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Clerks' Perspective on Clerking and Advocacy Before the Veterans Court

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U.S. Court of Appeals for Veterans Claims

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I. Introduction

53. Clerking provides a fascinating, almost disembodied, perspective on the American legal system. As two federal clerks who served the same judge on the U.S. Court of Appeals for Veterans Claims (a.k.a. the Veterans Court), we sat in limbo. We were both licensed lawyers but did not practice. We were not technically students, but we spent most of our time reading and learning like students. We were certainly not judges, but our professional lives revolved around and supported one. We did not directly engage with the legal system, in a sense, because we did not make decisions or argue for clients. But we were immersed in the system. It was a unique position to occupy and one that lent a unique perspective.

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2 Alison E. Preston also served as a law clerk to Judge Allen. She obtained her B.A. magna cum laude from Duke University in 2015 and her J.D. magna cum laude from Stetson University College of Law in 2018. The authors in no way intend this article as a subjective commentary on the proper outcome of any case. This article also in no way communicates information about past cases or any judge's decision-making process, or even our own decision-making processes.

54. From that vantage point, we've found ourselves reflecting on our pasts, presents, and futures: law school, clerking, and the practice of law, respectively. We thought that students and practitioners might benefit from this perspective while it's fresh. So, we decided to take some time to share some thoughts and reflections on clerking generally, our former court, and effective advocacy before it.

55. Each of the following sections corresponds to an aspect of our experiences at the Veterans Court. To begin, we offer an overview of judicial clerkships, for those unfamiliar with the position or interested in clerking. We explain what clerkships are, why you should clerk, and how you can improve your chances of getting one. Next, we provide an overview of our former court, the Veterans Court, for those students or practitioners new to it. This section also contextualizes the last section, our perspective on how advocates can advocate more effectively, in general, before the Veterans Court. We write aiming to inform and inspire those who do or hope to interact with our former court.

56. Note that we've organized the article intentionally to appeal to a wider audience. For those short on time, prospective clerks can read sections II and III, and advocates can read sections III and IV. Of course, we'd prefer you read it all if you're so inclined. With that, let's jump right in.

II. Judicial Clerkships: What Are They, Why Should You Do One, and How Do You Get One?

57. Last year over 3,200 law graduates went on to serve in judicial clerkships.³ But what is a judicial clerkship, why should you do one, and how can you get one? You may have some or all these same questions as we did when we started our legal careers. You may simply want to learn more about the clerkship application process or about judicial clerks' day-to-day responsibilities. Or maybe you're specifically curious about clerking at the Veterans Court. This Section reflects our combined wisdom (often learned at our own expense!) about judicial clerking in hopes that inquisitive young lawyers or law students can learn from our experiences. We both speak as former appellate clerks, but we suspect much of our commentary applies to the trial level as well.

58. So, first, what are judicial clerkships? We won't bore you with the history behind judicial clerks;⁴ suffice it to say that they act as judges' advisors and assist them with drafting, research, and trial or oral argument preparation. It's important to note that

3 *Class of 2017 National Summary Report*, [NAT'L ASSOC. OF L. PLACEMENT](#).

4 See Todd C. Peppers, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 [DEPAUL L. REV.](#) 51, 54–56 (2008).

a clerk's responsibilities are entirely at the discretion of his or her judge. Some judges allow their clerks to draft opinions, but not all do.⁵

59. It's important to remember your role as a clerk: to serve your judge through expert research and drafting in promoting his or her judicial philosophy. Although Learned Hand may have once referred to law clerks as "puisne judges,"⁶ the bottom line is that most federal judges are appointed by the President of the United States to decide cases and law clerks are not. In fact, the most essential qualities in a law clerk are likely "disinterestedness and deep humility."⁷ Although Justice Frankfurter used those words to describe qualities lending themselves to "the wise exercise of the judicial function,"⁸ aspiring clerks can only benefit from instilling these qualities in themselves early in their careers.

