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Articles

ARE LAW CLERKS FAIR GAME? INVADING JUDICIAL CONFIDENTIALITY

Charles W. Sorenson, Jr.*

I. INTRODUCTION

The recent disbarment of two attorneys and suspension of a third in *Bar Counsel v. Curry*,¹ for their surreptitious sting directed at a former trial court law clerk, presents one of the most bizarre and troubling cases of attorney misconduct imaginable. At first blush, the story seems so outlandish that one assumes that it must be fiction of the type penned by a novelist, or perhaps, a television writer for “Boston Legal.”² In fact, the 229-page special hearing officer decision and final Massachusetts Board of Bar Overseers (“BBO”) decision read more like pages from a tabloid than a typical bar discipline decision. Nothing is typical about this case. It involves an underlying multimillion (if not billion) dollar lengthy dispute among family members over a supermarket empire.³ It involves a colorful and controversial trial judge, who subsequently became a

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¹ *Bar Counsel v. Crossen, Curry, Donahue*, BBO File Nos. C1-97-0602, C1-97-0589, & C1-97-(9)589 [hereinafter *Bar Counsel v. Curry II*], available at <http://www.mass.gov/obcbbo/ccd2.pdf>. A prior hearing officer's report recommended disbarment of all three attorneys. *Bar Counsel v. Curry*, BBO File Nos. C1-97-0602, C1-97-0589, & C1-97-(9)589, 229 (Special Hearing Officer's Hearing Report May 11, 2005) [hereinafter *Bar Counsel v. Curry I*], available at <http://www.mass.gov/obcbbo/ccd.pdf>. The hearing officer's report was adopted virtually in total by the BBO, except that the Board recommended that attorney Donahue be suspended rather than disbarred. See *Bar Counsel v. Curry II*, *supra*, at 2, 51. Only lawyers Crossen and Curry appealed the recommendation. The Supreme Judicial Court heard their arguments on October 4, 2007 and February 6, 2008 and adopted the board's recommendation to disbar lawyers Crossen and Curry. See *In re Crossen*, 880 N.E.2d 352, 388 (Mass. 2008); *In re Curry*, 880 N.E.2d 388, 411 (Mass. 2008).

² See ABC, Boston Legal, <http://abc.go.com/primetime/bostonlegal/index?pn=about> (last visited Sept. 16, 2008) (describing the television program as stories about “emotionally challenged attorneys[]” who “continually stretch the boundaries of the law.”).

³ See *In re Curry*, 880 N.E.2d at 393; *Bar Counsel v. Curry II*, *supra* note 1, at 4.

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television judge.⁴ The lawyers involved arguably represent the best and possibly the worst of the profession.⁵ The victim, and former law clerk, is both a sympathetic and very unsympathetic character.⁶ Finally, perhaps what is most remarkable, given the backgrounds and numbers of lawyers who were involved in, or aware of, the elaborate and convoluted events that transpired over a six-month period in 1997, is the fact that no one put a stop to it and the fact that afterward some lawyers apparently thought the defendant lawyers did nothing wrong.⁷

Reduced to the bare essence, the facts are as follows: lawyers representing the losing side in a very contentious, lengthy, and expensive dispute over control of a supermarket empire pursued a scheme by which they hoped to get a new trial. Convinced that the trial judge who presided over their case was prejudiced against them, they hit upon what they believed was a way to expose the judge through the former law clerk who had worked on the case. The lawyers set up a false job interview for a “dream job[.]”⁸ The former law clerk was initially lured to Nova Scotia, presumably because surreptitious taping was not illegal there.⁹ In the course of the fake job interview, the interviewers repeatedly tried to get the law clerk to reveal the extent of his

⁴ Christopher Muther, *Judge Lopez Takes Tough Style to TV*, BOSTON GLOBE, Sept. 9, 2006, at A1, available at http://boston.com/ae/tv/articles/2006/09/09/judge_lopez_takes_tough_style_to_tv.

⁵ See notes 31, 35.

⁶ See *Bar Counsel v. Curry I*, *supra* note 1, at 221–23. Former law clerk Walsh was described as a vulnerable victim by the special hearing officer based in part on his difficulties in finding work after his first year as a law clerk for the superior court and his naiveté. *Id.* at 221; see also *In re Curry*, 880 N.E.2d at 396 n.13, 397 n.16; *In re Crossen*, 880 N.E.2d at 387. On the other hand, Walsh clearly engaged in puffery and dishonesty in his bar application and violated his duties of confidentiality to the court. See *Bar Counsel v. Curry I*, *supra* note 1, at 50, 64, 223; *In re Crossen*, 880 N.E.2d at 362, 365, 366 & n.26; *In re Curry*, 880 N.E.2d at 397–98.

⁷ See *Bar Counsel v. Curry I*, *supra* note 1, at 119–27.; *Board of Bar Overseers Hears Arguments in Conduct Case Against Boston Attorney*, MASS LAW. WEEKLY, Mar. 6, 2006, at 2, available at 2006 WLNR 9318898 (reporting that former Massachusetts Attorney General Robert H. Quinn had planned to testify that Curry’s conduct was ethical); Joan Vennoch, *Righting a Wrong*, BOSTON GLOBE, May 26, 2005, at A19; Ralph Ranalli, *For Demoulas Case Clerk, Vindication*, BOSTON GLOBE, May 16, 2005, at A1; Ralph Ranalli, *Recommendation Shocking to Some in Boston Legal Circles*, BOSTON GLOBE, May 13, 2005, at B4; John Strahinich, *Lawyers Get ‘Sordid’ Out; Judge Recommends Trio Be Disbarred for Demoulas Case Action*, BOSTON HERALD, May 13, 2005, at 26. Defendants’ lawyers who had not been involved in the law clerk contact and ruse initially and who were skeptical of its value and propriety when they found out about it, did not stop it. See *Bar Counsel v. Curry I*, *supra* note 1, at 122–25. Apparently one lawyer, however, Edward Barshak advised lawyer Donahue that he would leave the case if the law clerk information was used. See *id.* at 127.

⁸ *In re Curry*, 880 N.E.2d at 404–05 (internal quotation marks omitted); *Bar Counsel v. Curry II*, *supra* note 1, at 6.

⁹ See *In re Curry*, 880 N.E.2d at 396–97; *Bar Counsel v. Curry II*, *supra* note 1, at 34–35.

responsibility for drafting the decision in the case, and more importantly, that the judge had decided the outcome of the case prior to hearing evidence.¹⁰ The job interview ruse was continued several weeks later in New York City, essentially in an effort to elicit more specific, and hopefully admissible, evidence of prejudgment by the trial judge.¹¹ Finally, when the results of the two fake job interviews yielded less than the lawyers had hoped they would, a third interview was arranged with the law clerk—this time in Boston—for the purpose of “brac[ing]” the former law clerk.¹² This included revealing that the job offer was false and threatening to go public with information that would be damaging to the former law clerk, unless the law clerk cooperated with the lawyers by signing a statement that would more clearly support the claim of the trial judge’s prejudgment.¹³ Instead, the former law clerk went to the FBI and participated in a reverse sting that eventually resulted in the exposure of the lawyers and bar discipline proceedings.¹⁴

After the longest proceedings in the history of the Massachusetts BBO,¹⁵ the lawyers were found to have violated numerous provisions of the Massachusetts Code of Professional Conduct. The elaborate ruse they perpetrated was found to have run afoul of proscriptions on lying, deceiving, and making misrepresentations.¹⁶ Efforts seemingly aimed at coercing the law clerk into testifying favorably to the defendant-lawyers’ position were seen as attacks on the administration of justice and inconsistent with the fitness to practice law.¹⁷ What received relatively less attention, however, is the aspect of the case that struck me first when

¹⁰ See *In re Curry*, 880 N.E.2d at 398; *Bar Counsel v. Curry II*, *supra* note 1 at 7–8.

¹¹ *In re Curry*, 880 N.E.2d at 399–400; *In re Crossen*, 880 N.E.2d at 362–63; see *Bar Counsel v. Curry II*, *supra* note 1, at 10–15.

¹² See *In re Crossen*, 880 N.E.2d at 363, 364–66 (internal quotation marks omitted); *Bar Counsel v. Curry II*, *supra* note 1, at 17, 34, 44.

¹³ See *In re Crossen*, 880 N.E.2d at 365–66; *Bar Counsel v. Curry II*, *supra* note 1, at 17–19. It appears that in addition to revealing the law clerk’s obvious breach of confidentiality, the lawyers also threatened to reveal that the law clerk’s bar application had been supported by a letter written by a lawyer who did not know the law clerk. See *In re Crossen*, 880 N.E.2d at 366; *Bar Counsel v. Curry I*, *supra* note 1, at 145–46. Such a submission would have violated Massachusetts Disciplinary Rules 1-101 (A) (false statement in support of bar application) then in effect. See MASSACHUSETTS CONTINUING LEGAL EDUCATION, THE NEW RULES OF PROFESSIONAL CONDUCT 130 (James S. Bolan ed., 1998) (quoting old rule DR 1-101(A) that subjected a lawyer to discipline that “made a materially false statement in[] . . . connection with[] his application for admission to the bar[.]”), available at <http://www.mass.gov/obcbbbo/disciplinaryrules.pdf>; see also MODEL RULES OF PROF’L CONDUCT R. 8.1(a) (2003).

¹⁴ See *In re Crossen*, 880 N.E.2d at 366–69; *Bar Counsel v. Curry II*, *supra* note 1, at 20–26.

¹⁵ See *Bar Counsel v. Curry I*, *supra* note 1, at 2.

¹⁶ See *infra* Part II.C.

¹⁷ See *infra* note 88.

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I read the newspaper reports concerning the case. Unlike other cases involving lawyer lying, deceit, or undercover stings, which have been directed at potential criminal activity or civil wrongdoing by private parties, the ruse in this case was a blatant effort to invade the confidential relationship between a judge and a law clerk.

While I recognized that lawyer deceit in the forms of undercover criminal stings, the use of testers in civil rights and intellectual property infringement cases, and the use of puffery in negotiations were permissible in some circumstances,¹⁸ I assumed that it was widely understood that efforts to get a former law clerk to reveal confidential information, just like *ex parte* contacts with law clerks and judges generally,¹⁹ were clearly an impermissible interference with a judge-law clerk confidential relationship that would be inconsistent with fundamental principles governing the administration of justice. Close examination of the defendant-lawyers' conduct and arguments, the BBO's analysis of the issue, and the state of the law in this area suggests

¹⁸ See, e.g., *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456, 462-64, 471 (D.N.J. 1998) (rejecting defendants' argument that plaintiff's investigators calling to order stamps to test compliance with a consent order for a copyright was unethical behavior); *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 877, 880 (N.D. Ill. 2002) (finding that plaintiff's videotaping of gas station attendants to evince that African Americans were required to prepay for gas, while Caucasians were not, in a civil rights action was not unethical); *In re Conduct of Gatti*, 8 P.3d 966, 972 (Or. 2000) (suggesting that an attorney's deceitful conduct in a criminal sting operation would not be unethical if the attorney's reliance on Bar Counsel's letter was reasonable); *Transp. Ins. Co. V. Faircloth*, 898 S.W.2d 269, 282 (Tex. 1995) (stating that "puffery[]" regarding the value of an unliquidated claim during negotiation is permissible).

¹⁹ See, e.g., *Mallory v. Hartsfield, Almand & Grisham, LLP*, 86 S.W.3d 863, 867 (Ark. 2002) (stating that attorney's *ex parte* communication with judge's "law clerk[]" . . . is a violation[]" of the state's code of judicial conduct); *Vanzant v. R.L. Products, Inc.*, 139 F.R.D. 435, 438 n.4 (S.D. Fla. 1991) (stating that an attorney's attempt to elicit comments on the merits of cases from law clerks are "impermissible *ex parte* communication[s] with chambers."); *Davis v. United States*, 567 A.2d 36, 40 n.8 (D.C. 1989) (stating that judges should not consider *ex parte* communications concerning a pending or impending proceeding); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113(1) (2000) ("A lawyer may not knowingly communicate *ex parte* with a judicial officer before whom a proceeding is pending concerning the matter, except as authorized by law."); *Today's News: Update*, N.Y. L.J., Jan. 28, 1991, at 1, 1 (explaining that a law professor was "publicly censured . . . for engaging in *ex parte* communications with [a] . . . [j]udge . . . and his law clerk[]"); John R. Maley, 1997 *Federal Civil Practice Update for Seventh Circuit Practitioners*, 31 IND. L. REV. 483, 498 (1998) (citing judge that stated that *ex parte* communications with a law clerk about a case are just as inappropriate as direct *ex parte* communications with a judge); *Kennedy v. Great Atl. & Pac. Tea Co.*, 551 F.2d 593, 596 (5th Cir. 1977) (stating that law clerks have a duty to avoid *ex parte* "contacts outside the record that might affect the outcome of the litigation."); *Boston Bar Association Civility Standards for Civil Litigation*, BOSTON B.J., Sept.-Oct. 1994, at 11, 13 ("A lawyer should avoid *ex parte* communication on the substance of a pending case with a judge (or his or her law clerk) before whom such case is pending.").

that the courts should be concerned that their former clerks, and apparently some lawyers, generally do not share this understanding, but assume, instead, that the information that former law clerks have about the judges for whom they clerked is fair game for acquisition.²⁰

Questions about the confidentiality of the relationship between judicial law clerks and their judges, as well as the extent to which the communications between law clerks and their judges are subject to some sort of evidentiary privilege, have arisen sporadically over the past century. Usually, the issue has arisen in the context of an asserted breach of confidentiality by law clerks in writing an expose of the inner operations of the Supreme Court²¹ or in the context of a public investigation into alleged judicial wrongdoing.²² Prior to *Curry*, apparently no cases had addressed efforts by lawyers to privately acquire confidential information from law clerks for reasons related to ongoing cases.

The purpose of this Article is to examine the issue of whether a lawyer's mere act of attempting to obtain confidential information from a former judicial law clerk violates accepted standards of lawyer conduct so as to justify bar discipline. Part I briefly reviews the circumstances giving rise to, and the findings in, *Bar Counsel v. Curry*. Part II explores the judge-law clerk relationship, focusing particularly on the uniquely private and confidential nature of that relationship. It also reviews cases and circumstances in which judge-law clerk confidentiality has been discussed. Part III explores possible legal doctrines that are related to law clerk confidentiality and that might support discipline against lawyers who attempt to acquire confidential information from a judge's former law clerk. The Article concludes that the relationship between a law clerk and judge is widely recognized as uniquely confidential and worthy of protection. Furthermore, efforts by lawyers to induce a former law clerk to breach that confidentiality should be seen as either the improper acquisition of privileged information²³ or the improper inducement of a breach of a law clerk's fiduciary duty of confidentiality.²⁴ Given the obvious deleterious impact that such impropriety would have on the judicial system, lawyers who engage in

²⁰ Indeed, one indication of the extent to which lawyers may believe that acquiring confidential information from former law clerks is permissible is reflected in the statement by lawyer Donahue in this case to the effect that law firms routinely hire former law clerks as associates because of their confidential information. See *Bar Counsel v. Curry I*, *supra* note 1, at 76; see also *infra* note 59.

²¹ See *infra* notes 130–59 and accompanying text.

²² See *infra* notes 244–323 and accompanying text.

²³ See *infra* notes 372–96 and accompanying text.

²⁴ See *infra* Part IV.D.

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such actions must be seen as behaving in a manner that is prejudicial to the administration of justice so as to justify imposing severe discipline under the Rules of Professional Conduct.²⁵ However, this Article also concludes that the law in this area should be clarified. The most effective way to accomplish this would be by express judicial recognition of the common-law limited privilege for judge-law clerk communications. Such recognition would reduce the deleterious impact of lawyer intrusions on the judge-law clerk relationship. In combination with existing rules of professional conduct prohibiting lawyer interference with privileges and conduct that is prejudicial to the administration of justice,²⁶ recognition of this privilege would protect the judicial deliberative process and provide an unquestionably clear basis for lawyer discipline.

II. THE CIRCUMSTANCES LEADING TO THE DISBARMENTS

A. *The Demoulas Supermarket Dispute*

Two brothers—George and Telemachus Demoulas—created and operated an extremely successful supermarket chain beginning in 1964. Ownership of the corporation was shared evenly by the two brothers' families in 1971 when George died. At that point, Telemachus assumed control of the management of the company. In 1990, members of the George Demoulas family filed two state court suits in the same court against Telemachus Demoulas and his family. The first was a suit in which the plaintiffs alleged that the defendants had fraudulently transferred company stock from the George Demoulas family to the Telemachus Demoulas family in breach of their fiduciary duties. The second suit was a shareholder derivative suit alleging that Telemachus and his immediate family had diverted corporate opportunities from the jointly-owned supermarket company to entities owned and controlled by the defendants. The same lawyer represented the plaintiffs in both suits.²⁷

Both cases were assigned to the same Massachusetts Superior Court Judge—Judge Maria Lopez. The fraudulent stock transfer case was tried first to a jury. The shareholder derivative suit was tried subsequently to the judge.²⁸ Both cases were lengthy, expensive, very acrimonious, and characterized by numerous ancillary disputes and allegations of

²⁵ See *infra* Part IV.F.

²⁶ See *infra* Part IV.F.

²⁷ See *Bar Counsel v. Curry II*, *supra* note 1, at 3.

²⁸ *In re Curry*, 880 N.E.2d 388, 393 (Mass. 2008); see *Bar Counsel v. Curry II*, *supra* note 1, at 3.

wrongdoing by one side or the other, which is not surprising given the fact that about one billion dollars in assets were at stake.²⁹

Lawyer Gary Crossen was part of a large team of lawyers representing the defendants—the Telemachus Demoulas family.³⁰ Crossen had been involved in the trial of both cases. He had a relatively distinguished background and reputation.³¹

In May 1994, a jury returned a verdict in the stock transfer case primarily in favor of the plaintiff—the George Demoulas family. The bench trial in the shareholder derivative suit began in December. The law clerk assigned to assist Judge Lopez was Paul Walsh. Walsh, who had been unsuccessful in finding a lawyer job after the first year of his Superior Court Clerkship, was beginning his second year as a law clerk in the fall of 1994. He worked for Judge Lopez throughout the trial of the case beginning in December 1994 until August 1995 when it ended with the judge entering a decision finding for the plaintiffs and ordering “rescission of certain transactions, surrender of all illicit gains from those transactions, and payment of attorney’s fees.”³²

Given the enormity of the losses they faced, defendants pursued several post-trial measures in an effort to reverse their losses. They hired another attorney, Edward Barshak, to handle the appeal in the derivative action and to assist in other post-trial matters.³³ They brought in Richard K. Donahue “to supervise and coordinate the continuing litigation, to monitor its cost, and to handle public relations for them.”³⁴ Like Crossen, Donahue had enjoyed a distinguished career and reputation to that point. In fact, Donahue had been the Chair of the BBO, the disciplinary agency for the state.³⁵

²⁹ See *In re Curry*, 880 N.E.2d at 393; *Bar Counsel v. Curry II*, *supra* note 1, at 3–4. Essentially, as a result of losing the two cases, the defendants were not only faced with having to pay millions of dollars in attorneys fees and losing “enormously valuable assets,” but would also lose control of the Demoulas supermarket empire to the plaintiffs. *Id.* at 4; see also *In re Curry*, 880 N.E.2d at 394.

³⁰ See *In re Crossen*, 880 N.E.2d 352, 358 (Mass. 2008); *Bar Counsel v. Curry II*, *supra* note 1, at 4.

³¹ The special hearing examiner found that Crossen, who had served as an assistant district attorney, chief of a major crimes unit in the United States Attorney’s Office, and a member of the state’s Judicial Nominating Commission, had a “reputation for excellence in the legal community.” *Bar Counsel v. Curry I*, *supra* note 1, at 214, 216–18; see also *In re Crossen*, 880 N.E.2d at 358.

³² *Bar Counsel v. Curry II*, *supra* note 1, at 4; see also *In re Curry*, 880 N.E.2d at 393–94.

³³ *Bar Counsel v. Curry II*, *supra* note 1, at 4.

³⁴ *Id.*; *In re Curry*, 880 N.E.2d at 399 n.21.

³⁵ See *Bar Counsel v. Curry I*, *supra* note 1, at 206, 218. The special hearing officer described Donahue as follows: “A respected Massachusetts practitioner for five decades, he is a fellow of the American College of Trial Lawyers and has served as chair of the MBA [Massachusetts Bar Association] Commission on Professionalism, chairman of the Board of

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While defendants' counsel believed that the shareholder suit would be difficult to overturn on appeal, given that the decision was "well written, well researched, and founded on credibility determinations[.]" they doubted that the decision had been written by Judge Lopez.³⁶ Moreover, both defendants' counsel and defendants believed that the judge had been prejudiced against them.³⁷ Apparently, it was this belief that led to several post-trial efforts, including the elaborate fake job ruse involving the judge's former law clerk, to establish judicial prejudice as grounds for obtaining a new trial.³⁸

B. *The Post-Judgment Sting*

The notoriety of the case, the defendants' belief that the judge was prejudiced against them, the defendants' wealth, and the potential loss that the defendants faced after the judge's decision in the shareholder derivative suit probably attracted lawyer Kevin P. Curry and his investigator, Ernest P. Reid, to the defendant Telemachus Demoulas and provided the incentive for Curry and Reid to create the ruse directed at the judge's former law clerk.³⁹ At the time of the August 1995 decision in the shareholder derivative case, lawyer Curry had not been involved in the supermarket litigation.⁴⁰ Unlike defendants' lawyers Crossen and Donahue, Curry did not have a distinguished reputation. In fact, he was described by one of defendants' lawyers as a "bottom dweller[.]"⁴¹

Bar Overseers, assistant to President John F. Kennedy and president of Nike Corporation."

Id.

³⁶ Bar Counsel v. Curry II, *supra* note 1, at 4; see also *In re Curry*, 880 N.E.2d at 394-95.

³⁷ *In re Curry*, 880 N.E.2d at 394-95, 398; *In re Crossen*, 880 N.E.2d 352, 358-59 & n.6 (Mass. 2008); Bar Counsel v. Curry II, *supra* note 1, at 4.

³⁸ In addition to trying to establish judicial prejudice through information obtained from the former law clerk, defendants' lawyers, including Gary Crossen, repeatedly attempted to establish prejudice based on allegations that Judge Lopez had dined with the plaintiffs' lawyer during the litigation. *In re Crossen*, 880 N.E.2d at 358-59; Bar Counsel v. Curry II, *supra* note 1, at 4. Crossen also brought a federal court proceeding on behalf of defendants trying to establish that plaintiffs had bugged the offices of Telemachus Demoulas in order to acquire information for the litigation. See Kate Zernike, *Demoulas v. Demoulas*, BOSTON GLOBE MAGAZINE, Jan. 11, 1998, available at <http://graphics.boston.com/globe/magazine/1998/1-11/family>.

³⁹ See *In re Curry*, 880 N.E.2d at 393-96; Bar Counsel v. Curry II, *supra* note 1, at 3-5.

⁴⁰ *In re Curry*, 880 N.E.2d at 394 n.7; Bar Counsel v. Curry II, *supra* note 1, at 5.

⁴¹ Bar Counsel v. Curry II, *supra* note 1, at 10, 16 (finding that other lawyers for defendants warned Crossen and Donahue "to have nothing to do with Curry[.]" (internal quotation marks omitted); Bar Counsel v. Curry I, *supra* note 1, at 68 (finding that an attorney involved had doubts about the "probity" of Curry). The special hearing officer stated: "Curry, by contrast, does not enjoy a stellar reputation. He introduced no character evidence. During closing argument, his counsel quipped that Curry's character witnesses would fit in a telephone booth." *Id.* at 219.

Shortly after the August 1995 decision in the Demoulas shareholder derivative action, Reid, the investigator who worked with lawyer Curry, contacted defendant Telemachus Demoulas to set up a meeting “concerning ‘a matter of importance and confidence.’”⁴² Thereafter, at a meeting with Telemachus and his son, Arthur Telemachus, Curry reinforced defendants’ belief that Judge Lopez was prejudiced and corrupt, telling them that the “case ‘was over before it began.’”⁴³ Curry advised the defendants that he and Reid could do an investigation that would reveal misconduct by the judge that could be used to obtain a reversal of the shareholder derivative decision. Curry and Reid were retained by the defendants by Labor Day, 1995.⁴⁴

The investigation included sifting through public records concerning Judge Lopez and her husband, Steven Mindich.⁴⁵ It also included reading all of the judge’s written opinions with the goal of establishing that she had not written the Demoulas decision. Apparently, as part of their scheme to elicit information from the judge’s former law clerk, Walsh, they also investigated him. This included obtaining his bar application, a Motor Vehicles Registry Report, his and his parents’ addresses and phone numbers, and his and his parents’ neighbors’ addresses and telephone numbers.⁴⁶

In the spring of 1997, based on their investigation, Curry and Reid launched their ruse aimed at Walsh. Walsh had found it difficult to find a job after his clerkship. He had even submitted resumes to some of the Demoulas defendant’s lawyers. At this point, he was working for a Boston firm earning \$68,000 a year, but was dissatisfied.⁴⁷ Based on the information they had gathered about Walsh, Curry and Reid created a fake job opportunity to be used as a lure to “pump” Walsh for information about the Demoulas case and the judge. A fake \$90,000 a year job as in-house counsel at an international corporation with offices in Bermuda, Boston, and London was designed to appeal to Walsh’s

⁴² *In re Curry*, 880 N.E.2d at 394; Bar Counsel v. Curry II, *supra* note 1, at 5.

⁴³ *In re Curry*, 880 N.E.2d at 395; Bar Counsel v. Curry II, *supra* note 1, at 5.

⁴⁴ *In re Curry*, 880 N.E.2d at 395; Bar Counsel v. Curry II, *supra* note 1, at 5. The investigation and other activities proved to be quite lucrative—Curry was paid at least \$130,000 for his work for the defendants. *In re Curry*, 880 N.E.2d at 395 n.11; Bar Counsel v. Curry II, *supra* note 1, at 5.

⁴⁵ Bar Counsel v. Curry II, *supra* note 1, at 5; see also *In re Curry*, 880 N.E.2d at 395 n.9. There had been substantial press coverage of the public and private lives of the Judge and her publisher husband. See Muther, *supra* note 4; Chris Wright, *The Wrong Publisher*, BOSTON MAGAZINE, Sept. 2006, available at http://www.bostonmagazine.com/arts_entertainment/articles/city_journal_the_wrong_publisher/AmericanProfile.com, Ask American Profile, Sept. 10, 2006, <http://www.americanprofile.com/article/18985.html>.

⁴⁶ Bar Counsel v. Curry II, *supra* note 1, at 5–6; see also *In re Curry*, 880 N.E.2d at 396.

⁴⁷ See Bar Counsel v. Curry I, *supra* note 1, at 25.

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interests and supposed abilities; it was “Walsh’s dream job, and they knew it.”⁴⁸ Portraying himself as a headhunter representing a client, Reid called Walsh and described the job, telling Walsh that they were looking for “someone with no history of ethical problems or other skeletons in his closet, who was married and ‘settled down,’ and who had ‘excellent writing skills.’”⁴⁹ Perhaps indicating Walsh’s naivete,⁵⁰ the bait worked immediately. When asked by Reid if he had worked on any significant cases, Walsh told him he had worked on the Demoulas shareholder derivative case. When Reid subsequently asked for a writing sample, Walsh gave him the decision in that case, which Walsh said had been read, but not edited, by the judge.⁵¹

In May 1997, Reid again contacted Walsh, telling him that the client was especially impressed by the Demoulas decision writing sample and asking him questions about how it was written. Reid told Walsh that representatives of the client, an international insurance underwriting company, wanted to meet him, probably in New York or Halifax.⁵² Subsequently, Reid told Walsh that he was the only remaining candidate for the job and that the interview with a person named “Kevin Concave” on behalf of the client would be held at a hotel in Halifax.⁵³ Reid gave Walsh an airline ticket and \$300 as compensation for the day. In preparation for the fake job interview, Reid and lawyer Curry, who was to be “Kevin Concave,” brought in another investigator named Richard LaBonte to play another representative of the corporate client at the interview.⁵⁴

⁴⁸ Bar Counsel v. Curry II, *supra* note 1, at 6; *see also In re Curry*, 880 N.E.2d at 396.

⁴⁹ Bar Counsel v. Curry II, *supra* note 1, at 6; *see also In re Curry*, 880 N.E.2d at 396.

⁵⁰ Given Walsh’s previous difficulties finding a job, his background, the Boston job market at the time, and the “out of the blue” nature of the headhunter call, perhaps Walsh should have been more cautious and skeptical as the ruse played out.

⁵¹ *In re Curry*, 880 N.E.2d at 396; Bar Counsel v. Curry II, *supra* note 1, at 6–7. Oddly, lawyer Curry attached great significance to the fact that Walsh had written the decision, reportedly telling defendant Arthur T. Demoulas that if defendants could show that a third person wrote the decision, it “‘could tip the whole darn thing[.]’” *Id.* at 7. Drafting judicial opinions is one of the primary activities of law clerks. *See infra* text accompanying note 101. Therefore, it is not surprising that the defendants’ other lawyers saw this fact as virtually meaningless. *See In re Curry*, 880 N.E.2d at 398; *In re Crossen*, 880 N.E.2d 352, 359 (Mass. 2008); Bar Counsel v. Curry II, *supra* note 1, at 9.

⁵² *In re Curry*, 880 N.E.2d at 396–97; Bar Counsel v. Curry II, *supra* note 1, at 7. It appears that New York and Halifax were chosen based on the belief that surreptitious taping would be permissible in those locations. *See In re Curry*, 880 N.E.2d at 396–97; Bar Counsel v. Curry II, *supra* note 1, at 34–35.

⁵³ Bar Counsel v. Curry II, *supra* note 1, at 7.

