Writing from a Judicial Perspective
Professor Andrea McArdle

In this advanced Lawyering seminar offered to students in their second year, I ask this question: can they imagine a judicial system in which there are no judicial opinions, in which courts hear and decide cases but merely announce outcomes without committing their rationales to writing? I then ask them to consider what we would lose if we no longer had the benefit of a court’s written analysis of the reasons for its rulings. What would be the effects on the development of legal doctrine? How would litigants and their advocates gain access to the basis for judicial decision making?

This writing-focused seminar addresses these and other questions implicated in the drafting, analysis, and use of judicial opinions. It provides an opportunity to develop legal writing, research, close reading, and analytic skills, an exposure to the workings of the courts, and a deeper analysis of strategies of advocacy drawn from insights into judges’ responses to written and oral argument.

The course pays close attention to the "practice" of judicial writing with assignments that include drafting a bench memo and an opinion in a pending United States Supreme Court case. Students “hear” oral argument on the case and participate in a “bench conference” to discuss the issues, the legal standards, the evidence, and the policy implications of various possible rulings. The seminar engages in close readings of judicial opinions illustrating key themes of the course and analyzes writing by judges and other legal scholars. We also consider discourse from recent U.S. Supreme Court confirmation hearings relating to conceptions of judicial role. In addition to taking up these issues from the perspective of judges, we approach them from the vantage point of advocates who use judicial opinions in their own written argument, and who must anticipate, and try to influence through written argument, the way judges write opinions in the cases these advocates argue.

The seminar’s focus may be of particular interest and relevance to students considering judicial clerkships and internships and to students interested in advanced advocacy. Areas of inquiry include the nature of judicial authorship, and the roles that judicial clerks play in conceptualizing and drafting opinions; clerking and confidentiality; how considerations of audience shape judicial writing; the role of empathy in judging; the lack of a consensus-based tradition (or what some would consider a privileging of the separate authorship) in U.S. appellate opinions, and the issues created for courts and advocates in interpreting and using separate opinions from a single case; the function of amicus curiae briefs; the manifestation of social-justice perspectives in judicial writing; framing law and using facts in opinion writing; the effect of precedent/revisiting stare decisis; the trend toward courts’ drafting "unpublished" opinions and the weight of these opinions; and identifying a judicial voice.

Seminar students also choose an additional writing project, which may include a short-term placement with a New York City-area state or federal court or administrative tribunal, during which students draft a judicial writing. Alternatively, students may complete a written project related to one of the themes of the seminar.