60. Second, why should one clerk? Well, "[t]he judge-clerk relationship is the most intense and mutually dependent one . . . outside of marriage, parenthood, or a love affair."⁹ Especially an appellate judge-clerk relationship. Many judges are highly dependent on their clerks. In the words of the then-Chief Judge for the U.S. Court of Appeals for the D.C. Circuit:

Most of us are not Holmes or Cardozo; we are often unsure of our analyses or even our conclusions. We need to test ideas before exposing them to the hard probing of colleagues. We need assurances, but even more important, criticism from knowledgeable persons who are loyal and unambiguously committed to us. We have, on occasion, to let our guard down, to speculate, to experiment, to argue, even to make frank and sometimes uncharitable appraisals of our colleagues' drafts and suggestions. Despite trendy criticism of undue law clerk influence over judges, my view is that our jurisprudence is better for the give and take among judges and law clerks than if judges had to go it alone.¹⁰

61. "The relationship between judge and clerk is professional only in part; it is also a close human relationship, one that endures long after the clerkship ends."¹¹ "By accepting a judge's clerkship offer, a young lawyer becomes part of the judge's extended

5 See Todd C. Peppers, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 56 (2008).

6 See Philip B. Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk*, 24 U. CHI. L. REV. 661, 663 (1957).

7 Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179, 1182-83 (1973) (quoting Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 787 (1957)).

8 Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 787 (1957).

9 Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153 (1990).

10 Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153-54 (1990).

11 Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1708 (1991).

family, a disciple, an ally, quite possibly a friend.”¹² The effects of a clerkship can also be long-lasting:

The [j]udge and law clerk are in fact tethered by an invisible cord for the rest of their mutual careers. The judge will forever appear on the clerk's resume as his first professional employer; she will receive many inquiries about the clerk's performance and character. The law clerk is the judge's emissary to the world.¹³

62. Clerkships also provide a valuable data point for future employers. A clerk's judge may often be the clerk's first real professional employer. A clerkship affords valuable experience and prestige that have become virtual requirements for certain legal career paths — particularly academia.¹⁴ But the benefits of a judicial clerkship certainly come with some cost. The 2019 annual salary for a first-year clerk is \$53,062,¹⁵ while first-year associate salaries in major markets have recently climbed to \$190,000.¹⁶ Nonetheless, it is a rewarding way to begin one's legal career.

63. Finally, how does one get one of these coveted positions? Well, the law clerk hiring process is unlike any other we've seen.¹⁷ Many judges hire several years in advance. Law school counseling offices often overlook the need to apply early.¹⁸ Most, but (importantly) not all, post positions to OSCAR, the federal clerkship and staff attorney application system.¹⁹ Prospective judicial clerks should apply as early as possible if they want to ensure they have as many options as possible. Geographic flexibility, if your circumstances allow it, is also a huge boost to your chances. In the Federal system, there are 94 district courts with at least one in each state and four territories, 13 appellate courts, and 5 specialty courts.²⁰ Additionally, state court systems can hire clerks. Ultimately, the benefits of clerking can be lifelong. Moving to another locale for a year or two is maybe a small price to pay to foster for long-term success in your career.

12 Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1708 (1991).

13 Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1709 (1991).

14 See John W. Bruce & Michael I. Swygert, *The Law Faculty Hiring Process*, 18 HOUS. L. REV. 215, 251 (1981).

15 See *Salary Table 2019–GS*, OFFICE OF PERSONNEL MANAGEMENT.

16 See MP McQueen, *Your Law Firm is Paying You \$190K Right Out of Law School. Now What?*, THE AM. LAWYER (June 6, 2018, 3:04 PM.).

17 See Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CALIF. L. REV. 765, 776–80 (1993); Susan Harp, *Clerking — Something Every First Year Law Student Should Know*, 29 STETSON L. REV. 1291, 1294–95 (2000).

18 See Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1724–30 (1991).

19 *Welcome*, ONLINE SYSTEM FOR CLERKSHIP APPLICATION AND REVIEW.

20 *Court Role and Structure*, U.S. COURTS.

