The Scientifically Trained Law Clerk: Legal and Ethical Considerations of Relying on Extra-Record Technical Training or Experience

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Abstract

Technically trained law clerks should be permitted to rely on extralegal scientific principles, but only if those principles are objectively verifiable and not subject to reasonable dispute—a standard that matches Federal Rule of Evidence 201. By contrast, law clerks should not rely on extralegal scientific principles that are not objectively verifiable or beyond reasonable dispute. Technical training is particularly useful for law clerks at the Federal Circuit Court of Appeals because of its focus on patent cases. Technically trained clerks could also be useful at the trial level because the district courts recently began a ten-year Patent Pilot Program.

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Introduction

Imagine that you are a judicial law clerk at the California Supreme Court in 1968. Before the court is the appeal of a criminal conviction in which the prosecutor linked an interracial couple to a robbery using probability theory. The victim of the robbery testified that she saw the assailant, a young woman with blond hair. The victim’s neighbor testified that she saw a Caucasian woman with a dark blond ponytail run from the scene and enter a yellow car driven by a black man with a beard and mustache. A few days later, officers arrested the defendants, an interracial couple, but neither the victim nor the victim’s neighbor could conclusively identify either defendant. Nevertheless, the prosecutor called an expert “mathematician” to testify that only one in twelve million couples had these same characteristics; therefore, it was unlikely that two such couples would be in the same area at the same time. The prosecutor then argued that his estimate was conservative, and that the real probability was more like one in a billion. What neither the prosecutor, nor the judge, nor the jury realized was that the mathematics was wrong. Each of the characteristics was not independent; thus, twelve million was excessively high.

Although the judge does not realize the mathematical error, the law clerk does because the law clerk has previous training in mathematics. First, is it ethical for the law clerk to advise the judge of probability principles not contained in the record? Second, assuming that this advice is ethical, does the law clerk have the evidentiary authority to rely on mathematics

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2 See id. at 34.
3 See id.
4 See id. at 35.
5 See id. at 36.
6 See id. at 37.
7 See id. at 38.
8 See id.
textbooks not disclosed in the record? In the above case, *People v. Collins*, not only did the actual law clerk advise the judge of the mathematics, but the court’s opinion also included an appendix setting forth the probability calculations, citing several mathematics textbooks.

This Essay examines the legal and ethical considerations for judicial law clerks with previous technical experience, where that experience is not contained within the evidentiary record. This issue is relevant because the academic scholarship traditionally suggests that “a clerk cannot offer his judge expertise in matters other than law.” Professor John Paul Jones, for example, argues that “[a] judge who announces a preference for one or more non-legal backgrounds ought to make clear to her law clerks from the outset how the record must limit the clerk even in the field of his expertise.” Yet reliance on Professor Jones’ position without qualification could result in wrongful convictions, as *Collins* illustrates above.

Instead, this Essay proposes that scientifically trained law clerks should be able to rely on extralegal technical training as long as the principles cited are objectively verifiable, even if the record does not contain those principles. Part I introduces the duties of a judicial law clerk. Part II discusses technically trained law clerks. Part III proposes that law clerks should be permitted to rely on objectively verifiable scientific principles that are not subject to reasonable dispute.

**I. The Duties of Judicial Law Clerks**

In 1882, Justice Horace Gray was the first Supreme Court Justice to employ a law clerk. Congress authorized the first official law clerks for Supreme Court Justices in 1886, circuit court

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12 *Id.* at 785.
13 *Collins*, 438 P.2d at 41.
judges in 1930, and district court judges in 1936. Supreme Court Justices now employ four law clerks, circuit court judges employ three, and district court judges two. The law clerks’ primary work consists of bench memos and draft opinions, each discussed below in turn.

A. Bench Memos

Although the specific duties of a law clerk vary by court and by judge, in 1988, Judge J. Daniel Mahoney of the Second Circuit disclosed the typical duties of an appellate law clerk in a law review article. Work on the Second Circuit focuses on the “sitting week” of each month, during which attorneys make oral arguments before three-judge panels. Each sitting week may have up to twenty-five cases, with each law clerk responsible for about eight cases per month.