⁵⁴ *In re Curry*, 880 N.E.2d at 397; Bar Counsel v. Curry II, *supra* note 1, at 7. The ruse was carried so far as to have business cards printed for Curry and LaBonte listing a fake company, “British Pacific Surplus Risks, Ltd.” at a real address in London. *In re Curry*, 880 N.E.2d at 397; Bar Counsel v. Curry II, *supra* note 1, at 7. They also hired someone to

Taking on false identities as representatives of the corporate client, Curry and LaBonte met with Walsh in a hotel in Halifax. The focus of the interview was on the Demoulas decision and how it was prepared, with Curry and LaBonte asking Walsh questions that were intended to reveal the judge's deliberative process and extent of involvement in writing the decision, as well as to unearth damaging personal information about the judge.⁵⁵ Walsh's response to the interview questions reiterated that he had been completely responsible for the drafting of the decision and that the judge had merely read and signed the opinion. He also indicated that the judge had told him at the beginning of the bench trial that "'very quickly he would know who the good guys were and who the bad guys were' and who the winners and losers were going to be."⁵⁶ Finally, Walsh made disparaging remarks about Judge Lopez and other state judges. Afterward, lawyer Curry was apparently quite satisfied that the ruse had worked, reporting to defendant Arthur T. that, "'I think we got him.'"⁵⁷

Defendants' lawyers Crossen and Donahue became involved in the Curry and Reid law clerk ruse shortly after the Halifax phony interview. Defendant Arthur T. Demoulas told them what Curry had related about Walsh's claims to have written the shareholder derivative decision and

answer the telephone number listed in London. *In re Curry*, 880 N.E.2d at 397; Bar Counsel v. Curry II, *supra* note 1, at 7.

⁵⁵ *In re Curry*, 880 N.E.2d at 398; Bar Counsel v. Curry II, *supra* note 1, at 8. An interesting and ultimately significant side issue that arose during the interview related to Walsh's stuttering. *In re Curry*, 880 N.E.2d at 397; Bar Counsel v. Curry II, *supra* note 1, at 8. At the beginning of the interview when Walsh began to stutter, Curry told him they already knew about it. *In re Curry*, 880 N.E.2d at 397; Bar Counsel v. Curry II, *supra* note 1, at 8. When Walsh asked how they knew, LaBonte said they had read it in a letter in Walsh's bar application. *In re Curry*, 880 N.E.2d at 397; Bar Counsel v. Curry II, *supra* note 1, at 8. LaBonte asked why a friend who writes a letter of recommendation would mention the stuttering. *Id.* Walsh explained that a friend had not actually signed the letter. *In re Curry*, 880 N.E.2d at 397; Bar Counsel v. Curry II, *supra* note 1, at 8. Walsh had asked an attorney named Edward Cotter to write the letter but Cotter couldn't submit the letter because he was suspended from practice. *In re Curry*, 880 N.E.2d at 397 n.17; Bar Counsel v. Curry II, *supra* note 1, at 8. Cotter had obtained the signature of a friend named Mulcahy on the letter and Mulcahy had also signed Walsh's bar application as a sponsoring lawyer despite not knowing Walsh. *In re Curry*, 880 N.E.2d at 397 & n.17; Bar Counsel v. Curry II, *supra* note 1, at 8. Thus, in the interview Walsh revealed information that he had violated the Massachusetts Code of Professional Conduct. See MASSACHUSETTS CONTINUING LEGAL EDUCATION, *supra* note 13. This information was subsequently used by lawyers for the defendants to attempt to induce Walsh's cooperation. See *In re Crossen*, 880 N.E.2d 352, 366 (Mass. 2008) ("Donahue told the law clerk that, if he did not cooperate with them, the false letter submitted with his bar application would be made public."); Bar Counsel v. Curry II, *supra* note 1, at 19 (threatening to go public with bar recommendation letter if Walsh did not cooperate).

⁵⁶ Bar Counsel v. Curry II, *supra* note 1, at 8; see also *In re Curry*, 880 N.E.2d at 398.

⁵⁷ *In re Curry*, 880 N.E.2d at 398; Bar Counsel v. Curry II, *supra* note 1, at 9.

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his statements about the judge's purported predisposition. Crossen and Donahue thought that Walsh's statements about the judge's alleged bias were "'troubling'" and "'significant.'"⁵⁸ Both thought the information was significant and that it should be pursued further. At that point, neither seemed to be overly concerned about the ruse or the fact that it was being used on a former law clerk to obtain confidential information.⁵⁹ In considering the available options, Crossen thought about doing nothing, filing a motion accompanied by affidavits from Curry, Reid, and LaBonte, or doing further investigation.⁶⁰ Despite his years of experience as a state and federal prosecutor and his awareness that procedures existed for investigating juror misconduct,⁶¹ Crossen did

⁵⁸ *In re Curry*, 880 N.E.2d at 398; see *In re Crossen*, 880 N.E.2d at 359; Bar Counsel v. Curry II, *supra* note 1, at 9.

⁵⁹ See *In re Crossen*, 880 N.E.2d at 359–60; Bar Counsel v. Curry II, *supra* note 1, at 9; Bar Counsel v. Curry I, *supra* note 1, at 61–63. Donahue relied on Crossen's supposed expertise. See Bar Counsel v. Curry II, *supra* note 1, at 9. He also gave Crossen a copy of a case, *Matter of Bonin*, 378 N.E.2d 669 (Mass. 1978), that he apparently thought was somehow relevant. See *id.* A review of the *Bonin* case reveals that the case, which involves an investigation into a judge's alleged out-of-court misconduct by a judicial conduct committee at the behest of the Massachusetts Supreme Judicial Court, is only remotely, if at all relevant. See *Bonin*, 378 N.E.2d at 670. The case does not involve a ruse upon a judicial law clerk and does not involve issues of confidentiality or judicial privilege. See *id.* at 671–74 (summarizing the allegations made against the judge). While the committee's investigation included obtaining testimony by the administrative assistant to the judge, ultimately the court opinion did not even directly address admissibility issues. See generally *id.* at 673–85 (discussing testimony from judge's administrative assistant, but not addressing admissibility of testimony). A few days later, Donahue claims to have raised with Crossen the propriety of having contact with a former law clerk, but was really not concerned about it because "'every major law firm in Boston' [sic] quizzes their former clerks on the judges for whom they clerked" and "former law clerks [are] often asked how a judge might react to a particular argument[.]" Bar Counsel v. Curry I, *supra* note 1, at 76. Nothing in the record indicates research by either Donahue or Crossen into the propriety of contacts with former law clerks prior to their involvement in the second fake interview with Walsh, except that prior to the second interview, Donahue apparently sought and received a memorandum from another attorney in his firm about the admissibility of affidavit statements by the law clerk and investigators in support of a motion to recuse the judge. See *id.* at 71–72, 76–77, 100; Bar Counsel v. Curry II, *supra* note 1, at 11–12. The memo apparently only addressed hearsay issues, but not the propriety of either the ruse or contacts with the former law clerk, or of any privilege or confidentiality protection attached to a law clerk's information. See Bar Counsel v. Curry I, *supra* note 1, at 100, & Ex. 20 & 20A (on file with the author). In fact, they relied on cases arising in a completely different context—testimony in judicial misconduct proceedings by court administrative clerks. See *id.* at Ex. 20, Ex. 20A.

⁶⁰ *In re Crossen*, 880 N.E.2d at 359; see Bar Counsel v. Curry II, *supra* note 1, at 9; Bar Counsel v. Curry I, *supra* note 1, at 63.

⁶¹ Bar Counsel v. Curry I, *supra* note 1, at 63. In Massachusetts, the Rules of Court prohibit lawyer contact with jurors, but where allegations of misconduct arise, case law establishes a specific process for bringing the matter to the attention of the court. See *infra* pp. 99–101.

not consider the obvious remedy of referring the matter to the chief justice of the superior court for an investigation of the matter or formal questioning of Walsh.⁶²

After rejecting the notion of filing a motion accompanied by the Curry and LaBonte affidavits because of doubts as to their admissibility and credibility,⁶³ Curry, Crossen, and Donahue decided to conduct a second fake interview with Walsh, to be held in New York and taped.⁶⁴ The plan was that at the interview, Walsh would confirm the statements he had previously made in Halifax regarding writing the decision and the judge's prejudice, and once this occurred Crossen would "'brace[]'" Walsh—that is confront him with the ruse and his statements and try to convince him to testify on behalf of the defendants' position that the judge was predisposed against them.⁶⁵ Walsh was again lured to the fake interview with money and a plane ticket. Reid, LaBonte, and another investigator, Joseph Rush, hired by defendants' lawyers, conducted the fake interview at a hotel. The interview was taped and observed by video by Crossen from an adjoining room. Rush and LaBonte tried to elicit clear statements by Walsh that the judge had improperly prejudged the case. They also, for a second time, raised a matter concerning a recommendation letter that they knew Walsh had submitted to the Bar in violation of the Massachusetts Code of Professional Conduct, but Walsh indicated that he did not see a problem with it. At a break, investigator Rush reported to Crossen that "Walsh's statements on predisposition were 'very weak[]'" and Crossen told Rush

⁶² See *Bar Counsel v. Curry I*, *supra* note 1, at 63. The mere fact that the *Bonin* case, recently given to Crossen by Donahue, involved a formal proceeding for investigating superior court judge misconduct, *see supra* note 55, should have alerted Crossen to this type of formal remedy. *See supra* note 59. Furthermore, the authority to "receive information, investigate, [and] conduct hearings[] . . . concerning allegations of judicial misconduct" is also vested in the Commission on Judicial Conduct by statute. *See* MASS GEN. LAWS ch. 211C, sec. 2(1) (1987); *see also In re Markey*, 696 N.E.2d 523, 524 (Mass. 1998) (explaining that an aggrieved litigant filed complaint alleging judicial misconduct with the Commission on Judicial Conduct).

⁶³ *See Bar Counsel v. Curry II*, *supra* note 1, at 10; *Bar Counsel v. Curry I*, *supra* note 1, at 69–70.

⁶⁴ *In re Crossen*, 880 N.E.2d at 360; *In re Curry*, 880 N.E.2d 388, 399–400 (Mass. 2008); *Bar Counsel v. Curry II*, *supra* note 1, at 10–11. New York was selected based on the belief that it allowed taping with only one party's consent. *In re Crossen*, 880 N.E.2d at 360; *In re Curry*, 880 N.E.2d at 399; *Bar Counsel v. Curry II*, *supra* note 1, at 10–11; *see also Bar Counsel v. Curry I*, *supra* note 1, at 69–70, 73–75. Apparently, after the decision to hold the fake follow-up interview in New York was made, a New York federal court decision, *Miano v. AC&R Advertising*, 148 F.R.D. 68 (S.D.N.Y. 1993), was brought to Crossen's attention under which a lawyer's involvements in surreptitious taping in the context of a ruse was disapproved. *See Bar Counsel v. Curry I*, *supra* note 1, at 75–76, 88, 203.

⁶⁵ *See In re Crossen*, 880 N.E.2d at 360–61; *Bar Counsel v. Curry II*, *supra* note 1, at 11; *Bar Counsel v. Curry I*, *supra* note 1, at 81–84, 95.

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to go back and try again.⁶⁶ Although Walsh made additional statements in the interview that suggested that the judge had pre-formed views as to credibility and what had occurred, he did not agree that the judge had “predetermined” the case, stating that “she kept some sense of, of open-mindedness.”⁶⁷ Apparently, because of the inconsistencies between Walsh’s New York interview and the statements attributed to Walsh from the Halifax interview, Crossen decided not to “brace” Walsh at the interview. Instead, Walsh was told by Rush that they would get back to him shortly about the job.⁶⁸

After the fake interview in New York, Crossen reviewed the tapes, concluding they were a “mixed bag” because Walsh had answered inconsistently regarding the issue of predisposition.⁶⁹ Meetings with other lawyers for the defendants were held regarding the Demoulas litigation and the events involving the former law clerk. At one of these meetings Crossen was asked about the propriety of contacting a former law clerk, and Crossen answered that “he did not think [it was improper] but would look into the matter.”⁷⁰ Some of defendants’ other prominent lawyers, who had not previously been aware of the law clerk contacts and ruse, listened to the tapes or read the transcripts and viewed them as largely worthless in terms of establishing predisposition by the judge.⁷¹

⁶⁶ Bar Counsel v. Curry II, *supra* note 1 at 13; see also *In re Crossen*, 880 N.E.2d at 363.

⁶⁷ *In re Crossen*, 880 N.E.2d at 363 n.20; Bar Counsel v. Curry II, *supra* note 1 at 14. Essentially, Walsh had indicated that he and the judge had discussed the case and evidence after each trial session, and that her views as to who was going to win were influenced by the fact that she had seen most of the witnesses and much of the evidence in the previous, substantially overlapping jury trial. See *id.* at 13–14; Bar Counsel v. Curry I, *supra* note 1, at 103–11.

⁶⁸ See Bar Counsel v. Curry II, *supra* note 1, at 14.

⁶⁹ *Id.*; see also *In re Crossen*, 880 N.E.2d at 363.

⁷⁰ *In re Crossen*, 880 N.E.2d at 363; Bar Counsel v. Curry II, *supra* note 1, at 15. He did in fact have an associate at his firm research the issue and was given a voicemail, notes, and cases that supported the existence of limited judicial privilege between judges and law clerks, policy arguments against such contacts, and proscriptions on contacts with jurors, but no outright prohibition on contacts with law clerks. See *In re Crossen*, 880 N.E.2d at 363–64. Crossen did not discuss the issue further with the associate, but read the cases. See Bar Counsel v. Curry II, *supra* note 1, at 15; Bar Counsel v. Curry I, *supra* note 1, at 117–19. Among the cases was a case about Judge Alcee Hastings, *Matter of Certain Complaints Under Investigation*, 783 F.2d 1488 (11th Cir. 1986), in which the court adopted a limited privilege. See *id.* at 118. For further discussion of *Hastings* and the confidentiality privilege, see *infra* notes 262–84.

⁷¹ See *In re Crossen*, 880 N.E.2d at 364; Bar Counsel v. Curry II, *supra* note 1, at 15–16; see also Bar Counsel v. Curry I, *supra* note 1, at 119–25. Among the lawyers who listened to the tape were Edward Barshak and (former Superior Court Judge) Samuel Adams. See *In re Crossen*, 880 N.E.2d at 364; Bar Counsel v. Curry II, *supra* note 1, at 15–16. At that point, a post-trial motion to recuse Judge Lopez was filed based solely on allegations of a dinner

Crossen, Curry, and Donahue decided that the final act of the ruse would entail bringing Walsh to a meeting at a hotel in Boston purportedly to offer him the job. In fact, the plan was to reveal the ruse to Walsh and attempt to get him to confirm statements of prejudgment by the judge in an affidavit and otherwise cooperate with the defendants. They also planned to place him under surveillance to find out if he went to the judge or the plaintiffs' lawyer after the meeting.⁷² When Walsh arrived for the fake job offer, he was met by Rush and lawyer Donahue. Rush told him of the ruse, Donahue told him that defendants hired them to look into misconduct by Judge Lopez, and both of them told him that they had tapes and affidavits of both the Halifax and New York interviews. Crossen then entered the room and attempted to get Walsh to clearly confirm that he had written the entire decision and that the judge had been predisposed against the defendants. He essentially advised Walsh that if Walsh did not cooperate with defendants, the damaging tapes and information would be revealed. Lawyer Donahue raised the issue of the false bar recommendation letter, threatening to make it public if Walsh did not cooperate.⁷³

As might be expected in the circumstances, the former law clerk, who had been expecting to be offered his "dream job," was angry and distraught at learning that he had been tricked and manipulated by the defendants' lawyers. During the lengthy encounter, he refused to discuss the judge's supposed predisposition, stated that he had just been puffing his credentials to get the job, and repeatedly asked to hear the tapes.⁷⁴ Crossen refused the request to hear the tapes and told the former clerk that he should seek "independent counsel[]" advice, which Crossen believed would result in the law clerk cooperating with the

meeting between the judge and one of the counsel for the plaintiffs during the trial; no mention was made of any of the Walsh information. *In re Crossen*, 880 N.E.2d at 364. At about the same time, Crossen also was representing defendants in the retrial in federal court of a related action in which the Demoulas case defendants alleged that one of the plaintiffs had bugged the defendants' office. *Bar Counsel v. Curry II*, *supra* note 1, at 16-17. Interestingly, that case, *Kettenbach v. Demoulas*, involved another ruse apparently orchestrated by Crossen. 901 F. Supp. 486, 489-91 (D. Mass. 1995) (explaining that woman cooperated to set up a "rendez-vous" to Kittery, Maine to secretly record a conversation regarding "involvement in electronic operations conducted in and around [the] DSM headquarters[.]" and "to intercept oral communications"). The Demoulas defendants lost both the motion to recuse and the federal court case about the same time their lawyers Crossen, Curry, and Donahue decided to try again to get damaging information from Walsh. See *Bar Counsel v. Curry II*, *supra* note 1, at 17.

⁷² *In re Crossen*, 880 N.E.2d at 365; *Bar Counsel v. Curry II*, *supra* note 1, at 17.

⁷³ *In re Crossen*, 880 N.E.2d at 366; *Bar Counsel v. Curry II*, *supra* note 1, at 19.

⁷⁴ *In re Crossen*, 880 N.E.2d at 365-66; see *Bar Counsel v. Curry I*, *supra* note 1, at 137-51.

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defendants counsel in providing information.⁷⁵ As it turned out, Crossen could not have been more wrong about the effect that obtaining independent counsel would have.

After the meeting, Walsh, believing that his career was going to be destroyed if the tapes and bar letter were made public, felt “[s]ad, scared, [and] emotionally very hurt[.]”⁷⁶ He returned to work, where his employer found him sitting in a conference room “crying and distraught[.]”⁷⁷ At the suggestion of his employer, Walsh immediately contacted and retained a lawyer who, rather than contacting Crossen to negotiate some sort of cooperative arrangement, put Walsh in contact with the FBI. This resulted in Walsh wearing a wire as part of a reverse sting over the next two weeks in which Walsh had four telephone conversations and two in-person meetings with Crossen in an effort to document what was viewed by the FBI as a possible extortion attempt.⁷⁸

These conversations involved Walsh repeatedly asking to hear the tapes before he would discuss the matter further and Crossen repeatedly stating to Walsh that Walsh would have to have a “‘candid conversation’” with Crossen first. By this, Crossen apparently meant that Walsh would have to confirm that the judge had prejudged the *Demoulas* case.⁷⁹ The fraudulent bar recommendation letter was also a frequent topic during the conversation, with Walsh expressing his concern about what Crossen intended to do with that information, and Crossen doing little to alleviate Walsh’s concerns. In fact, when Crossen and Donahue finally decided to play a section of the tape from the New York meeting, it was the section in which Walsh explained how he had submitted a false letter in support of his bar application.⁸⁰ Then, Walsh believed, and the hearing examiner in the discipline case found, that Crossen used the letter to “pressure Walsh into agreeing to have the ‘candid conversation[:]’ [and i]f Walsh agreed to cooperate with him, Crossen would use his experience and position to do his ‘best . . . to keep it from coming out.’”⁸¹ In the last conversation between Walsh and

⁷⁵ Bar Counsel v. Curry II, *supra* note 1, at 19; Bar Counsel v. Curry I, *supra* note 1, at 150; see *In re Crossen*, 880 N.E.2d at 366.

⁷⁶ Bar Counsel v. Curry II, *supra* note 1, at 19–20.

⁷⁷ Bar Counsel v. Curry II, *supra* note 1, at 20; *In re Crossen*, 880 N.E.2d at 366.

⁷⁸ See *In re Crossen*, 880 N.E.2d at 366–68; Bar Counsel v. Curry II, *supra* note 1, at 20–26; Vennoch, *supra* note 7; Judy Rakowsky, *Decision on Lawyers Looming at Justice*, BOSTON GLOBE, Mar. 15, 2000, at B4. Interestingly, the law clerk’s lawyer was retained to represent him for all aspects of the *Demoulas* matter, including “the possible publication of his story.” Bar Counsel v. Curry I, *supra* note 1, at 154.

⁷⁹ See *In re Crossen*, 880 N.E.2d at 366; Bar Counsel v. Curry II, *supra* note 1, at 20; Bar Counsel v. Curry I, *supra* note 1, at 157–81.

⁸⁰ *In re Crossen*, 880 N.E.2d at 367; Bar Counsel v. Curry II, *supra* note 1, at 23.

⁸¹ Bar Counsel v. Curry II, *supra* note 1, at 23; see *In re Crossen*, 880 N.E.2d at 367.

Crossen on August 25, 1997, Crossen tried to pressure Walsh into providing an affidavit supporting defendants' position by telling him that a client strategic meeting was coming up in a couple of days and that Crossen "was not 'optimistic that if we don't get something done before [then] . . . that the client won't insist upon me dropping the hammer[.]'"⁸²

Instead, shortly after this conversation, "the hammer" dropped on Crossen, Donahue, and Curry. Crossen found out on August 29, 1997, that grand jury subpoenas had been served on the investigators who had been involved in the ruse and that the FBI was investigating him. Walsh and his lawyer held a press conference on September 17, 1997, and on September 26, 1997, the Superior Court Chief Justice filed a complaint with the Massachusetts attorney discipline authority—the Office of Bar Counsel.⁸³

C. *The Board of Bar Overseers Proceedings*

The Bar Counsel waited to act formally until after the FBI and United States Attorney's Office completed the criminal investigation into Crossen's, Curry's, and Donahue's conduct. Eleven months after the lawyers were advised that the matter was being closed without indictments, the Bar Counsel filed a petition for discipline against the lawyers on January 3, 2002.⁸⁴ The hearings before the specially appointed hearing officer, who was a former Chair of the Massachusetts BBO, were the longest in the history of the BBO, with twenty-five days of

⁸² Bar Counsel v. Curry II, *supra* note 1, at 25; see *In re Crossen*, 880 N.E.2d at 368. This statement was false, as was Crossen's denial during the conversation that defendants' investigators had been following Walsh for weeks. See Bar Counsel v. Curry II, *supra* note 1, at 24–26. The special hearing officer found that during these post New-York ruse meetings Crossen and Donahue had "attempted to get Walsh to state under oath that Judge Lopez had predetermined the . . . Shareholder Derivative Case" by threatening to disclose embarrassing or compromising statements that Walsh had made in the Halifax and New York interviews, and by disclosing the false bar recommendation letter that Walsh had submitted with his bar application. See Bar Counsel v. Curry I, *supra* note 1, at 185–86. The BBO accepted these findings. See Bar Counsel v. Curry II, *supra* note 1, at 33–35, 37–39, 42–43, 46–51.

⁸³ *In re Crossen*, 880 N.E.2d at 385 n.57; Bar Counsel v. Curry II, *supra* note 1, at 26.

⁸⁴ See *In re Crossen*, 880 N.E.2d at 368; Bar Counsel v. Curry II, *supra* note 1, at 26; Bar Counsel v. Curry I, *supra* note 1, at 1. The delay was based in part on a request from Curry and Donahue to defer the matter until after the FBI investigation was completed and in part on the fact that key documents and evidence were in the possession of the FBI until after the investigation was closed. Bar Counsel v. Curry I, *supra* note 1, at 209–10. Many questioned whether Crossen, as a former head of the Criminal Section of the U.S. Attorney's Office, had received special treatment. See Shelley Murphy, *US Says It Won't Press Case Against Lopez Foes*, BOSTON GLOBE, Feb. 16, 2001, at B1; Maggie Mulvihill, *Ethics, Law Probe Has Legal Observers Scratching Heads*, BOSTON HERALD, Feb. 8, 2000, at 37.

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hearings lasting about 18 months.⁸⁵ In a 229-page decision, with detailed findings of fact and conclusions of law, the hearing officer recommended that all three lawyers be disbarred. The lawyers appealed to the BBO, not only challenging the findings of fact, but arguing that their conduct was proper, or alternatively, that ambiguity or uncertainty in the standards of conduct warranted no punishment, or at most, only a reprimand. The BBO heard arguments in January and February of 2006, and on October 16, 2006, and with minor exceptions, unanimously adopted the hearing officer's findings of fact and conclusions of law. As to the final disposition, the BBO recommended that Curry and Crossen be disbarred and that Donahue be suspended for three years.⁸⁶

The vast majority of the findings of fact and conclusions of law in both the hearing officer's decision and the BBO's decision related to the misrepresentations and deceptions that were part of the fake job ruse and the threats that were made to expose the former law clerk's statements and bar recommendation letter if he did not cooperate. The significance of the fact that the ruse and threats were directed at a former law clerk or that the contacts, regardless of their nature, were intended to penetrate the confidential law clerk judge relationship, received only passing attention. Thus, with regard to Curry, the co-architect of the initial ruse, the special hearing officer and Board found that the "scheme to induce a former law clerk under false pretenses into disclosing confidential communications with a judge regarding the decision-making process[.]" his "holding out to a former law clerk the false promise of lucrative employment[.]" his false representations of his and his associates' identities, and "luring the former law clerk out of the Commonwealth on the false pretext of a job interview for the purpose of inquiring into the deliberative processes of a judge in a case . . . violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7)."⁸⁷

⁸⁵ See *Bar Counsel v. Curry II*, *supra* note 1, at 1; *Bar Counsel v. Curry I*, *supra* note 1, at 2.

⁸⁶ See *In re Crossen*, 880 N.E.2d at 369; *In re Curry*, 880 N.E.2d 388, 401 (Mass. 2008); *Bar Counsel v. Curry II*, *supra* note 1, at 1-2. Final determinations of disbarment and suspension are made by at least one justice of the Massachusetts Supreme Judicial Court. See, e.g., *In re McBride*, 865 N.E.2d 1110, 1112 (Mass. 2007).

⁸⁷ *Bar Counsel v. Curry II*, *supra* note 1, at 27-28; *In re Curry*, 880 N.E.2d at 400-01. At the time of the events in this case, Massachusetts's ethical rules were based on the ABA Model Code of Professional Responsibility. See Mass.gov, Rules, <http://www.mass.gov/obcbbbo/rules.htm> (last visited Dec. 7, 2007). DR 1-102 defined misconduct, stating in relevant part:

(A) A lawyer shall not:

...

(2) [C]ircumvent a disciplinary rule through actions of another.

...

Oddly, this same language regarding trying to acquire “confidential” information about the judges’ “deliberative process” was not used by the special hearing officer with regard to lawyers Crossen and Donahue. Instead, the special hearing officer stated that it was Crossen’s, Curry’s, and Donahue’s “conduct in planning, executing, and participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about the judge for whom he clerked with the false inducement of lucrative employment . . . in order to force the judge’s recusal or undermine her decisions in an ongoing case, [that] violated Canon One, DR 1-102(A)(2) and (4)–(6), and Canon Seven, DR 7-102(A)(5) and (7).”⁸⁸

(4) [E]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) [E]ngage in conduct that is prejudicial to the administration of justice.

(6) [E]ngage in other conduct that adversely reflects on his fitness to practice law.

MASSACHUSETTS CONTINUING LEGAL EDUCATION, *supra* note 13, at 130; *see* MASSACHUSETTS CANONS OF ETHICS AND DISCIPLINARY RULES DR 1-102, *available at* <http://www.mass.gov/obcbbbo/disciplinaryrules.pdf> (last visited Mar. 6, 2008). The substance of these rules is now contained in Rule 8.4 (a), (b), (c), (d), and (h) of the Massachusetts Rules of Professional Conduct. MASSACHUSETTS CONTINUING LEGAL EDUCATION, *supra* note 13, at 130; *see also* MODEL RULES OF PROF’L CONDUCT R. 8.4 (2003). DR 7-102 provided in relevant part:

(A) In his representation of a client, a lawyer shall not: . . .

(5) Knowingly make a false statement of law or fact. . . .

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

MASSACHUSETTS CONTINUING LEGAL EDUCATION, *supra* note 13, at 130. The counterparts under the current Massachusetts Rules of Professional Conduct are, Rule 4.1, which states “[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person[.]” and Rule 1.2, which states “(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” *Id.* at 10, 336; *see also* MODEL RULES OF PROF’L CONDUCT R. 1.2(d), 4.1(a) (2003).

⁸⁸ Bar Counsel v. Curry II, *supra* note 1, at 28–31; *In re Crossen*, 880 N.E.2d at 368. *See supra* note 87 for the content of the rules. In addition, the three lawyers were also found to have violated DR-102(A)(2) (acts of another) and (4)–(6) (dishonesty, prejudice to administration of justice, and lack of fitness) and DR 7-102 (A)(5) (false statement) and (7) ((fraud) by setting up the New York fake job interview for purposes of taping the conversation without Walsh’s consent. Bar Counsel v. Curry II, *supra* note 1, at 28–31. Crossen and Donahue were also found to have violated DR-102(A) (4)–(6) (dishonesty, prejudice to administration of justice, and lack of fitness) and DR 7-102(A)(5) (false statement) and (7) ((fraud) by misrepresenting to Walsh that the Halifax conversation was taped, threatening to disclose Walsh’s “embarrassing or compromising statements” made during the fake job interviews, and threatening to disclose that Walsh had submitted a false recommendation letter with his bar application if Walsh did not attest that the judge had predetermined the outcome in the shareholder derivative suit. *Id.* at 29–32. Finally, Crossen was found to have violated violated DR-102 (A) (4)–(6) (dishonesty, prejudice to

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Given the outrageousness of the lawyers' behavior during the ruse and the relative clarity of the ethics rules violations relating to the ruse and other false statements,⁸⁹ this focus is not surprising. A close examination, however, reveals that the special hearing officer and the BBO assiduously avoided directly taking on the question of whether the mere fact that the lawyers had targeted a former law clerk in an effort to get confidential information, in and of itself, would warrant discipline. Thus, the BBO, apart from its literal recitation of the hearing officer's findings above, did not mention the fact that the lawyers were attempting to pierce a confidential relationship between a law clerk and judge, except that it did note that the whole ruse was essentially hatched because the lawyers did not expect Walsh to "disclose, in violation of his obligations as a clerk, confidential communications with a judge unless

administration of justice, and lack of fitness) and DR 7-102 (A)(5) (false statement) and (7) (fraud) by placing Walsh and his wife under surveillance, and denying it. See *id.* at 30. Curry was found to have violated DR-102(A)(2) (acts of another) and (5)-(6) (prejudice to administration of justice, and lack of fitness) and DR 7-102(A)(7) (illegal or fraudulent conduct) by investigating Walsh's personal life to get damaging personal information. *Id.* at 28.