64. For better or worse, the clerkship hiring process is heavily focused on one's academic credentials. There is simply no substitute for superlative law school performance, law review participation (especially as an editor and especially on a school's flagship law review), moot court participation (especially competition participation), and scholarly publication. Beyond that, judges may look to grades in certain law school courses (particularly legal writing courses), geographic connections to their district or home state, and common interests between applicants and themselves.

65. Law schools can often woefully lack in resources for prospective judicial clerks.²¹ We highly encourage you to seek out professors with clerkship experience to serve as your advisors throughout the lengthy application process. Courses serve as dependably available resources. We recommend Federal Courts and the Federal System (or your law school's equivalent class(es)). This course (and its equivalents) exposed us to a variety of procedural, constitutional, and criminal issues more complex than those covered in the corresponding first and second-year classes. Next, we recommend a course in remedies as all types of litigation at all different types of courts involve issues surrounding the choice and availability of a remedy at one point or another. If possible, a course in administrative law can be very helpful as administrative agencies are frequent repeat players before the courts. Should clerking at the Veterans Court interest you, participation in a veterans' law clinic offers an invaluable look at the VA system and the court from the advocates' perspective. One of us participated in such a clinic and thinks the clinic experience prepares you to hit the ground running as a Veterans Court clerk.

66. For those prospective clerks whose credentials are already decided, don't despair! There's still much that you can do to increase your odds of securing a clerkship. First, there's a multitude of resources available online.²² Second, make sure you've applied to every court in any jurisdiction in which you'd agree to spend one or two years living. Less well known courts, such as the Tax Court, the Court of International Trade, the Court of Federal Claims, the Court of Appeals for the Armed Forces, or our former court have clerkships available that enable graduates to learn specialized areas of law. Third, contact alumni from your school who have clerked, especially for judges to whom you're applying. These contacts might provide insight into how particular courts or judges work or recommend you to their former judges. Lastly, keep applying. Clerkships open unexpectedly, and new judges are appointed constantly. Persistence can take you far.

67. One final note: Luck plays a not insignificant role in the clerkship search. Even if you do everything else right, you may end up empty-handed. Judges pass over many qualified candidates and good fits for chambers because demand far outstrips supply of positions. Even so, play your cards right, and you could walk away with a highly coveted

21 See *Courting Clerkships: The NALP Judicial Clerkship Study*, NAT'L ASSOC. OF L. PLACEMENT (Oct. 2000).

22 See Mary Dunnewold, et al., *Judicial Clerkships*, 8 LEGAL. COMM. & RHETORIC: JALWD 239 (2011).

legal position. Now that we've discussed what clerkships are, why you should do one, and how to get one, we turn to our former court, the Court of Appeals for Veterans Claims, commonly known as the Veterans Court.

III. Overview of the Veterans Court

68. Though the Veterans Court is an appellate court operating much like any other appellate court, its history, relationship to the rest of the judiciary and VA, and jurisdiction make it a “special” court. An overview of our court provides context for some of our observations regarding effective advocacy before the court, as well as our observations about clerking there.

69. President Abraham Lincoln's 1865 Second Inaugural Address unofficially marks the beginning of veterans' benefits. Speaking to a nation torn apart by civil war, he called for action:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.²³

70. Fast forward to the 1930's.²⁴ Congress established the Department of Veterans Affairs, then called the Veterans Administration, in 1930.²⁵ Just a few years later, Congress insulated VA's individual benefits decisions from judicial review.²⁶ Thus started VA's period of “splendid isolation,” during which it enjoyed over five decades of administrative autonomy.²⁷ But that isolation ended abruptly in 1988. Before 1988, the judiciary had wrestled at least some level of review over VA actions for itself.²⁸ Then, that year,

23 President Abraham Lincoln, *Second Inaugural Address* (Mar. 4, 1865), in ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS 449 (Library of America ed., 1st Vintage Books 1992).

24 See James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VET. L. REV. 135 (2011); see also Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims*, 40 U. MICH. J.L. REFORM 483 (2007).

25 See Pub. L. No. 71–536, Ch. 863 § 1, 46 Stat. 1016 (1930).

26 See Economy Act, Pub. L. No. 97–332, Ch. 314, § 401–08, 47 Stat. 382 (1932).

27 *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (quoting H.R. Rep. No. 100–963, pt. 1, at 10 (1988)).