For each case, the law clerks summarize the factual and procedural history of the case, analyze the arguments of counsel, and recommend a disposition through bench memos. The amount of work for each bench memo depends on the case’s complexity. Judge Mahoney usually reads the briefs and the opinion of the court below and any leading cases, key documents, and testimony; the clerk is responsible for the complete record and any case law or authority.

B. Draft Opinions

When Judge Mahoney writes an opinion, he assigns the first draft to the law clerk who wrote the bench memo. Draft opinions require “extraordinary effort.” They reflect “close

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15 Id. at 324–26.
16 Id. at 326; see also 28 U.S.C. § 675 (2006) (“The Chief Justice of the United States, and the associate justices of the Supreme Court may appoint law clerks and secretaries.”); id. § 712 (circuit court judges); id. § 752 (district court judges).
18 Mahoney, supra note 14.
19 Id. at 329.
20 Id. at 329–30.
21 Id. at 330.
22 Id.
23 Id.
25 Mahoney, supra note 14, at 333.
attention to detail, especially in the recitation of the factual background of a case, and contain a sound analytical framework.”

To ensure accuracy, Judge Mahoney requires “record, appendix, and any other required citations for the background section.”

Before beginning the draft opinion, the drafting clerk discusses with the Judge the general direction and shape of the draft. The drafting clerk also reviews the transcript of the oral argument and the panel voting memo to incorporate any “panel members’ arguments, concerns and suggestions.” Judge Mahoney often makes “substantial revisions” to the draft to “ensure that the final opinion reflects precisely [his] views and analysis of the case.” The Judge also circulates the draft to his other clerks for a “line-by-line editing session,” which “serves as a final check on the technical accuracy of the opinion.” A nondrafting clerk then cite-checks the draft before the drafting clerk circulates the draft to the other panel judges. If the other judges propose edits, the drafting clerk—with Judge Mahoney’s agreement—incorporates them. Finally, the drafting clerk proofreads the slip opinion and the advance sheet opinion.

For draft opinions authored by other panel judges, the law clerk summarizes the contents for Judge Mahoney and may draft a concurrence or dissent. Throughout this whole process, law clerks must maintain confidentiality because they are “privy to the judge’s thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be.” In short, law

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26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.
32 Id. at 333–34.
33 Id. at 334.
34 Id.
35 Id. at 335.
36 Hall v. Small Bus. Admin., 695 F.2d 175, 179 (5th Cir. 1983).
clerks can play an important role in advising judges through bench memos and draft opinions, although the specific duties of each clerk may vary by court and by judge.

II. **Scientifically Trained Law Clerks**

My experience as a judicial intern with Chief Judge Randall R. Rader of the Federal Circuit suggests that Judge Mahoney’s depiction of law clerks applies to the Federal Circuit. One difference with the Federal Circuit, however, is its focus on patent cases, which makes technical training particularly useful for law clerks.\(^\text{37}\) Technically trained law clerks could also be useful at the trial level because the district courts began a ten-year Patent Pilot Program in 2011.\(^\text{38}\) This Part discusses the role of law clerks at the Federal Circuit and the district courts.

A. **The Federal Circuit**

Technically trained law clerks are particularly useful at the Federal Circuit. Although Congress only created the Federal Circuit in 1982,\(^\text{39}\) more than one hundred years earlier Judge Learned Hand wrote of the importance of “unpartisan and authoritative scientific assistance in the administration of justice.”\(^\text{40}\) In 1973, Chief Judge Henry J. Friendly of the Second Circuit further proposed specialized courts for cases involving patents.\(^\text{41}\) Most recently, in 2010, Judge Douglas Ginsburg of the D.C. Circuit wrote that both the Federal Circuit and the D.C. Circuit “increasingly hear cases that have scientific or highly technical content.”\(^\text{42}\) Judge Ginsburg nevertheless suggests that the idea of employing experts is impractical because of the problem of

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\(^\text{40}\) Parke-Davis & Co. v. H.K. Mulford Co., 189 F. 95, 115 (C.C.S.D.N.Y. 1911).


determining the type of expert to hire. Federal Circuit judges, however, have demonstrated that this is not a problem because they have hired technically trained law clerks comfortable with many different technologies, not just cases within one specialty. Technical training could thus be very useful for Federal Circuit law clerks regardless of their specific background.