⁸⁹ *In re Curry*, 880 N.E.2d at 403-04 ("Curry's conduct in this matter raised 'dishonesty, fraud, deceit, or misrepresentation' and 'false statement[s] of law or fact' to heady levels."); *In re Crossen*, 880 N.E.2d at 376-79 (discussing the obviousness of Crossen's violations of rules prohibiting false statements and misrepresentations, distinguishing cases involving testers and prosecutors' undercover stings); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS—THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.1-2 (2007) (citing examples that illustrate the broad brush of the prohibition of false statements by lawyers); Michael S. Frisch, *Zealousness Run Amok*, 20 GEO. J. LEGAL ETHICS 1035, 1054-55 (2007) (discussing the patently unethical nature of the deceptions engaged in by lawyers Curry, Crossen, and Donahue); Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 577-78 (2005) (explaining that courts "abhor" all types of deception and quoting the New Hampshire Supreme Court as stating, "it is the responsibility of every attorney at all times to be truthful."); Livingston Keithley, Comment, *Should a Lawyer Be Allowed to Lie? People v. Pautler and a Proposed Duress Exception*, 75 U. COLO. L. REV. 301, 301-04, 325 (2004) (explaining that lying to a murderer on the grounds that it may save lives was not held to be an exception to the prohibition of lying and deception by lawyers and that allowing "justifiable deception" would result in a slippery slope); W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and Lying with an Explanation*, 44 S. TEX. L. REV. 53, 62-64 (2002) (explaining that truthfulness and honesty are "core values" that separate attorneys from other professionals and that even "few instances of real dishonesty[]" can compromise the system); Rebecca Graves Payne, *Investigative Tactics, They May Be Legal, but Are They Ethical?*, COLO. LAW., Jan. 2006, at 46 (quoting the Colorado Supreme Court as stating "[p]urposeful deception by an attorney licensed in our state is intolerable, even when . . . attempting to secure the surrender of a murder suspect."); Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722, 744-46 (1989) (explaining the rationales for the "rigid" prohibition on deception and lying by lawyers).

he were seduced by an offer he could not refuse.”⁹⁰ The extent to which the BBO saw this effort as wrongful per se is drawn into question by the BBO’s statement earlier in its opinion apparently suggesting that rather than launching the ruse, while in her fax the lawyers should have made a “straightforward request to Walsh that he tell them what had happened[.]”⁹¹ Even such a straight forward request seemingly would have sought confidential information about the judge’s deliberative process.

The special hearing officer more directly, even if not without ambiguity, addressed the attempt to invade a confidential relationship. Despite the fact that she found that the purpose of the defendants’ lawyers’ contacts with Walsh was to get him to breach his duties of confidentiality as a former law clerk, and that the parties had extensively briefed the question of whether the defendants’ lawyers had invaded a “judge-[law] clerk privilege” by their approach to Walsh, the special hearing officer “pass[ed] the question[.]” because she found that the lawyers’ actions had violated their “ethical duties even [if] no such privilege had existed.”⁹² Later she stated: “Because the deception sought improperly to undermine the integrity of a judicial proceeding—even assuming there existed no judge-clerk privilege to invade—I further find that it constituted misconduct prejudicial to the administration of justice in violation of . . . DR 1-102(A)(5)” and violates DR 1-102(A)(6) because “such conduct reflects adversely on one’s fitness to practice law[] . . .”⁹³ The problem is that this brief, ambiguous passage, which is not addressed or cited by the BBO, could be read in its context of a discussion of defendants’ lawyers’ dishonesty, fraud, deceit, or misrepresentation, to mean that it was the *deception* that was critical. It also could be read to mean that the contact with the former law clerk for the purpose of undermining the integrity of the judicial proceeding through acquisition of confidential information is itself a violation of the ethical proscriptions. Given the special hearing officer’s repeated “pass” on the judge-law clerk privilege question, it should probably be read as the former.

⁹⁰ Bar Counsel v. Curry II, *supra* note 1, at 60–61.

⁹¹ *Id.* at 53 n.13; *In re Crossen*, 880 N.E.2d at 370 n.33.

⁹² Bar Counsel v. Curry I, *supra* note 1, at 195 & n.75. She also stated that the fact that they were trying to induce the law clerk to breach his duty to the judge was the reason that they “could not ask him their questions directly and honestly. Having in mind specific answers they sought as to predisposition and authorship, they tailored their blandishments, interviews, and interrogation first to trick[and] later to frighten Walsh into making statements he ‘otherwise would not have made.’” *Id.* at 195; see *In re Crossen*, 880 N.E.2d at 357, 370.

⁹³ Bar Counsel v. Curry I, *supra* note 1, at 198 (citation omitted).

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Like the special hearing officer and the BBO, the Massachusetts Supreme Judicial Court, in affirming the disbarment of lawyers Curry and Crossen, focused almost entirely on the lawyers' false statements and misrepresentations that were part of the fake job ruse. In brief passages, the court did, however, acknowledge the importance of the confidentiality of deliberative process communications between a judge and law clerk to the administration of justice and the possible existence of a judicial deliberations privilege.⁹⁴ More importantly, while declining to address in these cases whether a deliberative privilege should exist regarding judge-law clerk communications, the court indicated that even absent such a privilege, "efforts to pierce the confidential communications of a former law clerk and a judge in a pending matter to benefit one of the litigants also constitute 'conduct prejudicial to the administration of justice.'"⁹⁵ Thus, the court seemingly indicated, the efforts by the lawyers here to induce a former law clerk to reveal confidential judicial deliberative information, quite apart from the use of misrepresentations and false statements, alone would run afoul of the rules of professional conduct, at least where it occurred in the context of an ongoing case.

III. THE JUDGE-LAW CLERK RELATIONSHIP

A. Generally

The judicial law clerk institution in the United States got its start in Massachusetts in 1875 when Chief Justice Horace Gray of the Massachusetts Supreme Judicial Court, because of his increasingly heavy workload, hired a high ranking recent law graduate as his legal "secretary."⁹⁶ When Justice Gray was appointed to the United States Supreme Court in 1882, he brought this practice with him, and soon thereafter the practice spread. Justice Oliver Wendell Holmes Junior, upon joining the Supreme Court in 1882, emulated Gray's practice of employing a recent honors law graduate because "no one can do all the work without breaking down."⁹⁷ In 1886, at the recommendation of the

⁹⁴ *In re Crossen*, 880 N.E.2d at 373; *In re Curry*, 880 N.E.2d at 406.

⁹⁵ *In re Crossen*, 880 N.E.2d at 373; *In re Curry*, 880 N.E.2d at 406.

⁹⁶ See Robert Bloom, *The Origin of the Supreme Judicial Court Law Clerk System*, LAW CLERKS' SOCIETY OF THE SUPREME JUDICIAL COURT (2003), <http://sjclawclerks.sociallaw.com/history.htm>. Gray called this secretary, whom he had to pay out of his own pocket, a puisne judge. See *id.*; Gerald Lebovits, *Judges' Clerks Play Varied Roles in the Opinion Drafting Process*, N.Y. ST. B.J., Jul-Aug. 2004, at 34; J. Daniel Mahoney, *Law Clerks: for Better or for Worse?*, 54 BROOK. L. REV. 321, 323 (1988); see also JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* 11 (1980).

⁹⁷ Bloom, *supra* note 96.

Attorney General, Congress authorized a “‘stenographic clerk’” for each justice to be paid \$1,600 a year by the government, but it appears that, at least as used by Justice Gray, the clerk’s duties were very similar to those of judicial law clerks as they have become traditionally viewed—“reviewing newly filed cases, discussing opinions [proposed] by other justices [on the Court], [and] engaging in . . . vigorous colloquy on opinions[.]”⁹⁸ The law clerk institution was introduced into the states and lower federal courts in the 1930s.⁹⁹

There is substantial variability among judges and courts in terms of the roles of law clerks and their relationships to particular judges. While some courts and institutions attempt to describe generally the functions of the law clerk, the actual role of an individual law clerk is usually determined by the judge for whom that law clerk works in the context of what is widely recognized to be a uniquely personal relationship.¹⁰⁰ In its most recent edition of the Federal Law Clerk Handbook, the Federal Judicial Center described the basic functions as follows:

In most chambers, law clerks concentrate on legal research and writing. Typically, law clerks’ broad range of duties includes conducting legal research, preparing bench memos, drafting orders and opinions, editing and proofreading the judge’s orders and opinions, and verifying citations. Many judges discuss pending cases with their law clerks and confer with them about decisions. District court law clerks often attend conferences in chambers with attorneys. Frequently, law clerks also maintain the library, assemble documents, serve as courtroom crier, handle exhibits during trial, and perform other administrative tasks as required by the judge to ensure a smooth-running chambers.

Law clerks for district court, bankruptcy court, and magistrate judges have substantially more contact with attorneys and witnesses than do their appellate court

⁹⁸ See *id.*; Lebovits, *supra* note 96, at 34; Mahoney, *supra* note 96, at 324. Gray’s clerks were also asked to draft opinions that were used for discussion purposes. Bloom, *supra* note 96; see also 24 Stat. 254 (1886).

⁹⁹ See Bloom, *supra* note 96; Lebovits, *supra* note 96, at 34; Mahoney, *supra* note 96, at 325–26; John Paul Jones, *Some Ethical Considerations for Judicial Clerks*, 4 GEO. J. LEGAL ETHICS 771, 771 n.1 (1990–91).

¹⁰⁰ See David Crump, *Law Clerks: Their Roles and Relationships With Their Judges*, 69 JUDICATURE 236, 236, 240 (1986); Mahoney, *supra* note 96, at 326–27; FED. JUDICIAL CTR., LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 1 (Sylvan A. Sobel ed., 2d ed. 2007); FEDERAL JUDICIAL CENTER, LAW CLERK HANDBOOK 1 (2d ed. 2007); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153–54 (1990).

counterparts. The principal function of an appellate court law clerk is to research and write about the issues presented by an appeal, while law clerks for district, bankruptcy, and magistrate judges may be involved in the many decisions made at every stage of each case.¹⁰¹

This description probably accurately describes the broad, common outlines of the duties of most federal and state law clerks, but it does not communicate the potential breadth of law clerks' functions or the unique, intimate access that many of these functions give the law clerk to the judge's inner thoughts and private life. A much more striking picture emerges from examining comments judges themselves have made about the law clerk relationship. Judge Patricia Wald of the United States Court of Appeals for the District of Columbia has stated that "[t]he judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair."¹⁰² Similarly, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit has described the relationship as a "human" one in which "a young lawyer becomes part of the judge's extended family, a disciple, an ally, quite possibly a friend."¹⁰³ Given the closeness of the relationship, both professionally and personally, "[m]utual trust and respect are not merely desirable, they are essential."¹⁰⁴

Other courts have noted that

[l]aw clerks are not merely the judge's errand runners. They are sounding boards for tentative opinions[,] and [they are] legal researchers who seek the authorities that affect decision[s]. Clerks are privy to the

¹⁰¹ FED. JUDICIAL CTR., *supra* note 100 at 1; *see also* Mahoney, *supra* note 96, at 327–28; ALVIN B. RUBIN & LAURA B. BARTELL, LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 1, 16 (1989). There is also often a mentoring or pupil-teacher relationship between the judge and a law clerk. Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1232 (1981).

¹⁰² Wald, *supra* note 100, at 153; *see also* Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1708–09 (1991) (United States Court of Appeals for the Ninth Circuit Judge Kozinski agreeing).

¹⁰³ Kozinski, *supra* note 102, at 1708. Judge Kozinski notes further that it is not an ordinary employer-employee relationship, but one that "calls for an uncommon degree of trust, respect and goodwill." *Id.* at 1718; *see also* Comment, *supra* note 101, at 1232 & n.17 (describing friendships that arise).

¹⁰⁴ Kozinski, *supra* note 102, at 1709.

judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be.¹⁰⁵

Citing and quoting this assessment with approval, the United States Court of Appeals for the Second Circuit has added the following commentary:

In contrast to court clerks, who frequently perform ministerial functions, a law clerk generally performs discretionary acts of a judicial nature. Indeed, a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function. . . . "Law clerks are closely connected with the court's decision-making process. . . . Law clerks are simply extensions of the judges at whose pleasure they serve."¹⁰⁶

The closeness of the judge-law clerk relationship arises from, and is probably reinforced by, a number of practical factors. The sheer workload that most judges face requires that they rely heavily on their law clerks for legal research and opinion drafting.¹⁰⁷ Moreover, the isolated nature of a judge's life greatly reduces the number of sources for input, feedback, or discussion of issues that a judge has. As Judge Wald has noted, her "[law] clerks are basically the only persons a judge can talk to in depth about a case. . . . If she is in doubt, troubled, or just plain frustrated, the clerk is her wailing wall."¹⁰⁸ The judge explained further that judges are "often unsure of [their] analyses" and "need to test ideas before exposing them to the hard probing of colleagues."¹⁰⁹ They turn to law clerks, who must be "unambiguously" loyal and committed to the judge, for criticism, especially because judges need to occasionally "let

¹⁰⁵ Hall v. Small Bus. Admin., 695 F.2d 175, 179 (5th Cir. 1983).

¹⁰⁶ Olivia v. Heller, 839 F.2d 37, 40 (2d Cir. 1988) (quoting Olivia v. Heller, 670 F. Supp. 523, 526 (S.D.N.Y. 1987)) (citation omitted); see also Gregorich v. Lund, 54 F.3d 410, 417 & n.6 (7th Cir. 1995) (noting the closeness of the judge and law clerk's work and the need for loyalty, cooperation, and responsibility by law clerks); Mahoney, *supra* note 96, at 326-27.

¹⁰⁷ See Mahoney, *supra* note 96, at 340; see also Gregorich, 54 F.3d at 417 (noting the relationship of law clerk assistance to the "staggering case loads that have crushed all courts, but especially [the] state judiciaries[' courts]."); Wald, *supra* note 100, at 154.

¹⁰⁸ Wald, *supra* note 100, at 153; see also Crump, *supra* note 98, at 240 (noting the solitary remote nature a of judge's job and the need for collegial atmosphere); see also Mahoney, *supra* note 96, at 342 (noting that because judges cannot seek outside assistance on analysis and practically cannot consult with busy colleagues, the law clerk "sounding board function" is "indispensable").

¹⁰⁹ Wald, *supra* note 100, at 153.

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[their] guard down, to speculate, to experiment, to argue, even to make frank and sometimes uncharitable appraisals of our colleagues' drafts and suggestions."¹¹⁰ Judge Wald believes that "our jurisprudence is better for the give and take among judges and law clerks than if judges had to go it alone."¹¹¹

Moreover, the close physical proximity of the law clerk to the judge, in chambers and otherwise, necessarily results in law clerks having access to private personal information about, and from, the judge and frequently results in close social interaction.¹¹² For example, during my clerkship for a federal appellate judge, it was common for the judge and law clerks, as well as other judges and their law clerks, to socialize together.¹¹³ Furthermore, the mere fact that I spent hours a day in the same office suite necessarily resulted in my acquiring a substantial amount of information about the judge's private life, including tastes, political opinions, opinions about lawyers and other judges, food preferences, personal and family relationships, work habits, and financial information.¹¹⁴ Given this kind of access, it is little wonder that Judge Kozinski has noted that the judge-law clerk relationship "calls for an uncommon degree of trust, respect and goodwill."¹¹⁵

B. Confidentiality

Given law clerks' functions and access to private information, it is hardly surprising that law clerk confidentiality has been traditionally viewed as a fundamental aspect of the judge-law clerk relationship.¹¹⁶ Indeed, from a judge's perspective, it is essential both for functional and personal reasons. As the Seventh Circuit has stated, "[t]he absence of . . . confidentiality is disruptive and inevitably impairs the operation of any court."¹¹⁷ Judges rely on the ability to engage freely in testing of their thoughts and ideas with their law clerks. Without confidentiality,

¹¹⁰ *Id.* at 153.

¹¹¹ *Id.* at 153–54; *see also* Kozinski, *supra* note 102, at 1723 (stating that a clerk advises and debates with the judge and "serves as his eyes and ears[]"); Mahoney, *supra* note 96, at 342 (clerk's "opinions or suggestions often result in a more careful search for the means by which a just decision should be reached[]" and may compel "a judge to consider alternatives that might otherwise have been ignored or considered inadequately.").

¹¹² *See* Kozinski, *supra* note 102, at 1708–09, 1723; Crump, *supra* note 100, at 240 (quoting Judge Coffin's statement that "[t]he pleasure of [a law clerk's] company is one of a judge's most refreshing fringe benefits."); Comment, *supra* note 101, at 1235.

¹¹³ This would include informal lunches, dinners, parties, and attending events.

¹¹⁴ *Cf.* Comment, *supra* note 101, at 1235 (stating that clerks have unique views of judges).

¹¹⁵ Kozinski, *supra* note 102, at 1718.

¹¹⁶ Crump, *supra* note 100, at 240; Jones, *supra* note 99, at 775–76; Mahoney, *supra* note 96, at 335–36; Lebovits, *supra* note 96, at 34; Comment, *supra* note 101, at 1236–38.

¹¹⁷ *Grogovich v. Lund*, 54 F.3d 410, 417 (7th Cir. 1995).

many judges would not engage in this process to the serious detriment of their decision-making.¹¹⁸ This is because judges understandably would be hesitant to publicly expose their uncertainties, possible mistakes or unsettled ideas, or unpopular conclusions.¹¹⁹ Moreover, as Judge Mahoney of the Second Circuit has noted, disclosure of “the workings of a chambers, or any apprehension that this is likely to occur, can only undermine the personal relationships involved and tend to induce a formal and defensive atmosphere that will undermine collegiality in chambers.”¹²⁰

Other rationales have been offered in support of confidentiality. These have included “[p]reserving public confidence in the judiciary,” which is based on the notion that judicial decisions, particularly appellate decisions, are often the product of compromise. It is the final written decision that is relevant and should be relied upon and assessed by the public. Disclosure of the compromise or sometimes strident differences of opinion leading to the compromise would undermine the public’s faith in the justice system.¹²¹ Other interests include preventing exploitation of information and imposing cost on the system and others.¹²² This is particularly likely to be a problem in pending cases or very recently decided cases that are still subject to appeal or reconsideration. A notorious example of exploitation is the 1919 case in which a Supreme Court law clerk allegedly leaked information, about a pending decision, that was used to engage in insider trading.¹²³ Improper imposition of costs on the system and opposing parties might

¹¹⁸ See Jones, *supra* note 99, at 776; Comment, *supra* note 101, at 1236.

¹¹⁹ See Jeffrey B. Abrahamson, *Should a Clerk Ever Reveal Confidential Information?*, 63 JUDICATURE 361, 362 (1979-1980). In part, this can be explained by the possibility that “courts inevitably will become politicized [if] they are forced to conduct their intramural arguments in public.” *Id.* at 402.; see also, Comment, *supra* note 101, at 1239 (noting the potentially negative impact on independent judicial reasoning from outside influence if candid internal discussions of unpopular ideas are subject to public scrutiny).

¹²⁰ Mahoney, *supra* note 96, at 335-36; see also Comment, *supra* note 101, at 1237-39 (stating that judges reported on a survey question that the breach of confidentiality impact included “negative impact on the closeness of the relationship” and the type and amount of information discussed with clerks, more inhibition by the judge, stricter hiring practices, and use of permanent law clerks).

¹²¹ See Comment, *supra* note 101, at 1239-40.

¹²² See *id.* at 1240. A recent example of an effort apparently aimed at avoiding exploitation of law clerk information is a policy of the United States Court of Appeals for the District of Columbia Circuit under which the identities of law clerks is maintained as confidential by the clerks office to avoid ex parte contacts by law firms. See Emma Schwartz, *D.C. Circuit Keeps Clerks Confidential*, LEGAL TIMES, Apr. 9, 2007, at 3, 3. Several other Circuit Courts have similar policies. See *id.*

¹²³ See *infra* text accompanying notes 136-37. See *infra* text accompanying notes 164-66 also for a discussion of the case of the former Illinois Appeals Court law clerk’s use of a judge’s memo in the clerk’s run for the judge’s seat in an election.

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occur where one party attempts to use confidential information as a basis for reopening a case, as was contemplated in the *Curry* case that is the subject of this Article.¹²⁴

In addition, law clerk confidentiality serves to protect judges' privacy and reputation interests.¹²⁵ An example of intrusion upon privacy interests could involve a law clerk's public disclosure of a judge's health issues.¹²⁶ A judge's reputation could also be unfairly harmed by a law clerk's revelation of confidential information outside the context of a judicial disciplinary proceeding and before the veracity of the information is established.¹²⁷ Finally, there is the interest of avoiding dissemination of a law clerk's distorted or inaccurate disclosures. Commentators have cautioned that law clerks' perspectives may not be accurate and may be distorted by their own interests, biases, or relationships with a judge. Also, law clerks' revelations may be distorted by the press.¹²⁸ An example of such law clerk distortion based on personal interest occurred in *Bar Counsel v. Curry*, where the law clerk engaged in puffery regarding his role in drafting the *Demoulas* shareholder derivative decision and made statements about the judge's prejudgment of the case because he thought that was what the job interviewers wanted and it would aid him in landing the job.¹²⁹

Those who would limit or reject confidentiality have relied on public interest rationales. Probably the most frequent justification for breaches of confidentiality, at least by former Supreme Court clerks, is the historical and scholarly value of the information.¹³⁰ Another rationale is that because courts are political institutions that frequently decide

¹²⁴ See *supra* text accompanying notes 4–13. It would be improper where the confidential information is not a sufficient basis for obtaining a new trial. See *In re Crossen*, 880 N.E.2d at 373–74 (bias does not exist merely because a judge's opinions may be based on information from earlier proceedings); *Bar Counsel v. Curry II*, *supra* note 1, at 54–55 (indicating that the mere fact that a judge was influenced by evidence in a prior similar case is not sufficient for recusal); *infra* text accompanying notes 260–82, 283–87, 302–24 (information is privileged and therefore generally inadmissible).

¹²⁵ See Comment, *supra* note 101, at 1240.

¹²⁶ See *id.* (citing the disclosure in *The Brethren* of details of Justice Douglas's last illness).

¹²⁷ See *id.* at 1240–41.

¹²⁸ See *id.* at 1241.

¹²⁹ See, e.g., *Bar Counsel v. Curry I*, *supra* note 1, at 223; see *In re Crossen*, 880 N.E.2d at 365.

¹³⁰ See David J. Garrow, "The Lowest Form of Animal Life": Supreme Court Clerks and Supreme Court History, 84 CORNELL L. REV. 855, 893–94 (1999); Erwin Chemerinsky, *Opening Closed Chambers*, 108 YALE L.J. 1087, 1090–1104 (1999); Abrahamson, *supra* note 119, at 403–04. But see Jones, *supra* note 99, at 776 n.23 (political and historical value does not justify breach of confidentiality in a judge's lifetime); Richard W. Painter, *Open Chambers?*, 97 MICH. L. REV. 1430, 1436 (1999) (historical and scholarship value is not worth the damage to the law clerk judicial relationship). This justification has a much diluted force outside the context of the Supreme Court.

matters of fundamental public policy, democratic theory requires that the people be informed not only of decisions but also of the basis of those decisions.¹³¹ A related rationale applicable in states where judges are elected is that in order to make informed judgments, voters need information about the judges' internal deliberations and the basis for their decisions; in addition, even where judges are appointed, such information would be highly relevant to court reform efforts.¹³² Finally, commentators and some courts have noted that exposing wrongdoing by members of the judiciary would justify an exception to the law clerk confidentiality duty.¹³³

While originally this secrecy surrounding what goes on in chambers may have been simply a tacit understanding, over the years judges and court systems have increasingly formalized the confidentiality requirement in the face of lapses by law clerks.¹³⁴ They have also clarified that the duty of confidentiality does not expire at the end of the clerkship; it continues indefinitely.¹³⁵ Also, although the exact contours of the law clerk confidentiality duty may be blurry at the periphery, when it comes to general information about a judge or the procedural operations of chambers or the law clerk's experiences, there is no question that a law clerk's information about the judge's decision-making process in particular cases is generally considered secret.¹³⁶

¹³¹ See Abrahamson, *supra* note 119, at 402–04; Comment, *supra* note 101, at 1241; David Lane, *Bush v. Gore, Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality*, 18 GEO. J. LEGAL ETHICS 863, 874–75 (2005). Opening deliberations to public scrutiny may not be worth the cost because it can result in loss of the testing of ideas with other judges and law clerks, premature judgments, and private and less informed decision-making. See Philip B. Kurland, *The Brethren: Inside the Supreme Court*, 47 U. CHI. L. REV. 185, 189 (1979) (book review); Comment, *supra* note 101, at 1241 n.60; *supra* text accompanying notes 116–19.

¹³² See Abrahamson, *supra* note 119, at 403; Comment, *supra* note 101, at 1242.

¹³³ See, e.g., Abrahamson, *supra* note 119, at 361, 363, 402; Comment, *supra* note 101, at 1242; *infra* note 222.

¹³⁴ See Richard W. Painter, *supra* note 130, at 1441–42, 1454–55; Mahoney, *supra* note 96, at 335–36; text *infra* text accompanying notes 142–45; see also George Anastaplo, *Legal Realism, the New Journalism, and The Brethren*, 1983 DUKE L. J. 1045, 1046 (1983) (noting unwritten nature of Supreme Court secrecy rule at the time of *The Brethren*).

¹³⁵ See *infra* note 175; FEDERAL JUDICIAL CENTER, MAINTAINING THE PUBLIC TRUST: ETHICS FOR FEDERAL JUDICIAL LAW CLERKS 6–7 (2002); Lebovits, *supra* note 96, at 34; Mahoney, *supra* note 96, at 336; Painter, *supra* note 130 at 1441–42, 1446–48, 1467–68. But see Chemerinsky, *supra* note 130, at 1093–94 (arguing that the 1989 Supreme Court Law Clerk Code did not impose a continuing duty of confidentiality); Garrow, *supra* note 130, at 893–94 (reviewing former Supreme Court law clerks post-clerkship revelations generally many decades later).

¹³⁶ See, e.g., Chemerinsky, *supra* note 130, at 1090–91, 1093 (drawing distinction between general conversations and experiences and conversations between law clerk and judge about a decision in a particular case and stating that “[n]o consensus exists as to what

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The most notorious confidentiality breaches have been those associated with former Supreme Court law clerks who divulged information relating to the operations of chambers and the “inside stories” of famous cases, usually in their own later writings or in interviews given to other writers. These have spawned a plethora of literature debating the extent to which post-clerkship law clerk confidentiality is the expected ethical norm and the extent to which specific disclosures by law clerks breached such a norm.¹³⁷

Probably the most infamous breach of confidentiality by a Supreme Court law clerk occurred in 1919 when Ashton F. Embry, a long-time law clerk to Justice Joseph McKenna, allegedly divulged information about a not yet released decision in *United States v. Southern Pacific Co.*¹³⁸ to some co-conspirators who used the information to profit in the stock market. When discovered, Embry resigned and was indicted for “conspiracy to defraud the [g]overnment of its right of secrecy concerning . . . opinions.” The law clerk’s motion to dismiss, on the

former Supreme Court [Law] [C]lerks can and cannot say.”); Leboivits, *supra* note 96, at 35 (drawing distinction between writing about experience and divulging secrets); Painter, *supra* note 130, at 1457–58 (noting ambiguity but arguing that most communications between a Justice and a law clerk about the decision-making process and Court’s opinions are confidential); FED. JUDICIAL CTR., *supra* note 135, at 5–6 (confidential information “includes any information you receive in chambers that is not filed in the public docket[,]” such as instructions from the judge and discussions of the judge’s assessment of a case); Comment, *supra* note 101, at 1253–66 (discussing proposed law clerk confidentiality guidelines and types of information covered and surveyed from judges’ perspectives as to what is confidential). *But see* Garrow, *supra* note 130, at 859–74, 893 (reviewing writings of former Supreme Court law clerks that revealed aspects of the decision-making process and comments by Justices about other Justices, suggesting that as to former Supreme Court law clerks there has been a long history of disclosures, usually after the passage of some time).

¹³⁷ See, e.g., David J. Garrow, *supra* note 130, at 859–75, 892–93 (based on historical review of disclosures by Supreme Court law clerks, author concludes there has been a “long-standing historical tradition [of disclosure] that has developed over the past sixty years.”); Chemerinsky, *supra* note 130, at 1090–1104 (arguing that former Supreme Court law clerk Edward Lazarus’s book *Closed Chambers* about Justice Blackmun and the Supreme Court does not violate confidentiality or other legal and ethical duties); Lane, *supra* note 131, at 863–76 (reviewing Supreme Court law clerk’s duties of confidentiality and the breaches that occurred in *The Brethren*, *Closed Chambers*, and an article in *Vanity Fair* about the Bush v. Gore decision); Painter, *supra* note 130, at 1434–71 (arguing that former Supreme Court law clerk Edward Lazarus’s book *Closed Chambers* about Justice Blackmun and the Supreme Court violates confidentiality and other legal and ethical duties, and reviewing law clerk confidentiality generally). See generally Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835 (1999) (excoriating Edward Lazarus’s revelations in *Closed Chambers* as unethical and immoral); Laura Krugman Ray, *America Meets the Justices: Explaining the Supreme Court to the General Reader*, 72 TENN. L. REV. 573, 578–612 (2005) (discussing *The Nine Old Men*, *The Brethren*, and *Closed Chambers*—books about the Supreme Court based on law clerk information).

¹³⁸ 251 U.S. 1 (1919).

grounds that there was no law forbidding the alleged conduct, was denied, and the appeal and petition for certiorari were also denied. Nevertheless, the prosecutor ultimately dismissed the prosecution.¹³⁹ This is one of the few examples of a breach of confidentiality by a law clerk during their employment discussed in the literature. The more well-known disclosures discussed below involved former Supreme Court law clerks who were either sources for, or authors of, books written primarily for the general public about the inside workings of the Supreme Court.

