

## Law Clerks Gone Wild: The State-Court Report

Parker B. Potter JR.

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# Ohio Northern University Law Review

## Articles

### Law Clerks Gone Wild: The State-Court Report

PARKER B. POTTER, JR. \*

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\* The author is a sometime Adjunct Professor at the University of New Hampshire School of Law in Concord, New Hampshire. By day, he is a law clerk for a United States Magistrate Judge. In days gone by, he clerked for the New Hampshire Superior Court, a United States District Judge, and the Chief Justice of the New Hampshire Supreme Court.

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## I. INTRODUCTION

In *Law Clerks Gone Wild*,<sup>1</sup> I reported on several dozen federal cases in which law clerks jumped the tracks, or were accused of doing so by enterprising litigants. Federal judges, of course, are not the only men and women in black to enjoy the assistance of law clerks. So, in the interest of comity,<sup>2</sup> I now turn my attention to state-court law clerks who may (or may not) have gone wild.

My initial organizational strategy—in the grand tradition of law clerks addicted to the cut-and-paste functions of their word processors—was to drain the text from *Law Clerks Gone Wild* and simply re-use the section headings from that article. But, a funny thing happened on the way to the sequel. On the one hand, I found more actual wildness in the state courts, as well as more different kinds of wildness and wildness that was more consequential. On the other hand, I found fewer unsuccessful accusations of inappropriate law-clerk conduct. Accordingly, this article is more a fraternal than an identical twin to its earlier-born sibling. That said, my basic aim remains the same. My purpose is to wag a few cautionary tales in the general direction of law clerks and their judges in an attempt to steer them clear of some of the pitfalls that have gobbled up others during the time they spent toiling in chambers.

In Part II, I focus on two opinions in which judges actually thanked their law clerks for going wild. Part III is devoted to law clerks who took it upon themselves to do things that had adverse effects on cases they were working on. Part IV discusses law clerks who were guided into error by their judges. Part V highlights opinions in which higher courts have chided lower courts for law-clerk conduct while finding the law clerks' errors to be harmless. Part VI spotlights cases in which litigants launched unsuccessful

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1. 34 SEATTLE U. L. REV. 173 (2010).

2. And, I hope, at least a wee bit of comedy . . . .

challenges to the use of law clerks or the conduct of law clerks. Part VII examines a category of cases virtually absent from *Law Clerks Gone Wild*—cases in which law clerks have appeared in judicial opinions because of extra-curricular wildness, that is, wildness generally unrelated to their duties as law clerks. Finally, Part VIII takes up opinions in cases in which current or former law clerks have been plaintiffs, a topic I discussed from a federal-court perspective in *Law Clerks Out of Context*.<sup>3</sup>

## II. WILD . . . BUT IN A GOOD WAY<sup>4</sup>

The basic premise of both this article and its predecessor is that law-clerk wildness is generally something to be avoided or, if not avoided, then agonized over, apologized for, or admonished. Thus, I was rather pleased by my discovery of two judges who thanked their law clerks for going at least a little bit wild.

In *Stuart v. State*,<sup>5</sup> Judge Stephen Bistline appears to have credited law clerks in general with the ability to think outside the linguistic box when he observed that a trial judge “found a ‘continuum,’ a fine-sounding word which we older practitioners have recently learned from law clerks, although it has not yet made its way into Black’s Law Dictionary.”<sup>6</sup> In light of the comments Judge Bistline directed toward law clerks in several of his other opinions,<sup>7</sup> however, it is possible that his laudation of law-clerk lexicography in *Stuart* was intended to be ironic. Substantially more sincere was the gratitude Judge Lamar Pickard expressed, during a post-trial hearing, toward a law clerk who went a little wild when flyspecking the judge’s performance while conducting a trial.<sup>8</sup> As Judge George Carlson reported:

In today’s case, Judge Pickard presided over the trial of this matter. During trial, a Mississippi Department of Health survey was entered into evidence on behalf of Harris to establish that Pinecrest had notice and knowledge of inadequate-supervision issues at its nursing home. The survey revealed a prior incident at the nursing home in which a resident had left the premises. Judge Pickard admitted a redacted version of the survey with a limiting

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3. 9 U.N.H.L. REV. 67 (2010).

4. This section heading is inspired by a comment once directed toward an artist friend of mine at a show where he was exhibiting some rather fanciful etchings: “You’re f\*\*\*ed in the head, but in a good way.” My friend took the comment in the way it was intended, as a compliment.

5. 801 P.2d 1216 (Idaho 1990).

6. *Id.* at 1260 (Bistline, J., dissenting).

7. *See infra* Part III.

8. *See Pinecrest, LLC v. Harris*, 40 So. 3d 557, 561 (Miss. 2010).

instruction; however, Pinecrest questioned a witness about the survey findings, and the entire survey was thereby admitted. At a post-trial hearing, Judge Pickard stated, as follows:

“[W]e have the record, and my law clerk has gone over it with a fine tooth comb, and frankly, it’s seldom that this occurs, but my law clerk has come up with . . . numerous errors that I had made, and it frankly kind of made me feel bad that I messed up that much in one trial . . . .”<sup>9</sup>

Hats off to Judge Pickard; it takes a pretty big jurist to fess up in open court.

### III. STEPPING IN IT SOLO

Part III is the heartland of this article. Here, I focus on the sometimes amazing stories of law clerks who have done serious damage to cases they were working on by doing what they thought—however misguidedly—to be the right thing.

I open this section with Debran Rowland, who was recently characterized by the Alaska Supreme Court as a “rogue law clerk” who acted as a “volunteer prosecution mole” and a “fox-in-the-chicken coop.”<sup>10</sup> Here are the facts:

In the middle of March 1996 . . . the case of *State v. Jones*, No. 4BE-S92-1258CR, was scheduled for trial before Judge [Dale] Curda. A few days before the *Jones* trial was to commence, Bethel District Attorney Jake Metcalfe became concerned that pre-trial motions had not been decided in *Jones*. Metcalfe encountered Debran Rowland, Judge Curda’s law clerk, in the courthouse and asked about the motions. Rowland told Metcalfe to “stop nagging her.” Within twenty-four hours, Metcalfe received a copy of a confidential bench memorandum from Rowland to Judge Curda; this memorandum discussed a pre-trial motion in the *Jones* case. Rowland attached a sticky note to the memorandum which stated the following:

“FYI—Just so you know how great a friend you have here—This is an indication of the battles I take on for you guys (and, of course, for the law). It is also part of the reason decisions take so f\*\*\*ing long. When you reason w/o

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9. *Id.* at 560-61.

10. *Amerada Hess Pipeline Corp. v. Reg. Comm’n*, 176 P.3d 667, 677 (Alaska 2008).

the law, you can say anything. The point is to do it right. So, quit nagging, and don't ever cross me, or I'll get you."

"P.S. FOR YOUR EYES ONLY!!!"

About two weeks later, on April 3, 1996, Metcalfe informed Judge Curda of the note and memorandum he received from Rowland. At the same time, Metcalfe provided the court with documents indicating that Rowland had had sexual relations with a Bethel assistant district attorney.<sup>11</sup>

Among all the law clerks I read about while researching this article and its predecessor, Debran Rowland is in a class by herself. Predictably, "Judge Curda . . . removed Rowland from her law clerk position."<sup>12</sup> Interestingly, however, I have not been able to learn what ever happened to *State v. Jones*, the case on which Rowland was working when she went wild.

In any event, Rowland's indiscretions produced no small amount of collateral damage; several criminal defendants in cases other than *Jones* used the revelations in *Jones* as the basis for asking Judge Curda to recuse himself from their cases<sup>13</sup> or to vacate orders he had entered in them<sup>14</sup> on grounds that "Rowland was biased in favor of the state, and that [her] bias either tainted Judge Curda's rulings or at least gave rise to a reasonable appearance that the judge's rulings were tainted."<sup>15</sup> The defendants in two of those cases were unsuccessful,<sup>16</sup> but in *Vaska v. State*, the Alaska Supreme Court determined that "the record raise[d] the possibility that Judge Curda's law clerk, because of her personal relationship with one of

11. *Vaska v. State*, 955 P.2d 943, 944 (Alaska Ct. App. 1998). And I thought I was the king of the mixed (up) metaphor. In any event, while either a mole-fox or a fox-mole might be more difficult to conceive/assemble than a jackalope, I would bet that either one would look great on the wall!

12. *Ivan v. State*, Nos. A-6548, 4055, 1999 WL 331668, at \*3 (Alaska Ct. App. May 26, 1999).

13. See *Vaska*, 955 P.2d at 944; *Raphael v. State*, No. A-6316, 1998 WL 191159, at \*7 (Alaska Ct. App. Apr. 22, 1998).

14. See *Ivan*, 1999 WL 331668, at \*1.

15. *Vaska*, 955 P.2d at 944. The *Raphael* court described the defendant's argument this way: "Raphael argued that Rowland's *ex parte* communication as well as her sexual relationship with an assistant district attorney was proof of Rowland's bias in favor of the state thus providing reasonable grounds for questioning the impartiality of the court's decision making." *Raphael*, 1998 WL 191159, at \*7.

16. See *Ivan*, 1999 WL 331668, at \*2-3 (affirming Judge Curda's decision not to vacate his pre-trial order and not to recuse himself, on grounds that defendant's trial took place after Judge Curda dismissed Rowland, and that judge's order on defendant's pre-trial motion was either favorable to defendant or not challenged on the merits on appeal); *Raphael*, 1998 WL 191159, at \*8 (affirming Judge Curda's decision not to recuse himself on grounds that Rowland did not begin working for Judge Curda until part way through defendant's trial, and had already left Judge Curda's chambers at the time of defendant's sentencing).

the state's attorneys, may have had an actual bias in favor of the attorney who prosecuted Vaska."<sup>17</sup> Accordingly, the court "remand[ed] Vaska's case to the superior court for an investigation of these issues,"<sup>18</sup> i.e., whether Rowland did significant work on Vaska's case and whether she had a personal bias that affected her work.<sup>19</sup> On remand, "the state stipulated 'that as a result of [Rowland's] activities, a reasonable appearance of impropriety and bias existed with regard to the pretrial rulings issued by Judge Curda.'"<sup>20</sup> Ultimately, the Alaska Court of Appeals was "unable to conclude that Vaska's trial was not tainted by the law clerk's participation"<sup>21</sup> and gave Vaska a new one.<sup>22</sup>

*People v. Cassell*<sup>23</sup> involved a rather more traditional form of law-clerk wildness. In that case, "[d]uring deliberations, a juror knocked on the jury room door and informed the court officer that she wanted to go home and did not want to continue deliberations."<sup>24</sup> "[T]he court officer escorted the juror outside of the building, where she remained for approximately 15 to 20 minutes . . ."<sup>25</sup> Then, at the direction of the trial court's law clerk, the court officer placed the juror back in the jury room, informing her that "she would have to continue deliberations . . ."<sup>26</sup> "[T]he juror told the court officer that she wanted to go home[,] but was rebuffed.<sup>27</sup> "[A]pproximately 10 minutes later, the jury informed the trial court that it had reached a verdict."<sup>28</sup> On appeal, the defendant was granted "a new trial based on the assumption of judicial functions by the trial court's law clerk and court officer."<sup>29</sup> In *People v. Ahmed*,<sup>30</sup> the case on which the *Cassell* court relied for the proposition that the trial-court law clerk assumed a judicial function by directing the court officer to tell the reluctant juror to continue deliberating, the Court of Appeals of New York reversed the defendant's conviction and ordered a new trial because the trial judge's law clerk "reread portions of the testimony and the charge in response to

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17. *Vaska*, 955 P.2d at 946.

18. *Id.*

19. *Id.*

20. *Vaska v. State*, Nos. A-6312 & 4326, 2001 WL 21196, at \*1 (Alaska Ct. App. Jan. 10, 2001).

21. *Id.* at \*3.

22. *Id.*

23. 880 N.Y.S.2d 303 (N.Y. App. Div. 2009).

24. *Id.* at 304.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Cassell*, 880 N.Y.S.2d at 304.

29. *Id.* According to the appellate court, the instruction to continue deliberating "should have been given to the juror directly by the trial court in the defendant's presence." *Id.*

30. 487 N.E.2d 894 (N.Y. 1985).

requests from the jury”<sup>31</sup> and also answered several jury questions.<sup>32</sup> Notwithstanding the fact that the defendant consented to the law clerk’s actions—which were undertaken in consultation with the judge, who was suffering from a bad cold and a sore throat—the appellate court determined that “the absence of the trial judge, and the delegation of some of his duties to his law secretary during a part of the jury’s deliberations, deprived the defendant of his right to a trial by jury, an integral component of which is the supervision of a judge.”<sup>33</sup>

A law clerk’s misguide initiative was also a key issue in *State v. White*.<sup>34</sup> In that case, “Rose Avellino, a judicial law clerk who also served as the courtroom bailiff during White’s trial . . . recalled ‘socializing’ with the jury panel by wishing one of the jurors ‘a happy birthday.’”<sup>35</sup> In addition:

Avellino testified she was in the jury room during the “vast majority” of deliberations because she thought it was her duty to “insure no one would interrupt the jury” and to be available to take any jury requests to the judge immediately. She knew the jurors were aware that she was the trial judge’s law clerk and that she was listening to their deliberations. She recalled that, at one point, a juror looked at her for guidance and may have actually asked for help. Avellino shook her head and told the juror, “No, I’m sorry.” She did not participate or recall making any other comments during the jury’s deliberation.<sup>36</sup>

White moved for a new trial on two grounds, one of which was “the presence of a law clerk during the jury’s deliberations.”<sup>37</sup> After conducting an evidentiary hearing, the trial court denied relief.<sup>38</sup> The Missouri Court of Appeals reversed and remanded for a new trial, holding that the State, which relied solely on Avellino’s testimony about her contact with the jury,

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31. *Id.* at 895.

32. *Id.*

33. *Id.* As the appellate court further stated: “[W]e conclude that the absence of the trial judge, and his allowing his law secretary to discharge some of his duties, though motivated by a commendable desire to avoid delay of the proceedings, deprived defendant of his right to a proper trial by jury.” *Id.* at 896.

34. 138 S.W.3d 783 (Mo. Ct. App. 2004).

35. *Id.* at 787.

36. *Id.*

37. *Id.* at 784.

38. *Id.* at 787-88.



“failed to overcome the presumption of prejudice arising from [the] law clerk’s intrusion in the deliberative process.”<sup>39</sup>

I conclude this section with accusations of law-clerk wildness that come from an unusual source, the bench. A surprising number of judges have used their opinions to comment unfavorably—if colorfully—on the prose stylings of law clerks.

Leading the pack is Judge Bistline of the Idaho Supreme Court, the same judge who, in *Stuart*, thanked law clerks for teaching older practitioners the word “continuum.”<sup>40</sup> Judge Bistline punched his ticket into this paragraph with his dissents in *Poss v. Meeker Machine Shop*<sup>41</sup> and *In re Barker*.<sup>42</sup> In *Poss*, Judge Bistline took issue with the way one Idaho Supreme Court opinion had dealt with a previous one: “Whatever motivated the author of *Booth* to treat *Phippis* as was done is beyond me, and I would prefer to believe it was an inadvertence occasioned by relying on an inexperienced law clerk. No matter.”<sup>43</sup> Well, I bet it mattered to the law clerk, if any, who worked on *Booth*. In *Barker*, Judge Bistline played pin the tail on the law clerk again, rather more melodramatically:

The *Spanbauer* Court, after inventing the presumption, then placed upon a claimant the obligation of *overcoming* that presumption. This was not only wrong, but even more wrong was that the Court then and there in the business of manufacturing that presumption out of whole cloth, at the same time *ascribed it to prior opinions which said no such thing*.

Obviously the creation of the presumption was an inadvertence which most likely occurred when a law clerk, either over-zealous or careless, thought that general rules and presumptions were synonymous. The Court membership then, which included two justices presently on the Court, was certainly entitled to believe that

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39. *White*, 138 S.W.3d at 787-88. As the court explained:

*White* was presumptively prejudiced by . . . Avellino’s presence during jury deliberations. The State offered no evidence to show whether or how the jury was affected by having an officer of the court listen to the deliberations. Avellino’s testimony that she did not participate in deliberations does not exclude the possibility that the jury was prejudiced by her “body language” or that her presence had a chilling effect by “operating as a restraint upon the . . . jurors’ freedom of expression and action.”

*Id.* at 788 (quoting *United States v. Olano*, 507 U.S. 725, 739 (1993)).

40. See *Stuart*, 801 P.2d at 1260 (Bistline, J., dissenting).

41. 712 P.2d 621, 627-34 (Idaho 1985) (Bistline, J., dissenting).

42. 719 P.2d 1131, 1133-46 (Idaho 1986) (Bistline, J., concurring in part and dissenting in part).

43. *Poss*, 712 P.2d at 630 (Bistline, J., dissenting).

the draft opinion submitted for their consideration was not premised upon a misstatement of law supposedly, but not uttered by an earlier Court.

Exactly how such took place is a question that cannot be answered. But that it did happen is too well documented to be ignored. The \$64,000 question, however, is: What will be the Court's reaction, and what will be done? This is a very serious concern; the very integrity of the Court is at stake.<sup>44</sup>

While I found no other judge who fingered a law clerk for placing the very integrity of his or her judge's court at stake, I found plenty of others who found some degree of wildness in the work churned out by law clerks.

For example, in his dissent in *Stephen L.H. v. Sherry L.H.*,<sup>45</sup> Chief Justice Richard Neely pointed out that "most discussion of standards of review in the reported cases emerge from law clerk watch winding; judicial staffs simply mouth platitudes because they really don't give a healthy damn about the underlying case or the justice thereof."<sup>46</sup> Chief Justice Neely continued:

[W]hen I review a circuit court decision, notwithstanding what my young law clerks write about standards of review in my reported opinions, my first real question is: "Is the circuit judge a twit?" If the answer to that question is a resounding "yes," then I haul out the "close scrutiny" standard of review that the old, pro-civil liberties, caring U.S. Supreme Court sent me in the early 1970's when I became a judge and that I've kept ever since in the bottom drawer of my desk. Once I figure out what *ought* to happen, I put my clerks on autopilot to manipulate precedent to arrive at the correct result regardless of what standard of review has been consistently set forth (and just as consistently ignored whenever anyone gave a damn about the case) in a few stock paragraphs stored in everyone's word processor.<sup>47</sup>

The lesson of *Stephen L.H.*, it would seem, is that law clerks on autopilot are the antidote to law-clerk watch winding, whatever that may be.<sup>48</sup> If that is indeed the case, then *Stephen L.H.* represents a rather dramatic about-face

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44. *Barker*, 719 P.2d at 1137 (Bistline, J., concurring in part and dissenting in part).

45. 465 S.E.2d 841 (W. Va. 1995).

46. *Id.* at 855 (Neely, C.J., dissenting).

47. *Id.* at 856.

48. *See id.*

in Chief Justice Neely's attitude toward law clerks on autopilot, given his concurring opinion in *Huffman v. Appalachian Power Co.*,<sup>49</sup> written about four years prior to his opinion in *Stephen L.H.*<sup>50</sup> In *Huffman*, the justice wrote:

The "excess fat" in the majority opinion is not necessary to the decision of this case, is contrary to our established principles, and probably is not what a majority of this Court would decide if the question were squarely presented to us . . . .

Much of law, alas, is explainable only in terms of mechanics: on a multi-member court, you can only argue in conference about so many things for so long before the whole operation comes unraveled. This is particularly true for cases like this one, decided at the end of a busy term. Indeed, courts are in the case-deciding business; law professors are in the reason-giving business! All courts, from the U.S. Supreme Court on down, would serve the bar better if they decided more cases with shorter opinions.

All judges should recognize that we are not writing for the ages; the shelf life of law is about 180 days or the next vacancy on the court—whichever shall first occur. Our job is simply to tell the world what the law is today. Certainly at the level of the U.S. Supreme Court, there is little need for separate opinions that recycle (unpublished) law review articles to concur with parts I, III, IV and VIII of the majority opinion, dissent to parts II, V and VI, and concur with the result but dissent to the reasoning of part VII. Even a first year law student can tell the difference between genuine thought instructed by political experience and the pseudo-scholarship of young law clerks put on autopilot!<sup>51</sup>

While Justice Neeley seems genuinely conflicted about whether or not it is a good thing for law clerks to be put on autopilot,<sup>52</sup> it does seem pretty clear that he does not want to catch his law clerks sleeping in trees: "The 'Get it done now' attitude alleged in this case does not rise to the level of 'deliberate exposure to dangerous working conditions.' Indeed, the slothful

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49. 415 S.E.2d 145 (W. Va. 1991).

50. 465 S.E.2d 841 (written in 1995); *Huffman*, 415 S.E.2d 145 (written in 1991).

51. *Huffman*, 415 S.E.2d at 157 (Neely, J., concurring) (citation omitted).

52. The way to harmonize *Stephen L.H.* and *Huffman*, I suppose, would be to conclude that Justice Neely only disapproves of law clerks on autopilot when those law clerks are riding shotgun with some other judge.

law clerk who drafted this opinion has heard the same admonition three times today!”<sup>53</sup> Whether or not a slothful law clerk belongs in an article about law clerks gone wild is, I will grant, a legitimate question, given the sloth’s general reputation for inactivity.<sup>54</sup>

In any event, Justice Neely’s concerns with law-clerk wildness in the form of pseudo-scholarship have been echoed by other judges. For example, in a concurring opinion in *Wolfe v. State*,<sup>55</sup> Judge Michael Keasler had this to say about the proliferation of dicta in judicial opinions:

Given the prevalence of dicta in court opinions and the standard complaints from dissenters, “one wonders why obiter dicta are even present.” One author has some theories:

“Sometimes, they are included for reasons of contrast. Sometimes, judges appear to be writing short essays on the law. Perhaps the judge wants the opinion included in a case book. Perhaps he is bucking for another job. Perhaps the judge writes well and is looking for a mode of self-expression. Perhaps he does not write the opinions at all but leaves them to law clerks who do not know any better, or who think they still are writing term papers. Perhaps all of these reasons apply, and perhaps there are others as well.”

Regardless of the reasons, the urge to write beyond what is necessary in any case should be tamed.<sup>56</sup>

Justice Clifford Brown made a similar point, even more pointedly, in his concurring opinion in *State v. Meadows*,<sup>57</sup> to wit:

Many inexplicable, grandiose statements, obviously designed for grandstanding effect, are contained in the concurring opinions. Such statements are a pretense at jurisprudential erudition in a case receiving widespread public attention, fulfilling an urge for public recognition and acclaim. It is in an obvious effort to share with the

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53. *Mayles v. Shoney’s, Inc.*, 405 S.E.2d 15, 28 (W. Va. 1990) (Neely, C.J., dissenting).