28 See generally Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veterans Benefits*, 17 OHIO N.U. L. REV. 99 (1990); see, e.g., *Johnson v. Robinson*, 415 U.S. 361 (1974); *Marozsan v. United States*, 852 F.2d 1469 (7th Cir. 1988) (en banc); *Devine v. Cleland*, 616 F.2d 1080, 1083–85 (9th Cir. 1980); *Zayas v. Veterans Admin.*, 666 F.Supp. 361 (D.P.R. 1987); *Plato v. Roudebush*, 397 F. Supp. 1295 (D. Md. 1975).

Congress passed the Veterans' Judicial Review Act (VJRA).²⁹ By establishing³⁰ the Veterans Court, originally known as the United States Court of Veterans Appeals in 1988 and then as the United States Court of Appeals for Veterans Claims in 1998, the VJRA finally allowed for judicial review of VA decisions.³¹

71. The veterans' benefits process can look byzantine to outside observers. The VA benefits system is undergoing change.³² But essentially, veterans can initiate various claims, such as those for disabilities incurred in or aggravated by their service,³³ home loans,³⁴ and GI Bill educational benefits,³⁵ with any of VA's various regional offices (ROs). If claimants disagree with those initial decisions, then an RO performs a second review.³⁶ If claimants still disagree with the RO's decision, they can then perfect an appeal by filing certain forms with the Board of Veterans' Appeals (Board).³⁷ Dissatisfied claimants may then appeal adverse rulings to the Veterans Court.³⁸

72. The Veterans Court consists of nine active judges³⁹ appointed by the President and confirmed by the Senate to 15-year terms.⁴⁰ The court's jurisdiction is narrow and yet surprisingly deep. The court is specifically prohibited from reviewing VA's disability rating schedule⁴¹ and making factual determinations.⁴² And, the government can't appeal any of the Board's decisions, whether favorable or unfavorable.⁴³ The court is empowered to "decide all relevant questions of law[;] interpret constitutional, statutory, and regulatory provisions[;] and determine the meaning or applicability of the terms of VA

29 Pub. L. No. 100-687, [102 Stat. 4105](#) (1988); see also Barton F. Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans Benefits Proceedings*, 41 ADMIN. L. REV. 365 (1989).

30 See Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, [102 Stat. 4105](#) (1988); see also Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, [112 Stat. 3315, 3341](#) (1998) (codified at [38 U.S.C. §§ 7251](#)).

31 [38 U.S.C. §§ 7292](#) (2002).

32 See The Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 155-55, [131 Stat. 1105](#) (2017); see also *Veterans Appeals Improvement and Modernization Act of 2017*, [DEP'T OF VETERANS AFFAIRS](#).

33 [38 U.S.C. §§ 1110](#) (1998); see *Appeals Process Overview*, [DEP'T OF VETERANS AFFAIRS](#).

34 [38 U.S.C. §§ 3701-3703](#) (2006).

35 E.g., [38 U.S.C. §§ 3301](#) (2008) (providing Post-9/11 educational assistance benefits).

36 See [38 U.S.C. §§ 7105\(a\)-\(d\)](#) (2000).

37 See [38 U.S.C. §§ 7105\(d\)\(3\)](#) (2013); see also [38 U.S.C. §§ 7101-7104](#) (2012).

38 See [38 U.S.C. §§ 7252\(a\)](#) (2012).

39 See [38 U.S.C. §§ 7253\(i\)\(1\)-\(2\)](#).

40 See [38 U.S.C. §§ 7253](#) (2000).

41 See [38 U.S.C. §§ 7252\(b\)](#) (2012).

42 See [38 U.S.C. §§ 7261\(c\)](#) (2000).

43 See [38 U.S.C. §§ 7252\(a\)](#) (2012).

actions.”⁴⁴ Sometimes unexpected, embedded issues such as state family law questions can arise. The court can also “compel action of the [VA] Secretary unlawfully withheld or unreasonably delayed;”⁴⁵ “hold unlawful and set aside decisions, findings . . . , conclusions, rules, and [VA] regulations” it finds to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;” and set aside or reverse material factual findings adverse to claimants that are clearly erroneous.⁴⁶ Appeals — now authorized by both claimants and VA — from the court go to the U.S. Court of Appeals for the Federal Circuit and then on to the Supreme Court of the United States.⁴⁷