Probably, the most famous of these was Bob Woodward's and Scott Armstrong's 1979 book, *The Brethren: Inside the Supreme Court*.¹⁴⁰ This bestseller chronicles the Court from the October 1969 term through June 1976, with a focus on the personalities and interactions of the Justices, including private conversations and comments about other Justices, during the decision-making process on major cases. Of particular importance here is the fact that the authors revealed that the general sources of their work included "interviews with more than two hundred people, including several Justices, more than 170 former law clerks, and several dozen former employees[.]" who were promised confidentiality by the authors.¹⁴¹ Moreover, the authors stated that their sources provided them "internal memoranda between Justices, letters, notes taken at conference, case assignment sheets, diaries, unpublished drafts of opinions and, in several instances, drafts that were never circulated even to other Justices."¹⁴²

The revelation that 170 former law clerks had contributed to *The Brethren* did not go unnoticed. Indeed, it has drawn a firestorm of criticism as an egregious example of a breach of confidentiality regarding

¹³⁹ Lebovits, *supra* note 96, at 34; Garrow, *supra* note 130, at 859; see also Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 310 (1961); John B. Owens, *The Clerk, the Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919*, 95 NW. U. L. REV. 271, 272 (2000).

¹⁴⁰ BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979). *The Brethren*, however, was not the first of its genre. In 1936, Washington newspaper columnists Drew Pearson and Robert S. Allen wrote: *The Nine Old Men*, which has been described as "a breezy summary of the Court's history and the major New Deal cases[]" that focuses on individual Justices and gives "brief accounts of the Justices that expressly tie their decisions to their individual identities and experiences." The point was to present the legal realist perspective that the Court's decisions (and Justices' resistance to the New Deal) were "shaped by unconstrained individuals rather than by the impersonal force of law." Ray, *supra* note 137, at 579. Unlike *The Brethren*, however, *The Nine Old Men* does not reveal the sources for its anecdotes and reports of verbatim private conversations. *Id.* at 580.

¹⁴¹ WOODWARD & ARMSTRONG, *supra* note 140, at 3-4. For a review of some of the more interesting aspects of *THE BRETHERN*, see Ray, *supra* note 137, at 589-99.

¹⁴² WOODWARD & ARMSTRONG, *supra* note 140, at 4.

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what goes on in chambers.¹⁴³ It also served as the impetus for the adoption of a law clerk code of conduct in 1981 by the United States Judicial Conference.¹⁴⁴ That Code specifically states: “The relationship between judge and law clerk is essentially a confidential one. . . . [A law clerk] should never disclose to any person any confidential information received . . . in the course of his duties, nor should he employ such information for his personal gain.”¹⁴⁵ In 1996, the Judicial Conference implemented a Code of Judicial Conduct for Judicial Employees, including law clerks and other employees, which clarified the duty and duration of confidentiality.¹⁴⁶ It provides as follows:

A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties, nor should a judicial employee employ such information for personal gain. A *former* judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.¹⁴⁷

The next major controversy over Supreme Court law clerk breaches of confidentiality erupted with Edward Lazarus’ publication in 1998 of *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*.¹⁴⁸ Lazarus, a law clerk to Justice Harry Blackmun during the Court’s 1988 term, provided detailed accounts and documents concerning the Court’s decision-making process in major cases decided that term. During Lazarus’s service to the Court in 1989, the Court enacted a Code of Conduct for Supreme Court Law Clerks that emphasized the law clerk’s duty of confidentiality to the Justice for whom the clerk works and to the Court. Canon 2 of the Code

¹⁴³ See, e.g., Anastaplo, *supra* note 134, at 1053–57; David R Fine, *Lex, Lies, and Audiotape*, 96 W. VA. L. REV. 449, 460–61 (1993–94); Mahoney, *supra* note 96, at 335–36; Painter, *supra* note 130, at 1454–55.

¹⁴⁴ See CODE OF CONDUCT FOR LAW CLERKS (Judicial Conference of the United States 1981); Mahoney, *supra* note 96, at 329 n.43.

¹⁴⁵ CODE OF CONDUCT FOR LAW CLERKS Canon 3(C); see Mahoney, *supra* note 96, at 336 (quoting CODE OF CONDUCT FOR LAW CLERKS Canon 3(C)).

¹⁴⁶ CODE OF CONDUCT FOR JUDICIAL EMPLOYEES (U.S. Judicial Conference of the United States 1996), available at <http://www.uscourts.gov/guide/vol2/ch2a.html>. Supreme Court employees were not covered by the Code.

¹⁴⁷ *Id.* at Canon 3(D) (emphasis added).

¹⁴⁸ EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998).

specifically stated that “[a] law clerk owes the . . . Justice . . . and the Court . . . complete confidentiality, accuracy, and loyalty[.]” that “[t]he Justice relies[.] . . . on confidentiality in discussing . . . performance of . . . judicial duties[.]” and that a law clerk “is in a position to receive highly confidential circulations from . . . chambers of other Justices [, [sic] and owes a duty of confidentiality with respect to such material similar to the duty owed to the Justice employing the clerk[.]”; Canon 3 added that “[a] law clerk should never disclose to any person any confidential information received in the course of the law clerk’s duties, nor should the law clerk employ such information for personal gain.”¹⁴⁹

Apparently anticipating the confidentiality controversy that would arise from his book, Lazarus attempted to deflect criticism in an introductory author’s note in which he essentially stated that although he had insider access to information, his accounts were based on independent sources.¹⁵⁰ He later also asserted that the Supreme Court law clerk code in effect at the time of his writing did not apply to former clerks.¹⁵¹ Lazarus’s efforts to stave off criticism proved largely

¹⁴⁹ Lane, *supra* note 131, at 877–78 (quoting CODE OF CONDUCT FOR SUPREME COURT LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES Canons 2, 3 (1989)). See Painter, *supra* note 131, at 1441–42, for a discussion of the 1989 Code. The only sanction expressly mentioned in the 1989 Code was dismissal. See *id.* at 1446; Chemerinsky, *supra* note 131, at 1094.

¹⁵⁰ See LAZARUS, *supra* note 148 at xi, 1426. Lazarus states:

[I]n describing the private decision-making of the Justices, I have been careful to avoid disclosing information I am privy to solely because I was privileged to work for Justice Blackmun. . . . I have reconstructed what I knew and supplemented that knowledge through primary sources (either publicly available or provided by others) and dozens of interviews

Id. Lazarus’s most probable sources for his revelations of conference discussions and conversations involving other Justices and their law clerks are his interviews with “dozens of former clerks who agreed to speak with [him] candidly about life inside the Court.” See *id.* at ix; see also Painter, *supra* note 130, at 1438, 1452 (noting Lazarus’s reliance on statements by other law clerks that would also be breaches of confidentiality). Lazarus apparently failed to see the ethical problem with his revealing other law clerks’ confidential information. See *id.* at 1459 (arguing that Canon 3 of the 1989 Supreme Court Law Clerk Code protecting the confidentiality of “circulations . . . [among] chambers” would cover such communications between law clerks); Kozinski, *supra* note 137, at 840 (same). But see Chemerinsky, *supra* note 130, at 1098 (arguing 1989 Code cannot be read to apply to former law clerk conversations with other former law clerks at all).

¹⁵¹ See EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, AND FALL, AND FUTURE OF THE MODERN SUPREME COURT x (1999) (author’s note to the paperback edition with the changed title); Kozinski, *supra* note 137, at 845 (recounting and critiquing Lazarus’s arguments that the Code should be read to only apply to current clerks); Painter, *supra* note 130, at 1446–48 (recounting and critiquing Lazarus’s arguments that the Code should be read to only apply to current clerks); see also Chemerinsky, *supra* note 130, at 1093–94 (supporting Lazarus’s position that the Code did not apply to former clerks).

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ineffective, and publication was met with a flurry of book reviews and other critiques of *Closed Chambers* asserting that Lazarus had behaved unethically by revealing confidential information.¹⁵²

The most important reaction to *Closed Chambers*, however, was by the Supreme Court itself.¹⁵³ In 1998, the Court removed much, if not all, ambiguity about the scope and duration of the law clerk confidentiality obligation when it revised the Code of Conduct for Supreme Court Law Clerks.¹⁵⁴ The revised Code indicated that the duty of confidentiality was owed not only to the appointing Justice, but to “all other Justices and the Court as an institution[.]”¹⁵⁵ This duty of confidentiality encompasses “[a]ll oral and written communications from the Justices or clerks in other chambers pertaining to the work of the court . . . [.]” including the outcomes, votes, identities of opinion authors in cases, “and the positions or preliminary ideas or views of any justice with respect to cases that have been before the Court, are pending before it, or are likely to come before it.”¹⁵⁶ The confidentiality relationship exists between law clerks and other Justices, and between law clerks; “[a]ll intra- and inter- chambers communications are confidential and communications from the chambers of another Justice enjoy the same protections of confidentiality, including communications from one law clerk to another discussing the work of the Court.”¹⁵⁷ Moreover, after the law clerk’s employment ends, “communications with the press are governed by the continuing obligations[.]”¹⁵⁸ Finally, not only does the revised Code specifically state that the confidentiality obligation “is a

¹⁵² See, e.g., *supra* note 137. For a recent summary of the reactions to *Closed Chambers*, see Ray, *supra* note 137, at 599–611.

¹⁵³ See Lane, *supra* note 131, at 868 & n.47 (noting that not only the timing suggested, but a contemporaneous news report stated, that the law clerk rules were tightened to “discourage [clerks] from writing tell-all books that reveal the [C]ourt’s inner workings.”). It is also clear from a review of the provisions emphasizing the continuing nature of the confidentiality obligation and potential sanctions beyond employment, and explicitly including communications between law clerks for all Justices, see *infra* text accompanying notes 154–58, that the revised code is responsive to Lazarus’s arguments in defense of his actions in *Closed Chambers*. See *supra* notes 150–51 and accompanying text.

¹⁵⁴ CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES (June 15, 1998). See Lane, *supra* note 131, at 877–79 for the relevant part of the Code as revised. Interestingly, the law clerk code itself apparently became a confidential document and is not available. *Id.* at 868 n.47; Todd Peppers, *Law Clerks and Confidentiality*, EMPIRICAL LEGAL STUDIES, Mar. 7, 2006, http://www.elsblog.org/the_empirical_legal_studi/2006/03/law_clerks_and_.html (stating that Todd Peppers in writing a book on Supreme Court Law Clerks was told by the Court and Justice Rehnquist’s Chambers that it was not publicly available).

¹⁵⁵ Lane, *supra* note 131, at 877 (emphasis omitted).

¹⁵⁶ *Id.* (emphasis omitted).

¹⁵⁷ *Id.* at 877–78 (emphasis omitted).

¹⁵⁸ *Id.* at 879 (emphasis omitted).

continuing one" that applies to former law clerks, it provides that this is a "condition[] of their employment, as attorneys, and as members or future members of the bar. Any breach of these provisions is prejudicial to the administration of justice and therefore will subject the law clerk to appropriate sanctions."¹⁵⁹

Despite the clarity of the revised Supreme Court Code of Conduct on the issue of law clerk confidentiality, the Supreme Court's controversial involvement in the 2000 presidential election in *Bush v. Gore*¹⁶⁰ provided the next impetus for major breaches of that duty. Four years after the Court's decision, writer David Margolick relied on interviews with former Supreme Court law clerks in his *Vanity Fair* magazine article "The Path to Florida," detailing the behind the scenes, and supposedly political machinations, of the Court's decision.¹⁶¹ However, none of the safeguards in place at the time—the tradition of confidentiality, the recent Law Clerk Code, and apparently the fact that the law clerks had signed a confidentiality agreement with the Court when they accepted their positions did¹⁶²—prevented the breaches. According to Margolick, the law clerks justified their actions because they believed that the Court had acted improperly in taking and deciding *Bush v. Gore* as it did.¹⁶³

Not surprisingly, as with the publication of *Closed Chambers* and *The Brethren*, the public criticized the law clerks' disclosures to Margolick.¹⁶⁴ In fact, "90 prominent lawyers and former Supreme Court law clerks, including former attorneys general Richard Thornburgh and William Barr" took the unusual step of issuing a joint statement condemning

¹⁵⁹ *Id.* (emphasis omitted). This latter provision clearly ties the confidentiality obligation to the Rules and Codes of Professional Conduct and potential disciplinary sanctions applicable to attorneys through bar authorities. See *supra* note 87; *infra* text accompanying notes 397–416. The provision thereby expands the explicit sanctions beyond those, such as dismissal, that could be imposed by the Justice for whom the clerk worked as reflected in the 1989 Code. See Chemerinsky, *supra* note 130, at 1094; Lane, *supra* note 131, at 871 (quoting CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES Canon 6 (1989)). Another possible sanction that might be available would be a breach of contract claim against the former clerk. See Lane, *supra* note 131, at 872 n.60; Comment, *supra* note 101, at 1248; *infra* text accompanying notes 358–61.

¹⁶⁰ 531 U.S. 98 (2000).

¹⁶¹ See David Margolick et al., *The Path to Florida*, VANITY FAIR, Oct. 4, 2004, at 310–12, 320, available at http://makethemaccountable.com/articles/The_Path_To_Florida.htm. Among the accusations were that conservative members of the Court—Justices Rehnquist, Kennedy, O'Connor, Scalia, and Thomas—acted as partisans rather than neutral jurists. See *id.* at 319–22, 355–59.

¹⁶² *Id.* at 320 n.2.

¹⁶³ *Id.* (stating the "'extraordinary situation . . . [justifies] breaking an obligation we'd otherwise honor[]'").

¹⁶⁴ See, e.g., Lane, *supra* note 131, at 863–67.

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Margolick's law clerk sources' breaches of confidentiality.¹⁶⁵ The article even spurred a call for a congressional investigation into the alleged law clerk misconduct because, as put by Texas Republican Senator John Cornyn, "[i]f members of the judiciary cannot rely on the confidentiality of their deliberations and discussions with law clerks, the judiciary as we know it simply could not function."¹⁶⁶

Understandably, with the much diminished press and academic interest in the lower federal and state courts' operations, instances of breaches of the duty of confidentiality by law clerks in those courts have received little attention.¹⁶⁷ As will be discussed in Part III.C below, most reported cases involving questions of law clerk confidentiality in these courts have arisen in circumstances in which information was sought from present or former law clerks as part of an official investigation or court proceeding.¹⁶⁸ However, one example of a somewhat unusual and blatant breach of confidentiality involved John N. Gregorich, a former Illinois Appellate Court research staff attorney,¹⁶⁹ who used confidential information as part of his political campaign for a judgeship against one of the judges he had worked for on the court. The confidential information, which the staff attorney argued demonstrated the judge's unfitness, consisted of an internal court memorandum in which the appellate judge had made a comment about a then-pending case—that "he was willing to 'chalk up [his] present reservations to [his] chronic state of confusion about civil law and (once again) simply slink away in the night with a quiet concurrence.'" ¹⁷⁰ In response to the charge that the former research attorney had "failed to act in a manner consistent with

¹⁶⁵ Tony Mauro, *Lawyers Bemoan Breach: Prominent Attorneys Blast Law Clerks Blast Clerks for "Bush v. Gore" Leaks to the Press*, NAT'L L.J., Oct. 4, 2004, at 4.

¹⁶⁶ Toney Mauro, *Chasing Clerks*, LEGAL TIMES, Oct. 4, 2004, at 3.

¹⁶⁷ A recent novel written by a former law clerk for a judge on the United States Court of Appeals for the Third Circuit, has received some attention. See SAIRA RAO, *CHAMBERMAID* (2007). *CHAMBERMAID* has been described as follows: "With *Chambermaid*, debut novelist Saira Rao breaks the code of silence surrounding the clerkship and boldly takes us into the mysterious world of the third branch of US government, where the leaders are not elected and can never be fired." Powell's Books, <http://www.powells.com/biblio?show=9780802118493> (last visited Sept. 21, 2007). Eighteen percent of the state and federal court judges who responded to a 1981 survey by the University of Pennsylvania Law Review indicated that they believed their court had experienced a breach in confidentiality by law clerks. Comment, *supra* note 101, at 1238 & n.43. The survey included a sampling of federal and state appellate and trial court judges, in addition to all United States Supreme Court Justices. *Id.* at 1263.

¹⁶⁸ See *infra* text accompanying notes 262–323.

¹⁶⁹ A research staff attorney in the Illinois Appellate Court is generally the functional equivalent of a law clerk. See *Gregorich v. Lund*, 54 F.3d 410, 417–18 (7th Cir. 1995).

¹⁷⁰ Carol McHugh Saunders, *Judge Candidate Who Used Court Memo Faces Suspension*, CHI. DAILY L. BULL., Sept. 16, 1996, at 1.

the integrity and independence of the judiciary, engaged in conduct involving dishonesty[,] and breached his fiduciary duty by improperly revealing the contents of the confidential memo[,]” the Attorney Registration and Disciplinary Committee recommended the attorney be suspended for four years.¹⁷¹

IV. MECHANISMS OF IMPOSING AND PROTECTING CONFIDENTIALITY

A. Codes and Agreements

As the foregoing discussion reflects, the law clerk confidentiality obligation no longer is grounded on mere tradition or customary ethics. Courts have employed various measures to emphasize the importance of confidentiality and ensure compliance.¹⁷² As discussed above, federal courts have adopted increasingly expansive codes of ethics, like the 1981 Code of Conduct for Law Clerks,¹⁷³ the 1996 Code of Conduct for Judicial Employees,¹⁷⁴ the 1989 Code of Conduct for Law Clerks of the Supreme Court of the United States,¹⁷⁵ and the 1998 revised Code of Conduct for Supreme Court Law Clerks.¹⁷⁶ Similar codes have been enacted by many state courts,¹⁷⁷ and some state courts also require law

¹⁷¹ *Id.* Interestingly, the same research attorney was involved in an unsuccessful 42 U.S.C. § 1983 suit, at about the same time, in which he argued that he had been fired for engaging in union-organizing activities. In that case, the Seventh Circuit found that the staff research attorney-judge relationship, including confidentiality, formed a basis for finding that the judge, who fired the staff research attorney, was entitled to qualified immunity because he could reasonably believe that such an individual should refrain from an adversarial role to the court. *Gregorich*, 54 F.3d at 417-18.

¹⁷² See Mahoney, *supra* note 96, at 336 & n.65; Comment, *supra* note 101, at 1243.

¹⁷³ See *supra* text accompanying note 144.

¹⁷⁴ See *supra* text accompanying note 146.

¹⁷⁵ See *supra* text accompanying note 149.

¹⁷⁶ See *supra* text accompanying note 154.

¹⁷⁷ See, e.g., Faye A. Silas, *Mums the Word: The Law Clerk as Confidant*, A.B.A. J., July 1985, at 36, 36 (1985) (discussing South Carolina Code); ARIZONA CODE OF CONDUCT FOR JUDGES AND JUDICIAL EMPLOYEES Canon 3(D) & Commentary (Aug. 1997) (imposing confidentiality obligation), available at <http://www.supreme.state.az.us/hr/Forms/CodeofConduct.pdf>; Michigan Supreme Court Administrative Order 2006-8 (stating that “‘Deliberative Privilege and Case Discussions in the Supreme Court[]’” provides that discussions, memos, and correspondence regarding case deliberations are permanently confidential, except with regard to certain judicial misconduct), quoted in Richard D. McLellan, Commentary: *Proper Time to Divulge Information on Charges Against Fellow Justices Is Now*, MICH. LAW. WKLY., Feb. 12, 2007, available at 2007 WLNR 2846279; MODEL CODE OF CONDUCT FOR JUDICIAL EMPLOYEES IN THE STATE OF NEVADA Canon 3(D) (March 2004) (imposing confidentiality for present and former judicial employees), available at http://www.nv.supremecourt.us/documents/misc/jc_employeeConduct.pdf; RULES OF THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE R. 46 Canon 3 (setting out confidentiality obligations applicable to present and former law clerks), available at <http://www.courts.state.nh.us/rules/scr/scr-46-3.htm>; RULES GOVERNING THE COURTS OF THE STATE OF NEW

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clerks to sign confidentiality oaths.¹⁷⁸ A large number of courts rely on the provision of written or verbal guidance to law clerks about their duty of confidentiality.¹⁷⁹

Massachusetts, where lawyers Crossen, Curry, and Donahue induced a breach of confidentiality by a state Superior Court law clerk, does not have a law clerk code of conduct. However, at least since the early 1990s, Superior Court law clerks, as well as legal interns working for the court, have been given written guidelines emphasizing the law clerks' confidentiality obligations, particularly as to the judges' decision-making process and opinions.¹⁸⁰ Moreover, as a condition of employment, law clerks must sign a confidentiality agreement.¹⁸¹ In fact, the law clerk involved in *Curry* was required to sign a form employment contract in which he agreed to the conditions of employment that had been set out in the offer of employment letter from the Chief Justice of the Superior Court, including the duty of confidentiality.¹⁸²

JERSEY, CODE OF CONDUCT FOR JUDICIARY EMPLOYEES Appendix I Code of Conduct for Judiciary Employees, Cannon 2 (Feb. 2004) (imposing confidentiality restrictions on current and former employees), available at <http://www.judiciary.state.nj.us/rules/appemploy.htm>. Prior to the enactment of many of these Law Clerk Codes, some courts dealt with the issues through local rules. See Comment, *supra* note 101, at 1236.

¹⁷⁸ See, e.g., Silas, *supra* note 177, at 36 (stating that South Carolina and Iowa require oaths of confidentiality); Comment, *supra* note 101, at 1236, 1248 & n.102; Peter N. Thompson, *Confidentiality in Chambers: Is Private Judicial Action the Public's Business*, BENCH & B. MINN., Feb. 2005, at 14, 18 (stating that Minnesota Court of Appeals requires law clerk confidentiality agreements).

¹⁷⁹ See, e.g., FED. JUDICIAL CTR., *supra* note 135, at 5-7; Silas, *supra* note 177, at 36 (stating that oral instruction is the most common practice); comment, *supra* note 101, at 1236. A nationwide survey of a sampling of state and federal judges conducted in 1981, following the publication of *The Brethren*, showed that 94% of judges relied on oral instruction and about 50% provided manuals to law clerks in addition to oral instructions. Comment, *supra* note 101, at 1236 & nn. 35, 37.

¹⁸⁰ See MASSACHUSETTS SUPERIOR COURT, A PRACTICAL GUIDE TO THE SUPERIOR COURT CLERKSHIP 3-6 (Massachusetts Superior Court 1993-94), reprinted in Exhibit 33, at 3-6, Bar Counsel v. Curry II, *supra* note 1 (on file with author); Superior Court Ethical Guidelines (on file with author).

¹⁸¹ See, e.g., Letter of Acceptance to Superior Chief Justice Barbara Rouse regarding Employment as a Law Clerk to the Massachusetts Superior Court for the September 1, 2008 to August 31, 2009 term (on file with author).

¹⁸² Exhibit 11, Bar Counsel v. Curry II, *supra* note 1 (Letter offer and employment contract part of the record and on file with author). The law clerk testified that he understood that "he was not supposed to reveal information gained in chambers to third parties and that his obligation to maintain that confidentiality was to last 'forever.'" Bar Counsel v. Curry I, *supra* note 1, at 55.

B. Attorney-Client Confidentiality and Privilege

It has also been suggested that law clerks function as lawyers for their judges, essentially the way an attorney represents a client.¹⁸³ This raises the question of whether the attorney-client confidentiality protections of the Rules of Professional Conduct¹⁸⁴ and the common-law attorney-client privilege¹⁸⁵ would require law clerks to maintain the confidentiality as a general matter, at least where a law clerk has been admitted to the bar and is therefore covered by a jurisdiction's law on confidentiality protections. Although the application of the rules of professional conduct and the attorney-client privilege would have little significance where law clerks are subject to a special code of conduct that includes a confidentiality obligation, or where a jurisdiction has recognized the existence of a judge-law clerk evidentiary privilege,¹⁸⁶ in those jurisdictions that have not adopted such codes, applying the lawyer rules of professional conduct would establish clearer and more uniform principles regarding a law clerk's continuing duty of

¹⁸³ See Crump, *supra* note 100, at 240 (quoting U.S. District Court Judge Norman Black); Kozinski, *supra* note 137, at 842 & n.38 (analogizing a judge-law clerk relationship to an attorney-client relationship); Comment, *supra* note 101, at 1245-46 (same); Painter, *supra* note 130, at 1447-48, 1461-62 (same); Peter N. Thompson, *supra* note 178, at 17 (suggesting lawyer code and privileges apply); see also, *In re Cohen's Estate*, 174 N.Y.S. 427, 427-28 (Sur. Ct. 1919) (analogizing the privilege for communications between a judicial officer and his clerk/stenographer assistants and the attorney-client privilege). But see Chemerinsky, *supra* note 130, at 1095-96 (rejecting attorney-client privilege analogy).

¹⁸⁴ See MODEL RULES OF PROF'L PROFESSIONAL CONDUCT R. 1.6, which provides in relevant part that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent[]" or it is permitted by an exception to the rule (e.g., "to prevent reasonably certain death or substantial bodily harm[]" or "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services[]"). *Id.* This broad principle of confidentiality applies to "all information relating to the representation, whatever its source." *Id.* at cmt. 3. The earlier Code of Professional Responsibility contained a similar provision. Under DR 4-101, attorneys were required to preserve the "[c]onfidences and [s]ecrets" of their clients unless otherwise authorized by the client or the rule. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101. Confidences were information protected by the attorney-client privilege and "'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." MASSACHUSETTS CANONS OF ETHICS AND DISCIPLINARY RULES, DR 4-101(A) (1981).

¹⁸⁵ The attorney client privilege is an evidentiary privilege that shields, from compulsory evidentiary production, the testimony of a lawyer about confidential communications with the client for the purpose of obtaining legal advice or services. See *In re Lindsey*, 158 F.3d 1263, 1266 (D.C. Cir. 1998); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING 9-25 to -26 (3d. ed. 2004); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-70 (2000); MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (2003).

¹⁸⁶ See discussion *infra* Parts IV.C.1-2.

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confidentiality, as well as the possibility of disciplinary sanctions for violations by former clerks.¹⁸⁷

As Judge Kozinski has noted, “[l]aw clerks perform many of the functions of lawyers: They research the law, provide legal advice, and draft legal documents.”¹⁸⁸ Moreover, at least a major portion of the rationale underlying both the attorney-client privilege and the rule of confidentiality protection—that confidentiality regarding client information is necessary so that the client may freely and candidly communicate with the lawyer and, thereby, obtain the best legal advice and promote the ends of justice—¹⁸⁹ would seem equally applicable to the relationship between the law clerk and the judge. Similarly, the concept of loyalty underlies both the judge-law clerk and attorney-client relationship.¹⁹⁰ Moreover, where the rules of client confidentiality protection or attorney-client privilege apply, they survive the termination of the relationship,¹⁹¹ a principle that is consistent with the law clerk code of confidentiality provisions.¹⁹²

Apart from the fact that lawyer rules of conduct only apply to members of a jurisdiction’s bar, thereby limiting their impact since law clerks do not necessarily have to be admitted to the bar to work for judges, the more significant problem with applying lawyer rules of professional conduct relates to the definition of who is a client in the government context for purposes of the rule.¹⁹³ The ABA Model Rules of Professional Conduct and the rules of the states based thereon do not expressly address the confidentiality aspect of the judge-law clerk relationship. The comments to the lawyer confidentiality rules, however, do discuss the applicability of the rule to government lawyers. For example, the lawyer codes of many states specifically indicate that the “requirement of maintaining confidentiality of information relating to

¹⁸⁷ See Comment, *supra* note 101, at 1247.

¹⁸⁸ Kozinski, *supra* note 137, at 842 n.38.

¹⁸⁹ See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2 (2003); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (2000) (“The rationale for the [attorney-client] privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services.”).

¹⁹⁰ See Comment, *supra* note 101, at 1243–44; Wald, *supra* note 100, at 153–54 (stating that judges expect “unambiguous[]” “loyal[ty]”); *supra* notes 100–04 and accompanying text.

¹⁹¹ See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.9(c)(2) (2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 77 (2000); see also *Swidler & Berlin v. United States*, 524 U.S. 399, 407–10 (1998) (holding that privilege applies even after client’s death); *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 70–72 (Mass. 1990) (same).

¹⁹² See *supra* notes 160–17 and accompanying text.

¹⁹³ See Comment, *supra* note 101, at 1245–46; Joshua Panas, Note, *The Miguel Estrada Confirmation Hearings and the Client of a Government Lawyer*, 17 GEO. J. LEGAL ETHICS 541, 547–48 (2004); Thompson, *supra* note 178, at 17.

representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.”¹⁹⁴ Similarly, the comments to the ABA Model Rule provision relating to a lawyer’s responsibilities to entity clients not only make clear that the Rule 1.6 confidentiality obligation extends to entities, but also directly states that the rule is applicable to “government organizations.”¹⁹⁵

While there is no obvious reason that judges or the judicial branch should not be generally encompassed within the term government organization, the difficulty arises in precisely determining the “client[]” to whom the confidentiality duty is owed—i.e., who would have access to the information.¹⁹⁶ The answer to the question may vary depending on the context or particular governmental structure, as well as the requirements of constitutions, statutes, and regulations.¹⁹⁷ The Rules of Professional Conduct provide only minimal guidance. Acknowledging the difficulty of the issue, the comment to Model Rule of Professional Conduct 1.13 states as follows:

Defining precisely the identity of the client and prescribing the resulting obligations of [government] lawyers . . . is a matter beyond the scope of these [r]ules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. . . . Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.¹⁹⁸

¹⁹⁴ See, e.g., RULES REGULATING THE FLORIDA BAR R. 4-1.6 cmt. (2007), available at <http://www.floridabar.org/divexe/rrtfb.nsf/FV/BC9881429B46D73985256BBC004B9AEC>; MASS. RULES OF PROF’L CONDUCT R. 1.6 cmt. 6 (2003). This language was part of the ABA Model Rules until it was deleted as unnecessary during the Ethics 2000 revisions since the rule itself contained no exception regarding government lawyers. See ETHICS 2000 COMMISSION, REPORT ON THE MODEL RULES OF PROFESSIONAL CONDUCT, available at <http://www.abanet.org/cpr/e2k/e2k-rule16rem.html>.

¹⁹⁵ See MODEL RULES OF PROF’L CONDUCT R. 1.13 cmts. 2, 6 (2003).

¹⁹⁶ This is a question that has received substantial attention as to governmental lawyers generally. See, e.g., Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 292, 296–98 (1991); Panas, *supra* note 193, at 546–59.

¹⁹⁷ See Cramton, *supra* note 196, at 296; MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 9 (2003).