54. *But see* *Silva v. Sunich*, No. CV 03-9327 GPS (CWx), 2006 WL 6116645, at \*7 (C.D. Cal. Sept. 6, 2006) (mentioning cartoon character called “Cha-Cha the Sloth” who, it would seem, could bust a move).

55. 120 S.W.3d 368 (Tex. Crim. App. 2003).

56. *Id.* at 374-75 (Keasler, J., concurring) (quoting Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 713 (1999)).

57. 503 N.W.2d 697 (Ohio 1986).

majority opinion the judicial glory in upholding the child pornography law. The obvious impression is that an opinion-writing field day was proclaimed and law clerks were inspired to run rampant, citing and discussing a multitude of cases decided by the United States Supreme Court on the subject of obscenity, and otherwise, totally irrelevant to the narrow issue in this case . . . .

. . . .

In short, it is my view that the three other concurring opinions are a studied effort at obfuscation rather than clarification . . . .

I write this concurring opinion solely for the purpose of informing the legal researcher not to waste his time wading through the reams of irrelevant legalese in the concurring opinions. These concurring opinions add nothing to the holding we have made in this case, as contained in the syllabus and the cogent analysis in the majority opinion. The only beneficiaries gaining from this opinion-writing orgy are the law book publishers, and the losers are the lawyers and law libraries which pay for this superfluous opinion-writing exercise. It is unfortunate that the practicing lawyer must provide valuable bookshelf space and pay so dearly for many useless official opinions as the result of so many drippy judicial pens.

A prudent exercise of judicial restraint in this case would have been a unanimous approval of the syllabus and the majority opinion, and the writing of no concurring opinions.<sup>58</sup>

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58. *Id.* at 714-15 (Brown, J., concurring) The “opinion-writing field day” hypothesized in *Meadows* brings to mind another rather remarkable tale, also from Ohio:

“At the hearing on appellee’s motion, the trial court stated that:

‘I should indicate to you, candidly, that the recommendation of the law clerk [to grant appellant’s motion for summary judgment] was submitted to me in writing and I signed it without reading it.’

The court subsequently found there to be genuine issues of fact presented by the materials before it and determined that its initial granting of the motion for summary judgment was illadvised [sic].”

*Frutkin v. Collins*, No. 46487, 1984 WL 4538, at \*1 (Ohio Ct. App. Mar. 8, 1984). Clearly, the trial judge in *Frutkin* was trying to throw somebody under the bus; what is not quite so clear is whom the judge was throwing, him- or herself, or the law clerk.

One can only stand back and admire the irony of an opinion that invokes the image of “drippy judicial pens” at an “opinion-writing orgy” even as it calls out other judges for their “inexplicable, grandiose statements, obviously designed for grandstanding effect.”<sup>59</sup>

Rather than merely decrying law-clerk pseudo-scholarship as inherently deleterious, one judge went so far as to identify a specific adverse effect of judicial over reliance on law-clerk research and writing. In *State v. Jewett*,<sup>60</sup> the Vermont Supreme Court was called upon to decide an issue under the state constitution but was forced to direct the parties to file supplemental briefs because “neither party [had] presented any substantive analysis or argument on [the] issue.”<sup>61</sup> The problem, apparently, was that the parties argued the issue solely on federal constitutional grounds, which led the court to explain that “[t]his occasion makes clear the need to raise the plane of consciousness of bench and bar about the resurgence of federalism that is sweeping across the country.”<sup>62</sup> As Justice Thomas Hayes lamented: “One longs to hear once again of legal concepts, their meaning and their origin. All too often legal argument consists of a litany of federal buzz words memorized like baseball cards.”<sup>63</sup> Justice Hayes continued:

Why has all of this happened? Former Justice Charles G. Douglas of the New Hampshire Supreme Court gives this explanation:

“The fact that law clerks working for state judges have only been taught or are familiar with *federal* cases brings a federal bias to the various states as they fan out after graduation from ‘federally’ oriented law schools. The lack of treatises [or] textbooks developing the rich diversity of state constitutional law developments could be viewed as an attempt to ‘nationalize’ the law and denigrate the state bench.”

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59. *Meadows*, 503 N.E.2d at 714-15 (Brown, J., concurring).

60. 500 A.2d 233 (Vt. 1985).

61. *Id.* at 234.

62. *Id.*

63. *Id.* at 235. He elaborated:

People do not claim rights against self-incrimination, they “take the fifth” and expect “*Miranda* warnings.” Unlawful searches are equated with fourth amendment violations. Journalists do not invoke freedom of the press, they demand their first amendment rights. All claims of unequal treatment are phrased as denials of equal protection of the laws.

*Id.* (quoting Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 273, 279 (B. McGraw ed. 1985)).

Despite the burgeoning developments in state constitutional law, only about a dozen law schools have courses in state constitutional jurisprudence. Some commentators have noted that this oversight stems from the fact that many law school deans are former clerks to Justices of the United States Supreme Court or other members of the federal judiciary.

To paraphrase Jefferson, we might as well require a man to wear still the coat which fitted him as a boy as to educate a law student in this time of the post-Warren counter-revolution as if there had been no resurrection of federalism and state judicial independence. It is small wonder that lawyers are confused or baffled when they decide to engage in independent interpretation of the Vermont Constitution.<sup>64</sup>

While numerous judges and commentators have criticized the results of overwrought or misguided law-clerk scholarship, the products of law-clerk gut feelings are also problematic. In an explicitly unpublished opinion discussing the merits of reliance upon unexplained state supreme court depublication decisions, a panel of the California Court of Appeal pointed out:

[T]he salutary purpose of the requirement of an opinion with reasons stated is entirely frustrated by relying on depublication decisions. As veteran appellate judges know, visceral reactions and preliminary studies of legal problems, particularly when they are done by law clerks without judicial assistance, are often unreliable predictors of the finished product of detailed research and painstaking exposition of the issues required in writing a formal opinion.<sup>65</sup>

So, the lesson seems to be that wildness could be afoot when law clerks rely too much on either their gray matter or their guts.

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64. *Jewett*, 500 A.2d at 235 (quoting Charles Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1147 (1978)).

65. *People v. Salgado*, 266 Cal. Rptr. 887, 887 n.1 (Cal. Ct. App. 1990).

## IV. PAS DE DOO-DOO

In *Vaska*, *Cassell*, and *White*, criminal defendants won new trials because of things law clerks did on their own initiative.<sup>66</sup> The more common situation is the one described in *Ahmed*, where the law clerk stepped in it but only because he or she was the partner of a judge who took the lead and fox-trotted right into something that soiled the soles of two pairs of dancing shoes.<sup>67</sup> In this Part, I focus on opinions in cases where law clerks have gone wild at the direction of their overstepping judges.<sup>68</sup>

Among all the law clerks I read about while researching this article, I do not think I found any who was more ill-used by a judge than one Elroy LNU.<sup>69</sup> Mr. LNU clerked for Orleans Parish Civil District Judge C. Hunter King, who was removed from office by the Louisiana Supreme Court for campaign misconduct.<sup>70</sup> The opinion in *In re King* reports the following exchange during a chambers staff meeting:

Judge King asked his staff to pay particular attention to the lawyers who appeared in his division of court. In one meeting, Judge King gave instructions to his staff concerning the manner in which the lawyers should be approached:

KELLY:

. . . I mean just have them on the list and then just make a phone call to them and say, I'm Judge King's law clerk. I dealt with you on such and such, and I was just wondering, you know, the Judge is having a fund raiser, can I sell you two tickets.

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66. *Cassell*, 880 N.Y.S.2d 303; *White*, 138 S.W.3d 783; *Vaska*, 955 P.2d 943.

67. *Ahmed*, 487 N.E.2d at 895.

68. In one of the more notorious examples of a law clerk led astray, the pied piper was not a judge at all, i.e., the law clerk's current employer, but, rather, a purported potential future employer. *See Demoulas v. Demoulas Super Mkts., Inc.*, 732 N.E.2d 875, 879 (Mass. 2000). In *Demoulas*, counsel for one side hired a private investigator to ascertain, among other things, the role a law clerk played in drafting an opinion. *Id.* To that end, the investigator and an attorney conducted a fake job interview with the law clerk during which they elicited information from the law clerk concerning the judge's thoughts about the case. *Id.* Because the law clerk's indiscretion had no effect on the case on which he was working, this remarkable story resides down here, in a footnote. *See id.* at 881. But, for those who might harbor a favorable impression of the ingenuity of the lawyer who cooked up the fake job interview, it is worth noting that the Supreme Judicial Court of Massachusetts determined that "[t]he scope of this misconduct has scant parallel in the disciplinary proceedings of this Commonwealth," *In re Crossen*, 880 N.E.2d 352, 357 (Mass. 2008), and disbarred not one but two attorneys who were involved in it, *id.* at 388; *In re Curry*, 880 N.E. 2d 388, 410-11 (Mass. 2008).

69. Last Name Unknown.

70. *See In re King*, 857 So. 2d 432, 433 (La. 2003).



JUDGE KING:

You can do it that way as long as you don't call from this office.

ELROY:

We can let them know we're the Judge's law clerks?

JUDGE KING:

Well, I think you need to call and say, my name is thus and so, I'm working on the Judge's finance committee.<sup>71</sup>

Whoever else may benefit from a non-elected judiciary, it seems pretty clear that law clerks are right up at the top of the list.

The rest of the law-clerk missteps in this section are considerably less grisly, and involve errors inspired by judges during the course of trial. These miscues run the gamut from taking on the role of the judge, to mishandling evidence, to having inappropriate contact with counsel, parties, or jurors.

*A. Acting Like a Judge*

Among the more common mistakes a law clerk can make at the behest of his or her judge is to exercise too much of the judge's authority.

The most striking examples of judicial over-delegation come from New York. In that state, "[p]rior to 1976, confidential clerks to Supreme Court Justices were specifically prohibited from serving as Referees in any capacity whatsoever."<sup>72</sup> In 1976, however, due to a "backlog of uncontested divorce actions . . . in certain judicial districts,"<sup>73</sup> the legislature lifted that blanket ban, allowing law clerks to serve as referees in uncontested matrimonial actions.<sup>74</sup>

In *Carpenter v. Carpenter*,<sup>75</sup> a husband sued for divorce on grounds of abandonment based on facts alleged in his complaint.<sup>76</sup> The trial judge

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71. *Id.* at 438 n.6.

72. *Scinta v. Scinta*, 517 N.Y.S.2d 645, 647 (N.Y. App. Div. 1987).

73. *Id.*

74. *Id.*

75. 718 N.Y.S.2d 105 (N.Y. App. Div. 2000).

76. *Id.* at 105. Specifically, he alleged that his wife placed all his clothing and other belongings outside the marital residence and changed the locks.

appointed the court's law clerk as a referee.<sup>77</sup> The wife did not contest her husband's claim of abandonment, and produced no evidence on that issue.<sup>78</sup> "The Referee nonetheless issued a report determining that abandonment had not been established."<sup>79</sup> The trial court denied the husband's motion to reject the report and denied the divorce.<sup>80</sup> On appeal, the Appellate Division held that "[a]ppointment of a confidential law clerk as Referee in this action was clearly improper, and should not have been done,"<sup>81</sup> and further held that the Supreme Court erred in determining that abandonment had not been established, given the wife's failure to amend her answer to plead a defense or to provide support for any such defense.<sup>82</sup> While it was not the appointment of the law clerk as referee that caused the Appellate Division to reverse the Supreme Court, the trial court was reversed after accepting the report of a referee who never should have been appointed in the first place.<sup>83</sup> The Appellate Division has determined that several other Supreme Court judges erred by appointing law clerks to serve as referees,<sup>84</sup> but those judges all avoided reversal because the party who later contested the appointment either consented to it initially or did not object to it until too late.<sup>85</sup>

Serving as a referee for a Supreme Court in New York is not the only judicial activity judges have improperly delegated to their law clerks. In *Brown v. State*,<sup>86</sup> a criminal defendant filed a petition for post-conviction

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77. *Id.* at 106.

78. *Id.*

79. *Id.*

80. *Carpenter*, 718 N.Y.S.2d at 106.

81. *Id.* It seems that appointment was improper because, even though the wife stipulated to abandonment, "the grounds for a divorce must be proven notwithstanding the parties' stipulation thereto," which necessitates judicial factfinding, which goes beyond the delegation of merely ministerial functions sanctioned by the legislature when it allowed the appointment of law clerks as referees in uncontested matrimonial actions. *Id.*

82. *Id.*

83. *Id.* at 106.

84. *See, e.g.,* *Treider v. Lamora*, 846 N.Y.S.2d 389, 391 (N.Y. App. Div. 2007) ("we agree with the mother's contention that the Family Court clearly erred in appointing its law clerk to hear this custody dispute"); *Barone v. Milks*, 734 N.Y.S.2d 763, 764 (N.Y. App. Div. 2001) (agreeing with mother that appointment of law clerk as referee in custody dispute between unmarried parents violated statute, where proceeding was neither matrimonial nor uncontested); *Scinta*, 517 N.Y.S.2d at 647 (concluding that where matter was contested, "it was contrary to law for the court to appoint its confidential clerk as Referee . . .").

85. *See Treider*, 846 N.Y.S.2d at 391 ("[T]he parties concede that they were aware of this impropriety and did not object to the law clerk serving as referee. Since the error is not a jurisdictional defect and a party may not challenge the qualifications of a referee for the first time on appeal, the mother waived this objection." (citations, internal quotation marks, and brackets omitted)); *Barone*, 734 N.Y.S.2d at 764 ("Milks waived any objection to the qualifications of the Referee by submitting to a hearing before her." (citations omitted)); *Scinta*, 517 N.Y.S.2d at 647-48 ("[I]t is well settled that a party may not challenge the qualifications of Referee for the first time on appeal." (citations omitted)).

86. 718 S.W.2d 937 (Ark. 1986).

relief.<sup>87</sup> Then, “[i]n a letter signed by the trial judge’s law clerk, the appellant was later informed, ‘Your second petition for post-conviction relief under Rule 37 is denied for the same reasons as all previous petitions . . . .’”<sup>88</sup> As the Arkansas Supreme Court explained:

The appellant contends that the purported letter-opinion of the law clerk is invalid. The appellant’s argument is valid. A trial judge simply may not delegate his judicial authority to a law clerk. The General Assembly has not attempted to give law clerks the power to decide cases. Since the trial court has not decided the case, we must remand for further proceedings.<sup>89</sup>

The Appellate Division of the New Jersey Superior Court has twice had to “call attention to [its] disapproval of the practice of delegating the announcing and explaining of judicial decisions to law clerks.”<sup>90</sup> In *Hungerford v. Greate Bay Casino Corp.*,<sup>91</sup> the trial judge granted summary judgment to the plaintiff, but “provided no findings of fact or conclusions of law. Rather, the only explanation provided the parties for the trial judge’s decision was a letter, mostly handwritten, from a law clerk.”<sup>92</sup> The appellate court was not impressed:

No authorization exists in our court rules for the performance of any judicial function by a law clerk, including the issuance of factual findings or conclusions of law. Any motion must be decided by the trial judge. Consequently, when findings of fact and conclusions of law are required, they should be issued by the trial judge.<sup>93</sup>

In *Tyler v. New Jersey Automobile Full Insurance Underwriting Ass’n*,<sup>94</sup> the trial-court law clerk twice wrote to counsel, announcing the court’s decision on a motion and denying a motion for reconsideration on grounds “that there was no such procedure.”<sup>95</sup> The appellate court criticized the law clerk

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87. *Id.* at 937.

88. *Id.*

89. *Id.* (citations omitted).

90. *Tyler v. N.J. Auto. Full Ins. Underwriting Ass’n*, 550 A.2d 168, 170 n.3 (N.J. Super. Ct. App. Div. 1988) (citing *Hungerford v. Greate Bay Casino Corp.*, 517 A.2d 498, 500 (N.J. Super. Ct. App. Div. 1986)).

91. 517 A.2d 498.

92. *Id.* at 500.

93. *Id.*

94. 550 A.2d 168.

95. *Id.* at 170.

both for getting the law wrong and for announcing and explaining the court's decision.<sup>96</sup>

*B. Collecting Evidence*

Law clerks have also tip-toed into this article by making missteps with regard to the collection and handling of evidence.

In *Smith v. State*,<sup>97</sup> the trial court found that Shirley Smith had violated the conditions of her probation, and on that basis, revoked her probation and reinstated her sentence of incarceration.<sup>98</sup> On appeal, she argued that “[s]he was denied due process of law because the trial judge directed his law clerk to investigate the allegations against her and in revoking probation relied on that investigation as revealed by the law clerk’s testimony at the revocation hearing.”<sup>99</sup> Here is what happened:

At the conclusion of evidence presented by the State and the defense, the judge asked the prosecutor whether he had any rebuttal. Upon receipt of a negative response, the judge announced “I am going to call [my law clerk] to the stand . . . with respect to the contact the defendant has had with me directly.” The law clerk was then examined by the judge. That examination revealed that on November 8, 1984, Smith had called the law clerk from the Baltimore City jail where Smith had been incarcerated for violation of probation because of failure to report. Smith told the clerk she had failed to report “because of bleeding problems related to her pregnancy.”

The law clerk went on to testify that at Smith’s request, she had called one Pat Slater at University Hospital. Recounting hearsay and sometimes double hearsay from Ms. Slater and others, the clerk in substance said that Smith had not had bleeding problems connected with her pregnancy, and that the problems she had had were related to heroin abuse.<sup>100</sup>

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96. *Id.* at 170 n.3.

97. 498 A.2d 284 (Md. Ct. Spec. App. 1985).

98. *Id.* at 285.

99. *Id.*

100. *Id.* at 286 (footnote omitted).

After the law clerk testified, the judge found Smith guilty of violating the terms of her probation,<sup>101</sup> and, in response to Smith's claim that she had testified truthfully, the judge explained:

"I don't believe you now, and I didn't believe you then [at sentencing on the underlying handgun charge] and I can't believe anything you said and that is why I carefully had it checked by my law clerk to determine whether or not there was anything valid to your explanations . . . ."<sup>102</sup>

Notwithstanding Smith's failure to interpose a timely objection to the law clerk's investigation and testimony, the appellate court took up the issue, deeming trial court's error in directing the investigation and soliciting his law clerk's testimony to be extraordinary, exceptional, and a violation of Smith's fundamental right to a fair trial.<sup>103</sup> Before remanding the case for hearing before a different judge, the appellate court stated:

The effect of the [ex parte] communication here was egregious. It turned the judge from an impartial arbiter, bound to decide the case on the facts presented in open court, into an investigator for the prosecution. In short, our adversarial system was abandoned in favor of an inquisitorial one. The judge took it upon himself, through his clerk, to unearth information about a case he was to try. This eliminated any vestige of impartiality. Smith's initiation of the *ex parte* communication that triggered the investigation does not alter this fact. Nor was the situation improved because the judge saw to it that the results of the investigation were adduced via testimony. By then, the damage—the elimination of impartiality or its appearance—had already been done. We add that the procedure would have been just as improper had the results of the investigation been favorable to the defense. The State, as well as the defendant, is entitled to an impartial judge.

. . . .

"The law requires the trial of a defendant not only to be fair but to give every appearance of being fair." The matter before us met neither requirement. The judge not only investigated (or had his

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101. *Id.*

102. *Smith*, 498 A.2d at 286.

103. *Id.* at 286, 288.

clerk investigate) Smith's defenses, he also denied her any opportunity to respond to the results of the investigation. And, as we have seen, he relied strongly on the investigation information when he revoked Smith's probation. This denial of due process so tainted the whole procedure that we must reverse despite the existence of evidence of violation of at least one condition of probation.<sup>104</sup>

A slightly different kind of law-clerk investigation was at issue in *Drolsum v. Luzuriaga*.<sup>105</sup> In that case, a dispute over rights and obligations under an easement was tried to the court.<sup>106</sup> Before issuing his written opinion, "[t]he trial judge visited the subject propert[ies]," and stated in his opinion that he had done so.<sup>107</sup> In an order denying post-judgment relief, the judge indicated that his law clerk had also visited the subject properties "for the purpose of refreshing the court's recollection . . . ."<sup>108</sup> The losing party objected to both visits.<sup>109</sup> The appellate court determined that under the Maryland Rules of Civil Procedure, which allow the court to order the trier of fact to visit property that is the subject of litigation, the judge's visit to the properties was permissible because there was nothing in the record to counter the judge's averment, in an order, that he visited the properties at the request of counsel.<sup>110</sup> The appellate court took a different view, however, of the law clerk's subsequent visit.<sup>111</sup> Specifically, it determined that the law clerk's visit violated the Maryland Rules of Civil Procedure, which require judge to be present at any viewing, and also constituted an "impermissible independent investigation" by the judge.<sup>112</sup> Thus, according to the court, when the parties asked the judge to view the subject properties, their request did not cover the visit the judge subsequently directed his law clerk to make.<sup>113</sup> Because of the law clerk's impermissible visit, the appellate court reversed and remanded for a new trial.<sup>114</sup>

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104. *Id.* at 288-89 (quoting *Scott v. State*, 426 A.2d 923, 928 (Md. 1981)).

105. 611 A.2d 116 (Md. Ct. Spec. App. 1992).

106. *Id.* at 117.

107. *Id.* at 121.

108. *Id.*

109. *Id.* at 120.

110. *Drolsum*, 611 A.2d at 121 (citing MD. R. CIV. P. 2-515(b)). The court did note, however, that "it would have been the better practice to place on the record a waiver by counsel for the parties of their right to be present during a view of the subject property." *Id.*

111. *Id.*

112. *Id.* at 122 (citing MD. R. CIV. P. 2-515(b)).

113. *Id.*

114. *Drolsum*, 611 A.2d at 122.

