

MEMORANDUM

TO: Sam, Jim, Nancy and Bob DATE: Feb. 9, 1978
FROM: Lewis F. Powell, Jr.

Having the pleasure this week of working on draft opinions from each of you, I thought it might be well to reemphasize the extent to which I rely on you as to the authorities - decided cases and secondary authorities - cited and quoted in my opinions.

Time constraints prevent my doing research (except in the rare case), and, of course, we all rely on the clerks to make sure that at least the directly relevant Supreme Court cases are not overlooked. In addition, as you know, I like buttressing from secondary authorities (particularly including major law reviews) whenever these are directly relevant. And in appropriate cases, the Restatement, the Standards of Criminal Justice, and the special codes of the ALI (Model, Prearrestment) should be checked.

The way in which we use authorities is even more important, perhaps, than making sure that we have not overlooked them. We were all taught in law school to be honest in the citation, quotation and general use of cases and secondary authorities. But pressures of advocacy all too often induce lawyers, in brief writing and argument, to misuse authorities - even leaving out of quotations portions that they consider adverse. Lawyers sometimes simply gamble in the hope that neither opposing counsel nor the

court will check with sufficient care the way in which authorities are used. Sadly, judges sometimes write opinions this same way.

I appreciate that I am talking to the "wrong audience" in this memorandum. I mention the foregoing unattractive practice of some of our profession to emphasize that, in addition to careful research, accuracy of use and relevancy of authorities are a must with me.

I do check Supreme Court cases we rely upon, unless I am already familiar with the case. I do not verify the appropriateness of all of the "see" and "cf." citations, even of Supreme Court cases. And I simply do not have time to read or check lower court decisions or secondary authorities - except where these are quite central to what we are saying.

In short, on these matters, I am in your hands. I add that my own assessment of the research and analysis by the four of you is quite affirmative. I have never had a second rate law clerk or one in whom I did not have confidence. I make no individual comparisons from year to year, but the "crop" of the 1977 Term is as good as the best.

L.F.P., Jr.