¹⁹⁸ MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 6 (2003) (citation omitted). Rule 1.13 addresses the responsibilities of lawyers representing entities, particularly where the

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The Restatement is slightly more helpful. The comments to Section 97 recognize that a universal definition of the government lawyer's client is not possible, but that the identity of the client may vary depending on the context and the functions being performed. While recognizing that as a general matter it may be asserted that the government lawyer represents the public or the public interests or perhaps the government as a whole, it indicates that this is usually not that helpful. Instead, a better approach in many instances is to regard an agency and those who are empowered to direct that agency as to a particular matter as the client. Ultimately, given the variety of forms and structures of government, the determination of the client's identity will depend on the circumstances, considering "such factors as the terms of retention or other manifestations of the reasonable understanding of the lawyer and the hiring authority involved, the anticipated scope and nature of the lawyer's services, particular regulatory arrangements relevant to the lawyer's work, and the history and traditions of the office."¹⁹⁹

Thus, it is theoretically possible for the government lawyer's client, including the government judicial law clerk's client, to be viewed as the general public, the government as a whole, the branch of government for whom the lawyer works, the agency (acting through its administrators) for whom the lawyer works, or the agency official for whom the lawyer works on public business. Nevertheless, the models that seem most appropriate in the context of the confidentiality duty, and which seem to be endorsed by most authorities, would be either the agency or branch model.²⁰⁰ Unless otherwise mandated by statute, court order, or other

lawyer knows that a constituent of the organization is engaging in activity that is illegal or violates a legal obligation to the corporation and is likely to injure the corporation substantially. *Id.*

¹⁹⁹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000) (citation omitted); *see also* Comment, *supra* note 99, at 1246-47 (citing Opinion 73-1 of the Federal Bar Association to the effect that the government lawyer's client, in terms of immediate confidentiality obligations, is the employing agency and its administration); Panas, *supra* note 193, at 549-50 (discussing Federal Bar Associations 1990 Model Federal Rules under which the lawyer represents the employing agency, but obligations may be affected by "more general obligations to the United States[]").

²⁰⁰ *See* Cramton, *supra* note 196, at 298; Panas, *supra* note 193, at 556-57, 560-61; Comment, *supra* note 101, at 1246-47; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000). The general public or public interest client model can be criticized for being too amorphous or subjective, giving too much discretion to the lawyer, interfering with the lawyer's counselor functions, raising separation of powers concerns, ignoring the democratic process, and providing virtually no guidance. *See* Cramton, *supra* note 196, at 298-300; Panas, *supra* note 193, at 552. Similarly, critics of the government-as-a-whole approach assert that it would violate separation of powers. *Id.* at 554.

law,²⁰¹ the law clerk's obligation would run to the judges for whom the law clerk worked and to those judges in charge of administration of the court, as they conduct public business.²⁰² Although it is conceivable that in some circumstances confidential information that a law clerk has about a particular judge would have to be disclosed to others within the judicial branch or in law enforcement,²⁰³ the duty of confidentiality would bar disclosures like those in the *Curry* matter made to private individuals outside the government.²⁰⁴

While the issue has generated substantial debate,²⁰⁵ it has been well-accepted that the attorney-client privilege generally applies to the government client,²⁰⁶ and much of the previous discussion regarding the identity of the aforementioned client in the context of the rule of conduct confidentiality would be applicable here.²⁰⁷ Recent federal court decisions, however, have indicated that at least in the context of criminal grand jury proceedings seeking compelled testimony by government lawyers, the issue of to whom the duty of confidentiality is owed and to whom the privilege belongs is more complicated.

As part of the "Whitewater" investigation into the involvement of President Clinton and Hillary Clinton with a savings and loan and land

²⁰¹ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. d (2000). See Cramton, *supra* note 196, at 303-14 for a discussion of the ways in which statutory and regulatory provision, including whistleblower statutes, might impact the duties of the government lawyer.

²⁰² See Comment, *supra* note 101, at 1247.

²⁰³ For example, case law would suggest that in some circumstances a government lawyer can be compelled to testify about client information as part of a grand jury proceeding investigating criminal activity. See *infra* text accompanying notes 206-22.

²⁰⁴ Even if the particular matter fell within one of the exceptions to the lawyer conduct rule confidentiality obligations, such as the authorization in ABA Model Rule 1.6(b) where the lawyer reasonably believes disclosure is necessary "to prevent reasonably certain death or substantial bodily harm[]" or "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests . . . of another and in furtherance of which the client has used . . . the lawyer's services[.]" the disclosure would be limited. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2007). As the comment to the rule points out, authorized disclosures are limited to those necessary to prevent the harm identified in the rule. "If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits . . . access to the tribunal or other persons having a need to know it . . ." *Id.* at cmt. 14. Thus, if a law clerk reasonably believed that a judge had used the law clerk's services to engage in fraud or illegal conduct that would substantially injure a party, the proper recourse under the rule would appear to be raising the matter within the court system, probably to a judge with administrative responsibility. See *id.*

²⁰⁵ For a recent review of the issue, see Nancy Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, 166-73 & n.50 (2007).

²⁰⁶ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 (2000); Leong, *supra* note 205, at 165.

²⁰⁷ See Panas, *supra* note 193, at 544-46.

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development corporation, the Office of Independent Counsel subpoenaed for grand jury proceedings certain documents relating to meetings between the President, Hillary Clinton, and White House Counsel. The White House asserted that the documents were protected by the attorney-client privilege and the work product protection.²⁰⁸ Treating the case as a dispute between two entities of the federal government—the Office of Independent Counsel and the White House—the court addressed the narrow issue of whether one of those entities could assert the attorney-client privilege in the face of a grand jury subpoena in the context of a criminal investigation.²⁰⁹ While the basis of the court's decision that the privilege would not apply is not entirely clear from a doctrinal perspective, the court emphasized the following factors: the criminal investigatory context and the importance of the information to that investigation, the strong public interest in disclosure of information relevant to public official wrongdoing, its view that there would be minimal impact of the disclosure on the governmental entity since the entity itself is not subject to criminal liability, and its view that there would be a lack of impact on the government attorney's advice as to future conduct.²¹⁰

A year later, the United States Court of Appeals for the District of Columbia confronted virtually the same issue. The Office of Independent Counsel sought information for a grand jury investigation from Deputy White House Counsel Bruce Lindsey as part of the now expanded Independent Counsel investigation into whether Monica Lewinsky or others had engaged in perjury or obstruction of justice in connection with the civil suit against President Clinton by Paula Jones. Lindsey refused to answer questions about certain conversations with the President, asserting the attorney-client privilege.²¹¹ While the court recognized the existence of the government attorney-client privilege that was “rather absolute” in civil contexts, the question here was whether such a privilege existed in a grand jury investigation instigated by one part of the government against another.²¹² The court's conclusion that the attorney-client privilege does not apply in this context rests heavily on its view that the government lawyer's loyalty lies not only with the agency official or agency, but extends to serving the public interest by providing evidence of criminal wrongdoing by public officials.²¹³

²⁰⁸ *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 913–15 (8th Cir. 1997).

²⁰⁹ *Id.* at 915.

²¹⁰ *Id.* at 918–24.

²¹¹ *In re Bruce Lindsey*, 158 F.3d 1263, 1267 (D.C. Cir. 1998).

²¹² *See id.* at 1269–72.

²¹³ *See id.* at 1273–74. In support of this conclusion, the court relied in part on the policy embodied in a federal statute that required Executive Branch officials to report possible

The preceding two cases involved intra-federal government criminal disputes where, arguably, a government lawyer's duties can be seen to extend beyond the immediate official or agency for whom the lawyer works, consistent with the general public, or government-as-a-whole, as client perspective.²¹⁴ Two other recent cases reaching inconsistent results have addressed the issue in the context of a criminal investigation by the federal government into the activities of state governments. The United States Court of Appeals for the Seventh Circuit found that the attorney-client privilege was not available in *In re: A Witness Before the Special Grand Jury 2000-02*,²¹⁵ a case involving a federal grand jury investigation into allegations of bribery in the Illinois Secretary of State's office. When federal prosecutors by grand jury subpoena sought the testimony of the Department of State Chief Legal Counsel Roger Bickel regarding conversations he had in his official capacity with the then Secretary of State, the former Secretary of State invoked the attorney-client privilege.²¹⁶ Accepting the parties' position that the privilege applies to government lawyers in the civil context, the court saw the issue as whether the privilege should apply in criminal proceedings where the government lawyer was representing a government official.²¹⁷ The court adopted much of the reasoning of the earlier Eighth and D.C. Circuit decisions in concluding that the privilege would not apply. In particular, the court emphasized that in the context of criminal proceedings against government officials, government lawyers have a higher duty than merely representing an individual client; instead, they must serve the public interest and ensure compliance with the law, as well as facilitate an open and accountable government.²¹⁸

In a very similar case involving a federal investigation into allegations of bribery in the Connecticut Governor's Office, the United States Court of Appeals for the Second Circuit reached a contrary conclusion on the privilege when federal prosecutors subpoenaed the Governor's former Chief Legal Counsel to testify regarding conversations with the Governor and his staff.²¹⁹ Reversing a district

violations of federal criminal law to the Attorney General. *See id.* at 1274 (citing 28 U.S.C. § 535(b)). The court noted that public officials who want complete confidentiality can obtain personal, rather than governmental, counsel. *Id.* at 1276.

²¹⁴ *See Panas, supra* note 193, at 512-54.

²¹⁵ 288 F.3d 289 (7th Cir. 2002).

²¹⁶ *Id.* at 290-91.

²¹⁷ *Id.* at 291-92.

²¹⁸ *Id.* at 293-94. The court rejected the argument, based on federalism, that the privilege should exist because of fact that the case involved a state lawyer and state client that were involved in a federal criminal investigation. *Id.* at 294-95.

²¹⁹ *In re Grand Jury Investigation*, 399 F.3d 527, 528-29 (2d Cir. 2005).

court decision that had rejected the attorney-client privilege based on public interest reasons, the court was unwilling to accept the proposition that the public interest invariably lies with the disclosure of information about possible criminal wrongdoing to a grand jury.²²⁰ Instead, the court not only recognized the applicability of the privilege to government lawyers in private civil litigation disputes, but also found that the general instrumental rationale for the applicability of the privilege—to induce candor by clients so that lawyers can receive all necessary information to render and act upon the best legal advice—is equally if not more applicable to the government lawyer and client.²²¹ In essence, the court believed that the public interest served by the privilege outweighed the general public interest in law enforcement and accountability served through grand jury proceedings.

The recent cases on the government attorney-client privilege, in the context of grand jury criminal investigations of government officials, should have relatively little impact on the availability of the privilege in the judge-law clerk relationship. At most, they suggest that where a judge is being investigated for criminal wrongdoing by government prosecutors, the attorney-client privilege might not be found to exist with regard to a grand jury subpoena of a law clerk's confidential information relating to advice and discussions on legal issues relevant to that investigation. As will be discussed in sections IV.C.1 and IV.C.2 below, this result would be consistent with the result under a particularized limited judge-law clerk privilege that has been adopted by some jurisdictions. For most cases, however, including those involving civil litigation like the *Curry* matter, the attorney-client privilege should be available.²²²

²²⁰ *Id.* at 534–35.

²²¹ *Id.* at 533–35. The court stated as follows:

It is crucial that government officials[] . . . be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.

Id. at 534. The court also noted that the Connecticut legislature had recognized this by enacting a statute that applied the privilege absolutely to government lawyers. *Id.* at 534.

²²² Commentators who have rejected the analogy to, or applicability of, attorney-client confidentiality and privilege to law clerks have done so because they have viewed these doctrines as inconsistent with their perception of the duty of confidentiality of law clerks, largely because they see attorney-client confidentiality as a permanent bar to disclosure, whereas they have argued that law clerk confidentiality does not extend indefinitely after employment, *see, e.g.*, Chemerinsky, *supra* note 130, at 1095, 1100, or that the attorney client privilege is absolute, whereas law clerks should be able to disclose information where relevant to a specific proceeding that involves the investigation of judicial wrongdoing. *See*

C. Judicial Deliberations Privilege

The attorney-client privilege is the oldest recognized privilege for confidential communications.²²³ One of the most recent privileges to be *formally* recognized has been referred to as the judicial privilege, the judicial proceedings privilege, or the judicial deliberations privilege.²²⁴ Given its relatively infrequent invocation, the exact source and precise boundaries of this privilege have not been clearly identified. Nevertheless, like other testimonial privileges, at its core, this privilege, when applicable, shields from compelled or voluntary disclosure a judge's deliberative thoughts and communications among judges and their staff, including law clerks.²²⁵

Comment, *supra* note 101, at 1260–61. As previously discussed, current law clerks' codes do make the duty of confidentiality permanent. See *supra* notes 133, 156–57, 175, 180 and accompanying text. Moreover, the most recent case law on the government lawyer attorney-client privilege would not apply the privilege in a criminal grand jury investigation of government official wrongdoing. See *supra* text accompanying notes 213–16. It should also be noted that the “[c]rime or [f]raud” exception to the attorney-client privilege would vitiate the privilege, where a lawyer is consulted by the client for assistance in committing a crime or fraud or where the client uses the lawyer's services to commit a crime or fraud. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000).

²²³ See *Developments in the Law – Privileged Communications*, 98 HARV. L. REV. 1450, 1455 (1985) [hereinafter *Developments*]; *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981); *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). Cases from as early as 1577 acknowledge the existence of the attorney client privilege. *Developments, supra*, at 1456. Other evidentiary communication privileges that have been widely recognized include the spousal, doctor-patient, clergy, and psychiatrist-patient privileges. See *id.* at 1456–63.

²²⁴ The term “[j]udicial [p]rivilege” has been used in a variety of contexts to refer to not only the evidentiary privilege that exists with regard to confidential communications between judges and their law clerks, see, e.g., 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5674 (1992 & Supp. 2007); Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89, 89–90 (1987); Kevin C. Milne, *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting a Privilege for the Federal Judiciary*, 44 WASH. & LEE L. REV. 213, 213 (1987), but also to doctrines that are generally unrelated to the type of evidentiary privilege at issue here. Most often, the term has been used to refer to the doctrine of tort immunity for allegedly defamatory statements made in the course of judicial proceedings. See, e.g., 1 ROBERT D. SACK, *SACK ON DEFAMATION* § 8.1, at 8-1 to -5 (3d ed. 1999) (stating that common law absolute privilege for judicial proceedings dates at least to 1772 for civil and criminal case participants); Robert E. Nunley, *Judicial Privilege: Does It Have a Role in Military Courts-Martial?*, 138 MIL. L. REV. 53, 53 & n.2. It has also been used generally in the context of judicial immunity to describe all judicially created privileges and a descriptive label for a court's right to engage in certain activities or to summarize or comment on particular matters. See *id.*; Catz & Lange, *supra*, at 121–22. To avoid confusion and to achieve a more accurate descriptive label, the term “judicial deliberations privilege” will be used here.

²²⁵ See *infra* text accompanying notes 262–89, 304–23; Catz & Lange, *supra* note 224, at 89–90; Milne, *supra* note 222, at 213; Nunley, *supra* note 224, at 55.

Before addressing the history and details of the judicial deliberations privilege, a brief review of the development of evidentiary privileges is appropriate for contextual background. These privileges generally are based on a determination that other societal interests outweigh the goal of truth seeking.²²⁶ The most commonly asserted bases for communication privileges are that such privileges are necessary (1) to assure candor and openness in desirable communications between individuals in certain relationships that will ultimately serve society's interests and (2) to protect the privacy expectations inherent in those relationships.²²⁷ Moreover, in the context of government privileges, preservation of constitutional separation of powers is implicated.²²⁸

As Professor Wigmore stated, as to the first instrumental rationale, the following four conditions should exist for the establishment of a privilege:

- (1) The communications must originate in a *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*. (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.²²⁹

²²⁶ *Developments, supra* note 223 at 1454; Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 982 (1999); Denise P. Lindberg, *The Accountant-Client Privilege: Does It and Should It Survive the Death of the Client?*, 1987 BYU L. REV. 1271, 1291 (1987); Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 928 (1987).

²²⁷ *Developments, supra* note 223, at 1471-72, 1481-83; Catz & Lange, *supra* note 224, at 95-96; James J. Dalessio, *Evidentiary Privileges and the Exclusion of Derivative Evidence: Commentary and Analysis*, 26 SAN DIEGO L. REV. 625, 631-38 (1989). Some commentators have argued that the privileges are actually established to benefit those in power or "as a means of preserving the image and legitimacy of the legal system." *Developments, supra* note 223, at 1493-98, 1498-1500; see Catz & Lange, *supra* note 224, at 98-100. Critics of evidentiary privileges attack them primarily on the ground that no empirical support exists for the instrumental rationale that privileges will encourage candid communication. In other words, whether people have knowledge that a privilege exists or is available has no bearing on their likelihood of candid communication. *Developments, supra* note 223, at 1474-75; Leong, *supra* note 205, at 187-92. For a review of the critiques of the rationales for evidentiary privileges, see *Developments in the Law, supra* note 223, at 1472-83.

²²⁸ See *infra* text accompanying notes 239, 249, 257, 269; Milne, *supra* note 224, at 213-14; Nunley, *supra* note 224, at 68-72, 78-82; Catz & Lange, *supra* note 224, at 119.

²²⁹ See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (John T. McNaughton rev. ed. 1961).

While evidentiary privileges initially were created by common law, subsequently they have been created by statute or constitution.²³⁰ The attorney-client and the spousal communication privileges are early examples of the common-law privileges.²³¹ In the Nineteenth Century, states began supplanting common-law privileges with privilege statutes.²³² In the mid-to-late Twentieth Century, the National Conference of Commissioners on Uniform State Laws created the Uniform Rules of Evidence that contained an article on privileges, including the attorney-client, psychotherapist-patient, and clergy-communicant privileges, which were ultimately adopted by many states, at least in substantial part.²³³ Examples of constitutionally-based testimonial privileges are the legislative privilege arising from the Speech and Debate Clause,²³⁴ the implied executive privilege, and the privilege against self-incrimination.²³⁵

Tracing the precise origins of the judicial deliberations privilege is difficult, in part because its existence may have been presumed long

²³⁰ See *Developments*, *supra* note 223, at 1454-71; Nunley, *supra* note 224, at 55-59. For a concise overview of the developments of privilege law in American courts, see *Developments*, *supra* note 223, at 1454-71.

²³¹ *Developments*, *supra* note 223, at 1456-57; Catz & Lange, *supra* note 224, at 93-94.

²³² *Developments*, *supra* note 223, at 1458; Catz & Lange, *supra* note 224, at 100; Nunley, *supra* note 224, at 57-58.

²³³ *Developments*, *supra* note 223, at 1462-63; see UNIF. R. EVID. Art. V (1974); 13 U.L.A. 2009 (1980). Privilege law in federal courts remained largely unsettled and non-uniform until the enactment of the Federal Rules of Evidence in 1975, with the courts relying on state statutory law, state or federal common law, federal statutes, and the Constitution in various contexts and times. See *Developments*, *supra* note 223, at 1463-66; Nunley, *supra* note 224, at 58. An unsuccessful attempt at specific codification of nine testimonial privileges was made in Article V of the proposed Federal Rules of Evidence transmitted to Congress for approval in 1973. As a result of the very substantial controversy over this rule, Congress substituted the current Rule 501 of the Federal Rules of Evidence under which generally in diversity cases state privilege law applies and in federal question cases courts rely on the Constitution, federal statutes, and federal common law. See *Developments*, *supra* note 223, at 1465-70; Catz & Lange, *supra* note 224, at 103-04; Nunley, *supra* note 224, at 58-59. A judicial communications or deliberations privilege was not among the nine privileges originally specified. See Proposed Federal Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 230-58 (1972).

²³⁴ U.S. CONST., art. I, § 6, cl. 1 provides:

Senators and Representatives . . . shall in all Cases, except Treason, Felony[, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Id. The last part of this clause has been held to provide a form of immunity from prosecutions for legislative acts and a privilege against testifying in court about those acts that extends to legislators' staffs. See *Gravel v. United States*, 408 U.S. 606, 615-18 (1972); Nunley, *supra* note 224, at 68-69.

²³⁵ U.S. CONST. amend. V; *United States v. Nixon*, 418 U.S. 683, 708-09 (1974).

before it was formally asserted or referred to in published opinions or otherwise. While neither the Constitution nor federal statutes expressly set forth an evidentiary privilege applicable to the judiciary, dicta in some opinions suggest that such a privilege exists and emanates from the Constitution in a manner similar to the Executive privilege.²³⁶ It has also been regarded by some courts as essentially a common-law privilege.²³⁷

1. The Privilege in Federal Court

Probably the first formal intimation of a judicial testimonial privilege relating to judicial proceedings occurred in 1953.²³⁸ As part of an investigation into United States Department of Justice activities apparently relating to certain grand jury proceedings, a House of Representatives Sub-Committee subpoenaed a federal district court judge to testify before the Committee at a hearing. The judge appeared and read statements signed by all the judges of the United States District Court for the Northern District of California and by the Chief Judge of the District, which asserted that under the constitutional doctrine of separation of powers, Congress could not compel judges to testify concerning judicial proceedings.²³⁹ Noting that the court was aware of no instance in which a congressional committee had similarly summoned a federal judge to testify, the judges stated: "The Constitution does not contemplate that such matters be reviewed by the Legislative Branch, but only by the appropriate appellate tribunals. The integrity of the Federal Courts, upon which liberty and life depend, requires that such Courts be maintained inviolate against the changing moods of public opinion."²⁴⁰ Apparently, nothing further occurred

²³⁶ See *infra* text accompanying notes 240–61; Nunley, *supra* note 224, at 68.

²³⁷ See *infra* text accompanying notes 246–49; Matthew Singer, *Protecting the Public's Interest in an Open Government Through the Creation of an Executive Privilege?: The Dann v. Taft Decisions*, 75 U. CIN. L. REV. 1741, 1758 (2007); Nunley, *supra* note 224, at 55; Catz & Lange, *supra* note 224, at 90.

²³⁸ An issue of judicial testimonial privilege actually occurred at the time of the American Constitutional Convention in the case of *Trevett v. Weeden* (Providence 1787) where the judges of the Rhode Island Supreme Court held that a state statute abrogating the right to a jury trial in certain cases was unconstitutional under the state constitution. The Rhode Island General Assembly summoned the judges before it to explain their holding, and when the judges refused to answer questions, sought their removal. Eventually, the removal proceedings were terminated because removal required a trial on criminal misconduct. See Milne, *supra* note 224, at 216–17.

²³⁹ Statement of the Judges of the U.S. Dist. Court for the N. Dist. of Cal., Made to the Subcomm. of the Comm. of the House of Representatives to Investigate the Dep't of Justice of the U.S., 14 F.R.D. 335, 335–36 (1953) [hereinafter *Statement of Judges*].

²⁴⁰ *Id.* at 336.

concerning this assertion of a testimonial privilege as to judicial proceedings.²⁴¹

Dicta in a series of federal court cases in the 1970s provide the next references to a possible judicial deliberations or communications privilege. The cases also linked the privilege to the rationale underlying the then-emerging governmental deliberative process privilege and Executive privilege. In his dissent in *New York Times Co. v. United States*,²⁴² in which he asserted that the Executive Branch of the government had inherent authority to classify and withhold documents, Chief Justice Burger analogized to what may well have been an implicit assumption by prior courts as to their own power:

No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.²⁴³

This notion of inherent judicial authority for a confidentiality privilege was picked up at about the same time in a concurring opinion in *Soucie v. David*,²⁴⁴ a case primarily involving the issue of the public availability under the Freedom of Information Act of a report prepared

²⁴¹ Nunley, *supra* note 224, at 73. It should be noted that the assertion of privilege was limited to testimony about judicial proceedings. The judges expressed no objection to congressional requests for testimony on “other than Judicial proceedings.” *Statement of Judges*, 14 F.R.D. at 336. A similar issue of judicial testimonial privilege was apparently recognized in *In re Wallace*, 170 F. Supp. 63 (M.D. of Ala. 1959). In that case, the Civil Rights Commission sought certain voting and registration records as part of an investigation. Local officials refused to turn over the records, and some records were impounded by state court Judge George C. Wallace. When the Commission issued a subpoena duces tecum to Judge Wallace to produce the records, he did not appear. *Id.* at 65–67. In a subsequent subpoena enforcement proceeding, the Judge argued that enforcement of the subpoena “would constitute an improper inquiry into judicial acts of judicial officers.” *Id.* at 67. Rejecting the argument, the court indicated that the subpoena was not seeking judicial testimony or records, but county voting records, and that there was no “judicial privilege or immunity” not to produce those records. *Id.* at 68–69. In dicta, the court noted that the judge would still be immune from inquiry into judicial acts and that neither the Commission nor Congress could question the Judge on “why he impounded these records or what factors he took into consideration when he impound [sic] these records.” *Id.* at 69.

²⁴² 403 U.S. 713 (1971). In this case the government sought to enjoin publication of a classified government study on United States involvement in Vietnam. The Court in a per curiam opinion affirmed lower decisions allowing publication under the First Amendment.

²⁴³ *Id.* at 752 n.3 (Burger, C.J., dissenting).

²⁴⁴ 448 F.2d 1067 (D.C. Cir. 1971).

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by a federal agency for the President.²⁴⁵ In his concurring opinion, Judge Wilkey commented upon the constitutional privilege against disclosure of the decision-making process, which he believed applied equally to the executive, legislative, and judicial branches of government, and had both common law and constitutional sources.²⁴⁶ He alluded to the “common law principle . . . that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.”²⁴⁷ In doing so, he specifically referenced its applicability to the “deliberation[s] of judges in conference[]” and the advice of subordinates such as law clerks.²⁴⁸ Judge Wilkey saw this common-law privilege on non-disclosure as bolstered further by the constitutional principle of separation of powers, which protects each branch of government from encroaching on the powers of the other branches.²⁴⁹ This principle would include a right of all three branches of government to withhold information in certain circumstances,²⁵⁰ and would preclude Congress, through acts such as the Freedom of Information Act, from

²⁴⁵ *Id.* at 1070–71. The Freedom of Information Act provides public access to federal agency records and reports that are not exempt from disclosure. See 5 U.S.C. § 552(a) (1)–(3) (2000). In *Soucie*, private citizens sought release from the Office of Science of a report it had prepared for President Nixon evaluating the Supersonic Transport. *Soucie*, 448 F.2d at 1070. The appeals court held that the Office of Science and Technology was a federal agency covered by the Act, *id.* at 1073, and remanded to the district court for a determination of whether a statutory or constitutional privilege would preclude disclosure. *Id.* at 1079. The constitutional privilege referred to by the court, which had not been asserted by the government at that point, was the executive privilege. *Id.* at 1071–72. The statutory privilege most likely implicated—the deliberative process privilege—protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]” 5 U.S.C. § 552(b)(5). The rationale underlying this qualified privilege is “to encourage the free exchange of ideas during the process of deliberation and policymaking; accordingly, it has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes[.]” *Soucie*, 448 F.2d at 1077. For a discussion of the deliberative process privilege generally, see Nunley, *supra* note 224, at 74–75; Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279 (1989); Erin Hoffman, *The Deliberative Process Privilege in Kentucky*, 25 J. NAT’L ASSN. ADMIN. L. JUDGES 485, 485–89 (2005).

²⁴⁶ *Soucie*, 448 F.2d at 1080–81 (Wilkey, J., concurring).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 1081. Judge Wilkey noted that as to the Executive Branch of the government most of the common law privilege has now been covered by the Freedom of Information Act exemption for interagency and intra-agency records. *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 1082.

“conferring upon any member of the general public a right which Congress, neither individually nor collectively, possesses.”²⁵¹

Two years later, the existence of a judicial confidentiality privilege again arose in dicta in another Executive privilege case. In *Nixon v. Sirica*,²⁵² the Special Prosecutor sought enforcement of a grand jury subpoena for certain tape recordings between President Nixon and his advisors that the President had refused to produce on the grounds of absolute Executive privilege.²⁵³ The court recognized the existence of an Executive privilege with constitutional underpinnings which is intended to “protect the . . . executive decision-making process[and] is analogous to that between a congressman and his aides under the Speech and Debate Clause; to that among judges, and between judges and their law clerks; and similar to” exemption five of the Freedom of Information Act.²⁵⁴ That privilege, however, while presumptively applicable, was found not to be absolute, and thus subject to a balancing of interests. That balance was found to favor disclosure in light of “the uniquely powerful showing made by the Special Prosecutor in this case.”²⁵⁵

The Supreme Court addressed the Executive privilege in *United States v. Nixon*,²⁵⁶ in the context of the President’s assertion of an absolute privilege in the face of a subpoena for White House tapes for use in the criminal trials of several presidential aides. The President argued two grounds for the privilege: (1) the need for protection of communications “between high Government officials” and their advisors; and (2) the doctrine of separation of powers.²⁵⁷ The Court acknowledged the importance of confidentiality, stating “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”²⁵⁸ Moreover, the Court

²⁵¹ *Id.* at 1081.

²⁵² 487 F.2d 700 (D.C. Cir. 1973).

²⁵³ *Id.* at 704–05.

²⁵⁴ *Id.* at 717 (footnote omitted); *see id.* at 713–17.

²⁵⁵ *Id.* at 717. In his dissenting opinion in *Nixon v. Sirica*, asserting that the executive privilege should be absolute, Judge MacKinnon elaborated on the judicial privilege. *See id.* at 740–42 (MacKinnon, J., dissenting). He noted that “[e]xpress authorities sustaining this position are minimal, undoubtedly because its existence and validity has been so universally recognized. Its source is rooted in history and gains added force from the constitutional separation of powers of the three departments of government[.]” and quoted the executive’s brief for the proposition that “[i]t has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality.” *Id.* at 740.

²⁵⁶ 418 U.S. 683 (1974).

²⁵⁷ *Id.* at 705–06.

²⁵⁸ *Id.* at 705.

recognized the constitutional basis of the President's generalized need for confidentiality of communications with advisors, as one of those powers or privileges incident to the "supremacy of each branch within its own assigned area of constitutional duties."²⁵⁹ Nevertheless, the Court concluded that neither this ground nor separation of powers justified an absolute privilege, but that these interests may be, and here were, outweighed by the needs of the criminal judicial process.²⁶⁰ In reaching this conclusion, however, the Court reiterated that the fundamental importance of confidentiality of communications justified a presumption that Presidential communications are privileged, and again analogized to judicial deliberation, stating that this privilege:

like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.²⁶¹

The first federal court case to address in any detail and actually apply a judicial deliberations privilege, *Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*,²⁶² is also the case that first drew substantial academic attention to the privilege.²⁶³ After Judge Hastings had been acquitted by

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 706–13.