The decision in *Drolsum* raises a host of questions, both legal and existential. Legally, one wonders about the interplay between a rule that allows “[t]he court . . . on its own initiative, [to] order the trier of fact [i.e., in a bench trial, its own self] [to] view any property that is involved in the litigation or any place where a material fact in issue occurred”<sup>115</sup> and a rule that prohibits a judge from “conduct[ing] ‘any kind of independent investigation’ into the facts that he or she must ultimately determine.”<sup>116</sup> Practically, one wonders whether the reasoning of the *Drolsum* opinion would make it impermissible for a judge, during the course of a trial, to ask for his or her law clerk’s opinion of a witness’s credibility; in such a situation, as in the circumstances of *Drolsum*, the judge would use the law clerk as a second set of eyes to look at something the judge is entitled to look at, and something about which the judge must form an opinion upon which a decision will be based.<sup>117</sup> For obvious reasons, I am not holding my breath waiting for an opinion that sets out the parameters of permissible reliance on law clerks in chambers during trial. Logically, it is well understood that a judge may not direct a law clerk to perform activities the judge may not perform himself or herself,<sup>118</sup> but the judge in *Drolsum* directed his law clerk to do nothing more than what he had been asked to do by the parties,<sup>119</sup> and while there are certain activities that are so inherently judicial that they may not be delegated,<sup>120</sup> it seems a stretch to say that the judge in *Drolsum* improperly delegated any of his judicial authority. Then, there is the big hairy existential question: If a “judge’s law clerk is an extension of the judge,”<sup>121</sup> why, in *Drolsum*, were the law clerk’s eyes not the judge’s eyes?<sup>122</sup>

In *State v. Worthen*<sup>123</sup> (a prosecution for aggravated sexual abuse of a child) the State, the defendant, and the appellate court all agreed that the trial court erred by ordering his law clerk to review the victim’s mental health records, and highlight the relevant portions, before presenting them

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115. *Id.* at 121 (quoting MD. R. CIV. P. 2-515(b)).

116. *Id.* at 122 (quoting *Legal Aid Bureau, Inc. v. Bishop’s Garth Assocs. Ltd. P’ship*, 540 A.2d 1175, 1180 (Md. Ct. Spec. App. 1988)).

117. *See generally id.* at 116-27.

118. *See, e.g., Kamelgard v. Am. Coll. of Surgeons*, 895 N.E.2d 997, 1002 (Ill. App. Ct. 2008) (“Rule 63(B) is clear, however, that the judge’s law clerk is an extension of the judge. A judge should require staff, court officials and others subject to the judge’s discretion and control to observe the standards of fidelity and diligence that apply to the judge.” (quotation omitted)); *In re Fine*, 13 P.3d 400, 409-10 (Nev. 2000) (explaining that law clerks cannot be used to “circumvent other provisions of the Canons or become an advocate for one of the parties”).

119. *Drolsum*, 611 A.2d at 121-22.

120. *See supra* Part IV.A.

121. *Kamelgard*, 895 N.E.2d at 1002.

122. *Drolsum*, 611 A.2d at 121-22.

123. 177 P.3d 664 (Utah Ct. App. 2008).

to him for in camera review,<sup>124</sup> and “that the trial judge, not a law clerk, should review the records at issue because of their sensitive nature and the need to limit the number of people allowed to view [the victim]’s confidential medical records.”<sup>125</sup> Finally, in *Davis v. United States*,<sup>126</sup> the District of Columbia Court of Appeals ruled “that the trial judge went beyond his proper role of impartial magistrate when he initiated an investigation to find out whether appellant had ever had a driver’s license”<sup>127</sup> by “ask[ing] his law clerk to have his (the judge’s) secretary make a telephone call” after the defendant “testified that he did not drive at all and did not even possess a driver’s license.”<sup>128</sup> As a result of the trial judge’s improper intervention, which substantially prejudiced the defense, the defendant was granted a new trial.<sup>129</sup>

### C. Making Contact

The third major way in which judges have waltzed their law clerks into error is by directing or encouraging them to have inappropriate contact with parties, witnesses, and counsel.

Perhaps the most remarkable example of judicially directed inappropriate law-clerk contact with a party—and probably the most widely cited—comes from *Sallie v. State*.<sup>130</sup> In that case, “William C. Sallie was convicted of malice murder and other crimes, and the jury recommended a death sentence.”<sup>131</sup> At trial, he was represented by appointed counsel.<sup>132</sup> His appointed lawyer “asked for assistance and the trial court appointed Boyd English as . . . co-counsel . . . [and] English represented Sallie until the conclusion of his trial . . . .”<sup>133</sup> The problem was that at the time he was representing Sallie, English was also a law clerk in the court where Sallie was being tried.<sup>134</sup> After noting that it had “never before addressed a conflict of interest case that arises from a lawyer’s simultaneous role as a criminal defense attorney and law clerk in the same court where he is trying

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124. *Id.* at 665-66.

125. *Id.* at 674. In fairness to the trial judge, it is worth reporting that the appellate court noted that he ordered his law clerk to examine the records in question “[i]n an effort to protect B.W.’s privacy.” *Id.* at 666.

126. 567 A.2d 36 (D.C. 1989).

127. *Id.* at 39.

128. *Id.* at 38. The investigation found that a person with the same name, date of birth, and social security number as the defendant had been issued a driver’s license in the District of Columbia. *Id.*

129. *Id.* at 42-43.

130. 499 S.E.2d 897 (Ga. 1988).

131. *Id.* at 898.

132. *Id.*

133. *Id.*

134. *Id.*



the case,” and that it could locate no other cases addressing that issue,<sup>135</sup> the Supreme Court of Georgia held that “the conflict here is obvious and, given the enormity of the penalty in this case, completely impermissible,” especially given that “[t]he evidence [was] uncontroverted that [Sallie] was never informed of English’s role as the law clerk for the Waycross Judicial Circuit.”<sup>136</sup> Based upon that conflict of interest, the court reversed and remanded the case for a new trial.<sup>137</sup>

Nearly twenty years before *Sallie* was decided, in a case with substantially lower stakes, a trial judge made a similar error with similar results. In *Deyling v. Flowers*,<sup>138</sup> “Kenneth and Yvonne Deyling filed a complaint against Stanley and Victoria Flowers alleging that they were the owners of an easement for roadway purposes over a strip of land . . . and that the Flowers had obstructed and interfered with the claimed easement.”<sup>139</sup> Mr. Flowers appeared for trial, but his wife did not.<sup>140</sup> “The trial judge appointed his law clerk, Mr. Jerry Federman to assist in presentation of defendant’s case.”<sup>141</sup> After Mr. Flowers was dismissed from the case, the judge asked his law clerk to represent Mrs. Flowers, in absentia.<sup>142</sup> After one day, the trial was continued, and at the continuation Mrs. Flowers was represented by counsel.<sup>143</sup> Her new counsel moved to strike the testimony offered on the first day of trial, but the motion was denied.<sup>144</sup> After an unfavorable verdict, Mrs. Flowers appealed and prevailed on her argument that the trial court erred by appointing its law clerk to represent her and by denying her motion to strike the testimony presented during the trial day when she was represented by the law clerk.<sup>145</sup> While acknowledging that the trial judge appointed his law clerk “in an effort to expedite the trial and give [Mrs. Flowers] a day in court,”<sup>146</sup> the Ohio Court of Appeals reversed and remanded for a new trial, pointing out that the law clerk’s service as counsel violated an Ohio statute, the Code of

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135. *Sallie*, 499 S.E.2d at 899. Tell me something I could not have guessed.

136. *Id.*

137. *Id.*; but see *Lizar v. State*, 166 P.2d 119, 121-22 (Okla. Crim. App. 1946) (affirming trial court’s decision to overrule criminal defendant’s objection to appointment of state supreme court law clerk to serve as special prosecutor).

138. No. 39345, 1979 WL 210413 (Ohio Ct. App. Sept. 27, 1979).

139. *Id.* at \*1.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Deyling*, 1979 WL 210413, at \*1.

144. *Id.*

145. *Id.* at \*1, 3.

146. *Id.* at \*1.

Professional Responsibility, and the Code of Judicial Conduct.<sup>147</sup> Regarding the Code of Judicial Conduct, the appellate court explained:

Appointing one's law clerk to defend a client in one's court in derogation of [section 4705.01 of the Ohio Revised Code] and then allowing the trial to progress without observation of the fundamental rule against unsworn testimony does little to promote public confidence in the integrity and impartiality of the judiciary.<sup>148</sup>

*Fine v. Nevada Commission on Judicial Discipline (In re Fine)*<sup>149</sup> is a judicial discipline case in which the Supreme Court of Nevada affirmed the removal of a judge from office for willful misconduct.<sup>150</sup> Several of the charges against Judge Fine involved allegations that she had ex parte contact with experts in cases before her,<sup>151</sup> including one case in which the docket included a minute order indicating that ““on March 30, 1993, Jennifer Henry, the law clerk for [Judge Fine] spoke to Stephanie Crowley, therapist.””<sup>152</sup> Based upon the law clerk's ex parte contact with Crowley, the judge's own ex parte contact with Crowley,<sup>153</sup> and five other instances of judicial misconduct,<sup>154</sup> Judge Fine was removed from the bench.<sup>155</sup>

While the opinion in *In re Fine* does not indicate what Judge Fine's law clerk thought about being asked to contact an expert witness,<sup>156</sup> the law clerk in *Briseno v. Superior Court*<sup>157</sup> did recognize the wildness of the judicial instructions he was asked to carry out.<sup>158</sup> The petitioners in *Briseno* were four police officers charged in the highly publicized beating of Rodney King.<sup>159</sup> In *Briseno*, the California Court of Appeal granted the officers a writ of mandate disqualifying the trial judge in their case under the following circumstances.<sup>160</sup> During the run-up to trial, venue was hotly

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147. *Id.* at \*2-3.

148. *Deyling*, 1979 WL 210413, at \*3.

149. 13 P.3d 400 (Nev. 2000).

150. *Id.* at 414-15.

151. *Id.* at 403.

152. *Id.* at 404. In addition to mentioning the conversation, the minute order detailed the substance of the conversation. *Id.*

153. *Fine*, 13 P.3d at 403-04.

154. *Id.* at 404-07.

155. *Id.* at 415.

156. *See id.*

157. 284 Cal. Rptr. 640 (Cal. Ct. App. 1991).

158. *See id.* at 644

159. *Id.* at 641.

160. *Id.*

contested.<sup>161</sup> The defendants moved to change venue, and Judge Bernard Kamins denied the motion.<sup>162</sup> The defendants then petitioned the California Court of Appeal for a writ of mandate transferring the case.<sup>163</sup> The court of appeal issued an order staying the trial, but allowed certain pretrial matters to proceed.<sup>164</sup> Judge Kamins responded by writing to the court of appeal, and when the Office of the District of Attorney learned of Judge Kamins's letter, it issued a statement that was broadcast on the radio.<sup>165</sup> Judge Kamins heard the statement and "reacted by sending his law clerk with an ex parte message to the prosecution."<sup>166</sup> At a hearing the following day, the deputy district attorney raised the issue and described the communication in this way:

We feel it is our obligation to inform defense counsel of any communication we have with the court. [¶] And there was a communication yesterday afternoon from one of the [judge's] law clerks, who came to our office to, in his words, deliver a message from the judge . . . . [¶] And the law clerk . . . spoke with our law clerks . . . and basically said that the judge had a message for us. [¶] The message was relayed to our two law clerks in my office. [¶] The message was basically, 'Don't stay up all night, that the judge says trust him, he knows what he is doing.' [¶] It was also my information that the law clerk said he felt strange delivering this message, and that he didn't know what the judge was going to do . . . .<sup>167</sup>

While the law clerk reported feeling "strange,"<sup>168</sup> Judge Kamins, in the end, felt "disqualified,"<sup>169</sup> notwithstanding his efforts to explain the message he sent to the District Attorney.<sup>170</sup> In the view of the court of appeal, "the

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161. *See id.* at 642.

162. *Briseno*, 284 Cal. Rptr. at 642.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Briseno*, 284 Cal. Rptr. at 643-44.

168. *Id.* at 642.

169. *Id.* at 650.

170. *Id.* at 644. The Court of Appeal described Judge Kamins's explanation this way:

Judge Kamins attempted to explain the ex parte communication with the prosecution as follows: "I was at the doctor's and overheard some spokesperson [on the radio] from the district attorney's office make a quick, panicked, reaction to the letter, stating that, something to the effect, 'We are going to go down fighting,' . . . or something to that effect."

conduct of Judge Kamins in this matter leads us to the inevitable conclusion that he ‘shed the robe of the judge’ and ‘assumed the role of the advocate.’”<sup>171</sup>

#### V. NO HARM, NO FOUL

Plainly, where the actions of trial-court law clerks have led to reversal on appeal, the appellate court has pretty much said to law clerks (and judges) everywhere, in no uncertain terms: “Don’t you be stepping in THAT steaming pile of reversible error!” But, of course, not every trial-court screw-up merits reversal, and appellate affirmance is not necessarily a clean bill of health for every little thing that transpired below. This Part is devoted to opinions in which appellate courts have wagged their fingers at law-clerk conduct but have stopped short of wrapping their fists around the judicial gear-shift knob and slamming the case into reverse (and remand). The harmless errors in this Part involve law clerks who acted like judges, conducted investigations, or made contact with parties (or their privies), counsel, and jurors.

Notwithstanding the general appellate condemnation of law clerks acting like judges, the trial judge in *Haynes v. State*<sup>172</sup> got away with letting his law clerk instruct the jury:

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“So my message was a psychological one. It had nothing to do with the facts or the issues in the case other than to not have them have a coronary on the spot. [¶] So it was more sensitivity training than it was anything else.” Judge Kamins explained his failure to convey the same message to defense counsel as follows: “I would have said it to you fellows too. But you had no reason to panic, because you were in a favorable position.”

*Id.*

171. *Briseno*, 284 Cal. Rptr. at 649-50 (quoting *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist.*, 839 F.2d 1296, 1302-03 (8th Cir. 1988)). The court elaborated:

The inappropriate conduct of Judge Kamins reveals that he allowed himself to become so embroiled in the case that he abandoned his status as a neutral decisionmaker and focused the spotlight on himself. Such conduct undermines the public perceptions of justice and damages public confidence in the judicial system. We repeat once more, it is not the fact of the actual prejudice of a judge toward one party or the other which requires disqualification, it is the appearance of prejudice.

*Id.* at 650. In an earlier opinion granting the defendants’ petition to change venue, the Court of Appeal had also indicated its dim view of Judge Kamins’s handling of the case:

Unfortunately, the trial judge’s actions have contributed to the publicity surrounding this case and have resulted in no small amount of public confusion about the venue issue. The trial judge’s apparent willingness to sacrifice legal principles in order to achieve an expeditious trial date makes it obvious why this court refused to vacate the stay of the trial before there was an actual change of venue ordered.

*Powell v. Superior Court*, 283 Cal. Rptr. 777, 781 n.5 (Cal. Ct. App. 1991).

Haynes's remaining claims of error require us to find the claimed error to be fundamental because no objection was raised below. Haynes complains that the trial judge had the jury instructions read by his law clerk (apparently a law student) rather than instructing the jury himself. Nothing appears in the record to indicate the judge was incapable of instructing the jury himself, and this was a clear violation of Florida Rule of Criminal Procedure 3.390(a) and section 918.10, Florida Statutes (2005). Not surprisingly, we have found no other cases in Florida or otherwise where a clerk has been allowed to instruct the jury, and we disapprove this practice. Trial judges in this district will not be fobbing off to a law clerk their important duty to instruct the jury, certainly not without some good reason and prior agreement of the parties. However, we do not see how it can rise to the level of fundamental error in this case.<sup>173</sup>

The law clerk in *Burns v. Parikh*<sup>174</sup> answered a jury question.<sup>175</sup> Upon learning of the law clerk's action, the trial judge polled the jury, with both attorneys present, and determined that the law clerk's answer had influenced none of the jurors.<sup>176</sup> Thus, the trial court denied a request for a mistrial, and the appellate court affirmed.<sup>177</sup> While the appellate court pointed out that it was improper for the law clerk to answer the jury's question, the judge and law clerk dodged the bullet of reversal because "it appear[ed] from the record that the answer did not prejudice the jury."<sup>178</sup> The court reached that conclusion on the basis of the jurors' statements to the trial judge that they had not been influenced coupled with the judge's own disinclination to question the jurors' beliefs in their own impartiality.<sup>179</sup>

Appellate courts have also condemned several forms of improper law-clerk research. The law clerk in *People ex rel. D.P.*<sup>180</sup> ventured slightly above his or her pay grade by conducting a telephone conference with an

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172. 946 So. 2d 1106 (Fla. Dist. Ct. App. 2006).

173. *Id.* at 1107 (footnote omitted). In point of fact, the appellate court determined that "the judge read some of the instructions, but the clerk read the majority." *Id.* at 1107 n.1. That the judge and his law clerk performed a duet made the performance no more melodious to the appellate court. *Id.*

174. No. CA 19853, 2001 WL 81258 (Ohio Ct. App. Jan. 31, 2001).

175. *Id.* at \*1.

176. *Id.*

177. *Id.* at \*2.

178. *Id.* Whether or not the law clerk's answer prejudiced the jury is a different question than whether or not the answer influenced the jury. One would hope that the answer *did* influence the jury to better understand the law it had been asked to apply, or the rules under which it had been asked to apply that law. If the jury was truly uninfluenced by the law clerk's response to its question, that response must have been pretty unenlightening.

179. *Burns*, 2001 WL 81258, at \*2.

180. 181 P.3d 403 (Colo. App. 2008).

out-of-state court.<sup>181</sup> But because the party who raised the issue was unable to demonstrate prejudice, the appellate court ruled that “the trial court’s error in allowing its law clerk to conduct the telephone conference with the Rhode Island court was harmless and does not warrant reversal.”<sup>182</sup> In *Feingold v. Skipwith*,<sup>183</sup> the court was confronted with several petitions to recuse Judge Alfred DiBona, Jr. from all cases involving one Allen Feingold, Esq.<sup>184</sup> Among (many) other things, Feingold complained that in a case in which he objected to the appointment of Leon Mankowski as a neutral arbitrator, and accused Mankowski of saying that he would have a hard time being impartial, Judge DiBona had his law clerk speak to Mankowski personally, “to ascertain the accuracy of Mr. Feingold’s allegations.”<sup>185</sup> The court concluded: “[a]lthough the delegation of a determination of Mr. Mankowski’s credibility to a law clerk appears to be an improper short cut, it cannot be said that this procedure was motivated by prejudice against Mr. Feingold. That and no other question is before this Court.”<sup>186</sup> In the end, Feingold’s petitions to recuse Judge DiBona were all dismissed.<sup>187</sup>

On several occasions, appellate courts have given law clerks free passes even though those clerks had contact with people they should not have contacted. In *Lardiere ex rel. Piro v. Piro*,<sup>188</sup> prior to a hearing on various post-trial motions:

[P]laintiff’s counsel delivered to the trial judge’s chambers a letter from plaintiff’s mother who recounted a meeting outside the courthouse with the judge’s law clerk. Plaintiff’s mother, in her letter to plaintiff’s counsel, stated that the judge’s law clerk said “the judge and I spoke regarding the case. We don’t feel the jury’s going to have a problem with the negligence part, but we are just not sure how high a figure they’ll come up for you.”<sup>189</sup>

Presumably, the law clerk was called on the carpet by his judge, and the law clerk responded:

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181. *Id.* at 407.

182. *Id.* at 407-08.

183. No. 1915, 1984 WL 320886 (Pa. Ct. Com. Pl. June 12, 1984).

184. *Id.* at \*21.

185. *Id.* at \*47.

186. *Id.*

187. *Id.* at \*52.

188. No. A-4328-06T1, 2008 WL 150082 (N.J. Super. Ct. App. Div. Jan. 17, 2008).

189. *Id.* at \*2.

In a memorandum to the judge from the law clerk, he stated “I stated something to the effect of, ‘In my opinion, for what it’s worth, I think you’ll hit for something, it’s just a matter of how much.’” The law clerk denied that he stated at any time what the judge’s feelings were about the case.<sup>190</sup>

On appeal, the plaintiff argued that the law clerk’s conversation with the plaintiff’s mother constituted grounds for a new trial.<sup>191</sup> The appellate court disagreed: “While we strongly condemn the judge’s law clerk’s violation of the Code of Conduct for Judiciary Employees, we do not find that it warrants a new trial.”<sup>192</sup> In so ruling, the appellate court pointed out that “the conversation did not adversely affect the trial itself,”<sup>193</sup> and that, “[a]t worse, it affected plaintiff’s family’s decision whether or not to settle the action.”<sup>194</sup> The court then observed “that this discussion was not brought to the court’s attention until well after the trial concluded,”<sup>195</sup> and deemed the issue to be waived, stating that by sitting on the issue, the plaintiff “in effect, attempted to take out ‘an insurance policy’ against an unfavorable verdict.”<sup>196</sup> Finally, the court also noted that the “plaintiff’s mother was not a party to the lawsuit.”<sup>197</sup> While I report this case in a section titled “No Harm, No Foul,” I suspect that the law clerk involved—mercifully left nameless by the appellate court—may not have felt entirely unharmed, given the concluding sentence of the opinion: “Consequently, while we abhor the gross misjudgment of the trial judge’s law clerk, we do not find that it warrants a new trial.”<sup>198</sup>

Litigation strategy was also at the heart of the inappropriate law-clerk contact in *People v. Gelman*<sup>199</sup> which entailed a different sort of ultimately harmless misstep. In that criminal case, one of the defendants disagreed with his counsel’s determination that he would fare better with a bench trial than with a jury trial.<sup>200</sup>

Following a pretrial conference in which the logistics of the coming proceedings were discussed, the Judge’s law clerk remarked to

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190. *Id.* at \*3.

191. *Id.*

192. *Id.* at \*5.

193. *Lardiere ex rel. Piro*, 2008 WL 150082, at \*5.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Lardiere ex rel. Piro*, 2008 WL 150082, at \*6.

199. 712 N.E.2d 686 (N.Y. 1999).

200. *Id.* at 689.

defendant's counsel during a chance encounter in a hallway of the courthouse that he agreed that defendant would be better off with a Bench trial, and that the Judge would certainly give him a fair trial.<sup>201</sup>

It was undisputed "[t]hat no promises as to either the determination of guilt or sentencing were made by the law clerk . . . ."<sup>202</sup> Eventually, the defendant agreed to waive his right to a jury trial, with all necessary formality.<sup>203</sup> While stating that "[t]he law clerk's remarks to defense counsel were imprudent," the appellate court ruled that the law clerk's statement did not render involuntary the defendant's waiver of his right to a jury trial.<sup>204</sup>

Ex parte contact with counsel was also at issue in *Kamelgard v. American College of Surgeons*,<sup>205</sup> in which the petitioner argued that the trial judge should have recused herself because she had directed her law clerk to contact the respondent's counsel and request, for in-camera review, various documents the petitioner had sought in discovery.<sup>206</sup> In ruling that the law clerk's contact with counsel was, in fact, an improper ex parte judicial communication, the appellate court rejected the respondent's attempt to rely on the fact that the law clerk, not the judge, made the contact at issue:

The trial court ruled, and respondent underscores, that the judge herself did not contact petitioner's attorney. The judge stated, "I did not communicate with opposing counsel. I had my law clerk call . . . . It was my law clerk that merely requested the documents that were referred to in the motion." Rule 63(B) is clear, however, that the judge's law clerk is an extension of the judge. "A judge should require staff, court officials and others subject to the judge's discretion and control to observe the standards of fidelity and diligence that apply to the judge." The judge's clerk called respondent's attorney but not petitioner's attorney. Therefore, these calls constituted *ex parte* communications.<sup>207</sup>

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201. *Id.*

202. *Id.*

203. *Id.*

204. *Gelman*, 712 N.E.2d at 689.

