 555 (1949); Rundell, *The Judge as Legislator*, 26 U. Kan. City L. Rev. 1 (1958).

22. Schaefer, *Precedent and Policy* 15 (1956); Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 12 (1936). See also Desmond, *The Formation of Law: The Interrelation of Decision and Statute*, 26 Fordham L. Rev. 217 (1957); Note, *The Uniform Commercial Code As A Premise For Judicial Reasoning*, 65 Colum. L. Rev. 880 (1965).

- (7) Judicial notice of socio-economic facts which may affect decisions:²³ when affirmative evidence required, "Brandeis briefs," common observation of facts bearing on controversial socio-economic theories, reliability of sources.
- (8) Function of dissenting opinions:²⁴ what induces judges to dissent or concur in result only?, dissents without written opinion, persistent dissents in successive cases, acrimonious dissents; Canons of Judicial Ethics No. 19; dissents which ultimately become law, corresponding function of *dicta* in majority opinions.

Fuller analysis would be interesting, but space here does not permit. It takes place in the seminar. The point is that there is plenty in the subject for the judges to think about. So is there in all the other subjects.

Continuing education for judges is now an accepted thing in the United States.²⁵ It is becoming institutionalized. This would not be a good thing if it threatened the old system of private study in the judge's chambers and at home in the evenings, but there is no threat to that. Good judges will always engage in that sort of continuing legal education.

Formalized study can do for the average judge, and for nearly every judge, much that private study cannot do. Most judges realize this, are grasping the opportunities for study that are available to them, and are demanding more opportunities. Judicial conferences and judicial councils justify themselves today primarily by their educational programs. Seminars for judges, whether at the trial or the appellate level, have been shown to be useful and successful. They will undoubtedly continue, and will be strengthened. Still greater possibilities remain, however, largely unexplored.

The appellate judge and the law teacher, both dealing with the law's future, are in comparable positions with respect to their need to keep abreast of growth in the law and of growth in the society as it bears upon the law. A law teacher who did no more than work throughout his career with the legal materials that existed when he finished law school would not be tolerated. Constant study of new materials is part of his job. Much of this he can do privately, but continuing formalized study through academic meetings, professional workshops and seminars, exchange of views through papers and other writings, interdisciplinary assignments, exchange professorships, sabbatical leaves for further study, and research beyond the call of daily duty are part of the law teacher's way of life. There is equal reason for the same types of activity, or comparable

23. Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 Wis. L. Rev. 39; Davis, *Judicial Notice*, 55 Colum. L. Rev. 945 (1955).

24. Hand, *the Bill of Rights* 72 (1958); Fuld, *The Voices of Dissent*, 62 Colum. L. Rev. 923 (1962); Moorhead, *Concurring and Dissenting Opinions* (1952 Ross Prize Essay), 38 A.B.A.J. 821 (1952); Pound, *Cacolithes Dissentiende: The Heated Judicial Dissent*, 39 A.B.A.J. 794 (1953).

25. See Institute of Judicial Administration, *Judicial Education in the United States: A Survey* (1965).

CONTINUING EDUCATION FOR APPELLATE JUDGES

ones, to be a part of judicial life.²⁶ Perhaps we are approaching a time when appellate judges will be expected to have the same intellectual opportunities throughout their careers as are supposed to be available to law teachers.

26. O'Connell, *Continuing Legal Education for the Judiciary*, 16 J. Legal Ed. 405 (1964).