73. The Federal Circuit’s appellate jurisdiction over the Veterans Court is limited. It cannot “review any challenge to a factual determination or any challenge to a law or regulation as applied to the facts of a particular case.”⁴⁸ The Federal Circuit also must affirm the Veterans Court unless its decision is arbitrary or capricious, unconstitutional, beyond its jurisdiction, or violates due process.⁴⁹ But, importantly, the Federal Circuit may also hear direct regulatory challenges in the first instance.⁵⁰ The veterans’ benefits system is unique. It’s a non-adversarial process⁵¹ with a statutory scheme designed to be pro-veteran.⁵²

74. The system is also massive. As of the end of 2018, VA reported:

- 9.3 million total health care enrollees;
- ~6 million active VA life insurance policies;
- 4.9 million veterans receiving disability benefits;
- 3.06 million VA home loan participants;
- And over 950,000 other veterans receiving educational, pension, and vocational rehabilitation benefits.⁵³

75. The agency maintains some 1,234 outpatient facilities, 300 vet centers, 143 hospitals, 135 cemeteries, and 56 regional offices, all serving almost 20 million veterans.⁵⁴

44 38 U.S.C. § 7261(a)(1) (2006).

45 38 U.S.C. § 7261(a)(2) (2006).

46 38 U.S.C. § 7261(b) (2006).

47 See 38 U.S.C. § 7292 (2006).

48 *Kalin v. Nicholson*, 172 F.App’x 1000, 1002 (Fed. Cir. 2006) (quoting 38 U.S.C. § 7292(d)(2) (2000)).

49 38 U.S.C. § 7292(d)(1) (2006).

50 See 38 U.S.C. § 7292(c) (2006).

51 See *Myers v. Derwinski*, 1 VET. APP. 127 (1991).

52 See 38 U.S.C. § 1154 (1991).

53 VA 2020 Budget Request: Fast Facts, DEP’T OF VETERANS AFFAIRS.

54 Nat’l Center for Veterans Analysis and Statistics, *Department of Veterans Affairs Statistics at a Glance*, DEP’T OF VETERANS AFFAIRS.

This massive bureaucracy is funded with a budget approaching 2 trillion dollars.⁵⁵ And, given the continuing War on Terror, the conflicts in the Middle East, and growing instability throughout the world, VA will likely only continue to grow.

76. The system certainly has its detractors. At the end of FY 2012, the Veterans' Benefits Administration (VBA), the part of VA that handles disability claims processing, had a backlog of 254,604 appeals with an average wait time of over 903 days to resolve appeals. By the end of FY 2015, the backlog had grown to 318,532 appeals with an average wait time of 935 days. These delays matter, particularly for such a vulnerable population. For example, in FY 2016, VA's Office of Inspector General estimates that 1,600 appeals were closed due to the claimant's death. Of those, 1,100 had been waiting for more than one year before their death.⁵⁶ Although the Veterans Court plays a limited role in the overall claims processing timeline, timely decision-making at every level of the process can only benefit claimants. Having discussed clerkships generally and the Veterans Court, we now turn to practical advice for practitioners before the court.

IV. Advice for Advocates before the Veterans Court

77. As clerks, we occupied unique positions that relatively few advocates ever occupy. We read briefs and/or listened to arguments first to learn about the case. Then we analyzed the arguments' strengths and weaknesses, for both our judge and the parties based on the law we had researched. This Section reflects those moments in which we had considered at a brief or listened to an argument and thought about how an advocate could have improved his or her chances of success on behalf of his or her client. We offer both abstract and more concrete takes on effective advocacy. Of course, we were not the decisionmakers, but to advocate effectively to a clerk is often to advocate effectively to a judge. If you win over a clerk, and a judge asks that clerk his or her opinion on a tough issue or case, your effective advocacy could have won you an advocate in chambers.