205. 895 N.E.2d 997 (Ill. App. Ct. 2008).

206. *Id.* at 1000-01.

207. *Id.* at 1002 (citations omitted).



Improper though it was, the law clerk's contact with counsel did not warrant the judge's recusal because nothing in the record—including the improper ex parte communication—indicated that the judge was prejudiced against the petitioner, and prejudice is the necessary prerequisite for recusal.<sup>208</sup>

*Randolph v. State*<sup>209</sup> presents a remarkable fact pattern. In that murder case, in which the death penalty was imposed, “Pamela Kohler, Judge [Robert] Perry’s law clerk at the time of [Richard] Randolph’s trial testified that she prepared the judgment and sentence on her computer”<sup>210</sup> and that “she received assistance with the wording of the order . . . from John Alexander, then an assistant state attorney assigned to Randolph’s case.”<sup>211</sup> More specifically: “Alexander assisted Kohler in her office as she sat in front of her computer. Neither Judge Perry nor defense counsel . . . was present.”<sup>212</sup> Upon learning of Kohler’s contact with Alexander, “Randolph claim[ed] that the communication between Judge Perry’s law clerk and the prosecutor amounted to improper ex parte communication which prejudiced his right to a neutral judge.”<sup>213</sup> After noting that it had “repeatedly stated [that] there is nothing ‘more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant,’”<sup>214</sup> the Florida Supreme Court determined that “Randolph [had] clearly established that improper ex parte communication occurred between the trial court and the State”<sup>215</sup> but that “Randolph’s right to a neutral judge was not violated by the improper ex parte communication in this case.”<sup>216</sup> The court based its holding on the record developed by the post-conviction court, before which Randolph had “not demonstrated that the sentencing order was not the result of Judge Perry’s independent weighing of the aggravating and mitigating circumstances.”<sup>217</sup>

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208. *Id.* at 1003.

209. 853 So. 2d 1051 (Fla. 2003).

210. *Id.* at 1056.

211. *Id.* at 1056-57. A law clerk named “Pamela Koller” was mentioned in another 2003 Florida death-penalty case, *Jones v. State*, 845 So. 2d 55 (Fla. 2003). In *Jones*, the Florida Supreme Court held: “We also determine that the trial judge did not err in concluding that Koller did not engage in improper ex parte communication with the State. Jones’s assertions with regard to Koller are based on nothing more than speculation. No relief is warranted.” *Id.* at 65. Presuming that Pamela Kohler and Pamela Koller are one and the same, her misstep in *Randolph* seems to have taken on a life of its own, much like Debran Rowland’s rather grosser error, which was seized upon by defendants in at least three cases unrelated to the one in which she pooped the bed.

212. *Randolph*, 853 So. 2d at 1057.

213. *Id.* at 1057. As in *Kamelgard*, the appellate court flatly rejected the argument that no improper communication took place because the communications at issue were those of the law clerk rather than the judge. *See id.* at 1057 n.6.

214. *Id.* (quoting *Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993)).

215. *Id.*

216. *Randolph*, 853 So. 2d at 1057.

217. *Id.* at 1058. The court pointed out, among other things:

Far more prosaic is the fact pattern in *State v. LeBron*.<sup>218</sup> There, “two jurors had overheard a brief conversation between a law clerk and a judge . . . in an elevator in the courthouse shortly after closing arguments had been made.”<sup>219</sup> Specifically, “mention was made of an appeal of LeBron’s conviction in federal court.”<sup>220</sup> The defendant appealed the trial court’s failure to grant a mistrial on grounds of improper contact with the jury.<sup>221</sup> Based upon its analysis of the trial court’s subsequent examination of the jurors and their indication “that the conversation would not influence their decision in the case,”<sup>222</sup> the Nebraska Supreme Court “conclude[d] that the State established that no prejudice was suffered by the defendant as a result of the unfortunate remark and that the court did not abuse its discretion in failing to grant a mistrial.”<sup>223</sup>

I close this section with one of the more mysterious law-clerk reference I have ever encountered. In *Sork v. Rand*,<sup>224</sup> Justice Benjamin Jones of the Supreme Court of Pennsylvania concluded his opinion for the court by writing: “As for Sork’s other contention, we accept the declaration of Judge Waters’—without condoning what took place—that the post-trial activities of his law-clerk had no bearing whatsoever on the outcome of the lower court’s decision.”<sup>225</sup> While that was no doubt good news for Judge Waters and his law clerk, the good news for them was accompanied by no news for the rest of us; the opinion does not describe or even mention the uncondoned post-trial activities of Judge Waters’s law clerk.<sup>226</sup> Discretion, I suppose, is the better part of obfuscation.

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The postconviction court properly considered the nature of the contact between the judge’s law clerk and the prosecutor. Moreover, the postconviction court properly concluded there was no evidence that Judge Perry failed to independently weigh the aggravating and mitigating circumstances in Randolph’s case. Unlike *Riechmann* and *Spencer*, Judge Perry did not delegate responsibility to the State to prepare the sentencing order; the record indicates that Judge Perry’s law clerk prepared the sentencing order on her computer and at the judge’s direction. Additionally, Judge Perry specifically identified and explained the applicable aggravating and mitigating circumstances at Randolph’s sentencing hearing on April 5, 1989.

*Id.* (citing *State v. Riechmann*, 777 So. 2d 342 (Fla. 2000); *Spencer*, 615 So. 2d 688).

218. 349 N.W.2d 918 (Neb. 1984).

219. *Id.* at 922.

220. *Id.*

221. *Id.*

222. *Id.*

223. *LeBron*, 349 N.W.2d at 923.

224. 222 A.2d 890 (Pa. 1966).

225. *Id.* at 893.

226. *Id.* at 890.

## VI. NOT SO FAST, SCHMEDLAP

As I noted in the Introduction, there seem to be proportionately fewer unsuccessful accusations of law-clerk wildness in the state courts than in the federal courts. Even so, a fair number of litigants in state courts have tried to gain advantage by criticizing the actions of law clerks, only to be told that their accusations were off base.

*A. Institutional Challenges (No Law Clerks for Me)*

Some litigants just do not like the idea of law clerks working on their cases, no matter what the law clerk may do. Consider the paean to the *opus oralis* described below:

Without citation to authority, Schemenauer also argues that we may “prefer” the oral decision over the written because the “trial court’s oral decision is definitely from the trial court,” as the judge rules in front of the parties and their attorneys and because the court reporter “records it for the record.” He suggests that the potential for abuse exists when the “trial court is allowed to reflect on its decision and create a written ruling with a more difficult standard of review.” Further, he declares that a trial court’s written decision may not “actually or accurately reflect the trial court’s ruling” because the judge’s law clerk or one of the party’s attorney’s might draft it. This line of argument is offensive, unsupported, incorrect and highly inappropriate. Accordingly, we deny costs to the appellant on appeal.<sup>227</sup>

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227. Schemenauer v. Robertson, 589 N.W.2d 455 (unpublished table decision), No. 98-0216, 1998 WL 887678, at \*8 n.7 (Wis. Ct. App. Dec. 22 1998); *see also* State v. Long, 2009 WL 2475254, at \*7, \*16 (N.J. Super. Ct. App. Div. Aug. 14, 2009) (rejecting, “without further comment,” appellant’s argument that “THE DECISIONS BY THE LAW DIVISION ARE SO OUT OF TOUCH AND OFF THE MARK THAT THEY CAN ONLY BE PERCEIVED TO HAVE WRITTEN [sic] BY THE LAW CLERKS WHOSE INITIALS APPEAR ON THEM, WHEREFORE, THE MATTER SHOULD BE REMANDED TO ANOTHER JUDGE FOR A FULL AND FAIR HEARING ON ALL OF THE ISSUES PRESENTED AND A DECISION WHICH REFLECTS THAT IT WAS MADE BY THE JUDGE, NOT THE LAW CLERK”); Lashus v. Slater, No. 08-ADMS-70006, 2009 WL 1580322, at \*3 n.5 (Mass. App. Div. June 2, 2009) (“Nor is our decision as to the validity of that order affected by any concern that the motion judge’s ruling was based to any degree on the inappropriate participation, or any actual participation, by a ‘law clerk,’ as Lashus suggests.”); Saoud v. Ziadah, No. 16747, 1995 WL 89374, at \*2 (Ohio Ct. App. Mar. 1, 1995) (rejecting appellant’s argument that the trial erred by relying on a “WRITTEN MEMORANDUM OF THE PROCEEDINGS PREPARED BY ITS LAW CLERK TO RENDER JUDGMENT . . .”).

One wonders why those who object to the use of law clerks have such a fondness for writing in all caps. A trained psychologist might well have some valuable insights but, alas, I lack the necessary training to venture an educated guess.

Snap.<sup>228</sup> Trial-court law clerks are not the only judicial amanuenses who have found themselves in the cross-hairs. In *Evans v. State*,<sup>229</sup> a death-penalty case, the defendant argued that his appellate counsel provided ineffective assistance by failing to argue that the Supreme Court of Nevada's "review is 'limited to reviewing bench memoranda prepared by recent law school graduates.'"<sup>230</sup> In a passage that may or may not have been drafted by a recent law-school graduate, the court disagreed:

Further, a recent law school graduate working as a law clerk in chambers could indeed have prepared the initial memo dealing with Evans's direct appeal in 1996, but our review of any case before us has never been limited to reading memos by our staff. A law clerk responsible for analyzing any case receives guidance and scrutiny from the law clerk's justice as well as from other justices and experienced attorneys on this court's central staff. Moreover, for the past few years this court has assigned all capital cases for analysis and recommendation to a team of central staff attorneys with experience and expertise in death penalty jurisprudence. In any case before us, each justice of this court freely consults any and all parts of the parties' briefs and the record, and we discuss cases directly with the staff attorney or law clerk to whom a case is assigned. We also hear oral argument in nearly all, if not all, direct appeals of capital convictions.

All these facts and considerations belie the charge that this court inadequately reviews capital cases or devotes less time and fewer resources to them than to other criminal cases, and in fact the opposite is true.<sup>231</sup>

In *People v. Steegman*,<sup>232</sup> an attorney was fined one hundred dollars by the Michigan Court of Appeals for "the 'disrespectful tenor of his motion for rehearing,'" which made reference to that court's use of law clerks.<sup>233</sup> The Michigan Supreme Court denied the defendant's appeal, but Justice Charles

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228. Judge Thomas Kane, the author of *Schemenauer*, has probably also earned a Crackle and a Pop for his rebuke of the cheeky appellant. But, on the other hand, one must admire the chutzpah of an attorney would extol the virtues of oral decisions, and denigrate the work of law clerks, in an argument to a court that communicates solely by issuing written decisions prepared with the assistance of law clerks.

229. 28 P.3d 498 (Nev. 2001).

230. *Id.* at 520.

231. *Id.* at 520-21.

232. 547 N.W.2d 868 (Mich. 1996).

233. *Id.* at 868.

Levin, writing in dissent from the denial, would have eliminated the fine,<sup>234</sup> arguing:

The only language that my law clerk or I can find that could possibly have so aroused the Court of Appeals are the statements that a law clerk “wrote” the opinion and that the law clerk was “badly confused.”

## I

The Court of Appeals and this Court would stultify ourselves if we were to deny that at least two-thirds and possibly three-quarters or ninety percent of the opinions are drafted or written by law clerks, or, in the case of Court of Appeals, “central staff attorneys,” and that two-thirds and possibly three-quarters or ninety percent of the writing in the opinions is by clerks or central staff. All the per curiam opinions issued by this Court are written by central staff attorneys.

The involvement of law clerks and central staff attorneys in the drafting and writing of opinions is well known. Law clerks and central staff attorneys have the same responsibility and involvement in opinion writing in most every appellate court in the land including the United States Supreme Court.

The involvement of law clerks and central staff attorneys in opinion writing is no secret. If it were a secret, it should not be. Clearly there is nothing disrespectful or impertinent in speaking the truth. The truth is that law clerks generally write the bulk of the opinions.

## II

There is an implication in the assistant defender’s language that the judges who signed the opinion did not adequately check what was written. I see nothing disrespectful and impertinent in saying a judge or justice must have failed to check what the law clerk wrote because if the law clerk’s assertion had been properly checked the error or “confusion” would have been discovered and avoided.<sup>235</sup>

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234. *Id.* at 869 (Levin, J., dissenting).

235. *Id.* at 868-69 (footnote omitted).

While Judge Levin's dissent stands for the proposition that no real harm can come from acknowledging law-clerk authorship of judicial opinions, there is a bigger and more interesting question: Just what is to be gained, strategically, by complaining about the participation of law clerks in judicial opinion drafting?<sup>236</sup>

Finally, it would seem that concerns over reliance on law clerks are not limited to litigants. In *Office of Disciplinary Counsel v. Ferreri*,<sup>237</sup> Judge Robert Ferreri of the Cuyahoga County Court of Common Pleas, Juvenile Division, was suspended from the practice of law, and from the bench, for various comments he made to the media.<sup>238</sup> In one instance, after his decision in *In re Hitchcock*<sup>239</sup> was reversed and remanded, Judge Ferreri gave an interview to a television station.<sup>240</sup>

In the interview, which was taped at [Judge Ferreri]'s home, respondent made several false statements about certain of the Hitchcock parties, including an erroneous accusation that one of them had filed for bankruptcy, and "stuck people – thousand dollars [*sic*] for court reporters fees." In the same interview [Judge Ferreri] stated that the court of appeals decision was "purely political," and that the court of appeals' decision was both made and written by a law clerk who "made a value judgment that was based in error and on law that doesn't exist." Without any personal knowledge of the activity at the court of appeals, [the judge] told the television interviewer that "volumes of data [were sent] to the court of appeals which obviously went unread." In the same interview [he] falsely stated that the judges of the court of appeals were influenced by the wife of one of the appellants' attorneys and that the attorney's wife was also a clerk to one of the judges on that court.<sup>241</sup>

In its opinion, the Supreme Court of Ohio adopted the findings and conclusions of the Board of Commissioners on Grievances and Discipline of the Supreme Court ("Board"),<sup>242</sup> one of which was:

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236. One could argue that it is less inflammatory to say that a law clerk is "badly confused" than it would be to say the same thing about a judge. But, then again, given the tendency of judges to be protective of their law clerks, it might be worse rather than better to speak ill of a law clerk.

237. 710 N.E.2d 1107 (Ohio 1999).

238. *Id.* at 1111.

239. *In re Hitchcock*, 696 N.E.2d 1090 (Ohio Ct. App.1996).

240. *Ferreri*, 710 N.E.2d at 1108 (citing *Hitchcock*, 696 N.E.2d at 1101).

241. *Id.*

242. *Id.* at 1110.

that by making these statements, whether on or off the record, [Judge Ferreri] acted without due regard for the impression he left as to the character and reputation of the party against whom he had ruled, the integrity of the court of appeals, the fairness and objectivity of the judicial system, and his own impartiality and judicial temperament.<sup>243</sup>

While the Board settled on an eighteen-month suspension from the practice of law, all stayed in favor of probation,<sup>244</sup> the Supreme Court of Ohio imposed an eighteen-month suspension, but only stayed the last twelve months, and also removed Judge Ferreri from the bench for six months without pay.<sup>245</sup>

*B. Specific Challenges (Just Not That Law Clerk)*

In addition to the institutional challenges described above, I found several cases in which litigants objected to the utilization of specific law clerks.

In a rather pedestrian example, the mother in a child-custody case appealed the trial court's "judgment that disapproved reunification with her daughter."<sup>246</sup> On appeal, the mother argued that "[t]he trial court erred by utilizing the same law clerk who had worked on the instant case with the previously recused Judge Green, thus relying upon staff's knowledge and opinions about the mother based upon the previous judge's biases."<sup>247</sup> The appellate court described the mother's argument this way:

In her motion for new trial, M.K.F. stated that while she did not question the law clerk's propriety, she did challenge the appearance of impropriety, as follows: "While undersigned counsel makes absolutely no suggestion that [the law clerk] acted improperly in any way whatsoever, and in fact, holds [the law clerk] in high regard, her mere prior and lengthy involvement in this matter, as attorney for [the recused judge], presents at a minimum a perception of bias against [M.K.F.]." She cites no law or jurisprudence establishing that utilization of court staff *per se* raises the appearance of judicial impropriety, and we can find none.<sup>248</sup>

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243. *Id.* at 1108.

244. *Id.* at 1109-10.

245. *Ferreri*, 710 N.E.2d at 1111.

246. *State ex rel. L.H.*, No. 2010 CJ 0645, 2010 WL 3526479, at \*1 (La. Ct. App. Sept. 10, 2010).

247. *Id.*

248. *Id.* at \*3.

The court of appeals rejected M.K.F.'s argument, noting that "while M.K.F. appears to suggest that the law clerk acted as personal attorney for the recused judge during the recusal proceeding, no evidence in the record supports this conjecture,"<sup>249</sup> and concluding that "[w]ithout evidence of actual bias resulting from utilization of a common law clerk . . . M.K.F. has failed to establish any bias on the part of the trial court."<sup>250</sup>

An attorney's attempt to have a law clerk removed in *In re Charges of Unprofessional Conduct Contained in Panel Case No. 15976*<sup>251</sup> resulted in a much less happy ending for the attorney than a mere losing issue on appeal.<sup>252</sup> In that case:

Respondent represented a disabled plaintiff in a personal-injury action. During the jury trial, respondent moved for a mistrial advocating on behalf of his client that the presence of the court's severely disabled law clerk diminished his client's ability to receive a fair trial. At the conclusion of trial, respondent moved for a new trial, once again objecting to the presence of the law clerk in the courtroom.<sup>253</sup>

Not only did the trial judge deny the requested relief, he reported the attorney to Minnesota's Office of Lawyers Professional Responsibility.<sup>254</sup> These are the facts:

Respondent's client sustained serious permanent physical injuries that disabled him when a school bus hit and ran over him with a rear tire while he was riding a bicycle in South Minneapolis . . . .

Complainant presided over the personal-injury action and assigned one of his two law clerks to assist with the action. The clerk assigned by complainant to assist in this case is physically disabled. He is paralyzed from his mouth down and has difficulty breathing and speaking. He performed his duties as a law clerk with the assistance of a large wheelchair, respirator and full-time attendant. The disabled clerk was present in the courtroom at the outset of the personal-injury trial, assisted with jury selection, and remained in the courtroom throughout the trial.

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249. *Id.*

250. *Id.*

251. 653 N.W.2d 452 (Minn. 2002).

252. *Id.*

253. *Id.* at 453.

254. *Id.*



On the first day of trial, respondent's client expressed reservations about his ability to receive a fair trial grounded on the fact that if the disabled law clerk continued to work in the courtroom, the jury would compare the clerk who was more severely disabled yet able to work, to himself, who was less severely disabled and claiming an inability to work. Later that same day respondent made an oral motion outside the presence of the jury, "for a mistrial and another panel of jurors without your law clerk present or in the alternative that this case be assigned to another judge." Respondent gave the following explanation for his motion:

"I will be asking the jury to award future loss of wages, future diminished earning capacity. I do not believe a jury when they look at the comparison with your law clerk, who's obviously gainfully employed, working in the courtroom under great handicap and great duress, will be able to award anything to my client under those circumstances."

Respondent stated that he brought the motion with "great reluctance" and acknowledged that the motion was "outrageous and distasteful for the court." He did not support his motion with any legal authority. Stating that the motion was "un-American," complainant denied the motion.<sup>255</sup>

The attorney raised the same issue in a motion for a new trial, again without legal support.<sup>256</sup>

The Director of the Office of Lawyers Professional Responsibility issued an admonition, which was subsequently amended by a Lawyers Professional Responsibility Board Panel.<sup>257</sup> The panel determined that the initial motion for a mistrial was "ill-considered" but not a violation of the Minnesota Rules of Professional Conduct.<sup>258</sup> However, the panel determined that the motion for mistrial did violate the professional-conduct rules because it had no legal basis and because its submission was prejudicial to the administration of justice.<sup>259</sup> The Minnesota Supreme Court affirmed on the second ground, first analogizing to a case in which a prosecutor was admonished for moving to prohibit the defendant's counsel

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255. *Id.* at 454-55.

256. *Charges of Unprofessional Conduct*, 653 N.W.2d at 454-55.

257. *Id.* at 453-54.

258. *Id.* at 455.

259. *Id.* (citing MINN. R. PROF'L CONDUCT 3.1, 8.4(d)).

from having a person of color as co-counsel,<sup>260</sup> and then holding that “[n]either race nor disability should be used to limit a court employee’s participation in our courts.”<sup>261</sup>

### C. Accusations of Misconduct

Not only have litigants mounted unsuccessful challenges to the institution of clerkship as a whole, or to the participation of individual law clerks in their cases, they have also frequently failed in attempts to gain advantage by objecting to specific instances of law-clerk conduct. In this section, I discuss cases in which litigants have failed to prevail on claims that law clerks acted like judges,<sup>262</sup> conducted inappropriate research,<sup>263</sup> had

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260. *Id.* at 456.

261. *Charges of Unprofessional Conduct*, 653 N.W.2d at 456. The court also affirmed the panel’s sanction—admonition—rather than the more serious sanction advocated by the complaining judge on appeal, on the ground that the attorney’s misconduct was an isolated incident. *Id.* at 457. The complainant’s argument for a harsher sanction inspired an interesting discussion from the court:

Under state and federal statutes, it is an objective to end disability-based discrimination and to integrate persons with disabilities so they can access employment opportunities, education and places of public accommodation. A disabled court employee has a right to perform his job in the courtroom. But here we have the perceived rights of two disabled persons potentially in conflict with one another. Respondent’s client also suffers from a disability. Respondent’s client was concerned that the jury would compare the law clerk’s more severe disability with his less severe disability and that comparison would unduly influence the jury to decide against him on his claims and deprive him of a fair trial. Ironically, the concern of respondent’s client, as argued by respondent, was not that the law clerk’s disability prevented him from capably performing his job, but that the law clerk’s demonstrated capability would diminish the client’s disability claim. Respondent’s motion can be viewed as an inappropriate attempt to address the respective rights of two disabled persons, rather than elevating the rights of one over the rights of another. If respondent was concerned that the jury might make improper comparisons, respondent could have addressed those concerns during voir dire. Nonetheless, when viewed in context, we conclude that the Panel did not act arbitrarily, capriciously or unreasonably by finding that respondent’s conduct in this particular situation was non-serious.

*Id.* at 457-58.