B. Trial Courts

Technically trained clerks could further be useful at the trial level because of the recently established Patent Pilot Program. The Patent Pilot Program provides explicit Congressional authorization for district courts to improve decision-making by directing patent cases to judges with more experience or interest in patent cases. The Patent Pilot Program suggests that district court judges may hire more law clerks with technical training because the training is helpful in understanding patent cases. Yet a technically trained judge or law clerk cannot “hide behind specialized vocabulary” because the judge is still accountable to generalist judges on a higher court or the Supreme Court. Thus, determining the proper level of reliance by law clerks on extralegal technical training could become more important as the Patent Pilot Program develops.

One of the most famous examples of an expert law clerk at the trial level did not concern patents, but social science. In United States v. United Shoe Machinery Corp., Judge Charles Wyzanski hired an assistant professor of economics at Harvard to be his law clerk during a complex antitrust case. Throughout the trial, Judge Wyzanski reviewed the trial transcripts and

43 Id. at 323–24.
47 See id.
48 See Ginsburg, supra note 42, at 309.
50 Ginsburg, supra note 42, at 309.
exhibits with his expert law clerk and received the clerk’s analysis of the case. Even though United Shoe challenged Judge Wyzanski’s employment of an expert law clerk, the Judge answered that he had no obligation to notify counsel if he read a book on economics. United Shoe therefore had no choice but to accept Judge Wyzanski’s expert clerk.

*United Shoe,* however, is not an ideal case because it does not exemplify objectively verifiable scientific principles that are beyond reasonable dispute. Judge Ginsburg further criticized *United Shoe,* writing that a judge may consult a textbook or manual, but the book can “only aid the judge in making a decision; it cannot make it for him.” The book’s author “is not aware of the particular facts and issues involved in a specific case at the time of writing, so there is no danger the book might suggest a resolution of the case that could supplant the court’s own reasoned judgment.” Judge Ginsburg added that even Judge Wyzanski “concluded after the fact that it would have been better to have had an independent expert confer with each side in the presence of the other, submit his report to both sides, and be subject to cross-examination.” Although Judge Wyzanski later changed his mind, *United Shoe* illustrates the danger of relying on social science principles that are not objectively verifiable or beyond reasonable dispute.

Judge Ginsburg distinguishes, for instance, a simple case—where an outside expert could convey objectively verifiable knowledge—from questions of scientific, mechanical, or economic feasibility (e.g., social science), where experts could disagree. To illustrate, Judge Ginsburg cites a patent infringement case “involving a dispute over the design of a hydraulic pump,” where the court could “employ an expert to explain how the pump works” without “rais[ing] the

51 Id.
52 Id. at 310–11.
53 Id. at 311.
54 Id.
55 Id.
56 Id. at 315–16.
concern of undue influence." The expert would “simply be conveying general, objectively verifiable knowledge, i.e., facts about the hydraulic pump.” The judge “could just as well find that information in a book or, more likely today, on the internet.” Judge Ginsburg’s reasoning thus supports the thesis that a law clerk could rely on objectively verifiable scientific principles without raising the same ethical concerns associated with social science principles.

III. Reliance on Objectively Verifiable Principles Not Subject to Reasonable Dispute

Law clerks should be able to rely on extralegal technical training, but only if the cited principles are objectively verifiable and not subject to reasonable dispute, even if the principles are not in the record. This Part first compares technically trained clerks with outside experts in the context of objectively verifiable principles, and then proposes a standard based on Federal Rule of Evidence 201 to determine whether a scientific principle is objectively verifiable.