78. Clerking doesn't make us inherently special or better writers, and certainly not better speakers. We embrace that we still have much to learn about written and oral advocacy. But, our positions arguably taught us more than the average lawyer about good and bad writing and oral advocacy. We want to share that perspective in hopes that our general advice will contribute to the improved efficiency and administration of justice, even if it's in the smallest of ways.

⁵⁵ Dep't of Veterans Affairs, *President Trump Seeks \$12B Increase in FY2019 VA Budget to Support Nation's Veterans*, [DEP'T OF VETERANS AFFAIRS](#).

⁵⁶ Review of Timeliness of the Appeals Process, [DEP'T OF VETERANS AFFAIRS OFFICE OF INSPECTOR GENERAL](#), i (Mar. 28, 2018).

79. Before diving into our thoughts on effective advocacy, we preface this discussion with a point of clarification. We lack experience to speak to effective advocacy at all stages of the veterans law system. In fact, we acknowledge that some of the most effective advocates frequently “win” well before their client’s claims would have the opportunity to come to our former court. We narrow our focus to our thoughts on effective advocacy for those who find themselves with a case before our former court.

Approach Advocacy as Relationship Building

80. We analyze advocacy from this perspective because clerks either consciously or subconsciously think daily about advocacy through this lens. After all, everyone engaged in this system is a human being. Even though clerks presumably (at least we did) start reading briefs from a place of pure logic and emotional disengagement, never forget that we’re human. For example, a “clever” spin of a fact or a selective omission of an arguably bad fact could cause a clerk to distrust you as an advocate and elicit a mild sense of betrayal. On the other hand, a strategic concession could win you admiration and respect. As you write and argue, think about your successful relationships — both professional and personal — as touchstones. Model your (and, if relevant, your firm’s) relationship with the Veterans Court after those relationships. If you do so, chances are, you will find more success before the Veterans Court.

81. Relationship building is a particularly apt lens for viewing advocacy before the Veterans Court because its bar is a notoriously tight-knit group. It’s a bit like a small town; everyone knows everyone, whether you like it that way or not. For claimants, a handful of individual advocates and firms handle most appeals that come to the Veterans Court. And with each appeal comes the guaranteed presence of the Secretary’s counsel.

82. Consequently, we encourage you to focus on the importance of relationship building not just in the context of any given appeal, but also over the course of time. Clerks occasionally consider an appeal in a vacuum. But if you’re a frequent flyer (or plan to become one), never forget that an appeal is nothing more than the latest iteration of your relationship with the Veterans Court.

83. The good news is that you have a large measure of control over the nature of your relationship with the Veterans Court. An effective advocate is one who builds a relationship with the Veterans Court based on clear and honest communication, trust, and respect. With each filing or oral argument, you mature several relationships with the clerk(s) and judge(s) who read or listen to it.

84. On a final note, don't doubt the power of institutional memory in relationship building. Though your appeal may find its way to a clerk new to your brand of advocacy, trust that clerks talk to both other clerks and judges about advocates. It matters not at all whether you consider that talking undesirable or welcome. It will almost certainly happen. Accept it, and make it work for you.

Be a Good Teammate to the Veterans Court

85. It takes a bad teamwork experience to appreciate the value of a good teammate. (If you haven't had a bad teamwork experience, consider whether it's because you were a bad teammate.) The good news is that it's never too late to become a good teammate. And in doing so, you guarantee yourself increased success at the Veterans Court.

86. At first thought, you may consider each party and the Veterans Court as three, separate teams. But try thinking about the Veterans Court and the parties' counsel as one team, trying to resolve the appeal. No lawyer ever forgets the adversarial nature of an appellate proceeding, but let's set that perspective aside for the sake of this discussion. If you can't shake the competitiveness, think about how you can become the Veterans Court's most trusted teammate.