262. *See, e.g., Del Rosario v. Wang*, 804 A.2d 292, 295 n.3 (D.C. 2002) (“Appellants’ bold assertion that, even according to Judge Graae, it was judge Beck’s *law clerk* who made the award of costs—rather than the judge—is refuted by Judge Graae’s statement twice that the ruling was Judge Beck’s.”); *nSight, Inc. v. Oracle USA, Inc.*, No. A117900, 2008 WL 2055850, at \*8 (Cal. Ct. App. May 14, 2008) (rejecting, on procedural grounds, argument that trial judge violated party’s due-process rights by improperly delegating power when she “had her law clerks me[et] with lawyers and issue[ ] orders shortening time in the judge’s name.”).

263. *See, e.g., Perroni v. State*, 186 S.W.3d 206 (Ark. 2004) (declining to address, as a superfluous matter, a claim made by attorney appealing state trial judge’s contempt order that the trial judge erred by directing his law clerk to go to federal court to obtain copies of pleadings and scheduling orders in condemnor’s case there). However, in *Fox v. Perroni*, the Arkansas Supreme Court held that the personal check the judge’s law clerk wrote to pay for copying the federal court material was subject to disclosure under the Arkansas Freedom of Information Act. *See* 188 S.W.3d 881, 890 (Ark. 2004).

improper contact with attorneys or jurors, or engaged in other conduct they should not have.

In *Attorney Grievance Commission of Maryland v. Sheridan*,<sup>264</sup> attorney Robert Sheridan—perhaps in an effort to deflect attention away from himself during a disciplinary action—accused a judge of delegating too extensively to his law clerk:

Moreover, Respondent bootstraps his claim of judicial prejudice, in part, upon his unsubstantiated theory that, after the hearing, the judge simply handed the matter to her law clerk to draft findings and conclusions that Respondent committed ethical violations. He asserts that:

“Judge Nolan completely ignored the clear and undisputed facts, admitted to knowing nothing about bankruptcy law or the applicable lien laws or the attorney ownership of fee assessment laws, and simply handed the matter to her law clerk to find Respondent guilty and write up some miscellaneous dates and “facts” to make Respondent look guilty.”

His exceptions are replete with similar accusations.<sup>265</sup>

Regarding Sheridan’s contention that the judge impermissibly delegated to her law clerk, the court was entirely unpersuaded:

Respondent has pointed to not one shred of credible evidence to support his claim that Judge Nolan referred this case to her law clerk to “paper” a pre-ordained decision to hold him accountable in this matter. Furthermore, Respondent’s focus on whether Judge Nolan’s law clerk drafted the findings of fact and conclusions of law, even if true, is of no moment in these disciplinary proceedings. We reject any notion that the delegation of drafting findings of fact

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264. 741 A.2d 1143 (Md. 1999).

265. *Id.* at 1150-51. Those accusations include the following:

Paragraph 7 further demonstrates the trial judge’s (or her clerk’s) complete lack of any grasp of the applicable legal terms and concepts in this case . . . . Similarly, the trial judge (or her clerk) apparently cannot grasp the concept of a consent judgment . . . . Again, Paragraph 7 is a clear demonstration of the complete lack of due process, which presumably requires a knowledgeable and attentive fact-finder with complete impartiality and grasp of applicable law, terms and legal concepts, not a pre-decided “fact”-finder instructing a totally unknowledgeable law clerk to whip up something that makes the Respondent look guilty.

*Id.* at 1151.

and conclusions of law to a judge's clerk, for the judge's review and adoption, lies outside the realm of a judicial clerk's duties or the proper administration of the judicial process. Judicial clerks are integral to the judicial process. See *Gill v. Ripley*, 724 A.2d 88, 98 ([Md.] 1999). Their work is "entirely judicial in nature and is 'supervised, approved, and adopted by the judges who initially authorized it.'" *Gill*, 724 A.2d at 97 (citations omitted). Judge Nolan's adoption of the findings of fact and conclusions of law, evidenced by her signature, cast them as her product, as if (and for all we know it was) penned originally by her hand from their inception. Whether her judicial clerk drafted the findings of facts and conclusions of law, or whether the judge herself drafted them, has no bearing on Respondent's case.<sup>266</sup>

The Mississippi Supreme Court was similarly unmoved by the defendant's claim, in *Jones v. State*,<sup>267</sup> that the judge who presided over his trial exhibited bias by having his law clerk research a point of law.<sup>268</sup> Before noting that the issue was actually moot, the appellate court stated: "This Court finds that Judge Hines's desire to know the law and make the correct decision in no way demonstrates his bias against Jones."<sup>269</sup> It is difficult to imagine that any appellate court anywhere has ever had to write a sentence more self-evident than that.

In *Mallory v. Hartsfield, Almand & Grisham, LLP*,<sup>270</sup> the issue was a telephone call made by the appellees' former counsel to the trial court's law clerk.<sup>271</sup> The appellant argued that the ex parte communication required the judge's recusal.<sup>272</sup> The appellate court ruled that there was, in fact, a violation of Canon 3 of the Arkansas Code of Judicial Conduct, but that the judge "cured this violation by calling the parties and allowing an opportunity to respond."<sup>273</sup>

In several opinions, appellate courts have rejected arguments that law clerks have had improper contact with jurors. In *State v. Starkey*,<sup>274</sup> the Minnesota Court of Appeals credited the post-trial court's determination that "the law clerk simply inquired of the juror's health at the trial judge's

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266. *Id.* at 1151-52 (parallel citation omitted).

267. 841 So. 2d 115 (Miss. 2003).

268. *Id.* at 138.

269. *Id.*

270. 86 S.W.3d 863 (Ark. 2002).

271. *Id.* at 866.

272. *Id.*

273. *Id.* at 867.

274. 507 N.W.2d 8 (Minn. Ct. App. 1993).

request,”<sup>275</sup> and, on that basis, ruled that the post-trial court did not err in refusing to question jurors concerning the appellant’s claim that “the trial judge’s law clerk pressured a juror to continue during closing arguments despite illness.”<sup>276</sup> The putative problem in *Gormley v. Grand Lodge of the State of Louisiana*<sup>277</sup> was the presence of a law clerk in the jury room:

After the case was submitted to the jury, the trial judge’s law clerk was seen leaving the jury room and overheard saying “Now, are you sure you understand about the interrogatories?” An oral motion for mistrial was then lodged by Mrs. Gormley. Upon questioning, the law clerk explained that she was asked by the jury to clarify the interrogatories at which time the law clerk left the jury room and referred the questions to the judge. The judge denied both the Motion for mistrial and a subsequently filed Motion for a new trial based on the same objection as to the law clerk’s conduct.<sup>278</sup>

On appeal, Gormley “contend[ed] that the communications of the trial judge’s law clerk with the jury in the jury room during deliberations constituted grounds for a new trial.”<sup>279</sup> The appellate court disagreed:

In the present case, the trial judge explained the law clerk’s presence in the jury room. It seems that the court was informed that the jury was having difficulty understanding the interrogatories given to them. The law clerk entered the jury room to determine what the difficulty was and then reported the question back to the court. Under such circumstances, we do not find the law clerk’s conduct to be of such a grievous nature as to impair the neutrality of the court.<sup>280</sup>

Finally, in *Sloan v. United States*,<sup>281</sup> a criminal defendant argued, on appeal, “that the trial judge violated the Code of Judicial Conduct by relying on an

275. *Id.* at 15.

276. *Id.*

277. 503 So. 2d 181 (La. Ct. App. 1987).

278. *Id.* at 183.

279. *Id.* at 186.

280. *Id.* (citing *Bossier v. DeSoto Gen. Hosp.*, 442 So. 2d 485 (La. Ct. App. 1983); *Peters v. Atlanta Int’l Ins. Co.*, 469 So. 2d 421 (La. Ct. App. 1985)); *see also Karagiannopoulos v. State Farm Fire & Cas. Co.*, 752 So. 2d 202, 210 (La. Ct. App. 1999) (“Plaintiffs allege the trial judge’s law clerk was in the room with the jury during deliberations and instructed the jury to rule in favor of State Farm. However, there is nothing in the record to support these allegations. Plaintiffs’ allegations regarding contact between the trial judge’s staff and the jury seem to be based on appellants’ apparent misunderstandings of routine proceedings in a jury trial.”).

281. 527 A.2d 1277 (D.C. 1987).

*ex parte*, post-verdict discussion by his law clerk with a juror about the reasons why [he] was acquitted of two of the three charged offenses.”<sup>282</sup> Factually:

After the verdict was delivered, a juror came to the trial judge’s chambers seeking to have the judge place a telephone call to his employer. When the juror asked the judge’s law clerk about placing this call, a discussion ensued in which the juror related to the clerk that the jury had acquitted the appellant on the two charges because it misunderstood the court’s instructions.<sup>283</sup>

At Sloan’s sentencing hearing, the trial court informed both sides of the conversation, declined defense counsel’s request to speak to the jurors about their reasons for the verdict, and imposed sentence.<sup>284</sup> On appeal, the defendant argued “that the information from the juror was improperly obtained and relied upon by the trial court in passing sentence, in violation of the ABA Code of Judicial Conduct.”<sup>285</sup> The appellate court did not agree, noting that neither the trial judge nor the law clerk initiated the communication, that the trial judge told counsel about the incident, and that at the sentencing hearing, the trial judge stated three times “that the communication made ‘absolutely no difference whatsoever to the sentence [he was] probably going to impose . . . .’”<sup>286</sup>

Another popular, but generally unsuccessful focus for litigant attacks on law-clerk conduct is the practice of having law clerks read various documents to juries. In *State v. Vincent*,<sup>287</sup> a criminal defendant argued that the trial judge committed reversible error by “permitt[ing] his law clerk to read portions of the coroner’s report and procès verbal of the autopsy to the jury.”<sup>288</sup> Vincent’s conviction and sentence were affirmed,<sup>289</sup> but the opinion sheds no light on the court’s reasoning vis à vis Vincent’s objection to the law clerk’s participation at trial.<sup>290</sup> Of substantially greater interest is *State v. Boudreaux*,<sup>291</sup> another Louisiana case that also involved material

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282. *Id.* at 1286 (emphasis omitted).

283. *Id.*

284. *Id.*

285. *Id.* at 1287.

286. *Sloan*, 527 A.2d at 1287.

287. 338 So. 2d 1376 (La. 1976).

288. *Id.* at 1385.

289. *Id.*

290. *See id.* at 1385.

291. 454 So. 2d 1293 (La.Ct. App. 1984).

read to the jury by a law clerk.<sup>292</sup> In Gary Boudreaux's murder trial, the state notified the defendant of its intent to use a taped statement he gave to police shortly after the victim was stabbed to death.<sup>293</sup> At trial, the tape could not be located, so a transcript of the taped statement "was read to the jury by the trial judge's law clerk."<sup>294</sup> On appeal, the defendant challenged the manner in which his statement was presented to the jury:

As an additional argument that the use of the transcript rather than the tape prejudiced him, appellant complains that the reading by the trial judge's law clerk resulted in "vocal inflection and intonation" that could not have faithfully reproduced the original, coming as it did from the mouth of a highly educated law clerk rather than from the voice of this seventh grade educated defendant. This argument is without merit. Defendant has cited us no case, and we have found none, condemning the widespread practice in this State of permitting the reading to the jury of written confessions or inculpatory statements. Moreover, there is no indication here that the reader's "inflection and intonation" dramatized or otherwise influenced the listener's understanding of the transcribed statement. The reading was done under the watchful eye of the trial judge, whose explanation to the jury as to why it was being handled in that way included the observation that the law clerk was merely a verbatim reader of someone else's words.<sup>295</sup>

A swing and a miss. In yet another case involving a law clerk who read testimony to the jury, the defendant in *State v. Hunt*<sup>296</sup> argued that "the trial court erred by divulging to the jury that the person reading the transcript of Walker's testimony was the court's law clerk."<sup>297</sup> In the defendant's view, "this revelation created the appearance that the trial court was giving its stamp of approval to the credibility of the Walker testimony."<sup>298</sup> The Ohio Court of Appeals did not share the defendant's view of the issue.<sup>299</sup>

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292. *Id.* at 1295.

293. *Id.*

294. *Id.*

295. *Id.* at 1296.

296. No. 95APA03-370, 1995 WL 600509 (Ohio Ct. App. Oct. 12, 1995).

297. *Id.* at \*4.

298. *Id.*

299. *Id.* at \*5 ("We conclude that it was not error for the court to inform the jury that it was the court's law clerk who would be reading the former testimony.").

*Raneda v. Bank of America, N.A.*<sup>300</sup> presents no groundbreaking legal analysis, but does offer a colorful fact pattern. Raneda—who was a law student—was assessed more than \$120,000 in costs and attorney’s fees for filing a frivolous lawsuit.<sup>301</sup> On appeal, he charged the trial court with bias that was expressed to his detriment by the judge in concert with his law clerk.<sup>302</sup> The appellate court was underwhelmed in every way:

[I]n his appellate brief, Raneda misrepresents the record by omitting relevant portions of a quotation, from the court’s decision on his motion after the verdict, in his effort to prove the court engaged in an *ex parte* communication that caused bias. The portions he omitted are in bold type:

“I was told by the law clerk who brought the jury up and down that apparently you applied for one of the judicial law clerk positions here, **and I did not say anything to him and I would not say anything. I would not make any determination as to what your future is.** But that’s almost adverse to your testimony where you said you had a patent job coming up at \$120,000 a year. So I don’t perceive you as being as lying—intentionally lying, I just perceive the way you tried the case and the things you say, that you [speak] without making certain that what you are saying is accurate and complete. **I’m not finding you to be a bad guy, a finding that the action was malicious, but** you just can’t start lawsuits and continue them without a factual underpinning without a basis to proceed, and that’s what you did in this case. And you knew it and you continued and you acknowledged it.”

We caution Raneda that at all times, and certainly when alleging judicial misconduct, he must meticulously present the record.

The record does not establish that the circuit court judge did anything to “initiate, permit, engage in, or consider” the law clerk’s information in rendering its decision. After pointing out that its finding of frivolousness was based on Raneda’s lack of evidence,

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300. 668 N.W.2d 563 (unpublished table decision), No. 02-2149, 2003 WL 21499015 (Wis. Ct. App. July 1, 2003).

301. *Id.* at \*1. Specifically, he sued the bank that repossessed his SUV after he failed to make four consecutive monthly lease payments. *Id.*

302. *Id.* at \*2.



the court specifically told Raneda about the law clerk's comment and emphasized that it had no bearing on its decision. The court clarified that it "did not say anything to [the law clerk]" and that it "would not say anything" or "make any determination as to what [Raneda's] future is." Thus, it is clear that Raneda was not prejudiced to any material degree by the court's knowledge of the law clerk's comment.<sup>303</sup>

I cannot imagine that Raneda's litigation strategy earned him many supporters on the Character and Fitness Committee when it came time to apply for admission to the bar.

I conclude this section on a more serious note, with another death-penalty case. In *Harlow v. State*,<sup>304</sup> James Harlow was convicted of murder and sentenced to death.<sup>305</sup> After trial, he sought, and was denied, an evidentiary hearing into the participation of the Wyoming Supreme Court's death-penalty law clerk in his trial.<sup>306</sup> Harlow's concern was that the death-penalty law clerk might have been privy to "the confidential particulars" of a death-penalty case pending before the Wyoming Supreme Court at the time of his trial, and that his constitutional rights could have been violated if the law clerk's advice to the trial court was based upon his secret knowledge of how the supreme court was dealing with the case before it.<sup>307</sup> The Wyoming Supreme Court soundly rejected Harlow's argument:

In participating in Harlow's trial, the death penalty law clerk could furnish correct advice to the trial court or he could furnish incorrect advice. His role was limited to that of any support personnel for the trial court. If the court acted upon incorrect advice, that would be manifest in the record, and any such error would be attacked in this appeal. If the trial court adopted and applied correct advice, there is no possibility of harm to Harlow. We are satisfied, at a pragmatic level, that regardless of the source of information the death penalty law clerk presented to the trial court, the only possible question is whether the advice was correct or not. The endeavor to manipulate this court by a complaint that this participation was wrong and that somehow this court infringed Harlow's constitutional rights by providing a death penalty law clerk is singularly unavailing.

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303. *Id.* at \*2-3.

304. 70 P.3d 179 (Wyo. 2003).

305. *Id.* at 183.

306. *Id.* at 199-200.

307. *Id.* at 200.

Clearly there is no basis to claim error because of the participation of the death penalty law clerk in Harlow's trial.<sup>308</sup>

## VII. EXTRA-CURRICULAR WILDNESS

So far, I have focused on wild things law clerks have done while attempting to carry out their law-clerk duties. While the best of intentions have sometimes resulted in reversal and remand, most of the law-clerk errors described above—Debran Rowland's being a possible exception—were committed in an honest attempt to do the job well, if not properly. The opinions I describe in this Part are another story. Taken together, they make up a parade of horrors that features a stunning array of things law clerks have done both inside and outside the courthouse, generally unrelated to their law-clerk work, that have landed them in hot water with disciplinary boards, or have resulted in their swimming in the even hotter water of the criminal justice system.

### A. In re *Law Clerk*

In this section, I turn my attention to opinions in cases in which law clerks, or, in several instances former law clerks, have come before state disciplinary panels. Specifically, I examine cases in which law clerks have been sanctioned for their conduct outside chambers, cases in which law clerks have been denied admission to the bar, and cases in which law clerks have been admitted to the bar, notwithstanding various blemishes on their records.

#### 1. *Reining in the Wild Law Clerk*

I begin with a case that reads like a Queen City homage to Alaska's Debran Rowland. In *Cincinnati Bar Ass'n v. Sauter*,<sup>309</sup> "Susan M. Sauter . . . was a law clerk to . . . a judge of the [Ohio] Court of Appeals . . ." <sup>310</sup> "While so employed, she had *ex parte* communication with counsel for a party in a pending case."<sup>311</sup> Specifically:

On October 4, 2000, Sauter sent an e-mail message to a friend of hers, Assistant City Solicitor Dotty Carman. She did not send a copy to counsel for the party opposing the city in the *Banks* case. The text of the message follows:

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308. *Id.* at 201.

309. 772 N.E.2d 620 (Ohio 2002).

310. *Id.* at 620.

311. *Id.*

“I couldn’t locate Geiler’s address, so I’m sending this to you to send to her.”

“Re: oral argument next week in Banks. For standard of review on evidentiary issues, courts use abuse of discretion standard. Recently, judges on this court have been defining that standard not as ‘arbitrary, unconscionable’ etc. but as ‘not based on a sound reasoning process’ . . . . Painter especially thinks this is a better standard for abuse-of-discretion review. This type of review is probably better for the city, so you might want to hammer on the lack of sound reasoning by the lower court.”

“This message will self destruct in two hours.”<sup>312</sup>

The Deputy City Solicitor reported the matter to the court, and Sauter’s judge recused himself before oral argument.<sup>313</sup> Nine days after she sent the email, Sauter resigned her clerkship.<sup>314</sup> The Supreme Court of Ohio affirmed the public reprimand imposed by the Board of Commissioners on Grievances and Discipline of the Supreme Court,<sup>315</sup> over the dissent of Justice Deborah Cook, who observed that “[r]espondent had been admitted to the practice of law more than nine years at the time she sent the ex parte communication.”<sup>316</sup> On that basis, Justice Cook would have imposed an actual suspension.<sup>317</sup>

Public reprimand was also the sanction imposed on the three law clerks in *In re McLaughlin*,<sup>318</sup> who were “caught red-handed in an illegal drug transaction . . . ,”<sup>319</sup> specifically, the purchase of about one gram of

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312. *Id.* at 620-21 (citations omitted).

313. *Id.* at 621.

314. *Sauter*, 772 N.E.2d at 621.

315. *Id.* As the court wrote:

We conclude without hesitation that Sauter’s conduct was prejudicial to the administration of justice. Sauter advised the city’s attorney how best to appeal to the panel members. Secretly helping one side was inconsistent with Sauter’s position as a confidential assistant to a judge assigned to the case. Such conduct, by one in Sauter’s position, may create a false impression that a party with inside connections can influence the decision-making processes of a court. Her behavior forced Judge Hildebrandt to recuse himself to restore the appearance of impartiality that Sauter’s e-mail had compromised.

*Id.*

316. *Id.* at 621 (Cook, J., dissenting).

317. *Id.*

318. 522 A.2d 999 (N.J. 1987).

319. *Id.* at 1000-01.

cocaine.<sup>320</sup> The local ethics committee recommended a private reprimand, but, at the next stage of the process, the Disciplinary Review Board (“DRB”) recommended a public reprimand.<sup>321</sup> Before the New Jersey Supreme Court, the former law clerks argued that a private reprimand was sufficient, citing various factors, including these:

(c) respondents were neophytes in the legal profession, not yet seasoned by the experience and wisdom born of years of practice; . . . (e) respondents have suffered “sufficient anguish, humiliation, loss of earning power through notoriety in legal circles,” and have experienced the lack of certainty in professional futures, in which they have invested “years of hard work, expectation, and financial expenses” connected with their legal educations; (f) the event “did not in any manner compromise [their] judicial clerkship[s],” and no judge, client, lawyer, case, or member of the public was “compromised or in any manner affected” by the incident . . . .<sup>322</sup>

For its part, the DRB determined that the respondents’ employment as law clerks was an aggravating factor, supporting the imposition of a public rather than a private reprimand:

The public was aware through news articles of the arrests and the positions respondents held within the judiciary. Respondents’ conduct must be viewed from the perspective of an informed and concerned private citizen and be judged in the context of whether the image of the bar would be diminished if such conduct were not publicly disapproved. *Cf. In re Opinion No. 415*, [407 A.2d 1197, 1200] ([N.J.] 1979). To withhold public discipline could cause the public to believe that the legal profession is not concerned about illicit drug usage, or that judicial law clerks as members of the judicial family had received preferential disciplinary treatment.<sup>323</sup>

The supreme court adopted the DRB’s reasoning as its own,<sup>324</sup> and added this:

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320. *Id.* Needless to say, the law clerks’ arrests were not well received by their employers: “All three respondents, having promptly reported the incident to the judges in whose chambers each was employed, were suspended from their judicial clerkships immediately.” *Id.*

321. *Id.* at 1001.

322. *McLaughlin*, 522 A.2d at 1001.

323. *Id.* (parallel citation omitted).