²⁶¹ *Id.* at 708.

²⁶² 783 F.2d 1488 (11th Cir. 1986), *cert. denied sub nom. Hastings v. Godbold*, 477 U.S. 904 (1986) [hereinafter *Hastings II*]. For a review of the history of the cases involving former federal judge Alcee Hastings, including his efforts to quash his criminal indictment for bribery (*United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983)), and his subsequent acquittal on criminal charges (*Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 95 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988)), see Catz & Lange, *supra* note 224, at 132–43; Nunley, *supra* note 224, at 845–89.

²⁶³ See, e.g., Catz & Lange, *supra* note 224, at 132–43; Milne, *supra* note 224, at 224–26; Nunley, *supra* note 224, at 84–89. Prior to the *Hastings II* case, a couple of federal court cases had made passing reference to assertions of some form of judicial privilege. See *McCorquodale v. Balkcom*, 525 F. Supp. 431, 432–33 (N.D. Ga. 1981) (Magistrate, on grounds of judicial privilege, refused to order deposition testimony regarding a sentencing report prepared for court by an assistant to the Georgia Supreme Court who argued that he was functioning as a judicial law clerk or attorney for the client; upon review District Court

a federal jury on bribery charges, two district court judges in the Eleventh Circuit filed a complaint under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,²⁶⁴ alleging, *inter alia*, that Judge Hastings “engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and has violated several Canons of the Code of Judicial Conduct[.]”²⁶⁵ In the course of its investigation, the Investigating Committee of the Judicial Council of the Eleventh Circuit sought to enforce subpoenas of Judge Hastings’s secretary and three law clerks or former law clerks. The judge and his staff resisted compliance with the subpoenas on several grounds, including that the subpoenas sought information that was covered by a testimonial privilege protecting from disclosure of “confidential communications among an Article III judge and members of his staff regarding the performance of his judicial duties.”²⁶⁶ This privilege was likened to the Executive privilege protecting presidential communications, the protection afforded Congress under the Speech and Debate Clause, and the common-law attorney-client privilege.²⁶⁷

The court began its analysis by acknowledging that it could find no cases applying a confidential judicial communications privilege, but stated that “the probable existence of such a privilege has often been noted.”²⁶⁸ The court then reviewed and quoted extensively the dicta discussed above from *Nixon v. Sirica*, *New York Times v. United States*, *Soucie v. David*, and *United States v. Nixon*, the opinions that had alluded to a privilege for communications among judges and between judges and their law clerks relating to judicial deliberations that found support in the common law and constitutional principles, such as separation of powers and the inherent power of each branch to ensure that it can

found it “unnecessary to rule on whether or not the Magistrate correctly analyzed . . . claim of judicial and/or attorney-client privilege[.]”; Nunley, *supra* note 224, at 83 (discussing an unreported case involving assertion of judicial privilege by federal magistrate judge in challenge to grand jury indictments). Also, a 1979 California state investigation of possible misconduct by state supreme court judges, in which a judicial testimonial privilege was asserted, generated some academic commentary. See, e.g., Abrahamson, *supra* note 119, at 361; Comment, *supra* note 101, at 1230–31. For a discussion of the California matter, see *infra* notes 290–93.

²⁶⁴ Act of Oct. 15, 1980, Pub. L. No. 96-458, 94 Stat. 2035 ((codified at 28 U.S.C. §§ 331, 332, 372), *repealed by* Pub. L. 107-273, Div. C, Title I, § 11043(a)(1)(B), Nov. 2, 2002, 116 Stat. 1855).

²⁶⁵ See *Hastings II*, 783 F.2d at 1491–92.

²⁶⁶ *Id.* at 1492–93, 1517–18. The judge and his staff also raised challenges to the jurisdiction of the court and the constitutionality of the Judicial Council’s Reform and Judicial Conduct and Disability Act of 1980. *Id.* at 1494, 1499.

²⁶⁷ *Id.* at 1518.

²⁶⁸ *Id.*

effectively discharge its duties.²⁶⁹ Emphasizing the critical importance of confidentiality in fostering the candor that is necessary for the decision-making process that was central to the Supreme Court's recognition of the qualified privilege protecting presidential communications in *United States v. Nixon*, the Eleventh Circuit Court of Appeals stated:

Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties. The judiciary, no less than the executive, is supreme within its own area of constitutionally assigned duties. Confidentiality helps protect judges' independent reasoning from improper outside influences. It also safeguards legitimate privacy interests of both judges and litigants.

We conclude, therefore, that there exists a privilege (albeit a qualified one[]) protecting confidential communications among judges and their staffs in the performance of their judicial duties.²⁷⁰

The court indicated that this qualified privilege is limited "to communications among judges and others relating to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings."²⁷¹ In the *Hastings* matter, this condition was clearly met so as to establish the presumption of privilege as to the testimony sought from the law clerks since the investigating Committee sought to question them about discussions among the judge and his staff members concerning pending cases. Nevertheless, further analysis was required because of the qualified nature of the privilege.²⁷² That the court found the privilege to be qualified is not surprising given its reliance on the analogy to the Executive privilege in *United States v. Nixon*, where the Supreme Court had concluded neither the President's need for confidential advice nor separation of powers would justify an absolute privilege.²⁷³ Determining whether the presumptive privilege applies requires a weighing of the need of the investigating party seeking the information against "the degree of intrusion upon the confidentiality of privileged communications[.]"²⁷⁴ Measuring the need for access requires consideration of "the importance of the inquiry for which the privileged

²⁶⁹ See *id.* at 1518–20; *supra* notes 242–61 and accompanying text.

²⁷⁰ *Hastings II*, 783 F.2d at 1519–20 (citation omitted).

²⁷¹ *Id.* at 1520.

²⁷² *Id.* at 1521.

²⁷³ See *id.*

²⁷⁴ *Id.* at 1522.

information is sought; the relevance of that information to [the] inquiry; and the difficulty of obtaining the desired information through alternative means.”²⁷⁵

Applying this balancing process to the circumstances involving the Judicial Council Committee’s investigation of Judge Hastings, the court determined that the testimony of the law clerks would be allowed. The court found the matter to be of “surpassing importance[]” to society given the potential outcome—either exoneration of the judge or a recommendation for impeachment—and the gravity of the allegations against the judge, particularly bribery, which have implications for “the public confidence in the judiciary, [and] the independence and reputation of the accused judge[.]”²⁷⁶ The court also believed that the information sought from the two law clerks, regarding their role in the case in which the alleged bribery occurred, to be highly relevant despite the fact that the Committee had access to the law clerks’ previous grand jury and criminal trial testimony.²⁷⁷ In assessing the strength of the judge’s interest in confidentiality, the court analogized again to *United States v. Nixon*, where the Supreme Court found the President’s generalized interest in confidentiality was overridden by the needs of the criminal process, and found the judge’s interest only generalized. It also found that any intrusion on confidentiality was mitigated by the fact that the law clerks’ testimony would be to a committee of federal judges, “uniquely cognizant of the need to safeguard” the communications of the judge and his staff, and that the Act required that privileged documents and testimony received by the Committee remain confidential.²⁷⁸ The court specifically left open questions about the

²⁷⁵ *Id.*

²⁷⁶ *Id.* The court noted that bribery and treason were the two constitutionally specified “high Crimes and Misdemeanors” which would justify impeachment. *Id.* at 1522 n.31 (quoting U.S. CONST. art. II, § 4).

²⁷⁷ *Id.* at 1522. The court explained that there may be matters that were not covered previously, that transcripts of testimony were not a substitute for live testimony where the Committee could make its own credibility determinations, and that the strength of the privilege was somewhat weakened by the fact that the law clerks had already testified and therefore breached confidentiality. *Id.* at 1522–23. The court declined to decide whether this prior testimony could be seen as a waiver of the privilege.

²⁷⁸ *Id.* at 1524–25. In support of this point, the court cited the Supreme Court’s order in *United States v. Nixon* that ordered in camera examination by the district judge as a means of protecting confidentiality interests. The court acknowledged in a footnote that information that the Judicial Council deems necessary for purposes of impeachment can be released, *id.* at 1525 n.34, a point that commentators have seized upon in questioning the Eleventh Circuit’s analysis. See Catz & Lange, *supra* note 224, at 142–43. On the other hand, it is clear that the confidentiality protections of either in camera review or review by a committee of judges will protect, to a substantial degree, confidentiality interests for the majority of judges as to whom no finding of wrongdoing will occur.

applicability of the privilege in circumstances other than those in the *Hastings* case, such as where the alleged misconduct involved is less serious than the “impeachable offense of bribery[.]” or the privilege is asserted for a reason other than the “generalized need for confidentiality[.]” or the privilege is asserted in a proceeding other than under the Act.²⁷⁹

The most recent mention of judicial privilege in federal court occurred in another case in which the testimony of law clerks was sought, this time in connection with a civil proceeding challenging the Texas election district plans that had been assigned to a three-judge federal district court.²⁸⁰ The defendants sought to recuse two of the federal court judges who had been assigned to the case on the grounds that there may have been improper ex parte communications with one of the judges or his law clerks, and the district court judge in *Terrazas v. Slagle*²⁸¹ was delegated the task of determining whether depositions of the judges’ law clerks would be allowed to support the defendants’ recusal argument.²⁸² Although the court quashed the subpoenas to the law clerks on the grounds that their testimony could not answer the question of whether the judges were actually influenced by any alleged communications, in dicta it briefly noted that the defendants recognized “the sanctity of communications between the judges and their law clerks” and acknowledged “existence of a ‘limited judicial privilege’ protecting those communications.”²⁸³ Moreover, the court explained: “All counsel admit that public inquiries by the litigants as to the internal operations and communications of the Court will, not may, destroy the integrity of our present legal system. This Court will not be a party to that destruction.”²⁸⁴

²⁷⁹ *Hastings II*, 783 F.2d at 1525. Commentators have generally assumed that the privilege could be asserted in other contexts, such as a civil or criminal trial. See WRIGHT & GRAHAM, *supra* note 224. It should also be noted that *Hastings II* has been cited by the Court of Military Appeals [now Court of Appeals for the Armed Services] in support of its determination that a privilege protecting judicial communications exists. See Nunley, *supra* note 224, at 94–95.

²⁸⁰ See *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1992), *aff’d* by *Richards v. Terrazas*, 505 U.S. 1214 (1992), and by *Slagle v. Terrazas*, 506 U.S. 801 (1992).

²⁸¹ 142 F.R.D. 136 (W.D. Tex. 1992).

²⁸² *Id.* at 137–38.

²⁸³ *Id.* at 138–39 (citing *Hastings II*, 783 F.2d at 1520). The court also stated that it believed that the real aim of the defendants was to disqualify the judges by the mere tactic of having the law clerks testify, as there is legal precedent for a rule that “if a law clerk testifies as a witness in a case before his judge, the judge must disqualify himself.” *Id.* at 139.

²⁸⁴ *Id.* at 139.

2. The Judicial Deliberations Privilege in State Court

A privilege attaching to judicial deliberations and communications has also received some attention and express acceptance in state courts. In fact, a somewhat obscure 1919 case from the New York Surrogate Court, *In re Cohen's Estate*,²⁸⁵ may have been the first case actually to recognize a judicial deliberations privilege. In that case, a challenge was made to the attorney's fees awarded to the attorney who was the proponent of a will in probate. The challenger sought the depositions of the chief clerk and stenographer to the then retired surrogate (judge). The court, analogizing to the common-law attorney-client privilege and citing public policy, found that the relationship between the judge and his assistants was a confidential one and that discussions of matters relating to the court's decisions were privileged.²⁸⁶ Exposing such matters would offend "the dignity of the court" and be inconsistent with "[t]he fair administration of justice[.]"²⁸⁷ While the court did not expressly address whether this was an absolute or qualified privilege, it did suggest that a judge could be questioned "regarding acts which were directed against the proper administration of the law, as, for example, his advice to destroy public records in his office, or direction to commit forgery or perjury."²⁸⁸ Finally, from the court's opinion, it seems clear that the court considered this common law privilege for communications between a judge and those in a confidential relationship with the judge to be a well established corollary of the common-law attorney-client privilege.²⁸⁹

When the question of a judicial communications privilege next arose in the states, sixty years later, it was in the context of a 1979 investigation into alleged judicial wrongdoing by justices of the California Supreme Court. In 1978, the court had allegedly improperly delayed the decision in a controversial case until after judicial elections had taken place in order to avoid the possible negative impact of their positions on the

²⁸⁵ 174 N.Y.S. 427 (N.Y. Sur. Ct. 1919).

²⁸⁶ *Id.* at 428–29.

²⁸⁷ *Id.* at 428.

²⁸⁸ *Id.* at 428–29. This can be seen as somewhat analogous to the crime-fraud exception to the attorney-client privilege, under which the privilege does not attach, where the communication with the attorney is for the purpose of the commission of a crime or a fraud by the client. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000). It also appears to be similar to the exception to the privilege recognized in *Hastings II* for serious judicial misconduct. See *supra* note 274 and accompanying text.

²⁸⁹ See *In re Cohen's Estate*, 174 N.Y.S. at 428. The court also cited as relevant the rules that grand juries and judges cannot be called to testify as to the basis for their decisions. *Id.*

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election of one or more justices, including Chief Justice Rose Bird.²⁹⁰ When the Commission on Judicial Performance subpoenaed law clerks to the justices to testify, two of the seven justices instructed their clerks not to testify; staff members of other justices testified as to conversations that had presumably been confidential.²⁹¹ Also, one of the justices, Justice Newman, specifically citing judicial privilege for confidential information, declined to answer most of the substantive questions asked by the Commission. Although the Commission, relying on *United States v. Nixon*, rejected the privilege, it apparently did not compel the judge to answer the questions as to which privilege had been claimed.²⁹² The Commission ultimately failed to bring charges against any of the justices.²⁹³

A recent Minnesota case in which the affidavits of two former law clerks were offered by a criminal defendant in support of his motion for a new trial and post-conviction relief has drawn attention because the Minnesota courts did not apply, or even raise, the issue of a judicial communications privilege.²⁹⁴ In *Greer v. State*,²⁹⁵ the defendant in a murder case repeatedly unsuccessfully sought the removal of the trial judge on the grounds of bias and improper ex parte contacts with the

²⁹⁰ See Abrahamson, *supra* note 119, at 361; Comment, *supra* note 101, at 1230-31 & n.7; Frank Greenberg, *Judicial Misadventures in California: A Response to Professor Tribe*, 65 A.B.A. J. 1493, 1493 (1979); Nunley, *supra* note 224, at 82; Harry N. Scheiber, *Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960-1990*, 66 S. CAL. L. REV. 2049, 2075 n.88 (1993). The story of the alleged delay was leaked to the press on the morning of election day in 1978 causing a major controversy that resulted in Chief Justice Bird calling for an investigation of the allegations and leaks by the California Commission on Judicial Performance. Greenberg, *supra*, at 1494; Irene A. Tesitor, *Calif. Commission Won't File Charges in Probe of Supreme Court*, 63 JUDICATURE 296, 296 (1980). The Judicial Council of the state altered the strict rule of confidentiality applicable to investigations by the Commission on Judicial Performance to require that the hearings of the Commission in this case only be held in public. See *Mosk v. Superior Court*, 25 Cal. 3d 474, 489 n.11 (1979); Abrahamson, *supra* note 119, at 363, 402; Greenberg, *supra*, at 1494; Laurence H. Tribe, *Trying California's Judges on Television: Open Government or Judicial Intimidation*, 65 A.B.A. J. 1175, 1177 (1979). The modification requiring public hearings was declared unconstitutional in *Mosk v. Superior Court*, 25 Cal. 3d at 499. Subsequently, the *Mosk* decision was abrogated by an amendment to the California Constitution requiring public judicial performance hearings. *Adams v. Comm'n on Judicial Performance*, 8 Cal. 4th 630, 638 (1994).

²⁹¹ Abrahamson, *supra* note 119, at 361.

²⁹² See Nunley, *supra* note 224, at 82. Thus, absent an intractable situation requiring court-ordered enforcement or quashing of the subpoenas, no court actually addressed the deliberations privilege in the California matter.

²⁹³ Tesitor, *supra* note 290, at 296.

²⁹⁴ See Thompson, *supra* note 178, at 15-16.

²⁹⁵ 673 N.W.2d 151 (Minn. 2004).

prosecutor and jury.²⁹⁶ Sometime after the trial, the defendant's lawyer obtained the affidavits of two former law clerks to the trial judge. The affidavits, which included statements by the former law clerks that the judge had told them that he had denied the defendant's challenges for cause "'because he was angry with [defense counsel,]" were offered in support of post conviction relief on the basis of actual bias.²⁹⁷ The defendant did not explain how or when the affidavits had been obtained, no objection to their entry in the record was made, and the briefs in the case did not raise issues regarding the production of the affidavits.²⁹⁸ Without commenting on the evidentiary propriety of the law clerks' affidavits, the Supreme Court of Minnesota affirmed the lower court's denial of post conviction relief, noting that "[e]ven if presented during appellant's numerous recusal motions, it is unlikely that the law clerks' affidavits would have formed a basis in themselves for removal of [the] judge"²⁹⁹

At least one commentator, Professor Peter Thompson, found the case troubling in the court's failure to address the propriety of "the use of affidavits from the judge's law clerks disclosing private aspects of the trial judge's decision-making process[.]"³⁰⁰ Noting that the affidavits in the *Greer* case contained the former law clerks' "subjective opinions about the judge's thought processes[]" and disclosed the "judge's statements, presumably made in the privacy of the judge's chambers[]" in the course of the decision-making process, Professor Thompson warned that the court's failure to address this invasion of the judicial decision-making process is a dangerous precedent that would encourage other litigants in the future to attempt to get information from court personnel in order to overturn court decisions.³⁰¹ Because of the strong policy arguments supporting the protection of confidential communications between judges and their law clerks relating to judicial integrity and efficiency, and because of the lack of clarity as to the legal sources for the protection of that confidentiality, Professor Thompson urged the state to take affirmative steps to assure confidentiality of in-

²⁹⁶ See *id.* at 152-54. Given that confidential law clerk information was sought to be used to obtain removal of a judge for bias, the *Greer* case appears quite similar to the *Curry* case in Massachusetts.

²⁹⁷ *Id.* at 154. The affidavit of one of the former law clerks also contained the law clerk's assessment of the judge's anger based on the judge's "'tone of voice, . . . agitated manner and . . . low frustration level[]" and the clerk's impression that the judge's reason for not sending a post trial juror questionnaire was that two juror notations that they believed the judge favored the prosecution would be evidence of bias. *Id.* at 154.

²⁹⁸ *Id.*; Thompson, *supra* note 178, at 16.

²⁹⁹ *Greer*, 673 N.W.2d at 157.

³⁰⁰ Thompson, *supra* note 178, at 14.

³⁰¹ See *id.*

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chamber discussions.³⁰² Among the suggested solutions were adopting a mandatory law clerk code similar to that adopted by the federal courts, enacting a statutory judicial communications privilege, developing the common-law privilege in the next case in which the issue was presented, and requiring contractual confidentiality agreements for judicial employees.³⁰³

A recent, and probably the most broad, application of a judicial deliberations privilege occurred in a somewhat unusual 2005 Illinois case. In *Thomas v. Page*,³⁰⁴ an Illinois Supreme Court justice brought a defamation case against a newspaper, reporter, and editor based on articles that the paper had published asserting that the justice was improperly influencing the court's decision in an attorney discipline case for political reasons.³⁰⁵ The defendants sought documents and testimony from the other justices of the court and their law clerks that related to the attorney discipline case. The justices filed a motion to quash, asserting the "'Doctrine of Judicial Privilege.'"³⁰⁶ The trial court found that Illinois recognized a judicial deliberations privilege as to communications between a judge and the judge's own law clerks, but not as to the communications between a judge and another judge's law clerks or between law clerks. Furthermore, the trial court held that the plaintiff justice, by filing the defamation case, had waived the privilege as to his communications with other judges, his law clerks, and other judge's law clerks. Nevertheless, the trial court certified for interlocutory appeal the issues surrounding the recognition and application of a judicial deliberations privilege to the Illinois Supreme Court Justices and law clerks in this case.³⁰⁷

The appellate court began its analysis by noting that "[i]t is well-settled that a judge may not be asked to testify as to his or her mental

³⁰² See *id.* at 16–18.

³⁰³ *Id.* at 17–18. Professor Thompson asserted that while law clerks should be able to provide information regarding judicial misconduct through appropriate channels such as judicial conduct boards, direct communications with the litigants by law clerks should be prohibited. *Id.* at 18.

³⁰⁴ 837 N.E.2d 483 (Ill. App. Ct. 2005).

³⁰⁵ John Flynn Rooney, *Court to Decide If Deliberation Privilege Exists*, CHI. DAILY L. BULL., May 13, 2005, at 1. The case involved a lawyer running for county prosecutor who apparently, during her election campaign, had offered county jobs in exchange for campaign contributions. *Id.* One article in the paper accused Justice Thomas of the Illinois Supreme Court of engaging in "'a little political shimmy-shammy[]'" in connection with the discipline case. *Id.* at 24; see also Brian Mackey, *Give Up the Privilege Shield, Justices Asked in Libel Case*, CHI. DAILY L. BULL., Dec. 5, 2005, at 1.

³⁰⁶ *Thomas*, 837 N.E.2d at 487.

³⁰⁷ *Id.* at 488. The issues relating to the judicial deliberations privilege were found to be "questions of law as to which there are substantial grounds for differences of opinion[,] the resolution of which may advance the ultimate conclusion of the litigation. *Id.*

impressions or processes in reaching a judicial decision[.]”³⁰⁸ apparently because the issue of whether Illinois recognizes the judicial deliberations privilege was seen as directly related to this basic proposition. The court cited the dicta from the previously discussed federal cases recognizing such a privilege and expressed its agreement with the rationale of the Eleventh Circuit Court of Appeals for recognizing a confidential communications privilege in *Hastings II*—that the effective discharge of judicial duties requires the ability to have candid conversations with other judges and judicial staff and that “[c]onfidentiality helps protect judges’ independent reasoning from improper outside influences . . . [and] safeguards legitimate privacy interests of both judges and litigants.”³⁰⁹

Furthermore, the court applied Dean Wigmore’s four-part test for determining whether particular communications should be privileged generally and concluded that a judicial deliberations privilege clearly satisfied the test.³¹⁰ The communications between judges and court staff obviously occur with the expectation that they are confidential. Moreover, this confidentiality is essential to the relationship between judges and their staff, which requires that in deciding cases, judges be able to receive “open and honest” advice and exchange views with other judges and staffs “freely and frankly[.]”³¹¹ For effective judicial decision-making, judges must be assured that these communications may be completely candid and will not later be made public.³¹² The court also found “a strong public policy favoring the protection of the

³⁰⁸ *Id.* (citing *Fayerweather v. Ritch*, 195 U.S. 276, 307, (1904)); *Washington v. Strickland*, 693 F.2d 1243, 1263 (5th Cir.1982), *rev’d on other grounds*, 466 U.S. 668 (1984)); *see also* *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Goetz v. Crosson*, 41 F.3d 800, 805 (2d Cir. 1994); *State ex rel. Kaufman v. Zakaib*, 535 S.E.2d 727, 735 (W. Va. 2000).

³⁰⁹ *Thomas*, 837 N.E.2d at 489 (quoting *Hastings II*, 783 F.2d at 1520); *see id.* at 489–94 (explaining the rationale, extent, and limits of the judicial deliberations privilege).

³¹⁰ *Id.* at 489–90. As discussed previously, *see supra* text accompanying note 227, the Wigmore test is as follows:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

Id. at 489 (quoting 8 JOHN HENRY. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (John T. McNaughton rev. ed.1961)) (emphasis omitted) (quotation marks omitted).

³¹¹ *Id.*

³¹² *Id.* at 489–90.

confidentiality of intra-court communications made in the course of the judicial decision-making process[]” in that it is the public that is the intended beneficiary of the confidentiality protection.³¹³ This is because the “very integrity of the process often rests on judges’ candid communications with their colleagues and staffs” that contribute to “the impartial and independent resolution of matters” in the public interest that could be undermined by the “pressures of public opinion” were intra-court communications disclosed.³¹⁴ For these reasons, the court also believed that the damage that could occur to the decision-making process from “disclosure of such communications would, in almost every instance, be far greater than the benefit which might be gained by those seeking disclosure.”³¹⁵ Accordingly, the court held that a judicial deliberation privilege exists for the confidential communications between judges and between judges and their staff members in the course of official court business.³¹⁶

Having recognized a judicial deliberations privilege, it remained for the court to determine its scope, including whose communications were covered and whether the privilege was absolute or qualified. The court had little difficulty concluding that the privilege should extend beyond communications between judges and between judges and their own law clerks. Noting that law clerks are staff to the court as well as the judge for whom they immediately work and that law clerks occasionally confer confidentially with other judges to the benefit of the decision-making process, the court concluded that the privilege should extend to communications between “a judge and another judge’s law clerk[.]”³¹⁷ Furthermore, the court held that the privilege should extend to communications among law clerks that are part of the deliberative process because the “clerks frequently discuss cases among themselves in order to clarify and distill the issues” before discussing the case with the judge.³¹⁸ This “test[ing of] their analysis of a case before conferring

³¹³ *Id.* at 490.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* at 491-92. In so holding, the court firmly rejected the defendants’ arguments that, consistent with Illinois case law rejecting the creation of a deliberative process privilege for municipal workers, the creation of new privileges by the judiciary is “strongly disfavored[.]” and that the creation of a judicial privilege for judges themselves would raise the “appearance of impropriety[.]” *Id.* at 490. The court stated as follows: “the judiciary, as a co-equal branch of government, supreme within its own assigned area of constitutional duties, is being asked to exercise its inherent authority to protect the integrity of its own decision-making process.” *Id.*

³¹⁷ *Id.* at 491-92.

³¹⁸ *Id.* at 491.

with their judges . . . strengthen[s] the integrity of the judicial decision-making process.”³¹⁹

The court next briefly addressed the defendant’s argument that any deliberations privilege should be a qualified one, as the Eleventh Circuit Court of Appeals held in *Hastings II*.³²⁰ The court first indicated that it believed the privilege that precludes judges from being required to testify about their mental processes and motivations in deciding cases has been treated as absolute.³²¹ In concluding that the judicial deliberations privilege it was recognizing was also absolute, the court relied on its view that the privilege was already “narrowly tailored, applying only to intra-court communications made in the course of the judicial decision-making process and concerning the court’s official business[,]” and that “[a]nything less than the protection afforded by an absolute privilege would dampen the free exchange of ideas and adversely affect the [judicial] decision-making process.”³²² After answering the certified questions, the appellate court remanded the case to the trial court.³²³

The issue of the existence of a deliberative privilege most recently arose in Michigan. Apparently fearing that one of the justices of the Michigan Supreme Court intended to publicize information about the court’s internal deliberations on cases, a majority of the court enacted an emergency administrative order expressly addressing the “Deliberative Privilege and Case Discussions in the Supreme Court,” and providing as follows:

³¹⁹ *Id.*

³²⁰ *Id.* at 492.

³²¹ *Id.* at 492–93 (citing of *State ex rel. Kaufman v. Zakaib*, 535 S.E.2d 727, 735 (2000)).

³²² *Id.* at 493. The Appellate Court declined to address the issue of whether the filing the defamation claim by one of the justices constituted a waiver of the privilege as to that justice’s communications or as to the privilege claims of the other justices. *Id.* at 494.

³²³ *Id.* at 496. The case has continued to be quite active and controversial. After the Appellate Court’s decision finding a deliberations privilege, the defendants sought an immediate appeal to the Supreme Court of Illinois. Mackey, *supra* note 305. The majority of Supreme Court Justices, upon defendant’s motion, recused themselves from hearing the petition; and, therefore, the Appellate Court’s decision stood. Brian Mackey, *Newspaper Wins Pyrrhic Victory With Recusal Motion*, CHI. DAILY L. BULL., Feb. 9, 2006, at 1. Justice Thomas prevailed in a jury trial for a \$7 million verdict, which was reduced by remittitur to \$ 4 million. Because of the involvement of the Supreme Court Justices in the trial, defendants’ appeal to the Illinois Supreme Court was assigned to the same Appellate Court panel that decided the privilege issue. See Brian Mackey, *Judge Nearly Halves Libel Award to State’s Chief Justice*, CHI. DAILY L. BULL., Apr. 2, 2007, at 1; Tony Mauro, *Newspaper Smacked With Damage Award Fights Back, Claims Trial of Illinois Justice’s Lawsuit Was Unfair*, LEGAL TIMES, June 18, 2007, at 8. Defendants filed a federal court civil rights suit under 42 U.S.C. § 1983 against the state claiming that they have not received a fair hearing because of the application of the privilege and the justices’ involvement in the case. See *id.*

All correspondence, memoranda and discussion regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a justice may disclose any unethical, improper or criminal conduct to the JTC [(Judicial Tenure Commission)] or proper authority.³²⁴

The four-justice majority stated that the purpose of the order

was to preserve “the integrity and confidentiality of the court’s deliberative process and to reflect practices that have characterized [the deliberations of] the Michigan Supreme Court, and to the best of our knowledge every other appellate court within the United States, including the United States Supreme Court, since their inception”³²⁵

The rule has been viewed as formalizing a deliberative privilege traditionally applicable to “the internal case deliberations of the court and its staff[.]”³²⁶

The foregoing shows that a judicial deliberations privilege, with roots in the common law as well as constitutional, functional, and separation of powers principles, is well-entrenched in both state and federal courts. In fact, not a single court opinion that has actually addressed the question of the existence of the privilege has rejected it.³²⁷ The relatively small amount of attention to the privilege in case law and

³²⁴ Richard D. McLellan, *supra* note 177 (quoting Admin. Order-2006-8); see Todd C. Berg, *Supreme Court Confidential*, MICH. LAW. WKLY., Feb. 5, 2007, available at 2007 WLNR 2278937; Allan Falk, *Commentary: Admin Order 2006-8 Should be Supported*, MICH. LAW. WKLY., Feb. 5, 2007, available at 2007 WLNR 2278967.