87. Analogize to teamwork in other familiar settings, like teamwork between associate (i.e., party's counsel) and partner (i.e., Veterans Court). If the associate does poor or incomplete work, he or she shifts the burden of that work to the partner. This burden shifting presumably has a negative impact on their working relationship and gives the partner a negative impression of the associate. For the partner depending on the associate's work, procrastination or poor effort can communicate disrespect for the partner. Similarly, if a party's counsel submits a poor or incomplete brief to the Veterans Court, or presents a poor argument to the Veterans Court in which he or she fails to answer questions, that counsel shifts the burden to the Veterans Court, with negative consequences reminiscent of those the associate brought upon him or herself.

88. A good teammate thinks deeply and critically about his or her case before briefing or arguing. He or she weeds out poor arguments or those simply unlikely to carry the day. Ideally, he or she narrows the appeal down to the most troublesome issues with the Board decision or the most fundamental flaws with the other side's reasoning. Crisp briefing in this respect is especially important and appreciated in a court with a high volume of cases.

89. Some lawyers might grumble about the amount of time it takes to write an excellent, slim brief or prepare for an argument useful beyond the briefs. We recognize the time commitment those things require and certainly don't take it for granted. A good teammate decides that the time is worth submitting an excellent brief instead of

a mediocre one, or preparing an enlightening argument rather than an ill-conceived or redundant one. Even if doing so involves some personal cost. If you don't think an appeal or opposition is worth the time to make the brief or argument good and right, then maybe you shouldn't appeal or oppose the appeal in the first place.

Educate Yourself on the Judges

90. Learning judges' preferences can lead to more effective advocacy. How does one do that? Read and listen a lot.

91. Take advantage of the fact that the Veterans Court publishes the single-judge author's name in memorandum decisions, also known as single-judge decisions. For the diligent and thoughtful advocate, these opinions offer windows into the judges' preferences and judicial philosophies. On the other hand, panel and en banc majority opinions issue after often extended negotiations and compromises among the judges, such that it is virtually impossible to tell which individual thought what about the case, although concurrences and dissents can teach you about single judges' preferences.

92. Similarly, with respect to oral arguments, listen and note the nature of judges' questions and monologues. In the moment, they seek information from you, but you can also mine the conversation for nuggets of insight about them. Listen to as many arguments as possible, and read as many opinions as possible, to educate yourself on the Veterans Court.

But Beware Differing Preferences

93. Judge a assignment after briefing means you must mind a variety of preferences. To gain knowledge of judges' preferences is both a blessing and a curse. A blessing because you might know how to frame an issue just the right way to win over a judge on the fence. But a curse because knowledge makes you realize how difficult — if not impossible — it sometimes is to win over two quite different judges simultaneously. Some arguments are like one-way ratchets in that they please one judge's preferences without offending any other judges. You should always try to identify and include those types of arguments. But then there are those insidious arguments that, although they might intrigue and persuade one judge, offend another such that you'll lose that judge with that argument's inclusion. Think twice about arguments known to rub a judge the wrong way. Consider trying to write to please a variety of preferences. But aim at least not to offend preferences.

Reject a “Get-Rich-Quick” Mentality

94. By using this label, we don't mean to attach fraudulent or wrongful mindset to any advocate. Rather, we're intending to call out a fallacious mentality that tempts even the best of us. Arguably, to be human is to be tempted by a “get-rich-quick” mentality. We encourage you to reject that tendency. Small investments rarely earn high returns in the short or long run. Similarly, in our eyes, devotion of only small amounts of time and little effort to researching, vetting, and writing your arguments threatens your success before our former court.

95. We suspect that instances of advocates falling victim to “get-rich-quick” mentalities explain some of the ineffective advocacy in underwhelming briefs and arguments we saw. That mentality is the antithesis of an effective advocate's mentality. An effective advocate mentally and otherwise prepares him, or herself, for the hard work and long hours it often takes to do excellent work.

View the Writing Process as a Tool For Yourself, Not Just the Means of Communicating With the Veterans Court

96. You may think about writing exclusively as the means to convey fully developed arguments and well-reasoned conclusions to the Veterans Court. But also consider it as a tool to help you to form those arguments and conclusions in the first place.