324. *Id.*

As well, we specifically reject, as did the DRB, respondents' contention that for purposes of discipline their judicial clerkships are of no moment. The position of law secretary to a member of the judiciary is earnestly sought by many. It is an honor and mark of distinction that is awarded to only the most highly qualified applicants. One reason for its attraction is that it is perceived—and rightly so—as a source of invaluable experience not to be gained elsewhere. But most importantly for today's purposes, the public sees judicial clerks as, in the DRB's phrase, "members of the judicial family"; and respondents' argument that we should attach no significance to their employment circumstances overlooks the fact that in engaging in illegal conduct they plainly, even spectacularly, compromised not just themselves but the judges for whom they worked. When they dishonored their coveted positions, they tarnished the integrity of the judiciary.<sup>325</sup>

In *In re Wong*,<sup>326</sup> law clerk Leo Wong was issued a public censure after he was convicted of a misdemeanor, specifically attempted fourth-degree grand larceny, for accepting \$3,240 in unemployment benefits to which he was not entitled.<sup>327</sup> Wong received the benefits from September through November of 2001, before he was admitted to the bar.<sup>328</sup> In August of 2002, he was hired by Chief Judge Rosemary Gambardella of the U.S. Bankruptcy Court for a clerkship he held until September of 2004.<sup>329</sup> During Wong's clerkship:

[I]n January 2003, [he] received a letter from the Department of Labor notifying him that he had received an overpayment of benefits and requesting that he contact them. Although [Wong] attempted to contact the Department of Labor by leaving telephone messages, he never made contact and did not follow through. In May 2003, the District Attorney's Office contacted [Wong] about the overpayment of benefits and asked him to come to their offices, where he was arrested.<sup>330</sup>

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325. *Id.* at 1002.

326. 805 N.Y.S.2d 69 (N.Y. App. Div. 2005).

327. *Id.* at 70-71.

328. *Id.* at 70.

329. *Id.* At Wong's hearing, "Judge Gambardella testified . . . that because of [Wong's] excellent work, she had extended the standard one-year clerkship to two years with respect to respondent, something she had only done on one or two occasions during her previous 19 years on the bench." *Id.*

330. *Wong*, 805 N.Y.S.2d at 70-71.

In imposing a relatively lenient sanction, the court noted the disciplinary panel's determination to credit Wong's "relative inexperience as an attorney at the time of the conduct complained of as well as the numerous character witnesses called on his behalf including, . . . the Hon. Rosemary Gambardella."<sup>331</sup>

*In re Barrier*<sup>332</sup> involved law-clerk misconduct that was perhaps a bit less spectacular than that in *McLaughlin*, but was more severely sanctioned. While employed as a judicial law clerk/staff attorney for the South Carolina Court of Appeals, C.H. Barrier conducted two or three real estate closings each month for more than two years for an attorney in private practice.<sup>333</sup> For violating the South Carolina Code of Conduct for Staff Attorneys and Law Clerks, as well as the Rules of Professional Conduct, Barrier was suspended from the practice of law for sixty days by the South Carolina Supreme Court.<sup>334</sup>

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331. *Id.* at 71.

332. 654 S.E.2d 85 (S.C. 2007).

333. *Id.* at 85-86.

334. *See id.* at 86; *see also In re Decuir*, 654 So. 2d 687, 690, 693 (La. 1995) (issuing public censure to judge for various acts of misconduct, including "permitt[ing] one of his law clerks to work as an independent contractor, performing legal research for a law firm"). In *In re Chandler*, 641 N.E.2d 473, 482 (Ill. 1994), a disciplinary action that resulted in a three-year suspension from the practice of law, the following law-clerk conduct was described, but not actually at issue:

In referring to the circumstances under which the respondent left her position [as a law clerk] with the Second Circuit, the dissent reads the record selectively, ignoring entirely the explanation provided by the respondent's former supervisor. During its investigation of the respondent, the Committee on Character and Fitness sent a questionnaire to the supervisor, seeking verification of the respondent's employment history and making inquiry regarding the respondent's qualifications. The supervisor answered "no" to the question, "While in your employ was the applicant worthy of trust and confidence?" In response to questions concerning the respondent's honesty, integrity, and conduct, the supervisor attached an explanatory statement. The explanation stated:

"While employed under my supervision as a law clerk for the Court of Appeals for the Second Circuit, Ms. Chandler was asked to resign because she had become actively involved with a team of defense attorneys representing certain defendants then in federal custody. According to prison records and information conveyed to me by a deputy warden Ms. Chandler visited these defendants several times while they were incarcerated in the Metropolitan Correctional Center. She gained access to the prison by claiming to be an attorney for one or more of these defendants. These visits occurred during working hours and without my knowledge or permission. In addition, I was informed by both an assistant United States attorney and a federal magistrate that Ms. Chandler had appeared before the magistrate on behalf of one or more of these defendants, also without my knowledge or permission and also during working hours. Moreover, Ms. Chandler failed to disclose to the prison officials, the AUSAs assigned to the case or to the magistrate that she was a Second Circuit law clerk. Ms. Chandler's activities violated the code of conduct applicable to law clerks employed by the federal courts and demonstrated her lack of candor and integrity."

Law-clerk involvement with drugs was also at issue in *Louisiana State Bar Ass'n. v. Tilly*,<sup>335</sup> but unlike the law clerks in *McLaughlin*, who were buyers, the law clerk in *Tilly* was a seller.<sup>336</sup> Specifically, Miles Tilly pled guilty to selling an ounce of marijuana,<sup>337</sup> but in response to a disciplinary action before the Committee on Professional Responsibility, he argued against a suspension from the practice of law by pointing out that “he had never publicly practiced law, having worked exclusively as a judicial law clerk from the time of his admission to the bar to his voluntary resignation after his arrest.”<sup>338</sup> After determining that “Tilly’s conviction demonstrate[d] a lack of fidelity to a lawyer’s duty to uphold and respect the laws . . . ,”<sup>339</sup> the Louisiana Supreme Court imposed a two-year suspension.<sup>340</sup> Interestingly, however, unlike the *McLaughlin* court—which found employment as a law clerk to be an aggravating factor when determining an appropriate sanction<sup>341</sup>—the *Tilly* court seems to have at least implicitly found that Tilly’s service as a law clerk was a mitigating factor, noting that “Tilly had no clients at the time of his conviction, nor had he practiced law previously [so that] [h]is conviction and actions . . . did not directly harm any clients.”<sup>342</sup> The court further noted: “Due to Tilly’s inexperience in the practice of law, his conviction received little publicity endangering the public’s trust in the legal profession.”<sup>343</sup>

*Disciplinary Board of the Hawaii Supreme Court v. Bergan*<sup>344</sup> involved a good bit more cocaine than the one gram the law clerks purchased in *McLaughlin*,<sup>345</sup> and a stiffer sanction than the two-year suspension imposed on the law clerk in *Tilly*.<sup>346</sup> “[W]hile employed as a law clerk to the

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“Finally, during this time Ms. Chandler was unable to devote her attention to her duties as a law clerk. As a result, her assignments were not completed in a timely fashion or were poorly performed.”

“In sum, Ms. Chandler’s conduct while in the Court’s employ demonstrated that she was not worthy of the trust and confidence placed in her by the Court.”

*Id.* at 476 n.1.

335. 507 So. 2d 182 (La. 1987).

336. *Id.* at 182.

337. *Id.* at 182-83.

338. *Id.* at 182.

339. *Id.* at 183.

340. *Tilly*, 507 So. 2d at 183.

341. *McLaughlin*, 522 A.2d at 1001.

342. *See Tilly*, 507 So. 2d at 183.

343. *Id.*

344. 592 P.2d 814 (Haw. 1979).

345. *See McLaughlin*, 522 A.2d at 1000.

346. *See Tilly*, 507 So. 2d at 183.

administrative judge of the first circuit court, [law clerk David Bergan] was arrested by Federal Drug Enforcement Administration agents while in the process of consummating a sale of approximately 385 grams of thirty-seven percent pure cocaine.”<sup>347</sup> The findings of fact made by the hearing committee of the Supreme Court of Hawaii’s Disciplinary Board linked Bergan’s drug sale to his clerkship: “With the expenses of living in Honolulu without an income while studying for and taking the bar examination and prior to obtaining employment, the moving expenses for himself, said [a] woman and child and his relatively low-paying job as a law clerk to Judge Kawakami, [Bergan] quickly exhausted his savings.”<sup>348</sup> In the end, the Supreme Court of Hawaii imposed neither the three-year suspension recommended by the hearing committee nor the disbarment recommended by the Disciplinary Board,<sup>349</sup> but instead suspended Bergan from the practice of law for five years.<sup>350</sup> The fact that Bergan was a law clerk when he committed his crime appears not to have influenced the court one way or the other.

In *In re Christie*,<sup>351</sup> a law clerk pled guilty to a host of charges related to his inappropriate conduct with two minors.<sup>352</sup> In support of his argument that he should not be disbarred for his convictions, he pointed out to the Delaware Supreme Court that after he made a full confession to the police, he “notified the President Judge of the Superior Court, for whom he was working, and immediately offered his resignation as a law clerk.”<sup>353</sup> While observing that “Christie ha[d] been cooperative and remorseful”<sup>354</sup> and that he “committed these acts of misconduct within a few months of his admission to the Bar . . . [while he was] still a law clerk[,] . . . has never had a client and has never practiced law,”<sup>355</sup> the Delaware Supreme Court imposed a three-year suspension, the maximum sanction short of

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347. *Bergan*, 592 P.2d at 815.

348. *Id.* at 816. The low rate of law-clerk pay was also mentioned in *In re Ferguson*, 9 So. 3d 811 (La. 2009), in which a law clerk was accused of offering to pay someone else five hundred dollars to write an overdue law school paper for him: “Mr. Prudhomme did not accept the offer, and acknowledged that petitioner probably did not even have \$500, considering that he was working as a law clerk.” *Id.* at 813 (Johnson, J., dissenting). Given *Bergan* and *Ferguson*, I was somewhat surprised to find only a single case involving a law clerk who had issues paying back student loans. See *Higher Educ. Assist. Found. v. Hensley*, 871 S.W.2d 115 (Mo. Ct. App. 1994).

349. *Bergan*, 592 P.2d at 818.

350. *Id.* at 820.

351. 574 A.2d 845 (Del. 1990).

352. *Id.* at 846. Specifically, “Christie provided the minors with alcoholic beverages, showed them ‘X-rated’ video tapes, and masturbated in their presence.” *Id.*

353. *Id.* at 852.

354. *Id.* at 854.

355. *Christie*, 574 A.2d at 854.



disbarment.<sup>356</sup> The Supreme Court of Pennsylvania, however, suspended Christie five years for the same convictions.<sup>357</sup>

In my research, I found only one case in which an attorney was disbarred for misconduct committed during a clerkship. The unfortunate attorney was Eric Paul, and after he was convicted for fourth-degree attempted grand larceny and filing a false tax return, the court that disbarred him described his conduct this way:

It is undisputed that respondent used a power of attorney to commit multiple thefts from an elderly client [totaling \$43,800]. He used the client's funds for personal purposes while neglecting to pay bills on the client's behalf. Additionally, many of the thefts occurred after respondent left the private practice of law while he was employed in a position of trust as a law clerk in the Unified Court System.<sup>358</sup>

## 2. *Guarding the Gateway to the Bar*

The opinions discussed above all involved disciplinary actions taken against attorneys for misdeeds they committed while serving as law clerks. Such disciplinary actions, of course, may be taken only against attorneys who have been admitted to the bar.<sup>359</sup> In this section, I deal with cases in

356. *Id.* at 854.

357. *See* Office of Disciplinary Counsel v. Christie, 639 A.2d 782, 786 (Pa. 1994). The court's decision reflected various mitigating factors, including:

Expert testimony established that respondent suffers from a psychiatric condition . . . which causes an involuntary attraction to minor and adult males. The testimony further indicated that respondent's criminal conduct was induced by this psychiatric disorder rather than by any willful criminal design.

*Id.* at 785-86.

358. *In re* Paul, 765 N.Y.S.2d 281, 281 (N.Y. App. Div. 2003). While larceny is a sure way to lose a clerkship, past acts of larceny, it seems, do not foreclose the possibility of a future clerkship. In 1983, attorney John Standridge stole \$76,000 from a client. *See* State v. Standridge, 505 So. 2d 256, 257 (La. Ct. App. 1987). By the time of his trial, Standridge was "able to maintain a law clerk position with the Orleans Parish Criminal Court." *Id.* at 258. Moreover, the judge who employed him had, at some earlier point, found that Standridge lacked the mental capacity to be tried on charges of forgery, prosecuted in a case unrelated to his larceny case. *See* La. State Bar Ass'n v. Standridge, 534 So. 2d 1256, 1257, 1259 (La. 1988). In a proceeding that resulted in a one-year suspension from the practice of law (due to Standridge's criminal convictions) his employer, "Judge Jerome Winsberg . . . testified that his work is highly commendable, his mental condition is stable, and that overall he does a 'remarkable job.'" *Id.* at 1259.

359. *See, e.g.*, MO. R. OF PROF'L CONDUCT R. 4-8.5 (2007); LA. R. OF PROF'L CONDUCT R. 8.5 (2005); OHIO R. OF PROF'L CONDUCT R. 8.5 (2011); N.J. R. OF PROF'L CONDUCT R. 8.5 (2004); N.Y. R. OF PROF'L CONDUCT R. 8.5 (2011); S.C. R. OF PROF'L CONDUCT R. 8.5 (2005); HAW. R. OF PROF'L CONDUCT R. 8.5 (1994); DEL R. OF PROF'L CONDUCT R. 8.5 (2008).

which law clerks sought admission to the bar and ran in to problems resulting from various kinds of misconduct.<sup>360</sup> I begin with cases in which the bar has said “nay,” and then turn to cases in which the bar has said “yea.”

Leading the nays is *In re Ferguson*.<sup>361</sup> In that case, Brian Ferguson was denied admission to the Louisiana bar because of, among other things, “allegations of misconduct by [Ferguson] during law school as well as during his subsequent employment as a judicial law clerk.”<sup>362</sup> While the majority’s opinion does not identify Ferguson’s law-clerk misconduct, that misconduct is described in some detail in Justice Bernette Johnson’s dissenting opinion:

I also find no reliable evidence of Petitioner’s misconduct during his employment with former Judge Krake. Petitioner began working for Judge Allen Krake as law clerk in August 2004. Petitioner was terminated in June 2005, effective July 31, 2005. Judge Krake’s position was that petitioner was terminated for misconduct for claiming that he possessed a law degree when he was hired, and for allegedly forging Judge Krake’s signature on a letter increasing Petitioner’s salary. Petitioner denied the allegations, and asserted that his termination was pretextual and in retaliation for his cooperation with the Judiciary Commission’s investigation against Judge Krake arising out of the Judge’s alcoholism. Petitioner believed that he was terminated because he twice testified under subpoena in the Judiciary Commission proceedings against Judge Krake.

I find no reliable proof that Petitioner signed the pay raise letter. Rather, I agree with the Commissioner’s finding that Judge Krake actually signed the letter. The Bar Committee apparently chose not to call Judge Krake to testify about whether his signature appeared on the letter. No other credible evidence was presented to prove that this was not the Judge’s signature. More importantly, the Commissioner noted that it was only after Petitioner cooperated

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360. Just to avoid some future head scratching, I note at this point that a subsequent part of this article (Part VIII, B, to be precise), discusses cases in which law clerks have battled for bar admission against obstacles that did not involve misconduct. So, when you get to Part VIII, B, and start to curse me for redundancy, please remember that you read this footnote and, if you care to, you can have a laugh at the expense of any of your fellow readers who eschew the small print down here below the line.

361. 9 So. 3d 811 (La. 2009).

362. *Id.* at 811.

with the Judiciary Commission that the pay raise letter was questioned.

The evidence against Petitioner consists primarily of hearsay and speculation. With no actual proof of the alleged misconduct, I cannot agree with the majority's decision to deny Petitioner admission to the bar. A review of the record, and lack of credible evidence supporting the allegations, leads me to agree with the Commissioner that the Petitioner's problems arose not due to actual misconduct, but, rather, out of his actions in reporting Judge Krake to the Judiciary Commission and his willingness to cooperate with the Judiciary Commission. The testimony reflects that some court personnel were covering up for Judge Krake, and that although petitioner fully cooperated, he was very fearful of retaliation. The testimony reflects that the information Petitioner provided was absolutely essential to the investigation and to this Court's subsequent actions against Judge Krake. Notably, petitioner was fired after his sworn testimony taken by the Judiciary Commission.<sup>363</sup>

In any event, his experience with Judge Krake was probably not what Ferguson had in mind when he knocked on the door of his law school's office of career services with visions of a clerkship dancing in his head.

For purposes of this article, Brian Ferguson is like a fastball right over the plate; according to the majority, he perfectly fit the definition of a law clerk gone wild.<sup>364</sup> While conducting the research that uncovered *Ferguson*, I also discovered a couple of curveballs. The first is Harvey Prager, who was hired as a law clerk by the Supreme Judicial Court of Maine five years after his conviction for "conspiracy to import into the United States a large quantity of marihuana, possession with intent to distribute a large quantity of marihuana, aiding and abetting the commission of this crime, and conspiracy to possess with intent to distribute in excess of 1,000 pounds of marihuana,"<sup>365</sup> a conviction that was preceded by four years on the lam in Europe.<sup>366</sup> The second curveball is Kelle Hinson-Lyles, who was hired as a law clerk by the Ninth Judicial District Court in

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363. *Id.* at 813-14 (Johnson, J., dissenting) (footnotes omitted).

364. *Ferguson*, 9 So. 3d at 811-12.

365. *In re Prager*, 661 N.E.2d 84, 87 (Mass. 1996) (denying Prager's application to the Massachusetts bar).

366. *Id.* at 87.

Louisiana<sup>367</sup> several years after she had pleaded guilty to “two counts of felony carnal knowledge of a juvenile and one count of indecent behavior with a juvenile, also a felony.”<sup>368</sup> If Ferguson was a law clerk gone wild then, surely Prager and Hinson-Lyles are examples of wild people gone law clerk. Clerkship, however, was only a stepping stone on the road to full redemption. Prager first applied to the Massachusetts bar in 1994,<sup>369</sup> but was not admitted until 2003.<sup>370</sup> It is not clear that Hinson-Lyles has ever been admitted to the Louisiana bar.<sup>371</sup>

The road to redemption was quite a bit shorter for Marcus Bryant and Michael Farris. Bryant, who was convicted of possessing cocaine with the intent to distribute<sup>372</sup> as a seventeen-year-old high-school student,<sup>373</sup> was admitted to the Louisiana bar, notwithstanding his felony conviction.<sup>374</sup> As Justice Weimer pointed out in concurring with the decision to admit Bryant:

Judge Porter testified he has employed Bryant as his law clerk since Bryant’s completion of law school. The judge was familiar with Bryant’s background, having been the judge to set bail for Bryant after his 1994 arrest. He testified that the drug charges were out of character for Bryant. Judge Porter’s opinion is that Bryant, with the help of a very supportive family, has thoroughly rehabilitated himself. The judge also described Bryant as moral, honest, and trustworthy, and that he possesses a sense of fairness.<sup>375</sup>

Michael Farris was granted admission to the Nevada bar, even though on a previous application he had falsely stated that he was a resident of Nevada

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367. *In re Hinson-Lyles*, 864 So. 2d 108, 112, 115 (La. 2003) (Kimball, J., dissenting) (denying Hinson-Lyles’s application to the Louisiana bar) (footnote omitted).

368. *Id.* at 111. Both Prager and Hinson-Lyles attended law school after their convictions. *Prager*, 661 N.E.2d at 92; *Hinson-Lyles*, 864 So. 2d at 114-15 (Kimball, J., dissenting).

369. *Prager*, 661 N.E.2d at 86.

370. Hinshaw & Culbertson LLP, Our People, Harvey Prager, <http://www.hinshawlaw.com/hprager> (last visited Oct. 2, 2011).

371. See *In re Hinson-Lyles*, 869 So. 2d 866 (La. 2004) (denying application); *In re Hinson-Lyles*, 874 So. 2d 160 (La. 2004) (denying request for rehearing); *In re Hinson-Lyles*, 919 So. 2d 721, 721 (La. 2006) (denying application, and explaining that “[o]nce an applicant is denied admission to the bar, this court will not consider a subsequent application for admission absent a showing of changed circumstances.”) (citation omitted).

372. *In re Bryant*, 922 So. 2d 471, 471 (La. 2006) (per curiam).

373. *Id.* at 472 (Weimer, J., concurring in part and dissenting in part).

374. *Id.* at 471 (per curiam) (Bryant was “granted permission to sit for the bar exam, with the condition that upon his successful completion of the exam, he apply to the court for appointment of a commissioner to take character and fitness evidence.”).

375. *Id.* at 473 (Weimer, J., concurring in part and dissenting in part). Judge Porter is the second Louisiana judge I found who ended up hiring a person who had once appeared before him as a criminal defendant to work as a law clerk. See *La. State Bar Ass’n v. Standridge*, 534 So. 2d 1256, 1257, 1259 (La. 1988).

and had failed to mention several convictions for traffic offenses in California.<sup>376</sup> In its opinion granting Farris's application, the Supreme Court of Nevada noted his subsequent service as a law clerk:

Petitioner's past reveals one occurrence, or series of related occurrences, that casts doubt on his character. In his first application for admission to the State Bar of Nevada, filed in 1969, petitioner falsely stated that he was residing in Nevada. (He also omitted to mention certain convictions for traffic offenses in California.) Under inquiry before the local administrative committee, he first adhered to his false statements concerning his residency; however, he voluntarily returned before them, acknowledged the truth, and withdraw his application for that year. Then, having come to Reno approximately a month before [applying for admission to the bar], he remained and obtained employment as a law clerk to Judge Bowen, one of the senior trial judges of this state. He thus demonstrated enough purpose, enough dedication to his ambition to practice law in Nevada, and enough character, to face his mistake and subject himself to scrutiny.

In addition to Judge Bowen, another district judge, a member of our Board of Bar Governors, and others with capacity to make a meaningful judgment on the subject, have attested they believe him fit, after observing him since he came to Reno more than two years ago. Life presents few better opportunities to assess a prospective lawyer's professional dedication and purpose than that given a judge to evaluate his clerk. Judge Bowen, who thus knows petitioner well, and who would not injure the law to favor any man, has testified that during the 15 months petitioner worked with him, petitioner was honest and forthright at all times. (Upon leaving his employment with Judge Bowen, petitioner performed legal research for private practitioners; then Judge Craven requested petitioner to become his clerk. Thus, three district judges who know him have manifested confidence in him.)<sup>377</sup>

So, it would seem that a judicial clerkship can be an effective antidote to antecedent wildness.

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376. *In re Farris*, 489 P.2d 1156, 1156 (Nev. 1971).

377. *Id.* at 1156-57.

*B. Law Clerks as Civil Defendants*

As I pointed out in *Law Clerks Out of Context*,<sup>378</sup> the doctrine of judicial immunity ensures that very few claims against law clerks proceed very far, at least when those claims are based upon work performed in chambers.<sup>379</sup> Even so, a small handful of state-court law clerks have ended up as defendants in civil cases.