³²⁵ Berg, *supra* note 324. Michigan Lawyer’s Weekly emailed 40 states about their confidentiality practices or rules. Six of eight state Supreme Courts who responded (Florida, Georgia, Maryland, Minnesota, and Tennessee, and West Virginia) indicated that they had “long-standing” rules, practices, or policies on confidentiality of court deliberations. *Id.*

³²⁶ *Id.*; see Falk, *supra* note 324; McLellan, *supra* note 177. The Michigan Supreme Court held a public administrative hearing on the order on January 17, 2007. *Id.*

³²⁷ The Massachusetts Supreme Judicial Court in the *Crossen* and *Curry* appeals avoided addressing the existence of a judicial deliberations privilege, indicating that it need not address the issue given the fact that a lawyer’s efforts to obtain judicial deliberative communications with a law clerk would, in any event, be impermissible because “[t]he administration of justice requires respect for the internal deliberations and processes that form the basis of judicial decisions, at very least while the matter is still pending.” *In re Curry*, 880 N.E.2d at 406. See text *infra* section IV.F.

secondary sources should not be attributed to the novelty or tenuousness of the privilege. Instead, it probably stems from a number of factors, including the relative infrequency with which the issue of a judicial deliberations privilege has arisen or is likely to arise. Related to and contributing to the infrequency is the obvious need for confidentiality of judicial deliberative communications and an attendant privilege for those communications.³²⁸ In this regard, it should be remembered that the launching point for much of the analysis that led federal courts to conclude that deliberative process and Executive privileges existed for the Executive Branch of the government was the assumed existence of such an inherent privilege for the judiciary.³²⁹ Where challenges to the assumed privilege of confidentiality of judicial deliberations have arisen, courts have formally acknowledged the privilege through judicial common law-making as in *In re Cohen's Estate*,³³⁰ *Hastings II*,³³¹ and *Thomas v. Page*,³³² or by judicial rule as in Michigan.

Moreover, as the case law has recognized, including the Eleventh Circuit's *Hastings II* and the Illinois Appellate Court *Thomas v. Page*, acceptance of at least a qualified privilege³³³ that applies to communications among judges and their staff members relating to judicial deliberations is clearly supported by the policies applicable to communications privileges generally. Indeed, the case for a judicial deliberative communications privilege is arguably more compelling than most, given the impact on the quality of justice that the absence of the privilege is likely to have and the constitutional values protected by the privilege.³³⁴ Unquestionably, the relationship among judges and between judges and their law clerks is premised upon the confidentiality of communications, especially concerning the judges' deliberations.³³⁵

³²⁸ See Catz & Lange, *supra* note 224, at 89-90, 114-15.

³²⁹ See *supra* text accompanying notes 242-61.

³³⁰ See *supra* text accompanying notes 285-89.

³³¹ See *supra* text accompanying notes 268-70.

³³² See *supra* text accompanying notes 308-22.

³³³ The Illinois Appellate Court's conclusion that the privilege is absolute is not well-supported by the court's own analysis and is inconsistent with the rationale underlying deliberative privileges generally—that at some point the values being served by the privilege are less important than the values served by access to information, at least in official investigations of serious criminal wrongdoing and judicial misconduct. See, e.g., *supra* text accompanying notes 274-76 (explaining that the judicial privilege was not applicable under the facts of *Hastings II* because the need for the privilege was overridden by the needs of the criminal process); *supra* text accompanying note 260 (explaining that the privilege in *United States v. Nixon* was outweighed by the needs of the criminal judicial process).

³³⁴ See *supra* text accompanying notes 269-70, 284, 287, 311-15; Catz & Lange, *supra* note 224, at 115-19, 144-45.

³³⁵ See *supra* text accompanying notes 116-20.

Courts and judges have been emphatic that the confidentiality of communications is essential for effective decision-making in the public interest. It not only allows for the uninhibited exploration, debate, and testing of ideas in the formulation of decisions, but it insulates judges from intrusion by other branches of government, public pressures, and popular opinion that can be inconsistent with justice, and other interference with judicial impartiality, independence, and efficiency.³³⁶ Indeed, judicial efficiency and finality in the administration of justice could be seriously undermined in the absence of a judicial deliberations privilege, given the incentive that litigants—such as those in the present *Curry* matter and the Minnesota *Greer* case—³³⁷often have to leave virtually no stone unturned in order to get the result in their case overturned.

Presumably, critics of the privilege, as critics of the confidentiality surrounding chambers generally, focusing largely on the United States Supreme Court, would essentially rest their opposition on the historical distortion or inaccuracy concerning, and the public's general loss of information about, the courts' operations and procedures that are engendered by confidentiality.³³⁸ As noted previously, however, there is always a loss of truth, accuracy, and information attendant to the application of a confidential communications privilege, but the value of confidentiality and privacy is considered to serve greater public interests.³³⁹ Thus, in this regard it has been noted:

Equally strong but opposing values of truth and individual privacy have come to a balance [in other privileges], allowing some claims of privacy to transcend the goal of producing “every man's evidence” in court. Public policy dictates that we maintain a judiciary free of interference from other branches of government and from the population at large and the judicial privilege is an example of a privilege that easily passes the truth/privacy balancing test.³⁴⁰

³³⁶ See *supra* text accompanying notes 114–21, 128, 270, 302, 307; Milne, *supra* note 224, at 231–34.

³³⁷ See Thompson, *supra* note 178, at 14, 16; *supra* text accompanying note 301.

³³⁸ See Abrahamson, *supra* note 119, at 363, 403–04; Arthur Selwyn Miller & D.S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFF. L. REV. 799, 802–06, 822–23 (1973); Milne, *supra* note 224, at 230–31.

³³⁹ See *supra* text accompanying notes 226–27.

³⁴⁰ Catz & Lange, *supra* note 224, at 144; see also Milne, *supra* note 224, at 231–34.

Some commentators have asserted that given the infrequency of its use outside the context of judicial corruption, a judicial deliberations privilege is really not needed.³⁴¹ This ignores that the existence of the privilege itself provides protection for judicial deliberative confidentiality and the values it serves in several ways. First, a process exists that governs the access to, and use of, deliberative communications. Assuming that the communications between a judge and law clerk are shown to meet the threshold requirement of being made in connection with judicial function, such as the court's deliberations on a case, the information is presumptively privileged and the party seeking the information bears the burden of establishing that their need for the information outweighs the values served by the assertion of the privilege in the particular instance. The determination of these issues most likely will occur in the context of an *in camera* review in connection with a case or a confidential judicial conduct proceeding by a judicial body³⁴²—circumstances that will protect confidentiality until a determination is made that disclosure is required.

Furthermore, while the exact showing of need required in order to overcome the assertion of the privilege has not been clearly delineated, based on the cases decided to date in the area of the executive and the judicial deliberative privilege, it is probably wrong to assume that mere allegations of some form of judicial misconduct or mistake are sufficient. Thus, in *United States v. Nixon*, the Court's conclusion that the President's generalized interest in confidentiality did not outweigh the "demonstrated, specific need for evidence in a pending criminal trial[.]" emphasized the negative impact that application of the privilege would have on the "fundamental demands of due process of law in the fair administration of criminal justice[]" protected by the Confrontation and Compulsory Process Clauses of the Sixth Amendment to the Constitution and the Fifth Amendment Due Process Clause.³⁴³ The Court's opinion appears to indicate that the result might not be the same if what was involved was "the need for relevant evidence in civil litigation[.]"³⁴⁴ Similarly, in *Hastings II*, the Eleventh Circuit Court of Appeals referred to the Judicial Council Committee's investigation of Judge Hastings as being of "surpassing importance[]" particularly in light of the gravity of the allegations of bribery—one of the two expressly

³⁴¹ See WRIGHT & GRAHAM, *supra* note 224, at § 5674 (noting "the rarity in which such communications would be relevant to a proceeding that did not involve judicial corruption[]").

³⁴² See *id.*; *Hastings II*, 783 F.2d at 1524. This is, of course, assuming that the privilege is in fact qualified as opposed to an absolute privilege.

³⁴³ 418 U.S. 683, 711–13 (1974).

³⁴⁴ See *id.* at 712 n.19.

mentioned impeachable offenses in the Constitution—and the context of the Committee’s investigation for purposes of making a recommendation as to impeachment of a federal judge.³⁴⁵ The court left open the possibility that judicial privilege might prevail “in other contexts, such as where the investigation is aimed at conduct less serious than the potentially impeachable offense of bribery[] . . . or where a privilege is invoked in a proceeding other than an investigation under the Act.”³⁴⁶

Certainly, mere allegations of more general improper judicial conduct, such as bias and ex parte contacts, should not be sufficient to even trigger the balancing process under the qualified privilege, much less provide sufficient grounds for overcoming the privilege.³⁴⁷ To conclude otherwise would virtually vitiate the value of the privilege, invite frequent intrusions into the judicial deliberations process by disappointed litigants grasping for any grounds upon which to obtain a different result outside the normal appeal process, and increase litigation costs.

Recognition of a narrowly prescribed privilege, which can only be overcome upon a party’s production of evidence of a substantially important need related to criminal wrongdoing or serious judicial misconduct, will serve as a disincentive to the time-wasting, cost-imposing, and potentially harassing behavior reflected in cases like *In re Cohen*, *Greer v. State*, and, particularly, the *Curry* case, where litigants have demonstrated that they apparently are willing to go to substantial lengths to obtain a different result in their cases by intruding into the confidential relationship between judges and their law clerks. Parties would unlikely pursue obtaining information from law clerks and other court staff if they knew it is unlikely that the information will be legally admissible because of the privilege. Also, as discussed in sections IV.D, IV.E, and IV.F below, not only does the likelihood of not being able to use the information serve as a disincentive, but the existence of the privilege triggers other doctrines under tort and lawyer professional

³⁴⁵ *Hastings II*, 783 F.2d at 1522 & n.31.

³⁴⁶ *Id.* at 1525. Obviously, if the privilege is absolute as in the Illinois *Thomas v. Page* case, no showing of need can overcome the privilege.

³⁴⁷ Cf. *Liteky v. United States*, 510 U.S. 540, 555 (1994) (stating that judicial opinions based on evidence or events occurring during prior proceedings generally do not constitute disqualifying bias); *Greer v. State*, 673 N.W. 2d 151, 157 (Minn. 2004) (holding law clerk affidavits are legally insufficient to establish bias and improper ex parte contacts); *Terrazas v. Slade*, 142 F.R.D. 136, 138–39 (W.D. Tex. 1992) (holding law clerk affidavits on ex parte contacts are not a legally sufficient basis for recusal). Indeed, in *In re Crossen*, the Massachusetts Supreme Judicial Court indicated that the statements by the law clerk regarding possible judicial bias would not constitute “cognizable evidence of judicial misconduct or a disqualifying bias.” 880 N.E.2d 352, 373 (Mass. 2008).

responsibility law that allow penalties to be imposed upon lawyers who interfere with a privilege or induce another to breach a privilege.³⁴⁸

The proper application of the judicial deliberative privilege should be analogous to, and is supported by the rationale of, the rules prohibiting the admission of testimony by jurors regarding their deliberations³⁴⁹ and prohibiting unsupervised post-verdict contact by lawyers.³⁵⁰ For example, in the leading Massachusetts case of *Commonwealth v. Fidler*,³⁵¹ a criminal defendant sought a new trial based, in part, on an affidavit that his lawyer had obtained after the trial from one of the jurors that discussed alleged misconduct that had occurred during the jury's deliberations.³⁵² The Supreme Judicial Court first reiterated the well-established rule barring impeachment of verdicts through juror testimony, except where that testimony shows improper extraneous influence.³⁵³ This rule is designed to protect jurors from harassment (by losing parties who try to come up with evidence of misconduct) and to preserve the quality of the deliberations process

³⁴⁸ See text *infra* text accompanying notes 358–94.

³⁴⁹ See WRIGHT & GRAHAM, *supra* note 224, § 5674; FED. R. EVID. 606(b) (juror testimony only allowed as to “(1) whether extraneous prejudicial information was improperly brought to the jury’s attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form[]”).

³⁵⁰ See, e.g., *Commonwealth v. Fidler*, 385 N.E.2d 513, 519 (Mass. 1979); *Florida Bar v. Newhouse*, 498 So. 2d 935, 936–37 (Fla. 1986); *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985), *cert. denied*, 474 U.S. 9101 (1985); MASS. RULES OF PROF’L CONDUCT R. 3.5(d) (no lawyer initiated post verdict communications with the jury without leave of court for good cause shown, and “[i]n no circumstances shall such a lawyer inquire of a juror concerning the jury’s deliberation processes.”), available at <http://www.mass.gov/obcbbbo/rpc3.htm#Rule%203.5>. At the time of *Fidler*, the Massachusetts Disciplinary Rule 7-108(D) prohibited only contacts with a juror “‘calculated merely to harass or embarrass the juror or to influence his actions in future jury service.’” *Commonwealth v. Solis*, 553 N.E.2d 938, 941 (Mass. 1990) (quoting then extent DR-7-108(D)). The rule was amended to formally implement the *Fidler* decision. See Alice Saker, Note, *Massachusetts’ Revision of DR 7-108(D): Attorney Postverdict Communication With Jurors*, 5 GEO. J. LEGAL ETHICS 719, 719–20 (1992). Interestingly, the relevance of these principles to the lawyer communications with law clerks was apparently recognized by lawyer Crossen in the *Curry* case. Crossen specifically asked that another attorney in his firm look at these cases in researching the propriety of the sham job interviews with the law clerk. See *Bar Counsel v. Curry II*, *supra* note 1, at 15.

³⁵¹ 385 N.E.2d 513 (1979).

³⁵² The purported misconduct included allegations that the jury considered evidence and comments that it had been instructed to disregard, and that the jury was exposed to information not admitted at trial. *Id.* at 515. The affidavit apparently had been obtained as a result of a communication initiated by a juror. *Id.*

³⁵³ *Id.* at 516–17. Examples of extraneous influence include an unauthorized jury view, outside communications, and consideration of documents not in evidence. *Id.* at 517. While juror testimony is allowed as to the existence of such influence, it is not allowed as to the impact that the extraneous matter had on the jury’s actual deliberations. See *id.* at 516, 519.

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because allowing admission of such evidence would “make what was intended to be a private deliberation, the constant subject of public investigation[—]to the destruction of all frankness and freedom of discussion and conference.”³⁵⁴ The rule is also intended to diminish the incentives for jury tampering, promote finality of decisions, and maintain confidence in the jury’s decision.³⁵⁵

Because the Court in *Fidler* was concerned, however, that the mere inadmissibility of most juror testimony was not sufficiently protective of the jury system, it addressed methods that would be allowed for gathering admissible evidence. It established a rule requiring that “any post-verdict interviews of jurors by counsel, litigants, or their agents” must be conducted under court direction and supervision.³⁵⁶ This rule was found to be necessary for the following reasons: “unrestricted post-trial interviews . . . [(1)] would defeat the important interests protected by restrictions on the use of juror testimony to impeach verdicts[;]” (2) “could lead to harassment of jurors, exploitation of jurors’ thought processes, and diminished confidence in jury verdicts[;]” and (3) could result in interrogation that exceeds the proper scope.³⁵⁷ Finally, in “emphatically” condemning post-verdict contacts by lawyers and litigants with jurors, the court stated that any lawyer or litigant who does so “acts at his peril, lest he be held as acting in obstruction of the administration of justice.”³⁵⁸

Like the restrictions on litigant and lawyer post-verdict contacts with jurors and the use of juror evidence, a judicial deliberations privilege applicable to communications with law clerks and judicial control of the method by which a determination is made as to whether the privilege applies will serve virtually identical important policy interests, inhibit lawyer harassment of participants in the judicial process, protect the

³⁵⁴ *Id.* at 516 (quoting *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915)).

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 519. Thus, to obtain a post-verdict interview with a juror, a lawyer for a party would first have to bring to the court’s attention by motion some evidence that extraneous matters tainted the jury’s deliberations. The court would then decide what, if anything, further is required, including whether post-verdict interrogation under the court’s supervision will be allowed. Where lawyers receive unsolicited information, they may only investigate it as necessary to determine whether it should be brought to the court’s attention. *See id.* at 520 & n.12.

³⁵⁷ *Id.* at 519; *see also* *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985) (“Permitting the unbridled interviewing of jurors could easily lead to their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts, as well as to unbalanced trial results depending unduly on the relative resources of the parties.”).

³⁵⁸ *Fidler*, 385 N.E.2d at 520. Lawyers may investigate unsolicited information only as necessary to determine if it is “worth bringing to the judge’s attention.” *Id.*

frankness and completeness of deliberative discussion, preserve public respect for the deliberative process, and serve the interests of finality. Just as the *Fidler* case presented an opportunity for the state's highest court to adopt what effectively amounts to a privilege protecting jury deliberations, the *Curry* matter presented the court with a rare opportunity to recognize a deliberative privilege.³⁵⁹ Indeed, the *Curry* case clearly demonstrates that both clarity in the law and very strong disincentives are needed to prevent lawyers from attempting to intrude into the communications between judges and their law clerks that are part of the deliberative process. Although adoption and application of the privilege in *Curry* would not have altered the outcome given the numerosity of lawyers' violations of the rules of professional conduct there,³⁶⁰ it would have put all lawyers on notice that, in the future, post-judgment efforts to obtain information about the court's deliberations from law clerks or former law clerks is not only generally impermissible

³⁵⁹ The court unquestionably has the power to recognize the privilege. See *Babets v. Sec'y of the Executive Office of Human Servs.*, 526 N.E.2d 1261, 1264 (Mass. 1988) (acknowledging the court's power to adopt common law privileges such as the deliberative process privilege, but declining to adopt an executive deliberative process privilege for Massachusetts); *Alberts v. Devine*, 479 N.E.2d 113, 120 (Mass. 1985), *cert. denied sub nom. Carroll v. Alberts*, 474 U.S. 1013 (1985) (stating that courts have power to answer novel questions of law and provide relief where no precedent exists). Although the court in *Babets* declined to adopt the deliberative process privilege for Executive Branch agencies, it did so in a context that is arguably distinguishable from that involving a judicial deliberative communications process. The court's decision not to recognize the privilege rested primarily on the following factors (1) the fact that the court's general approach had been to leave the creation of privileges to the legislature's determination because the court believed the legislature is in the best position to balance the competing social values usually involved in creating privileges; (2) the Massachusetts Legislature had created a statutory deliberative process privilege that applies until the final decision has been reached; and (3) the executive agency involved in *Babets* had failed to meet its burden of showing that the privilege was necessary for effective decision-making. *Babets*, 526 N.E.2d at 1264-66 & n.8. In this regard, the court specifically noted that the agency's argument that absence of the privilege would chill intra-agency communications was speculative and conjectural. *Id.* at 1266. The Illinois court in *Thomas v. Page* faced the same issue when it recognized an absolute judicial deliberations privilege because the Illinois Supreme Court had previously declined to adopt the executive deliberative process privilege. See *supra* text accompanying note 314. There, the court noted it was not being asked to create a privilege for another branch of government, but instead "the judiciary, as a co-equal branch of government, supreme within its own assigned area of constitutional duties, is being asked to exercise its inherent authority to protect the integrity of its own decision-making process." *Thomas v. Page*, 837 N.E.2d 483, 490 (Ill. App. Ct. 2005). As the court in *Thomas* recognized, the court has the necessary first-hand information regarding the need for the judicial deliberations privilege and is in the best position to balance the interests involved.

³⁶⁰ See *supra* notes 85-88 and accompanying text (listing all of the lawyers' actions that the BBO found to violate the rules of professional conduct).

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but likely to be a fruitless effort because the information obtained would likely be inadmissible.

D. Breach of Contract, Breach of Fiduciary Duty, and Inducement of Breach

Although recognition of a judicial deliberations privilege applicable to the communications between judges and law clerks would most clearly and directly discourage deleterious intrusions into judicial decision-making, other legal doctrines also may deter such intrusions and provide a basis for sanctions against lawyers who attempt them. Law clerks have a fiduciary duty to maintain the confidentiality of the information they have obtained during the course of their employment that would preclude using or disclosing confidential information during and after their employment.³⁶¹ Moreover, in those jurisdictions that require law clerks to sign a confidentiality agreement or subscribe to a confidentiality oath, a contractual duty of non-disclosure would arise.³⁶² Thus, law clerks who breach their fiduciary or contractual obligations may be subject to liability, although the potential remedies available may not be all that effective in preserving the court's interests in confidentiality. In most cases, damages from the breach would be difficult to measure, injunctive relief could not cure past indiscretions, and a constructive trust remedy would only be relevant where the law clerk had profited from the breach.³⁶³ More importantly, however, it is also possible that the breach of fiduciary or contractual duty of confidentiality could be used as the basis for professional discipline

³⁶¹ See Comment, *supra* note 101, at 1248-50; *supra* note 171 and accompanying text (in *Gregorich*, a former staff attorney law clerk breached a fiduciary duty by using a confidential court memo); see also *Snepp v. United States*, 444 U.S. 507, 515 & n.11 (1980) (holding that CIA employee in position of trust has a fiduciary obligation not to use or reveal confidential information); RESTATEMENT (SECOND) OF AGENCY §§ 395, 396(b) (1958), amended by RESTATEMENT (THIRD) OF AGENCY § 8.05 (2006) (duty of agent not to use or disclose confidential information is acquired during agency, unless authorized by the principal); RESTATEMENT (SECOND) OF TORTS § 874 & Reporter's Note (1979) (imposing tort liability for breach of fiduciary duty: "One breach of fiduciary duty that is more commonly regarded as giving rise to an action in tort is the disclosure of confidential information."); Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1431-32, 1444-48, 1459-60 (1982) (discussing breach of confidentiality actions generally).

³⁶² Comment, *supra* note 101, at 1248; see *supra* note 178 and accompanying text (discussing confidentiality agreements); Vickery, *supra* note 361, at 1444-48 (discussing confidentiality contract actions generally).

³⁶³ Comment, *supra* note 101, at 1250. Perhaps in the situation in which a former law clerk published a book that revealed confidences, the constructive trust remedy could be meaningful. Cf. *Snepp v. United States*, 444 U.S. at 515-16 (the Supreme Court approved the imposition of a constructive trust on the proceeds from a book by a former CIA agent who breached contractual and fiduciary obligations).

against a law clerk or former law clerk who has been admitted to the bar.³⁶⁴

Furthermore, and of particular relevance to circumstances like those in the *Curry* matter, not only may liability for breaches of confidentiality be imposed on law clerks, but under emerging doctrines liability may be imposed on those who induce the law clerks' breaches. Thus, the Restatement of Torts not only recognizes liability for the breach of a fiduciary duty of confidentiality, but also extends liability to one "who knowingly assists a fiduciary in committing a breach of trust[.]"³⁶⁵ In *Alberts v. Devine*,³⁶⁶ the Massachusetts Supreme Judicial Court applied this "general rule that a plaintiff may hold liable one who intentionally induces another to commit any tortious act that results in damage to the plaintiff[]" in a case involving the induced breach of a fiduciary duty of confidentiality.³⁶⁷ In *Devine*, a minister's supervisors obtained confidential information from the minister's psychiatrist that was used to keep the minister from being retained. In recognizing the theory of liability, the court first held that a fiduciary obligation of confidentiality arose as part of the physician-patient relationship and that recovery of damages in tort was available for a physician's violation of that duty.³⁶⁸ To establish liability against the minister's superiors, the plaintiff had to show that they (1) "knew or reasonably should have known of the existence of the physician-patient relationship;" (2) intended to induce or reasonably should have anticipated their actions would induce

³⁶⁴ Thus, in the Illinois case in which a former law clerk had utilized a confidential court memorandum for personal purposes in an election campaign, the disciplinary authority recommended a four-year suspension from practice. *Supra* notes 168-69 and accompanying text. Breaches of confidentiality by law clerks could also be considered to constitute actions that are "prejudicial to the administration of justice[.]" so as to run afoul of provisions like ABA Model Rule of Professional Conduct 8.4(d). See *infra* text accompanying notes 398-412. See also *supra* note 159 and accompanying text, discussing confidentiality under the 1998 Code of Conduct for Supreme Court Law Clerks, including the provision that "[a]ny breach of these provisions is prejudicial to the administration of justice and therefore will be subject the law clerk to appropriate sanctions."

³⁶⁵ RESTATEMENT (SECOND) OF TORTS § 874, cmt. c (1979) (citing § 876). RESTATEMENT (SECOND) OF TORTS § 876(b) provides liability for harm caused by tortious conduct of a third person where one "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself[.] . . ." Actual physical assistance or participation is not required; mere "[a]dvice or encouragement" is sufficient. *Id.* § 876 cmt. on cl. (b).

³⁶⁶ 479 N.E.2d 113 (1985).

³⁶⁷ *Id.* at 121. For similar applications see, e.g., *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 795 (N.D. Ohio 1965) (action against insurance company that induced physician to reveal confidential patient information); *Morris v. Consol. Coal Co.*, 446 S.E.2d 648, 650 (W. Va. 1994) (action against employer that induced physician to reveal confidential information).

³⁶⁸ *Devine*, 479 N.E.2d at 120.

disclosure of patient information; and (3) “did not reasonably believe that the physician could disclose that information . . . without violating the duty of confidentiality[.]”³⁶⁹

While the majority of tort cases involving liability for breaches of the confidentiality duty appear to involve physician-patient or banking relationships, the basic principle and rationale underlying that principle should apply to other confidential relationships such as lawyers and clients, counselors and advisees, and law clerks and judges.³⁷⁰ Thus, in circumstances like those in *Curry*, assuming that the law clerk has a fiduciary duty of confidentiality, there would be no question as to satisfaction of the first two elements of the tort: The lawyers not only knew of the judge-law clerk relationship, but specifically targeted that relationship to induce the law clerk to divulge information about that relationship and the judicial deliberative process in the *Demoulas* case. The only question, then, is whether they would have reasonably believed that the law clerk could divulge the specific information they were seeking without violating his duty of confidentiality. As will be discussed below,³⁷¹ this element should also be met in the factual circumstances of the *Curry* matter.

Where the duty of confidentiality is established by the terms of the employment contract, there is also a similar potential claim for interference with a contract or inducement of a breach of contract.³⁷² The Restatement of Torts recognizes liability for pecuniary loss from the breach of a contract where “[o]ne . . . intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract”³⁷³ To be accountable

³⁶⁹ *Id.* at 121.

³⁷⁰ See Vickery, *supra* note 361, at 1431–32. Perhaps one reason for the absence of cases involving attorney inducement of breaches of confidentiality relates to the fact that such actions are often caught early and serve as the basis for motions to disqualify counsel in litigation. See, e.g., authorities cited *infra* note 386.

³⁷¹ See *infra* text accompanying notes 406–09, 418–19 (discussing lawyers’ reasonable knowledge of the confidentiality of deliberative communications between a law clerk and judge).

³⁷² See Susan J. Becker, *Discovery of Information and Documents from a Litigant’s Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 NEB. L. REV. 868, 979–81 & n.717 (2003); see also *Floor Graphics, Inc. v. News Am. Mktg. In-Store Servs., Inc.*, Civ. No. 04-3500 (AET), 2006 WL 2846268, at *4–5 (D. N.J. Sept. 29, 2006) (recognizing a claim for tortious interference with contract, including a confidentiality provision under New Jersey law); *Givens v. Mullikin*, No. W1999-01783-COA-R9-CV, 2000 WL 1839128, at *9–11 (Tenn. Ct. App. May 7, 2000) (recognizing a cause of action against a law firm for inducing a breach by a physician of a contractual duty of confidentiality).

³⁷³ RESTATEMENT (SECOND) OF TORTS § 766 (1979).

for interference or inducement one must have knowledge of the contract,³⁷⁴ but the types of conduct that are considered inducement “may be any conduct conveying to the third person the actor’s desire to influence” the third person to not perform the contract, including “a simple request or persuasion exerting only moral pressure[,]” “a threat[,]” or “the promise of a benefit[.]”³⁷⁵ That inducement must also be improper, which requires evaluating and balancing a number of factors, most important of which is the “nature of the actor’s conduct[.]”³⁷⁶ Ordinarily, conduct involving fraudulent misrepresentations, threats of illegal conduct, actions contrary to “established public policy[,]” and “[v]iolation[s] of recognized ethical codes . . . or of established customs or practices” relating to certain activities will be seen as improper.³⁷⁷ In a case like the *Curry* matter, it appears that the lawyers’ conduct would be considered improper, particularly in light of the fraudulent misrepresentations made to the law clerk regarding the non-existent job opportunity, the threats of disclosure of the law clerk’s bar application violation, and the lawyers’ violations of the ethical code applicable to their contacts with the law clerk generally.³⁷⁸ Actual knowledge of the express contract between the law clerk and the court, including the confidentiality term, however, may be absent, rendering interference with the contract claim unavailable.

Of course, the availability of a tort remedy for inducement of a breach of a duty of confidentiality, whether as an action based on breach of a fiduciary duty or on express contract, depends on the existence of damages to a particular plaintiff, judge, or the court to whom that duty is owed, and it may be difficult to measure those damages.³⁷⁹ One possible

³⁷⁴ See *id.* § 766 cmt. j.

³⁷⁵ *Id.* § 766 cmt. k.

³⁷⁶ *Id.* § 767. The other factors are:

- (b) the actor’s motive,
- (c) the interests of the other with which the actor’s conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor’s conduct to the interference and
- (g) the relations between the parties.

Id.

³⁷⁷ *Id.* § 767 cmt. on cl. (a).

³⁷⁸ See *supra* notes 8–13, 87–88 and accompanying text; text *infra* Parts IV.E–F (discussing ethical violations).

