THE ROLE OF STAFF ATTORNEYS IN THE REVIEW AND DRAFTING PROCESS

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CHAPTER 11
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I. INTRODUCTION

“So what does a staff attorney do, exactly?” is usually the question I’m asked when I first tell someone where I work. This paper will answer that question, at least with respect to the petition and opinion drafting process. But it is nearly impossible to address a staff attorney’s role in that process without also addressing the role of the law clerks. So this paper will explain how the law clerks, staff attorneys, and justices work together to complete the work of the Court. Of course, every chambers and justice operates a little differently as far as who does what and how much. But this paper will explain how things generally are done.\(^1\)

II. PETITION FOR REVIEW

Some justices have law clerks prepare a short summary of each petition that is filed (and response if one has been filed) before the justice reads the petition and votes. These summaries are not meant to (and do not) replace the actual petition. The clerks do not review cases or any other sources cited in the petition or do any independent research. They do, however, review the court of appeals’ opinion. The clerks are instructed to especially look out for issues not addressed in the petition that will impact what the Court might do. For example, if the petitioner only addresses the substantive issue in the case but the court of appeals disposed of the appeal on failure to preserve error grounds, the petition summary would bring this to the justices’ attention. The petition summaries are not reviewed by a staff attorney before they are given to the justices.

If any justice votes to take any action other than deny a petition, the petition is placed on the agenda for discussion at the Court conference. On rare occasions, a justice may ask a staff attorney or clerk to review an issue in a petition for review before the conference discussion. This generally only occurs when an issue is not fully addressed in the petition.

At conference, one or two justices may be interested in requesting briefs on the merits and having a study memo prepared, but they cannot convince a third justice to join them in that vote. If one of the justices feels strongly enough about the petition, he or she will ask that the case not be denied on that week’s orders to give him or her more time to study it. When that happens, the justice’s clerk or staff attorney will draft an opinion. Whoever is assigned to draft an opinion will generally review all the briefing that has been filed in a case and discuss the case in depth with his or her own staff to review the case or an issue and prepare a memo. If the justice is still interested in granting the case after further review, a memo to that effect will be circulated to the Court.

III. THE STUDY MEMO\(^2\)

If three justices so vote, the clerks office requests briefs on the merits and a study memo is assigned randomly to a chambers. After the briefs are filed, a law clerk prepares a study memo for the Court in which he or she objectively analyzes the issues. Very rarely will a staff attorney prepare a study memo. But the staff attorneys provide guidance to the clerks through the study memo drafting process. Most staff attorneys review study memos before they are circulated to the Court. When law clerks are just starting at the Court, their study memos may go through a few drafts with the staff attorneys before they are ready for circulation. After the clerks have written a few study memos, the memos should require very little editing. The justice whose clerk is preparing the study memo generally does not review the memo before it is circulated to the other justices.

Similar to the process when a justice is interested in getting a study memo but not enough other justices are interested, if, after reviewing a study memo a justice thinks a case should be granted but there are not enough votes for that disposition, he or she may ask his or her own staff to review the case or an issue and prepare a memo. If the justice is still interested in granting the case after further review, a memo to that effect will be circulated to the Court.

IV. DRAFTING MAJORITY AND PER CURIAM OPINIONS

Some justices do some or much of the opinion drafting themselves, but use staff to research issues and prepare memos on those issues for use in drafting. Most justices use staff to prepare first drafts of opinions. If the Court votes to issue a per curiam opinion, the opinion is most often assigned to the chambers that prepared the study memo. In those cases, the clerk who drafted the study memo will often also draft the per curiam opinion. If the Court grants a case, it will be assigned to a staff attorney or clerk to draft an opinion. Who the case is assigned to involves a number of factors including the complexity of the case, the subject matter, and what other assignments the staff is working on.

Whoever is assigned to draft an opinion will generally review all the briefing that has been filed in a case and discuss the case in depth with his or her justice before drafting. These discussions can take place before or after oral argument (or both) and after

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\(^1\)Blake Hawthorne’s paper and presentation at this CLE on the Supreme Court Clerks Office and Court Procedures outlines the general procedures discussed in this paper.

\(^2\)For a more detailed discussion about study memos generally, see McKay Cunningham, Study Memos and Their Impact, TexasBar CLE Practice Before the Texas Supreme Court (2009) Tab 5.
the entire Court has discussed the case in conference after oral argument. Once the staff attorney or clerk starts drafting, the discussions do not stop. Depending on the complexity of the case, these discussions can occur frequently or infrequently. Sometimes the issues that come up are better addressed through a written memo that lays out the research for the justice to review. If a law clerk is drafting an opinion, the staff attorney will also be involved to help the law clerk and ensure that the justice’s concerns and thoughts are being addressed. The staff attorney reviews and edits a law clerk’s draft (sometimes several times) before it is submitted to the justice for his or her review and edits.

Once the draft is completed, the justice will review and edit it and then return it to the staff attorney or clerk who drafted it for further edits or drafting. For example, the justice may see an issue the drafter did not address, or may want an issue developed more. The justice will also change wording to give the opinion his or her own voice. (Even though the staff attorneys and clerks make great efforts to draft opinions in their justice’s voice, it is impossible to do so 100 percent of the time). The drafter then returns the new draft to the justice for another review. This back-and-forth may continue for a few or several times with discussions as needed. But the bottom line is, the justice has the final say about what will or will not be included or said in an opinion. And once the justice is satisfied with the structure and content of the draft, the staff attorney or clerk who has been working on it will do a final edit for things like grammar and citation form before circulating it to the Court.

If another justice writes a dissent or concurrence, then the attorney working on the case will discuss with his or her justice about how to respond or if a response is necessary. Either the justice or the staffer will make edits to an opinion in response to comments from other justices.

V. REVIEWING OTHER JUSTICES’ WRITINGS
Some Justices also ask staff to review issues in other justices’ opinions. This generally occurs in complex cases or in a case in which a justice is considering concurring or dissenting. During this process, whoever is reviewing the case will generally consult with the staff who worked on the majority opinion and share research (such as what is in the record), if applicable. Law clerks usually love reviewing other justices’ writings because it gives them a chance to poke holes in another justice’s analysis. But as with everything else, the justice makes the final decision about whether to join an opinion or not.

VI. DISSENTS AND CONCURRENCES
Justices draft dissents and concurrences more frequently than majority opinions. But they will still work with a staff attorney or clerk who will do any needed research and edit the draft when completed. The process is very similar to the majority drafting process with discussions and multiple drafts.

VII. CONCLUSION
The main point to take away from this paper is that although various people put lots of work into an opinion, the ultimate result is the justice’s word. But also important to remember is that justices, staff attorneys, and law clerks are involved at each point in the process. So the oft repeated advice of “know your audience” is also important when submitting anything to the Court.