A. Objectively Verifiable Scientific Principles

Scientifically trained law clerks should be able to rely on objectively verifiable scientific principles because the alternative could be a wrongful conviction. According to Professor Jones, although a law clerk may consult legal libraries or sources freely, the clerk cannot consult nonlegal libraries or sources, even when that information is objectively verifiable, without raising ethical concerns. Professor Jones argues that “[w]hen a law clerk, also trained as an economist or a biologist, is available within chambers to offer economic or biologic information to a judge deciding factual issues of economics or biology, the parties’ right to a decision on the record is violated.” This problem cannot be solved by allowing notice and comment because it

57 Id.
58 Id. at 316.
59 Id.
60 See id. at 315–16.
61 Fed. R. Evid. 201 (judicial notice of adjudicative facts).
62 Jones, supra note 11, at 783.
63 Id. at 784.
would transmute the law clerk’s responsibility from chambers staff to trial witness. Yet Professor Jones’ position cannot be correct because it could result in a wrongful conviction.

Collins illustrates what could happen when generalist judges without technical training rely exclusively on expert witnesses at trial. After a conviction at the trial court, the case went up to the California Supreme Court, where a law clerk trained in mathematics was able to point out the absurdity of the prosecutor’s arguments, because the scientific principles cited were objectively verifiable using basic mathematics textbooks. For cases like Collins, both Judge Harold Leventhal of the D.C. Circuit and Justice Stephen Breyer support the hiring of independent outside experts or special masters.

In the Ninth Circuit and the Federal Circuit, moreover, courts can even appoint technical advisors. Unlike court-appointed experts, “a technical advisor provides assistance to the judge privately outside of the hearing of the parties, and [is] not subject to cross-examination.” A technical advisor can be appropriate in “a highly technical case far beyond the boundaries of the normal questions of fact and law with which judges routinely grapple.” Technical advisors thus share many similarities with technically trained law clerks.

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64 Id.
65 See supra text accompanying notes 1–10.
67 See Tribe, supra note 10.
68 Harold Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509, 554 (1974) (“In a final response to the concern that the influence of a scientific aid might become excessive, I would again emphasize the analogy to the law clerk rather than the expert witness.”).
70 Fed. R. Evid. 706 (court-appointed expert witnesses).
72 Ass’n of Mexican-American Educ. v. California, 231 F.3d 572, 590–91 (9th Cir. 2000) (en banc); see also Pegram, supra note 44 (“The Federal Circuit also benefits from the assistance of law clerks with science or engineering degrees, and a central staff of technical advisors.”).
73 ROBERT C. KAHRL, PATENT CLAIM CONSTRUCTION 7-56.1 (2002 Suppl.).
Technically trained law clerks are also different from outside experts because judges receive the advice of law clerks in bench memos and draft opinions, even though Judge Ginsburg believes that “it would be a mistake for the federal courts of appeals to retain or consult experts.” Judge Ginsburg suggests that any communications with experts off the record and in confidence is problematic because of undue influence. The expert’s advice is “neither known to, nor subject to challenge by, the litigants.” These arguments, however, do not apply to law clerks because adversarial parties cannot object to the advice of clerks, technical or otherwise.

Judge Ginsburg even acknowledges that a law clerk’s ex parte communication with a judge “could also have an undue influence upon the judge’s thinking, especially if that clerk has the technical training the judge lacks,” but he nevertheless resolves this influence by suggesting that it is “episodic and not by design or intent.” He believes that it is “not a systemic flaw,” whereas “independent experts” are “hired precisely in order to provide expert advice,” and the “risk” of undue influence is greater. Yet his analysis does not take into account the fact that law clerks work full-time for the judge and provide continuous assistance. The influence of a technically trained law clerk on a judge is the precise subject of this Essay. Instead, to avoid the risk of undue influence, law clerks should rely on extra-record facts only if they are objectively verifiable scientific principles, as in Judge Ginsburg’s earlier hydraulic pump example.