³⁷⁹ See *supra* text accompanying note 363; Comment, *supra* note 101, at 1250. Under the Restatement, because the actions sound in tort rather than contract, the potential damages available are broader and not constrained by limitations in contract damages such as that

situation in which damages could be shown is where a judge is required to expend resources in replying to the public disclosure of confidential deliberative information. For example, in a system with elected judges, the public disclosure of confidential information obtained from a law clerk might require a judge to expend funds during an election to explain or counter that disclosure.³⁸⁰ Although the absence in most cases of the availability of significant monetary damages may make the use of inducement actions unlikely, and therefore reduce their potential effectiveness as a deterrent to efforts to acquire confidential judicial deliberations information, as discussed below in sections IV.E and IV.F, the conduct giving rise to such actions in the context of inducing breaches of the duty of confidentiality by law clerks may serve as a basis for disciplinary actions against lawyers under state rules governing lawyer conduct.³⁸¹

E. Intrusion upon Third Party Legal Rights

The Rules of Professional Conduct prohibit using “methods of obtaining evidence that violate the legal rights” of others.³⁸² The exact scope of this section and the precise nature of the legal rights encompassed are not entirely clear. In this regard, the comment to Rule 4.4 states: “It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.”³⁸³ Thus, as a general matter this section has

the loss caused by the breach be within the contemplation of the contracting parties. *See* RESTATEMENT (SECOND) OF TORTS § 774A cmt. d (1979). Thus, damages could include “pecuniary loss of the benefits of the contract[,]” consequential damages legally caused by the breach, and damages for any reasonably expected emotional distress or damage to reputation. *Id.* § 774A(1).

³⁸⁰ *Cf. supra* text accompanying notes 169–70 (explaining the Illinois *Gregorich* case, in which a former law clerk used a deliberative memo in a campaign election against a judge).

³⁸¹ *See* MODEL RULES OF PROF’L CONDUCT R. 4.4(a) (2002) (“Respect for Rights of Third Persons”) (emphasis omitted); MODEL RULES OF PROF’L CONDUCT R. 8.4(d) (“conduct that is prejudicial to the administration of justice[.]”); *see also* MASSACHUSETTS CANONS OF ETHICS AND DISCIPLINARY RULES, DR 1-102(A)(5) (1981), available at <http://www.mass.gov/obcbbbo/disciplinaryrules.pdf> (same language).

³⁸² MODEL RULES OF PROF’L CONDUCT R. 4.4(a) (2002).

³⁸³ *Id.* at R. 4.4 cmt. 1. The language specifically identifying “privileged relationships[.]” as being among the rights protected was added to the comment in 2002. CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 418 (6th ed. 2007). One treatise on lawyer professional conduct simply states that under this section “a lawyer who obtains evidence or information for a client may not violate the law.” RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.4-2(a), at 872 (2007–08). The disciplinary rules of the ABA Code of Professional Responsibility did not contain

been applied to lawyer efforts to obtain confidential or privileged information that is protected by law,³⁸⁴ including information protected by rules of civil procedure such as discovery rules protecting work product,³⁸⁵ information that is protected by the attorney-client privilege,³⁸⁶ and other litigation-related confidential information.³⁸⁷ It

an equivalent provision regarding intrusions on the legal rights of another, but improper acquisitions of confidential information may have been addressed under the provision governing conduct considered “prejudicial to the administration of justice.” *See infra* Part IV.F.

³⁸⁴ *See generally* ABA/BNA AMERICAN BAR ASSOCIATION & THE BUREAU OF NATIONAL AFFAIRS, *LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT* § 71:805 (2007); CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, *supra* note 383, at 418; *Clark v. Beverly Health & Rehab. Servs. Inc.*, 797 N.E.2d 905, 911-12 & n.10 (Mass. 2003) (stating that there is an abundance of authority that lawyers gathering information from former employees of opposing party must “strictly . . . avoid matters that are privileged or confidential”); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 102 (2000) (in communicating with non-clients, lawyers are prohibited from trying to obtain “information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law.”). Examples of protected information include information protected under the attorney-client privilege, work-product immunity, or the doctor-patient privilege, but the Restatement also indicates that the confidentiality imposed by law is based on the “law of agency, evidence, and unfair competition and similar bodies of law[.]” and notes the overlap with tort law because one who knowingly obtains from an agent confidential information as to the principle “commits an actionable wrong against the principal.” *Id.* § 102 cmt. b.

³⁸⁵ *See* 2 GEOFFREY. C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 40.4, at 40-12 (3d ed. 2004); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 102 cmt. b (2000).

³⁸⁶ *See* *Arnold v. Cargill, Inc.*, No. 01-2086 (DWF/AJB), 2004 WL 2203410, at *7-8, *14 (D. Minn. Sept. 24, 2004) (disqualifying plaintiffs’ lawyers for violating Minnesota Rule of Professional Conduct 4.4 by acquiring privileged and confidential documents from former management employee of defendant); *Equal Employment Opportunity Comm’n v. Hora, Inc.*, No. Civ.A. 03-CV-1429, 2005 WL 1387982, at *11-13, *18 (E.D. Pa. June 8, 2005) (disqualifying a lawyer who acquired attorney-client information through opponent party’s employee); *Becker, supra* note 372, at 954-57 (acquiring attorney-client privilege information from former employees was the basis for disqualification, sanctions, and discipline under Rule 4.4); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 91-359 (1991) (attempt to acquire privileged information from former employee of opposing corporate party lawyer could violate Rule 4.4); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408, n.14 (1997) (“Gaining from a former government employee information that the lawyer knows is legally protected from disclosure for use in litigation nevertheless may violate Model Rules 4.4, 8.4(c) and 8.4(d) and also may result in court-imposed sanctions.” (citing case where law firm was disqualified when it interviewed former government employee regarding discussions with government counsel about plaintiff’s case)).

³⁸⁷ *See* 2 HAZARD & HODES, *supra* note 385, § 40.4, at 40-10 to -11 (conduct involving infiltrating opponent’s camp to acquire litigation strategy or obtaining evidence by subterfuge violate Model Rule of Professional Conduct 4.4); N.J. Sup. Ct. Adv. Comm. on Prof. Ethics Op. 680 (1995) (surreptitious copying of confidential documents in possession of attorneys for adverse party violates Rule 4.4); *see also* *Patriot Scientific Corp. v. Moore*,

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has also been applied in other contexts, such as attempts to obtain confidential patient-psychiatric information,³⁸⁸ confidential personnel files and information,³⁸⁹ and confidential criminal records information.³⁹⁰ Furthermore, because state rules of professional conduct also establish a general legal right to confidentiality from one's attorney that is broader than the evidentiary attorney-client privilege for confidential communications,³⁹¹ these confidentiality rules would also form the basis for a violation of Rule 4.4 where a lawyer attempts to obtain confidential client information from another lawyer.³⁹² Finally, although no cases on

178 F. App'x. 18, 22-23 (Fed. Cir. 2006) (lawyers' inducement of former attorney for opposing party in patent suit to breach fiduciary duty of client confidentiality violated California Rule of Professional Conduct 1-120 concerning inducement of another to violate rules of conduct and justified disqualification of inducing lawyer); N.Y. State Ethics Op. 749 (2001) (lawyers may not use software that examines and traces modifications to electronic transmissions received from other parties or their counsel; to the extent this gives lawyer access to confidential communications between another lawyer and client, it is an impermissible intrusion into the lawyer-client relationship).

³⁸⁸ See Conn. Bar Ass'n Informal Op. 96-4 (1996) (under Rule 4.4, a lawyer cannot acquire psychiatric records of a client's ex-wife made confidential by statute); Pa. Bar Ass'n Informal Op. 93-135 (1993) (Rule 4.4 prohibits a lawyer from surreptitiously gaining access to opposing party's witness's psychiatric records that are confidential under state case law).

³⁸⁹ See *United States v. Santiago-Lugo*, 904 F. Supp. 43, 47-48 (D. P.R. 1995) (lawyer use of FED. R. CIV. P. 45 civil subpoena ex parte to obtain confidential police personnel records for use in criminal case violated Model Rule of Professional Conduct 4.4); *EEOC v. Hora, Inc.*, 2005 WL 1387982, at *13-14, *18 (lawyer who acquired confidential personnel and other proprietary information through opponent party's employee violated Rule 4.4 and was disqualified); see also, *Spencer v. Steinman*, 179 F.R.D. 484, 486-89 & n.7 (E.D. Pa. 1998) (lawyer use of FED. R. CIV. P. 45 civil subpoena ex parte to obtain telephone records from third parties for use in case violated Pennsylvania Model Rule of Professional Conduct 4.4).

³⁹⁰ See *BBO Public Reprimand No. 2005-21* IN RE: CAROL A. GILBERT, 21 MASS. ATT. DISC. REP. 280, 281 (LEXIS NEXIS 2005) (lawyer's improper acquisition of criminal offender record information ("CORI") for use in a probate and family proceeding violated Massachusetts Rule of Professional Conduct 4.4).

³⁹¹ See, e.g., MODEL RULES PROF'L OF CONDUCT R. 1.6 (2002) (unless client consents or exception applies, information acquired by lawyer that relates to representation must not be disclosed); *id.* at R. 1.6 cmt. 3 (noting that the confidentiality duty under the rules encompasses more than attorney-client communications protected by privilege).

³⁹² Cf. *Patriot Scientific Corp.*, 178 F. App'x at 22-23 (lawyers' inducement of former attorney for opposing party in patent suit to breach fiduciary duty of client confidentiality violated California Rule of Professional Conduct 1-120 concerning inducement of another to violate rules of conduct and justified disqualification of the inducing lawyer); *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651, 654, 658 (M.D. Fla. 1992) (lawyer inducement by payments to former employee to reveal confidential information about opposing party's management practices and other litigation-relevant information violated Florida Rules of Professional Conduct Rule 4-1.6 because the duty of attorney confidentiality "imposes upon attorneys a correlative duty to refrain from inducing others to disclose confidential matters[]" and is conduct prejudicial to the administration of justice under Florida Conduct Rule 4-8.4(d), thereby also resulting in disqualification of lawyer.).

point are available, it would seem that the legal rights embodied by the tort actions for inducement of breach of confidentiality, whether as a matter of contract or fiduciary duty, should independently be protected under Rule 4.4 and serve as the basis for discipline.³⁹³

As discussed previously in Part IV.D above, lawyers' efforts to acquire confidential judge-law clerk information may run afoul of tort doctrines relating to inducement of the breach of duty. Also, as discussed below in Part IV.F, such efforts may violate the rules of professional conduct relating to "conduct that is prejudicial to the administration of justice[.]"³⁹⁴ However, the application of these doctrines and rules can be complicated, uncertain, and require nuanced interpretations, thereby leaving the level or extent of protection for confidential judicial deliberations information in a highly ambiguous state. Rule 4.4, protecting legal rights of third parties generally, presents a more direct analytical path. Where a jurisdiction has enacted formal codes of conduct that include provisions imposing on law clerks and other court personnel a duty of confidentiality as to the court's deliberative process,³⁹⁵ Rule 4.4's proscriptions on violating the legal rights of third parties in attempting to obtain evidence should prohibit efforts by lawyers to induce law clerks and former law clerks to violate those confidentiality codes. Such codes arguably establish legal rights to confidentiality for the benefit of judges and courts that are analogous to the confidentiality protections established by statutes, evidence rules, and case law that have been found to be encompassed by Rule 4.4.³⁹⁶ Moreover, in jurisdictions that formally recognize the existence of at least a qualified judicial deliberations privilege, the application of Rule 4.4 should be even more straight forward given the wide acceptance of the basic proposition that the rule is intended to prohibit intrusion upon such evidentiary privileges. Thus, where there is either a law clerk confidentiality code or a judicial deliberations privilege, the message of

³⁹³ Cf. Becker, *supra* note 372, at 981 (violation of private confidentiality agreements may trigger sanctions under ethics and civil rules). But see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 102 cmt. b (2000) (stating that the section does not apply to "confidentiality duties based only on contract"). The Restatement seems to recognize the overlap between ethical protections for confidential information and tort law because one who knowingly obtains from an agent confidential information as to the principal "commits an actionable wrong against th[at] principal." *Id.* On the other hand, it concludes that because an agent can contract for a degree of confidentiality greater than that ordinarily established by law and the confidentiality rights protected are based on "fundamental and general law such as the attorney-client privilege. . . . [C]onfidentiality duties based only on contract are not within the Section." *Id.*

³⁹⁴ MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2002); see also text *infra* Part IV.F.

³⁹⁵ See *supra* notes 170–80 and accompanying text.

³⁹⁶ See *supra* notes 379–90 and accompanying text.

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what is expected from lawyers should be much clearer; therefore, the expected deterrence should be much greater, than where the application of Rule 4.4 is dependent on a jurisdiction's finding that a law clerk has a fiduciary or contractual duty of confidentiality, the inducement of a breach of which by a lawyer is encompassed by the rule.

F. Conduct Prejudicial to the Administration of Justice

Model Rule of Professional Conduct 8.4(d) and its predecessor Model Code of Professional Responsibility DR1-102(A)(5) contain provisions making it misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice[.]"³⁹⁷ This broad provision is particularly relevant to the *Crossen* and *Curry* cases, the facts of which occurred prior to adoption by Massachusetts of the Rules of Professional Conduct, including the more narrowly-focused Rule 4.4(a), regarding obtaining evidence in violation of third party rights.³⁹⁸ While Rule 8.4(d) has been applied, so as to overlap conduct affecting the administration of justice that is also covered by other rules,³⁹⁹ it has also been applied to other conduct that is considered independently prejudicial to the administration of justice.⁴⁰⁰ For purposes of this Article, the question is whether the "prejudicial to the administration of justice standard," standing alone, should be interpreted to apply to the mere act of attempting to acquire confidential judicial deliberative process information from a former law clerk.

³⁹⁷ MODEL RULES OF PROFESSIONAL CONDUCT R. 8.4(d) (2002); see CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, *supra* note 383, at 575; AMERICAN BAR ASSOCIATION & THE BUREAU OF NATIONAL AFFAIRS, *supra* note 384, § 101:501; 2 HAZARD & HODES, *supra* note 385, § 65.6, at 65-11; see also MASSACHUSETTS CANONS OF ETHICS AND DISCIPLINARY RULES DR 1-102(A)(5), available at <http://www.mass.gov/obcbbbo/disciplinaryrules.pdf> (same language).

³⁹⁸ As discussed *supra* at notes 87-88 and accompanying text, the lawyers in the *Curry* matter were charged with violating several then-applicable Massachusetts disciplinary rules, including DR 1-102(A)(5), for their actions directed at the former law clerk. This provision could also be drawn upon in jurisdictions that have not adopted Rule 4.4's restrictions on acquiring evidence in violation of third party rights. See STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 331 (2007) (explaining that New York has "no direct counterpart to ABA Model Rule 4.4(a) or (b)[. . .]").

³⁹⁹ See AMERICAN BAR ASSOCIATION & THE BUREAU OF NATIONAL AFFAIRS, *supra* note 384, § 101:502 (overlap with rules on competence and diligence); 2 HAZARD & HODES, *supra* note 385, § 65.6, at 65-11 to -12 (noting overlap with rules limiting advocacy in Part 3 of the Rules of Professional Conduct); CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 614 (5th ed. 2003) ("encompasses conduct prohibited by other ethics rules[. . .]").

⁴⁰⁰ AMERICAN BAR ASSOCIATION & THE BUREAU OF NATIONAL AFFAIRS, *supra* note 384, § 101:502; 2 HAZARD & HODES, *supra* note 385, § 65.6, at 65-12; CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, *supra* note 399, at 614.

Given the breadth of the language of the Rule, it is not surprising that it has been challenged as unconstitutionally vague and overbroad. While generally courts have upheld the constitutionality of the provision,⁴⁰¹ in doing so, they have given the Rule a relatively narrow interpretation.⁴⁰² Conduct that “undermine[s] the legitimacy of[,]”⁴⁰³ or interferes with, the judicial process triggers the application of Rule 8.4(d).⁴⁰⁴ Where the conduct does not violate another rule of professional conduct, it must be “egregious” and “flagrantly violative of accepted professional norms.”⁴⁰⁵ The Rule was intended “to address[] violations of well-understood norms and conventions of practice only.”⁴⁰⁶ In applying this standard, the perspective to be applied is that of “lawyers, who are professionals and have the benefit of guidance provided by case law, court rules[,] and the ‘lore of the profession.’”⁴⁰⁷ Accordingly, as a rule “written by and for lawyers . . . [it] need not meet the precise standards of clarity that might be required of rules of conduct for laymen.”⁴⁰⁸ Moreover, for an attorney to be on notice that particular conduct is covered, it is not necessary that a court has previously addressed similar circumstances.⁴⁰⁹

Not unexpectedly, given the unique circumstances in *Curry*, beyond these general principles, little guidance can be gleaned from prior case

⁴⁰¹ AMERICAN BAR ASSOCIATION & THE BUREAU OF NATIONAL AFFAIRS, *supra* note 384, § 101:502; 2 HAZARD & HODES, *supra* note 385, § 665.6, at 65-23; CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, *supra* note 383, at 592.

⁴⁰² See, e.g., *In re Discipline of an Attorney*, 815 N.E.2d 1072, 1078 (Mass. 2004); 2 HAZARD & HODES, *supra* note 385, § 65.6, at 65-12; see also *Grievance Adm’r v. Fried*, 570 N.W.2d 262, 265 (Mich. 1997).

⁴⁰³ *In re Discipline of Two Attorneys*, 660 N.E.2d 1093, 1098 (Mass. 1996) (internal quotation marks omitted).

⁴⁰⁴ AMERICAN BAR ASSOCIATION & THE BUREAU OF NATIONAL AFFAIRS, *supra* note 384, § 101:502; CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, *supra* note 399, at 614. While conduct that occurs during the course of court proceedings is covered, the rule also extends to other conduct unconnected to a particular proceeding that has a negative impact on the administration of justice. *Id.*; GILDA TUONI RUSSELL, MASSACHUSETTS PROFESSIONAL RESPONSIBILITY § 84.01[1], at 84-13 (2d ed. 2003).

⁴⁰⁵ *In re Crossen*, 880 N.E.2d at 379; *In re Discipline of an Attorney*, 815 N.E.2d at 1099. But see *Attorney Grievance Comm’n of Md. v. Ficker*, 572 A.2d 501, 505-06 (Md. 1990) (rejecting flagrant or egregious standard; only requiring lawyer to be reasonably able to determine appropriate conduct).

⁴⁰⁶ 2 HAZARD & HODES, *supra* note 385, § 65.6, at 65-12; see also *Fried*, 570 N.W.2d at 265; cf. *In re Ruffalo*, 390 U.S. 544, 556 (1968) (White, J., concurring) (stating that discipline should not rest upon a “determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct.”).

⁴⁰⁷ *Howell v. State Bar of Tex.*, 843 F.2d 205, 208 (5th Cir.1988) (citing *In re Snyder*, 472 U.S. 634, 645 (1985)); see also *Ex rel. Okla. Bar Ass’n. v. Bourne*, 880 P.2d 360, 362 (Okla. 1994); *Attorney Grievance Comm’n of Md. v. Goldsborough*, 624 A.2d 503, 510 (Md. 1993).

⁴⁰⁸ *In re Discipline of an Attorney*, 815 N.E.2d at 1079.

⁴⁰⁹ *Goldsborough*, 624 A.2d at 511.

law and treatises applying the “prejudicial to the administration of justice” standard in answering the question of whether inducing a former law clerk to breach the duty of confidentiality would violate the Rule. While it is relevant that the Rule has generally been applied to efforts to improperly influence the outcome of litigation,⁴¹⁰ including by improperly acquiring or using confidential information⁴¹¹ or trying to taint the deliberative process,⁴¹² the applicability of the Rule to the mere act of trying to obtain confidential information about judicial deliberations in a particular case presents a novel question.

As this Article has extensively discussed in the context of law clerk confidentiality and the judicial deliberations privilege, it seems clear that allowing lawyers to intrude into the confidential judge-law clerk relationship and the judicial deliberations process will seriously undermine the judicial process.⁴¹³ Such intrusions would be inimical to the trust and candor essential to effective decision-making. Thorough testing of ideas would be inhibited and judicial independence would be threatened by increased exposure to public pressures and popular opinion inconsistent with justice.⁴¹⁴ With the loss of confidentiality would also come increased costs to parties and to the administration of justice generally resulting from challenges to the finality of judicial decisions based on perceived defects in the deliberative process learned

⁴¹⁰ See AMERICAN BAR ASSOCIATION & THE BUREAU OF NATIONAL AFFAIRS, *supra* note 383, § 101:502.

⁴¹¹ See, e.g., *In re Allen*, 783 N.E.2d 1118, 1120 (Ind. 2002) (holding that reading opposing counsel's confidential documents at deposition is conduct prejudicial to the administration of justice); *In re Moran*, 840 N.Y.S.2d 847, 850 (N.Y. App. Div. 2007) (holding that lawyer who posted confidential information on his website concerning attorney Grievance Committee investigation into the conduct of a rival law firm engaged in conduct prejudicial to the administration of justice that adversely reflected on his fitness as a lawyer); 2 HAZARD & HODES, *supra* note 385, § 65.6, at 65-12 (secretly interviewing opposing party's expert witness and offering to pay for information about case preparation); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-408 (1997) (acquiring information legally protected from disclosure from former government employee for use in litigation).

⁴¹² *Grievance Adm'r v. Fried*, 570 N.W.2d 262, 267-68 (Mich. 1997) (lawyer retained judges' relatives on cases to get recusal; it is unethical conduct for a lawyer to tamper with the court system or to arrange disqualifications); *In re Keilor*, 380 A.2d 119, 125 (D.C. 1977) (conduct which taints the decision-making process is prejudicial to the administration of justice; in this case, a lawyer represented a company using a law firm associate as an arbitrator without telling the union representative); *In re Orfanello*, 583 N.E.2d 1277, 1278-81 (Mass. 1991) (lawyer had ex parte contact with judge, telling the judge that a supporter of his judicial nomination had a case scheduled to come before the same judge; this was an effort to influence the disposition of the case and was prejudicial to the administration of justice, and showed lack of fitness to practice).

⁴¹³ See *supra* 90.

⁴¹⁴ See *supra* text accompanying notes 108-11.

about through lawyer communications with law clerks.⁴¹⁵ Moreover, exposure of the compromises and uncertainties that are necessarily a part of the judicial deliberations process could erode public confidence in the justice system.⁴¹⁶ Finally, another potential harm that exists is harm to the privacy and reputational interests of judges from the public revelation of information from a law clerk that may be untrue, or may be the product of misperceptions or personal biases.⁴¹⁷

What is less clear is whether such intrusion in the name of zealously protecting a client's interests would clearly violate "accepted ethical norms of the profession."⁴¹⁸ The answer to this question seems to depend on whether reasonable lawyers could differ as to the propriety of the conduct.⁴¹⁹ Factors supporting a conclusion that such conduct is generally viewed as impermissible include the pervasiveness of the concept of the law clerk's duty of confidentiality and the well-accepted reasons for that duty, as well as the judiciary's tacit assumption of the existence of a judicial deliberations privilege.⁴²⁰ Also relevant is the response of the other attorneys involved in the *Demoulas* case upon learning of the efforts being made to acquire information about the deliberative process from a former law clerk.⁴²¹ In this regard, it should be remembered that, except for lawyers Curry, Crossen, and Donahue, the other attorneys raised serious questions as to the permissibility of contacting the former law clerk. Moreover, the research memorandum prepared for lawyer Crossen flagged the existence of at least a limited judicial deliberations privilege.⁴²²

On the other hand, the fact that formal recognition of a judicial deliberations confidentiality privilege applicable to former law clerks has been limited and had not occurred in Massachusetts, and the fact that a number of attorneys have expressed the view that Crossen, Curry, and Donahue did nothing wrong,⁴²³ support an argument that in 1997 when Crossen and the other lawyers induced the law clerk to breach his duty of confidentiality, such conduct would not have been seen as flagrantly inconsistent with professional norms. In the end, these arguments are

⁴¹⁵ See *supra* text accompanying note 301.

⁴¹⁶ See *supra* text accompanying note 301.

⁴¹⁷ See *supra* text accompanying note 301.

⁴¹⁸ See *In re Discipline of an Attorney*, 815 N.E.2d 1072, 1080 (Mass. 2004).

⁴¹⁹ See *supra* text accompanying notes 407–09.

⁴²⁰ See *supra* Parts II.B, III.C.

⁴²¹ See *Bar Counsel v. Curry I*, *supra* note 1, at 122–25, 127 (at least three of the defense team lawyers questioned the propriety of approaching the former law clerk about the case, and apparently one lawyer, Edward Barshak, advised lawyer Donahue that he would leave the case if the law clerk information was used.).

⁴²² See *supra* note 70.

⁴²³ See sources cited *supra* note 7.

unconvincing. The fact that a few lawyers fail to recognize the boundaries between legitimate zealous advocacy and accepted ethical norms of practice should not result in a dilution of those norms. This is particularly true where virtually no authority or precedent existed at the time that would have endorsed the type of intrusion into judge-law clerk deliberative confidential communications that occurred here, but, instead, the available information viewed through the eyes of a reasonable lawyer would clearly have indicated that such an intrusion was impermissible. Perhaps what is ultimately most damning, however, is the fact that the lawyers seemed to know that what they were doing was wrong. As the special hearing officer noted, rather than approach the law clerk openly and directly for information about possible judicial prejudgment, the lawyers attempted “first to trick[and] later to frighten Walsh into making statements he ‘otherwise would not have made.’”⁴²⁴

In their appeals to the Massachusetts Supreme Judicial Court, lawyers Crossen and Curry raised arguments regarding the lack of a clear prohibition on communicating with a law clerk about judicial deliberations. Crossen argued that the “prejudicial to the administration of justice” standard was unconstitutionally vague when applied to his actions. The court summarily rejected that argument, agreeing with the BBO “that prior bar disciplinary law and prevailing professional norms, as well as his own colleagues’ understandable misgivings about his conduct, placed Crossen on notice that, in the Board’s words, ‘such outrageous conduct’ was proscribed.”⁴²⁵ More importantly, the court tersely brushed aside Curry’s argument that his contacts with the law clerk were proper, given the absence of an explicitly recognized judicial deliberations privilege in Massachusetts, stating, “efforts to pierce the confidential communications of a former law clerk and a judge in a pending matter to benefit one of the litigants also constitute ‘conduct prejudicial to the administration of justice.’”⁴²⁶

The context and brevity of the court’s treatment of this issue is problematic. On the one hand, it could be seen as an indication of the obviousness of the widely-understood importance to the administration of justice of the principle of the confidentiality of deliberative

⁴²⁴ Bar Counsel v. Curry I, *supra* note 1, at 195 & n.75; *In re Crossen*, 880 N.E.2d 352, 370 (Mass. 2008); see also *supra* text accompanying notes 90, 92.

⁴²⁵ *In re Crossen*, 880 N.E.2d at 379. In particular, the court drew attention to Crossen’s efforts to obtain confidential information from the law clerk through threats. *Id.* The court also specifically found that as an experienced attorney, Crossen “knew that the communications about deliberative processes that flow between judge and law clerk were confidential and an important aspect of the administration of justice.” *Id.* at 373.

⁴²⁶ *In re Curry*, 880 N.E.2d at 406. In fact, the court stated that Curry’s actions showed “a breathtaking lack of respect for the administration of justice[.]” *Id.* at 407.

communications between judges and law clerks—a view that is supported by a broad reading of the court’s statement that no one “is free to induce or coerce a law clerk into revealing confidential communications between the clerk and the judge about an ongoing matter to benefit one of the litigants, in particular confidential communications that the law clerk otherwise would not have revealed.”⁴²⁷ On the other hand, the absence of substantial analysis of the issue leaves at least some question as to whether, absent the deceit and threats employed by the lawyers in *Curry*, the court would have found that simply contacting the former law clerk for confidential deliberative information would be impermissible under the “prejudicial to administration of justice” standard. As argued above in this Article,⁴²⁸ a more extended analysis would clearly support that conclusion.

V. CONCLUSION

The *Curry* case is a remarkable example of lawyers engaging in clearly unacceptable conduct purportedly in the name of zealous advocacy for a client. The focus to date by the public and bar discipline system has been on the more sensational aspects of the case—the elaborate phony job scam involving deceit and apparent extortion directed at a former judicial law clerk by three lawyers, two of whom previously had been well-regarded by the legal profession. This aspect of the case was seen by the Massachusetts BBO as justifying the severe sanctions of suspension and disbarment that were imposed on attorneys Curry, Crossen, and Donahue, and it is this conduct upon which the Massachusetts Supreme Judicial Court focused in its review.

Overshadowed by the lawyers’ outrageous conduct, however, is an arguably equally severe ethical lapse that should not be ignored. As this Article has demonstrated, the mere act of attempting to acquire from a former law clerk confidential information relating to the judicial deliberations process itself runs afoul of rules of professional conduct and ethical norms, thus warranting substantial discipline. That such conduct impermissibly intrudes upon confidential relationships, constitutes improper inducement of a breach of fiduciary duty, and is prejudicial to the administration of justice should be made patently clear. The Massachusetts Supreme Judicial Court’s review of the *Curry* and *Crossen* cases offered a rare opportunity for the court to remove any doubt that former judicial law clerks simply are not fair game for

⁴²⁷ *In re Curry*, 880 N.E.2d at 406.

⁴²⁸ See *supra* text accompanying notes 401–24.

lawyers seeking to acquire information about the judicial deliberation process.

Although the court did appear to take a substantial step in this direction when it seemingly indicated that efforts to obtain confidential deliberative information from former law clerks would be inconsistent with the proper administration of justice, that principle should have been more fully explored and explained in the court's opinions. Moreover, the court passed up the chance to directly and more effectively protect judicial deliberative confidentiality from improper intrusions by also formally recognizing the judicial deliberations privilege, a privilege that is essential for the effective functioning of the judiciary.⁴²⁹ Adopting the privilege and appropriate procedures for acquiring privileged information about the judicial deliberations where warranted, such as those the court adopted regarding post judgment lawyer inquiries about juror deliberations,⁴³⁰ would serve the legitimate interests of advocates in acquiring evidence of improper judicial conduct while preserving the quality of judicial decision-making. Moreover, the formally recognized privilege, in conjunction with Model Rule of Professional Conduct 4.4, prohibiting intrusions upon privileged relationships by lawyers,⁴³¹ would make pellucid that law clerks cannot be targeted by lawyers for information about the deliberative process. Perhaps, with this clarity in the law, even lawyers apparently blinded by adversarial zeal, such as those in the *Curry* case, would be restrained.

⁴²⁹ See *supra* Part III.C.

⁴³⁰ See *supra* text accompanying notes 346–57.

⁴³¹ See *supra* Part III.E.