97. If you've struggled with “writer's block” or procrastination, or if you've ever considered previously promising arguments weak on paper as a filing deadline looms, consider this insight that one of us gained during clerking. Writer's block, procrastination, or the baffling transformation of a strong argument in your head into a weak argument on paper sometimes signals deeper problems than they are in and of themselves. Sometimes a deeper lack of understanding of your arguments or the reasoning underlying your conclusion manifests itself in these more easily identifiable problems.

98. One of the only ways to realize your failure to understand something inside and out, backwards and forwards, is to start writing about it. Only then can you start to tease out the points of confusion or gaps in research, supporting law, and reasoning. This process can remedy writer's block and procrastination because it replaces stagnant thinking with a concrete, actionable to-do list. You also may educate yourself on your arguments' infirmities by trying and failing to articulate them, which inevitably will lead to stronger ones. Or maybe the realization that you shouldn't appeal at all (or oppose the appeal, from the Secretary's perspective).

99. Starting the writing process early allows it to work for you in more ways than you can imagine and gives you time to strengthen your arguments. Allow time for the writing process to help you before you turn to educating the Veterans Court.

Say What You Mean and Mean What You Say

100. Occasionally, we would get to the end of a brief and realize that we couldn't articulate the brief's arguments coherently if our lives depended on it. Sometimes, assuming we figured it out, we would then find a way to restate it clearer and wonder why the advocate didn't just say that in the first place.

101. Try to say what you mean as simply and directly as possible. Don't feel the need to fill the page limit if saying what you mean takes considerably less space. Repetition can result just as easily in confusion as emphasis of a point.

102. A less common but still present problem is the blatant misuse of terms of art. This brings us to "mean what you say." Misusing terms of art confuses the argument and leads to misunderstandings about your client's position. These misunderstandings probably won't resolve in your favor. Misusing terms of art also contributes to the impression that you don't know what you're talking about, which potentially leads to distrust of the entire brief. If you use a legal term of art, mean it, not something else.

Assemble Analogous Legal Precedent For the Veterans Court When Faced With a New Frontier

103. Courts typically shy away from breaking new ground and do so only when necessary. If you want the Veterans Court to break new ground in your appeal, make it as easy as possible. One of the ways to make the appeal more palatable to more cautious judges is to show them that others broke the ground first. Find analogous situations. Look to appeals from other agencies to other courts. As clearly as you can, draw a roadmap, showing the Veterans Court where you want it to go and how it can get there. Don't forget, though, about the earlier point concerning one-way ratchets. Sometimes arguments about that which other courts have done can backfire, so tread carefully.

Find Yourself a Mentor or Sounding Board

104. For new lawyers or lawyers new to veterans law, an experienced mentor is essential to teach sound advocacy practices. But even the most experienced of lawyers could benefit from a sounding board or someone who can vet (pun intended) advocacy practices. One of the most efficient ways to become a more effective advocate is to find other lawyers with whom you can debate good practice.

105. What is great about practicing veterans law is that you immediately join a tight-knit group of advocates and bar association. Take advantage of that closeness. Reach out to a veterans law pro bono organization or a private lawyer whom you know. One thing on which everyone agrees is that veterans seeking benefits deserve the best representation lawyers can offer them, and we feel certain that healthy debate among members of the bar will improve everyone's advocacy.

106. But also consider talking to appellate lawyers who practice outside the veterans law world. Not only don't they compete with you for clients, in all likelihood, but they also can introduce you to good appellate advocacy tips. Who knows? Maybe you will walk away from one of those conversations with some inspiration that will fuel effective advocacy before our court, as we hope you will from this article.

V. Concluding Thoughts

107. Clerking is an invaluable experience that offers young lawyers a unique perspective on the law and allows them to form valuable connections and relationships. Clerking at the Veterans Court is especially rewarding. We both consider it an honor to have clerked at the Veterans Court and to offer general advice and observations drawn from our experiences. If you apply to clerk or incorporate our advice into your practice, present or future, we'll consider this article successful.