Furthermore, a technically trained law clerk could simply assist a judge in testing the scientific credibility of expert witnesses rather than determining the objective truth. Testing

75 See supra Part I.
76 Ginsburg, supra note 42, at 304.
77 Id. at 315–317.
78 Id. at 314.
79 See supra text accompanying notes 36 and 52.
80 Ginsburg, supra note 42, at 317.
81 Id.
82 See supra text accompanying notes 56–60.
83 See Kaplan, supra note 45, at 256.
expert testimony is important not only for credibility, but also for Daubert challenges. Under Daubert, a judge must determine whether an expert’s testimony is the result of reliable methods, and whether the expert is reliably applying those methods to the facts. This analysis can be particularly important in cases like Collins, where the expert testimony was objectively wrong.

Unlike other experts, moreover, a law clerk’s loyalty is to the court rather than the parties. This loyalty is essential because a judge may not feel comfortable communicating openly with an outside expert, but would be comfortable with his clerk because of the highly confidential nature of the judge-law clerk relationship. A law clerk should therefore be able to rely on extralegal scientific principles, but only if the cited principles are objectively verifiable.

**B. Judicial Notice of Legislative Facts Not Subject to Reasonable Dispute**

To determine whether a scientific principle is objectively verifiable, law clerks should use the standard of “not subject to reasonable dispute” under Federal Rule of Evidence 201. As a threshold issue, a distinction exists between judicial notice of adjudicative facts, governed by Rule 201, and judicial notice of legislative facts, governed by common law. Technical experience would not qualify as adjudicative facts because adjudicative facts apply the law to the facts of a specific case. Adjudicative facts “go to the jury” because they “relate to the parties, their activities, their properties, [and] their businesses.” Under Rule 201, adjudicative facts are

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85 Fed. R. Evid. 702 (testimony by expert witnesses); Daubert, 509 U.S. at 597–98; see also supra note 69.
86 See supra text accompanying notes 1–8.
87 See supra text accompanying note 36.
88 See Fed. R. Evid. 201 (judicial notice of adjudicative facts).
90 See United States v. Gould, 536 F.2d 216, 219 (8th Cir. 1976).
91 Id.
“not subject to reasonable dispute” because they are “generally known” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”

By contrast, technical experience could qualify as legislative facts, because legislative facts are “established truths, facts or pronouncements that do not change from case to case but apply universally.” Objectively verifiable scientific principles could therefore constitute legislative facts. Although Rule 201 does not apply to legislative facts, objectively verifiable scientific principles would be beyond reasonable dispute, indicating that Rule 201 is an appropriate standard for determining whether a scientific principle is objectively verifiable.

Under the proposed Rule 201 standard, a judge would be able to take judicial notice of objectively verifiable scientific facts that are not subject to reasonable dispute, even though the noticed facts are legislative facts. By extension, law clerks should also be able to take judicial notice of legislative facts under this standard, because law clerks are extensions of the judge and any discussion in chambers between judges and law clerks is confidential.

In United States v. Gould, for example, the court “judicially noticed such a legislative fact when it recognized that cocaine hydrochloride is derived from coca leaves and is a schedule II controlled substance.” Gould underscores the case of statutory construction, where the court relied on nonlegal sources (e.g., a dictionary), to judicially notice facts that were “scientifically

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92 Fed. R. Evid. 201.
93 Gould, 536 F.2d at 220.
95 See Rice, supra note 94.
96 See supra text accompanying note 36.
97 United States v. Gould, 536 F.2d 216 (8th Cir. 1976).
98 Id. at 220.
99 Id. at 219 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 434 (1961)).
and pharmacologically unimpeachable.”100 Any contrary result could be “preposterous, thus permitting juries to make conflicting findings on what constitutes controlled substances under federal law.”101 Gould illustrates well-settled science where it should be proper for the court to rely on objectively verifiable scientific principles that are not subject to reasonable dispute.