In *State ex rel. Paugh v. Bradley*,<sup>380</sup> James T. Paugh sought “a writ of *quo warranto* against Dorothy Bradley, a law clerk and master for Division II of the District Court of the Eighteenth Judicial District, Gallatin County . . . .”<sup>381</sup> Paugh claimed that because Bradley was a member of the Montana legislature, she was constitutionally barred from serving as a law clerk and master.<sup>382</sup> The Montana Supreme Court determined that Paugh’s petition was deficient for five separate reasons, including these: “[t]he petition does not indicate that Paugh himself seeks to hold the position of law clerk, now held by Dorothy Bradley, which might entitle him to bring the action,” and “[t]he petition fails to show that Dorothy Bradley, as a person employed as a Law Clerk and Master in the Eighteenth Judicial District is a public officer.”<sup>383</sup>

The law clerk in *Morgan v. Laurent*<sup>384</sup> was sued for injuries Yvette Morgan claimed to have received when she was struck by an automobile driven by Eve Laurent while Laurent “was working as a law clerk for the Second Parish Court of the Parish of Jefferson” and was on her way to a presentation by a firm that was constructing a new courthouse for the Second Parish Court.<sup>385</sup> The interesting legal issue in *Morgan* was whether

378. Potter, *supra* note 3.

379. *See id.* at 119-20.

380. 753 P.2d 857 (Mont. 1988).

381. *Id.* at 858.

382. *Id.* at 858-59. He based his claim on a constitutional provision providing as follows:

“*Separation of Powers.* The power of the government in this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution as expressly directed or permitted.”

*Id.* at 858 (quoting MONT. CONST. art. III, § 1).

383. *Id.* at 859. Failure to demonstrate that either of Bradley’s positions in the judicial branch qualified as public offices was important because Paugh’s action was based upon a Montana statute providing that “a person claiming to be entitled to a public office unlawfully held and exercised by another, by himself or by an attorney and counselor at law, may bring an action therefore in the name of the state . . . .” *Bradley*, 753 P.2d at 860 (quoting MONT. CODE ANN. § 27-28-301 (2011)).

384. 948 So. 2d 282 (La. Ct. App. 2006).

385. *Id.* at 283.

the Parish of Jefferson, Louisiana, or the Second Parish Court could be held vicariously liable for law clerk Laurent's alleged tort.<sup>386</sup> The short answer is yes, no, and yes.<sup>387</sup>

### C. *State v. Law Clerk*

Given the title of this article, I feel obligated to report that I found one law clerk who was indicted for stabbing his supervisor in his supervisor's office in the courthouse,<sup>388</sup> and another who was convicted of sexually assaulting a courthouse co-worker.<sup>389</sup> But, as it should be fairly obvious that law clerks should not assault the people they work with, there is not much useful information to be gleaned from *People v. Goodman*<sup>390</sup> or *State v. Don Yoo Dong Kim*.<sup>391</sup> Perhaps the most unfortunate law clerk ever to be a criminal defendant is Charles Ryan, who "was forced to resign his position as a Confidential Law Clerk to a New York Supreme Court Justice"<sup>392</sup> because, prior to his indictment—which was dismissed for lack of evidence<sup>393</sup>—it was disclosed "that he was the subject of a Grand Jury investigation . . . ."<sup>394</sup> To add insult to injury, the Appellate Division granted the defendant's motion to dismiss Ryan's claim for malicious prosecution and abuse of process.<sup>395</sup>

## IX. LAW CLERKS AS PLAINTIFFS

While very few state-court law clerks have wound up on the far side of the "v." in either civil cases or criminal prosecutions, plenty of law clerks have set up camp on the near side of the "v." as plaintiffs in civil actions.<sup>396</sup>

386. *Id.* at 284-88.

387. *Id.* at 288.

388. See *People v. Goodman*, 619 N.Y.S.2d 501 (N.Y. Sup. Ct. 1994). In that case, the trial court accepted the defendant's plea of "not responsible by reason of mental disease or defect," and ordered that he be supervised on an out-patient basis. *Id.* at 502, 504. *Goodman* was one of only two cases I uncovered that dealt with courthouse violence involving law clerks. In *In re Inquiry Concerning a Judge*, 696 So. 2d 744 (Fla. 1997), Judge Gayle Graziano was charged with multiple acts of misconduct, including "[approaching] a law clerk, Richard Lawhorn, point[ing] a gun at his head, and ask[ing] why he completed a research project for another judge before completing an earlier assignment for herself." *Id.* at 747 n.2. Yikes!

389. See *State v. Don Yoo Dong Kim*, No. A06-515, 2007 WL 1892871 (Minn. Ct. App. July 3, 2007).

390. 619 N.Y.S.2d 501 (N.Y. Sup. Ct. 1994).

391. No. A06-515, 2007 WL 1892871 (Minn. Ct. App. July 3, 2007).

392. *Ryan v. State*, 439 N.Y.S.2d 703, 704 (N.Y. App. Div. 1981).

393. *Id.* at 703.

394. *Id.* at 704.

395. *Id.* at 703-04.

396. The near side of the "v." can sometimes be an inhospitable place for a law clerk. In *Avco Financial Services v. Foreman-Donovan*, 772 P.2d 862 (Mont. 1989), the counterclaim plaintiff asserting a fraud claim "was a law school graduate and was working as a law clerk for a district judge . . . ."

In this section, I examine cases in which law clerks have litigated their rights to a range of employment benefits (including employment itself), have done battle with the bar, have contested the conditions of their employment, and have challenged the conduct of their employers.

### *A. Employment and Benefits*

Lawsuits about the benefits associated with law-clerk employment have involved a wide range of issues from getting the job, to getting paid for doing the job, to getting retirement benefits after finishing the job.

#### *1. Getting the Job*

In *Lee v. Cuyahoga County Court of Common Pleas*,<sup>397</sup> Martha Lee sued unsuccessfully to get her law-clerk job back.<sup>398</sup> Lee was a law clerk for the court of common pleas from June of 1979 through March of 1983.<sup>399</sup> In March of 1980, “she was involved in a serious non-work related accident . . . .”<sup>400</sup> She continued working for the court until “she resigned in March 1983 because she was unable to handle the responsibilities of her employment . . . .”<sup>401</sup> “[S]he reapplied for a position as a law clerk two years after her resignation, but was not rehired.”<sup>402</sup> Lee was not rehired because of “a court policy of not rehiring law clerks once they leave.”<sup>403</sup> In her lawsuit, Lee asserted “that the court breached a fiduciary duty to [her], and that the court violated the Equal Protection and Due Process Clauses of the Ohio Constitution by failing to tell her of the no-rehire policy.”<sup>404</sup> More specifically, Lee alleged in her complaint that:

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*Id.* at 864. On that basis, the court determined that she was not entitled to rely on the allegedly fraudulent statement at issue because the evidence in the case “d[id] not disclose two parties on unequal footing.” *Id.* Sometimes, even being a former law clerk can come back and bite you on the behind. In a case in which attorney John Wood was held in contempt for refusing an appointment to represent an indigent criminal defendant, based on his claim that he was not competent to handle the case, the Alaska Supreme Court determined that it could not say that Wood was incompetent to handle a criminal case because Wood stated himself that he had handled some criminal cases until 1973, approximately ten years prior to the disputed appointment, and “Judge Moody pointed out that in working for the Court System as a law clerk Wood had dealt with criminal matters.” *Wood v. Superior Court*, 690 P.2d 1225, 1232 (Alaska 1984).

397. 602 N.E.2d 761 (Ohio Ct. App. 1991).

398. *Id.* at 761-62.

399. *Id.* at 762.

400. *Id.*

401. *Id.*

402. *Lee*, 602 N.E.2d at 762.

403. *Id.*

404. *Id.*



“The Defendants’ relationship with the plaintiff after her accident, based on the above-related instances of special treatment, social interaction, and entrustment of other business affairs, was fiduciary in nature and involved a special trust and confidence reposed by plaintiff in the defendants.”

“As fiduciaries, the defendants had a duty to inform plaintiff of all material facts pertaining to her employment with them, including the fact that once a law clerk resigns, he or she absolutely can never come back.”

“Plaintiff would have re-thought her decision to resign had she known that she could not come back, and would not have resigned.”<sup>405</sup>

The Ohio Court of Appeals did not agree, explaining that “[w]hile it is true that a fiduciary relationship may be created out of an informal relationship, this occurs *only* when *both* parties understand that a special trust or confidence has been reposed.”<sup>406</sup>

In a case that involved more than just one law clerk who found herself stuck on the outside of chambers looking in, over 100 law clerks serving civil court judges in New York City sued to stave off the wholesale elimination of their positions for budgetary reasons.<sup>407</sup> Their suit arose out of the following situation:

By resolution adopted September 26, 1975, and dated October 15, 1975, the Administrative Board of the Judicial Conference directed, among other things, that the positions of Civil Court Law Secretary and Confidential Attendant to the Supreme Court Justices in the First Judicial District be eliminated. Because of subsequent developments and a worsening situation, the Mayor advised the

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405. *Id.* at 763. The “special treatment” Lee refers to in paragraph 18 includes the following:

[A]s a result of the 1980 accident fellow employees, including Stanley Kent, the Chief Law Clerk, sent her flowers and visited her; as a result of the 1980 accident she was permitted to take sick time in excess of the allowable limit; after the 1980 accident, Judge Markus assisted her in obtaining counsel from his former law firm for her personal injury suit; she was granted a one-month leave of absence in December 1982 to further recover from her injuries . . . .

*Id.* at 762.

406. *Lee*, 602 N.E.2d at 763 (citing *Blon v. Bank One, Akron, N.A.*, 519 N.E.2d 363, 367 (Ohio 1988); *Umbaugh Pole Bldg. Co. v. Scott*, 390 N.E.2d 320, 323 (Ohio 1979)).

407. *See Blyn v. Bartlett*, 379 N.Y.S.2d 616 (N.Y. App. Div. 1976).

Administrative Judge that additional cuts in the court budget of 7.35 million dollars were required, meaning that the courts now had to reduce their annual budget by a total of 13.15 million dollars. The cuts in services and personnel included the closing of some courts, the non-retention and non-appointment of certain judges, and the elimination of a total of 802 positions from court staffs, including those which are the subject of these proceedings, although the 120 Civil Court Law Clerk positions which were to be eliminated were to be replaced by a pool of 40 Law Assistants.

By letters dated October 27, 1975, all Law Secretaries to Civil Court Judges were notified that they would be dismissed as of November 21, 1975. By letters dated November 5, 1975, the Confidential Attendants were notified that their services were terminated effective December 5, 1975. In both proceedings Special Term annulled and set aside the determination of the Administrative Board directing the elimination of the positions and enjoined appellants from taking further steps to eliminate the jobs.<sup>408</sup>

In reversing the Special Term decision, the Appellate Division rejected the law clerks' argument "that the positions of Civil Court Law Secretary and Confidential Assistant to Supreme Court Justices in the First Judicial District ha[d] been created by legislative act and thus may be abolished only by statute."<sup>409</sup> The court went on to note that "[a]lthough it is apparent that the Civil Court Law Secretaries and the Confidential Attendants perform extremely valuable functions, it cannot be said that their removal to the extent discussed herein would 'debilitate' the Civil or Supreme Courts."<sup>410</sup> I wonder how much law-clerk input went into *that* opinion.

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408. *Id.* at 620-21.

409. *Id.* at 621. The court also rejected, however, "the argument advanced by appellants [i.e., the court system] that the Administrative Board and/or Administrative Judge have the power to unilaterally eliminate these positions." *Id.* at 623.

410. *Id.* at 622-23. New York City law clerks lost again in *Tolub v. Evans*, 444 N.E.2d 1 (N.Y. 1982), a case in which they challenged the manner in which law clerks previously paid by municipalities were incorporated into the state law-clerk salary structure during the unification of the state's courts. *Id.* at 4. New York, it seems, is a hotbed for law-clerk litigation. See, e.g., *Mirsch v. State of N.Y. Office of Court Admin.*, 490 N.Y.S.2d 62 (N.Y. App. Div. 1985) (reversing trial court's judgment in favor of law clerk seeking to annul court system's reclassification of his position from full-time to part-time); *Ward v. Sise*, 485 N.Y.S.2d 161 (N.Y. Sup. Ct. 1984) (granting motion to change venue in case where law clerk challenged classification of his position from the county where he was employed to the county in which the decision was made); *Schaffer v. Evans*, 477 N.Y.S.2d 866 (N.Y. App. Div. 1984).

## 2. *Getting Paid*

In addition to fighting for their jobs, several law clerks have resorted to litigation to collect their salaries, sometimes under rather unusual circumstances. Take, for example, Paul Greene. Shortly after Lloyd Dodge's election as Special County Judge of Suffolk County, New York, Dodge appointed Greene as his law clerk.<sup>411</sup> About two years later, Judge Dodge, Greene, and another were indicted, "and on July 29, 1960 were found guilty after trial of the misdemeanor of conspiracy."<sup>412</sup> Ultimately, the three prevailed on appeal, and the indictments were dismissed by order dated March 3, 1961.<sup>413</sup> That, however, is not the end of the story.

On August 8, 1960, immediately following the convictions, Judge Dodge wrote the petitioner the following letter:

"Dear Paul:

Recent events in which you have been personally involved compel me to reach the unpleasant but necessary duty of directing you as my law secretary to forego receiving your salary until the appellate court has favorably disposed of the matter. I believe this action is in the public interest and in no manner reflects my opinion of your integrity and innocence in which I have complete faith.

In taking this action it is my intention to preserve the prerogatives and emoluments of your position as law secretary until such time as the appellate court resolves your case in your favor. At that time, in my opinion, you will be entitled to and will receive accumulated back pay and all other benefits relating to your position.

Most sincerely,

/s/ Lloyd P. Dodge

County Judge"

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411. *See* Greene v. Cromarty, 220 N.Y.S.2d 411, 412 (N.Y. Sup. Ct. 1961).

412. *Id.*

413. *Id.* at 412-13.

Acting in pursuance of this directive Judge Dodge's secretary promptly filed with the County Civil Service Commission a 'Report of Personal Changes' indicating thereon to the best of her ability the temporary status that the petitioner was to assume.<sup>414</sup>

After the convictions were reversed, Judge Dodge resigned from the bench and Greene correctly deduced that his judge's resignation terminated his position as a law clerk.<sup>415</sup> Greene did, however, make a claim for back salary accrued from the date of Judge Dodge's post-conviction letter until the date of the judge's resignation.<sup>416</sup> "On the advice of the County Attorney the respondent Comptroller refused to recognize the claim."<sup>417</sup> The supreme court sided with Greene and ordered him to be paid.<sup>418</sup>

The law clerk in *Schwartz v. Crosson*<sup>419</sup> was not as fortunate as Paul Greene. Michael Schwartz "was appointed as a full-time Principal Law Clerk at a salary grade 31, step 1 in February 1982."<sup>420</sup> Subsequently, he "was appointed as a part-time Law Clerk," resigned, was again appointed to a part-time clerkship, and, finally, "was offered a position as a full-time Principal Law Clerk . . ."<sup>421</sup>

In a letter dated December 13, 1988, the executive assistant to the Administrative Judge of the Ninth Judicial District stated that, based upon petitioner's years of service, petitioner's new position would be at salary grade 31, step 6, at an annual salary of \$70,398. In reliance upon this representation, petitioner accepted the position. He was then informed that he was to be paid at the hiring rate of a salary grade 31. A representative of respondent Chief Administrator of the Courts thereafter adjusted petitioner's salary to grade 31, step 4 (with a \$64,233 salary) due to reinstatement of his former position at grade 31, step 2 and due to statutory amendments providing two additional annual increments.<sup>422</sup>

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414. *Id.* at 413.

415. *Id.* at 414.

416. *Greene*, 220 N.Y.S.2d at 414.

417. *Id.*

418. *Id.* at 416. In so ruling, the court distinguished the case before it from *Hirschberg v. City of New York*, 60 N.E.2d 539 (N.Y. 1945), in which a law clerk requested and was granted a leave of absence to attend to an indictment for larceny and was subsequently denied back pay, due to the voluntary nature of his absence. *See id.* at 414-15.

419. 566 N.Y.S.2d 679 (N.Y. App. Div. 1991).

420. *Id.* at 680.

421. *Id.*

422. *Id.*

Schwartz sued to receive the higher salary, and won at trial, on grounds of estoppel.<sup>423</sup> On appeal, the court system prevailed, as the Appellate Division “disagree[d] with the Supreme Court that the doctrine of estoppel [was] applicable,”<sup>424</sup> and then went on to rule against Schwartz on the merits, concluding that the court system “rationally interpreted and applied the relevant statutes and regulations when determining [Schwartz]’s salary grade.”<sup>425</sup> “All parties agree[d] that Schwartz [had been] ‘reinstated’ to his former position as a Principal Law Clerk,”<sup>426</sup> and, ultimately, the court ruled that when Schwartz was reinstated as a full-time law clerk he was not entitled to credit (for salary grade purposes) for his intervening service as a part-time law clerk.<sup>427</sup>

The New York reinstatement rules also came into play in *Stearns v. Office of Court Administration*.<sup>428</sup> In that case, Harvey Berman worked as an assistant attorney general, was terminated from that position, and then found a position as a law clerk to a supreme court justice.<sup>429</sup> His salary was set at “the hiring rate for a grade 31, which [was] the minimum salary for that grade.”<sup>430</sup> “Thereafter, [he] submitted an application to respondent Office of Court Administration . . . seeking credit for [his] prior Department of Law service, which if successful would have resulted in increased [salary and benefits].”<sup>431</sup> His application was denied, and the Appellate Division ruled that his claim was time-barred and that even if the claim were timely, it would fail on the merits because the only rules that would entitle Berman to a higher salary were the rules on reinstatement, which did not apply because when Berman was hired as a law clerk, after having served as an assistant attorney general, he was not reinstated to his former position but hired into an entirely different one, in a different branch of government.<sup>432</sup>

Law clerk Bonita Welch had it twice as bad as Schwartz and Berman; she lost not one but two legal challenges to her salary reduction.<sup>433</sup> The facts are these:

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423. *Id.* at 681.

424. *Schwartz*, 556 N.Y.S.2d at 681.

425. *Id.*

426. *Id.*

427. *Id.* at 681-82.

428. 688 N.Y.S.2d 813 (N.Y. App. Div. 1999).

429. *Id.* at 815.

430. *Id.*

431. *Id.*

432. *Id.* at 815-16.

433. See *Welch v. Hoeh*, 733 N.E.2d 410 (Ill. App. Ct. 2000); *Welch v. Ill. Supreme Court*, 751 N.E.2d 1187 (Ill. App. Ct. 2001).

Prior to 1994, Welch was employed by the Illinois Appellate Court, Third District, as a law clerk to the former Justice Tobias G. Barry. On February 16, 1994, Welch began employment with the Illinois Appellate Court, Third District, as a staff attorney, at a salary of \$39,464. On February 23, 1994, Welch was notified that Justice [James] Heiple determined that all entry-level staff attorneys should start at the minimum salary. Thus, Welch's salary was reduced to \$32,571, retroactive to her start date.<sup>434</sup>

Welch did not take her salary reduction lying down. Rather, she filed two charges with the Illinois Department of Human Rights.<sup>435</sup> In her first charge, she alleged that: (1) "Justice Heiple ordered her salary lowered because she had worked for Justice Tobias G. Barry, Heiple's political opponent[;]"<sup>436</sup> and (2) "the Illinois Supreme Court and the Illinois Appellate Court, Third District, discriminated against her based on her age and sex."<sup>437</sup> In her second charge, she alleged that: (1) "she was '[s]ubject to work environment of retaliatory isolation[;]'"<sup>438</sup> and (2) "she was 'subject to salary retraction on or about Feb. 24, 1997.'"<sup>439</sup> The Department of Human Rights dismissed Welch's second charge on grounds that the isolation claim was not timely and that the salary reduction claim was not

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434. *Welch*, 733 N.E.2d at 411.

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.* at 412. More specifically:

In support of this . . . claim, Welch alleged that between November 25, 1996, and February 24, 1997, Justice William E. Holdridge discussed settling her first charge with her and asked her not to discuss the charges with anyone else. As a result of a study of the salaries of other staff attorneys, Holdridge offered to adjust Welch's salary to that of the staff attorneys for the Appellate Court, Fourth District, retroactive to July 1, 1996. Welch accepted Holdridge's offer on February 18, 1997, but on February 24, 1997, Welch told Holdridge that she would not withdraw her first charge. In response, Holdridge immediately retracted Welch's salary increase and reset Welch's salary to the rate in effect prior to February 16, 1997. Holdridge also abandoned his efforts to adjust the salary of at least one other staff attorney.

*Welch*, 733 N.E.2d at 412.

439. *Id.* The court elaborated:

In support of this claim, Welch alleged that after she filed her first charge against the respondents she "was offered a salary adjustment which was contingent upon an overall settlement of the charges before the Il. Dept. of Human Rights" and that she declined the offer. She further alleged that the offer was retracted because she had filed the first charge and refused to withdraw it. Welch alleged that the salary retraction was, therefore, retaliatory.

*Id.*

supported by substantial evidence.<sup>440</sup> The Illinois Appellate Court sustained the dismissal against arguments that: (1) “the order sustaining the Department’s dismissal was invalid because Hoeh, a mere designee of the chief legal counsel, did not have the authority to issue the final order;”<sup>441</sup> (2) “the Department’s decision to dismiss [Welch’s] second charge was erroneous,”<sup>442</sup> and (3) “the Department deprived [Welch] of due process of law by failing to investigate the factual basis of her request for review.”<sup>443</sup> Of particular note, on the merits, the appellate court held:

Welch failed to establish the third element of retaliation [i.e., a causal connection between the protected activity and the adverse act]. There is nothing in the record to indicate that the salary increase offer was rescinded for any reason other than it was part of a settlement offer that was not accepted by Welch. A settlement offer has certain elements such as a *quid pro quo*. In this case, the salary increase was the *quid* and the dismissal of Welch’s first charge was the *quo*. Since Welch did not agree to dismiss her first charge, her employer withdrew its salary increase offer. Apparently Welch takes the position that because she refused to dismiss her first charge she was punished by not getting a salary increase. The problem with this argument is that the salary increase was the basis of her first charge. Even when viewed in a light most favorable to Welch, her argument is, essentially, a paradox. Thus, the Department did not abuse its discretion by finding that the petitioner failed to show substantial evidence of retaliatory conduct regarding the withdrawal of the salary increase offer.<sup>444</sup>

The failure of Welch’s too-cute-by-half litigation strategy demonstrates, rather powerfully, the value of knowing enough to quit while you’re ahead.