By contrast, it would not be proper for judges or law clerks to take judicial notice based on personal experience. In the trademark case, Triangle Publications v. Rohrlich,102 for instance, a dissenting judge questioned adolescent girls at random to determine whether product confusion could exist between a magazine and a girdle with the same trade name.103 Judicial notice was not proper because the answers received were not beyond reasonable dispute. It would also not be proper for judges to rely on social science evidence that could be subject to reasonable dispute.104 In Brown v. Board of Education,105 the Supreme Court cited social science research on segregation in its famous footnote eleven.106 This social science research later “drew heavy criticism” from scholars because the criticized research had employed “primitive” methods.107

Perhaps the most famous example of judicial notice is Roe v. Wade,108 where Justice Harry Blackmun conducted extensive outside research on the medical history of abortion.109 Justice Blackmun even spent part of his summer in the library of the Mayo Clinic,110 where he

100 Id. at 221 n.7.
101 Id. at 221.
103 Id. at 976–77 (Frank, J., dissenting).
106 Id. at 494 n.11.
107 See, e.g., Heise, supra note 104.
had previously served as resident counsel for ten years. Justice Blackmun cited five medical articles for the principle that “[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.”

Not only did Justice Blackmun rely on this outside medical research, but he also received advice from his law clerks based on the research. When Justice Blackmun’s papers became public, scholars discovered multiple memos from his clerks. In one, his clerk advised: “I have chosen the point of [fetal] viability for this ‘turning point’ (when state interests become compelling) for several reasons.” In another, his clerk advised that “during the ‘interim’ period between the end of the first trimester and viability (about 6 months), the state might impose some greater restrictions relating to medical dangers.” Justice Blackmun adopted both recommendations—despite their reliance on extra-record medical principles—in *Roe*.

Chief Judge Friendly would later criticize *Roe*, writing that the cited principles “rested entirely on materials not of record in the trial court.” Other scholars further criticized the methods used in the cited medical articles, suggesting that the criticized methods were neither objectively verifiable nor beyond reasonable dispute. *Roe* thus illustrates the dangers of relying on outside medical principles that may not be beyond reasonable dispute. Part of the controversy in each of the above cases could be the unsettled nature of the underlying science.

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112 *Roe*, 410 U.S. at 149 n.44.
115 Garrow, supra note 110.
116 Memorandum from George Frampton to Justice Blackmun (Aug. 11, 1972), quoted in Garrow, supra note 110.
117 Memorandum from Randall Bezanson to Justice Blackmun (Nov. 29, 1972), quoted in Garrow, supra note 110.
118 *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that a state may not regulate abortion before the end of the first trimester, but may regulate abortion to promote the health of the mother after the first trimester).
119 Friendly, supra note 109, at 36–37.
In sum, it would not be reasonable to require scientifically trained law clerks to ignore their technical training while working on a complex case without also requiring the judge to do so. Naturally, law clerks should always cite to the record for factual propositions to avoid relying on extra-record evidence, regardless of whether the proposition is a scientific principle or a record fact. But if the record omits an objectively verifiable scientific principle that is essential to the case, the law clerk should bring this distinction to the attention of the judge, who should make the final decision. Examples of scientific facts that are objectively verifiable include the facts in *Collins*, *Gould*, and the hydraulic pump example cited by Judge Ginsburg. In all of these cases, moreover, the judge cannot defer to the law clerk, but must always retain his own final judgment.\(^{121}\) The fact that the law clerk is a scientific expert should not change this rule.

**Conclusion**

Technically trained law clerks should be permitted to rely on scientific principles not contained in the record, but only if those principles are objectively verifiable and not subject to reasonable dispute. By contrast, law clerks should not rely on extralegal scientific principles that are not objectively verifiable or beyond reasonable dispute, particularly in cases where the underlying science is not well settled. This proposal can be especially important in cases like *Collins*, where the law clerk essentially became the last defense against a wrongful conviction. Applying the proposed standard, the clerk in *Collins* properly relied on the extra-record mathematics because the math was objectively verifiable and not subject to reasonable dispute.

\(^{121}\) Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 305 (2008) (“Whether the law clerk prepares the initial drafts or the final edits, the entire adjudicative function and decision-making process must remain exclusively with the judge.”).