But, as noted, Welch’s claim before the Illinois Department of Human Rights was not the only arrow in her quiver. She also filed suit in state court, charging the Supreme Court of Illinois with breach of contract<sup>445</sup> and Justice Heiple with tortious interference “with [her] employment agreement

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440. *Id.* at 413.

441. *Id.* at 415.

442. *Welch*, 733 N.E.2d at 415.

443. *Id.* at 416.

444. *Id.*

445. *Welch v. Ill. Supreme Court*, 751 N.E.2d 1187, 1191 (Ill. App. Ct. 2001).

by directing that her salary be reduced.”<sup>446</sup> Both claims foundered, however, on the rocky shoals of sovereign immunity.<sup>447</sup>

Like Bonita Welch, the law clerk in *Lee v. Villines*<sup>448</sup> doubled his or her displeasure by failing, in two different fora, to get paid for time off taken at the direction of his or her judge.<sup>449</sup> Specifically, in *Lee*, “Circuit Judge Marion Humphrey granted administrative leave to the court’s secretary, case coordinator, bailiff, assistant bailiff, probation officer, and law clerk from May 24th to June 4, 1993, while the court’s chambers and courtroom were being relocated in the Pulaski County Courthouse.”<sup>450</sup> Subsequently, however:

County Judge F.G. “Buddy” Villines later learned that the circuit court employees had not worked during the two-week period and advised Judge Humphrey that he had been without authority to grant administrative leave to the court employees because Pulaski County’s personnel policy, adopted by ordinance, provides that a county employee must work forty hours to receive a full week’s pay. [T]he statutes creating the circuit court positions provide, “The employees covered by this subsection shall be treated by Pulaski County in the same manner as other Pulaski County employees for all other purposes.” Ark. Code Ann. §§ 16-13-1409(d)(4), -1410(d)(5), -1411(d)(4), -1412(e)(4), -1413(d)(2), and -1414(d)(4) (Repl.1994). The Circuit Judge apparently did not agree that the statutes could constitutionally provide that circuit court employees are county employees, and the two judges were unable to resolve the matter. The County Judge subsequently contacted each of the circuit court employees and asked whether the employee wanted to forfeit part of his or her vacation time or have his or her compensation adjusted to make up for the unauthorized leave. Each refused to agree to forfeiting either vacation time or compensation. The County Judge, acting in his executive capacity, directed the County Comptroller, Jean Rolfs Fulwider, to deduct either vacation time or compensation from each of the employees.<sup>451</sup>

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446. *Id.*

447. *Id.* at 1192, 1195 (citing ILL. COMP. STAT. ANN. 5/1 *et. seq.*, 705 ILL. COMP. STAT. ANN. 505/8 (West 1998)).

448. 942 S.W.2d 844 (Ark. 1997).

449. *See id.* at 844-45.

450. *Villines v. Lee*, 902 S.W.2d 233, 234 (Ark. 1995).

451. *Id.*



The employees initially filed suit in chancery court, seeking “a temporary restraining order and permanent injunction against economic losses that ‘will result’ or ‘have resulted’ to them.”<sup>452</sup> The court employees prevailed in the chancery court, but lost on appeal due to the chancery court’s lack of subject-matter jurisdiction.<sup>453</sup> In addition to reversing the decision of the chancery court, the Arkansas Supreme Court “remanded for transfer to circuit court.”<sup>454</sup> In the circuit court, the judge who had previously ruled in favor of the court employees (while sitting as a “chancellor on assignment”) heard the case again, this time as a “circuit judge on assignment,” and entered an order dismissing the court employees’ claim with prejudice.<sup>455</sup>

A happier ending came to pass in *Pope v. Judicial Department*,<sup>456</sup> where a former law clerk sued to recover civil penalties from the court system that employed her because it failed to remit her accrued vacation pay within the statutory time frame for such payments.<sup>457</sup> She won \$1,372 plus costs and attorney fees at trial<sup>458</sup> and prevailed on appeal,<sup>459</sup> where the only issue was “whether defendant, a state agency, [was] an ‘employer’” under the relevant state statute.<sup>460</sup>

I conclude my discussion of litigation to secure law-clerk pay with one of the most heartwarming cases I have ever come across. In that case, the judges of the Court of Common Pleas of Pennsylvania’s Twenty-Seventh Judicial District filed a petition in the Commonwealth Court of Pennsylvania seeking, among other things, an order directing the county controller to authorize the payment of salary to a law clerk who took time off to study for and take the bar exam.<sup>461</sup> Factually, “Lisa B. Morris, who was a law clerk for Judge Rogers[,]” took three days off to study for the Pennsylvania bar exam and two days to take it, all with her judge’s permission.<sup>462</sup> Morris, however, was compensated for only one of those

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452. *Id.* at 234-35.

453. *Id.* at 235.

454. *Id.* at 236.

455. *Lee v. Villines*, 942 S.W.2d 844, 845 (Ark. 1997). Given Judge John Lineberger’s successive service as a chancellor on assignment and a circuit judge on assignment, in two different iterations of the same case, Justice Roaf’s dissent in *Villines v. Lee* sounds quite prescient: “Once again we have litigants caught short in the morass of subject-matter jurisdiction between our chancery and circuit courts.” 902 S.W.2d at 236 (Roaf, J., dissenting). I guess that makes Judge Lineberger a one-man morass.

456. 721 P.2d 462 (Or. Ct. App. 1986).

457. *Id.* at 462.

458. *Id.*

459. *Id.* at 464.

460. *Id.* at 463.

461. *See* *Judges of the Court of C.P. of the Twenty-Seventh Jud. Dist. v. Cnty. of Wash.*, 548 A.2d 1306 (Pa. Commw. Ct. 1988).

462. *Id.* at 1308.

days.<sup>463</sup> “The Controller refused to compensate Ms. Morris for the other four days on the basis that County policy does not provide for hours not worked.”<sup>464</sup> In granting summary judgment to the judges, the court relied on a case “which recognizes that the question of leave time of court employees is within the province of the judiciary”<sup>465</sup> and then explained:

The Controller argues that “county policy” precludes payment; she does not explain what she means by this. In any event, we think that *Eshelman* dictates that a mere county policy cannot impinge upon the inherent supervisory authority of the judiciary. In challenging Judge Rodgers’ authority to grant his clerk leave, the Controller has, in this case, injected herself into a management decision which is beyond her scope of authority.<sup>466</sup>

Judiciary 1, Bureaucracy 0.

### 3. *Getting Retired*

The traditional view of a judicial clerkship is that it is a transitional position, a brief, low-paying sojourn in chambers that serves as a prestigious pathway between law school and a well-compensated gig in the private sector. The rise of the career law clerk and the dreaded “shadow judiciary,”<sup>467</sup> however, have given rise to a handful of cases in which law

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463. *Id.*

464. *Id.*

465. *Id.* at 1309 (citing *Eshelman v. Comm’rs of Berks Cnty.*, 436 A.2d 710 (Pa. Commw. Ct. 1981)).

466. *Judges*, 548 A.2d at 1309-10.

467. Professor Victor Williams has noted this development and commented on it, with some alarm:

Another Article III judicial coping technique, known, but seldom publicly challenged by the legal profession, is the abdication of fundamental judicial decisional functions to staff attorneys and “permanent” law clerks. Debate over elbow law clerks’ “drafting” of federal judicial opinions has proceeded for years, certainly fueled by the bold article critical of the practice that young William Rehnquist wrote in 1957, after he completed his service as law clerk to Justice Robert Jackson. The fierce competition for “top clerks” may be some indication of the degree to which judges abdicate decisional authority to these freshly minted JDs.

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The increased reliance on central staff attorneys to evaluate or “screen” appeals (the very essence of the judicial decisional function) outside even the supervision of a judge, and the use of permanent law clerks to work as “assistant judges” rather than as “assistants to the judges,” becomes more tempting in times of docket overload. Indeed, the employment of permanent law clerks has been rising at an alarming rate. A 1994 Judicial Conference memorandum referencing a report produced for the Judicial Conference’s Judicial Resources

clerks, or former law clerks, have had to go back to court, as litigants, to secure their rights to retirement benefits.

In the Empire State—the de facto home office for law-clerk litigation—supreme court law clerk Saul Abrams sued for, and won, retroactive membership in the state retirement system.<sup>468</sup> The case turned on the deficiency of the advice provided to Abrams by the court’s personnel officer when he came on board as a law clerk.<sup>469</sup> William Soronen’s attempt to gain retroactive membership in the New York state retirement system failed, however, due to a forty-month break in service.<sup>470</sup> Finally, in *Finnan v. Levitt*,<sup>471</sup> a former supreme court law clerk was held not to be entitled to a retiree health benefit because the benefit at issue had been created and granted by the New York legislature after the date on which the law clerk left state service.<sup>472</sup> New York, however, is not the only state in which former law clerks have litigated retirement issues. In *Fingeret v. Retirement Board of Allegheny County*,<sup>473</sup> several Pennsylvania law clerks successfully sued to be paid interest on retirement-system contributions refunded to them when they left their clerkships.<sup>474</sup> And, in a factually complicated case that turned on the interpretation of Florida law, a former law clerk who retired from state service and was subsequently reemployed by the state prevailed in an action to transfer her credit in an earlier state retirement system to her

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Committee by the National Academy of Public Administration Association, expresses concern that our overworked federal judges may be tempted to abdicate genuine decisional responsibilities to a “shadow judiciary” of permanent law clerks. “Permanent” law clerks have a qualitatively different institutional position than traditional clerks, who, for largely educational purposes, commit to a one- or two-year term in a judge’s chambers at a relatively modest salary. Career law clerks also differ substantially from the increasing number of law students who volunteer as “interns.” Although judges depend heavily on temporary law clerks for “drafting” orders and decisions, the increasing numbers of permanent law clerks often become players in the decisionmaking process, having first-line contact with attorneys and often conducting informal conferences. In such roles, career law clerks often are correctly seen by the federal bar as “junior judges” with commensurately generous salaries.

Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535, 592-93 (1996) (footnotes omitted).

468. *Abrams v. N.Y. State & Local Emps. Ret. Sys.*, 668 N.Y.S.2d 342, 346 (N.Y. Sup. Ct. 1998).

469. *See id.* at 345-46.

470. *See Soronen v. Comptroller*, 669 N.Y.S.2d 694, 695 (N.Y. App. Div. 1998). While in law school, Soronen worked as a part-time, temporary aid to a state senator. *Id.* at 694. For just over three years after law school, Soronen was an associate in a private law firm. *Id.* at 694-95. Then he was hired as a law clerk by a state supreme court justice. *Id.*

471. 457 N.Y.S.2d 968 (N.Y. App. Div. 1982).

472. *Id.* at 970-71.

473. 475 A.2d 889 (Pa. Commw. Ct. 1984).

474. *Id.* at 891-92.

account in the successor retirement system, which she joined during her second round of state employment.<sup>475</sup>

I conclude this section with a cautionary tale about a good deed that blew up in a law clerk's face. Kathryn Burton was hired as a law clerk by a United States District Judge for a one-year term running from September 1985 through September 1986.<sup>476</sup>

However, early in that term, [Burton]'s supervisor, Judge Frye, asked her if she would prefer to end her employment in late May, 1986. The judge wanted to hire a particular person to replace [Burton], and that person wanted to begin work before September, 1986. [Burton] testified that she told the judge that she wanted to think about the proposed change to determine whether it would affect her eligibility for unemployment benefits when she became unemployed. According to [Burton]'s testimony, the deputy clerk of the district court in charge of personnel assured her that modification of the employment contract would not affect her eligibility.

In March, [Burton] agreed to modify the contract and to end her employment on May 23, 1986, which became her last day of work. She applied for unemployment benefits but was informed by the Employment Division that she did not qualify, because her separation papers indicated that she resigned. The referee concluded, and [Employment Appeals Board] agreed, that [Burton] had voluntarily left work without good cause and, therefore, was ineligible for unemployment benefits under ORS 657.176(2)(c).<sup>477</sup>

Burton sought judicial review of the Employment Appeals Board's decision and lost.<sup>478</sup> In ruling against Burton, the court held that because Burton was not obligated to modify her contract to include an earlier termination date, her departure was voluntary, thus disqualifying her from unemployment benefits.<sup>479</sup> One hates to validate clichés, but here, the shoe fits: Kathryn Burton's was surely a good deed that did not go unpunished.

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475. *Martin v. Williams*, 364 So. 2d 549, 552-53 (Fla. Dist. Ct. App. 1978).

476. *Burton v. Emp't Div.*, 755 P.2d 723, 724 (Or. Ct. App. 1988).

477. *Id.* at 724.

478. *Id.*

479. *Id.* The court also held that Burton was not entitled to relief based on her reliance on the assurances she received from the deputy clerk: "Claimant's estoppel argument based on representations made by the court clerk is without merit. There were no representations made by anyone speaking either for the Employment Division or for EAB and, therefore, claimant cannot assert that equitable estoppel lies against either agency." *Id.* at 725 n.1.

*B. Battles with the Bar*

Given that most law clerks aspire to become practicing attorneys once they leave chambers, it should come as no surprise that a few of them have ended up waging legal battles against bar associations that balked at granting them admission.

For reasons that are not at all clear, it seems that what New York is to litigation over law-clerk benefits, Alaska is to litigation over law-clerk relations with the state bar. My research uncovered three different cases in which law clerks litigated issues related to admission to or membership in the Alaska Bar Association (“ABA”).

I begin my “tundra trilogy” with *Sheley v. Alaska Bar Ass’n*.<sup>480</sup> In that case, Elizabeth Sheley, who was “serving as a law clerk for a federal district court judge in Texas[,]” applied to take the Alaska bar examination during the term of her clerkship in Texas because she planned to move to Alaska at the conclusion of her clerkship to establish a law practice.<sup>481</sup>

She notified the Alaska Bar Association that she would be unable to meet the thirty-day residency requirement imposed by Bar Rule 2(1)(e) because she was employed as a law clerk and could not move to Alaska until after her clerkship. She also stated that she did ‘not have the financial resources to take the July bar because that in effect would make me unable to practice (law) and earn a living for at least four months.’ Based on her representation concerning the residency requirement, the Board of Governors denied her application to take the examination because she could not meet the residency requirement of Bar Rule 2(1)(e).<sup>482</sup>

Sheley appealed the decision, and the Alaska Supreme Court initially granted her motion “to sit for the examination pending the determination of the merits of her appeal.”<sup>483</sup> On the merits, the court determined that “[t]he right to practice law is a ‘fundamental right’ calling for strict scrutiny under the privileges and immunities clause [of the United States Constitution].”<sup>484</sup> While agreeing with the ABA that “afford[ing] the ABA with a reasonable opportunity to investigate an applicant’s academic fitness and moral character . . . furthers a legitimate state interest,”<sup>485</sup> the court went on to

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480. 620 P.2d 640 (Alaska 1980).

481. *Id.* at 641.

482. *Id.*

483. *Id.*

484. *Id.* at 643.

485. *Sheley*, 620 P.2d at 645.

hold that “[t]he discrimination which the [residency] rule works against nonresidents does not bear a substantial relationship to the end sought by the ABA.”<sup>486</sup> On that basis, the court reversed the decision of the ABA Board of Governors, explaining:

The efforts of the ABA to insure that bar applicants are morally and academically qualified to practice law are commendable. In pursuit of those goals, however, the ABA may not abridge the applicants’ constitutional rights. We fail to see how this discrimination against nonresidents furthers such goals. In reality, Alaska Bar Rule 2(1)(e) may well deny licenses to applicants who are eminently qualified for admission by effectively deterring many of them from coming to Alaska. We believe that the bar residency requirement is the sort of economic protectionism that the privileges and immunities clause of the United States Constitution was designed to prevent.<sup>487</sup>

In *In re Crosby*<sup>488</sup> the issue was not whether or not David Crosby<sup>489</sup> would be admitted to the ABA but, rather, what kind of membership he was entitled to have once he had been admitted.<sup>490</sup> After his admission, Crosby was automatically suspended from membership for failure to pay dues as an active member.<sup>491</sup> Crosby argued that “he should be granted inactive member status in the Alaska Bar Association because he [was] a law clerk to a judge of the United States District Court for the District of Alaska; therefore, he [was] not engaged in the active practice of law as defined by the by-laws of the Alaska Bar Association.”<sup>492</sup> He made that argument to the ABA in a petition that was denied, after the association’s board members had been polled by mail.<sup>493</sup> Crosby appealed, and the Alaska Supreme Court remanded the matter to the ABA because due process required that he be given a hearing before being suspended from membership when he was not contesting the fact of non payment of dues

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486. *Id.*

487. *Id.* at 646.

488. 495 P.2d 1270 (Alaska 1972).

489. The opinion does not indicate whether Stephen, Graham, or Neil ever sat for the Alaska bar exam, but you must admit that Crosby, Stills, Nash, and Young does sound a bit like the name of a law firm. If I were ever to receive a demand letter, or a request to cease and desist, I’d be a good bit more intimidated if the missive arrived on CSNY letterhead than if it were sent out by a law firm named “Strawberry Alarm Clock,” “Vanilla Fudge,” or “Three Dog Night.” Sorry about the trippy trip down Memory Lane. Now back to our regularly scheduled Article.

490. *In re Crosby*, 495 P.2d at 1271-72.

491. *Id.* at 1271.

492. *Id.*

493. *Id.*

but, rather, was arguing about “the proper application of the by-laws and rules to the facts of his case.”<sup>494</sup>

In *In re Moody*,<sup>495</sup> the Alaska Supreme Court directly addressed the substantive issue that had been raised two years earlier in *Crosby*.<sup>496</sup> The petitioner in *Moody* was admitted to the ABA upon passing the bar examination.<sup>497</sup>

Thereafter, he received a bill from the Alaska Bar Association for \$225, representing the membership dues of an active member for one-half of the year 1972 and all of the year 1973. He replied promptly, enclosing a check for \$20, the amount of inactive dues for a two-year period. He requested inactive membership for the reason that he was employed as a law clerk for the superior court and was, therefore, prohibited from engaging in the practice of law. The executive director of the Association rejected his request.<sup>498</sup>

The Board of Governors of the ABA affirmed the executive director’s decision and recommended that Michael Moody be suspended for non-payment of dues.<sup>499</sup> On appeal to the Alaska Supreme Court, Moody advanced three arguments:

1. Judicial law clerks are not engaged in the practice of law as defined by Art. III, Sec. 2(c), of the Association’s by-laws. Therefore, he is eligible for inactive status;
2. If petitioner’s position is considered to come under the definition of the practice of law, such definition is invalid as unreasonable, and the Board exceeded its authority under AS 08.08.080 in promulgating an unreasonable regulation;
3. The classification of a law clerk as an active member denies equal protection of the law to petitioner and all others similarly situated, as there is no rational basis for distinguishing him from those recognized as inactive by the Association.<sup>500</sup>

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494. *Id.* at 1272.

495. 524 P.2d 1261 (Alaska 1974). Whether or not Michael Moody had the blues over his situation, I cannot say.

496. *Id.* at 1267; *see Crosby*, 495 P.2d at 1271-72.

497. *Moody*, 524 P.2d at 1262.

498. *Id.*

499. *Id.*

500. *Id.* at 1262-63 (footnote omitted).

In a lengthy opinion that focused primarily on Moody's first argument, the court sided with the ABA.<sup>501</sup> In rejecting Moody's contention that it was unreasonable to require him to be an active member of the bar because court rules prohibited him from engaging in the private practice of law while holding a clerkship, the Alaska Supreme Court pointed out that Moody's argument "overlook[ed] a vital consideration . . . that a high degree of organization is one of the salient characteristics of a true profession"<sup>502</sup> such as the law, and that by seeking admission to the bar, Moody "undertook to become a member of one of the classical learned professions, which means that he assumed a number of responsibilities together with his privileges . . . [including] the reasonable support of the activities of the professional organization which is empowered to regulate and speak for that profession."<sup>503</sup> The court further explained that Moody's argument also "overlook[ed] . . . the reciprocal relationship between [himself] and the Association" and the fact that his choice "to engage in an employment in which he is restricted from practicing law in the courts of Alaska is something over which the Association exercises no control."<sup>504</sup> The court continued:

Petitioner's job can be fairly labeled a legal position with the state government. Even though it can be performed by one not admitted to the bar, it requires legal skills of a high order. It entails legal research, analysis of pleadings and procedural problems, the preparation of memoranda of law, the analysis of factual material, and the rendering of assistance in countless ways to one who is acting at the center of our working legal system—the judge. Functionally, a court attorney or law clerk may be more heavily engaged in strictly legal endeavors than many private practitioners.<sup>505</sup>

In the end, the court affirmed Moody's suspension from the bar for failure to pay his dues.<sup>506</sup> The delicious irony of this case is that if the *Moody* opinion was drafted by a law clerk who had been admitted to the Alaska bar, that clerk was obligated to pay dues as an active member of the ABA

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501. *Id.* at 1269.

502. *Moody*, 524 P.2d at 1266.

503. *Id.* at 1267.

504. *Id.*

505. *Id.*

506. *Id.* at 1269.



while the judge whose name appears at the top of the opinion was absolutely barred from active membership.<sup>507</sup>

A state court in New York reached a similar result in *In re Attorneys who are in Violation of Judiciary Law Section 468-a*.<sup>508</sup> In that case, Daniel Katz claimed “that his employment as a law clerk for a judge on the U.S. Court of International Trade exempt[ed] him from compliance with the registration fee requirement of Judiciary Law § 468-a because the judge for whom he work[ed] [was] exempt from such requirement.”<sup>509</sup> Legally, Katz argued that treating him differently from his judge violated his rights to equal protection under the federal and state constitutions.<sup>510</sup> The court was not swayed by Katz’s argument:

[T]he rational basis for distinguishing between Judges and their law clerks is readily apparent. A Judge, whether elected or appointed, serves in a uniquely distinctive capacity in our legal system, unlike the Judge’s law clerk, a court employee, who renders advice and assistance on legal issues. Moreover, while respondent correctly points out that both Federal Judges and their law clerks are not permitted to “practice law,” this may be said of other attorneys who are employed by the government, whether State or Federal, all of whom are nonetheless required to pay the biennial registration fee. Thus, the application of the statute to respondent does not deny him equal protection under the New York and U.S. Constitutions, and his request that the instant petition be denied as to him is denied.<sup>511</sup>

Accordingly, the court suspended Katz from the practice of law in New York.<sup>512</sup> As a practical matter, Katz’s suspension only barred him from doing something he was not doing anyway, i.e., practicing law, but I suspect that the suspension would have complicated Katz’s transition from his clerkship to any other legal employment.

While both Alaska and New York take the position that law clerks must be active members of the bar, Cumberland County, Pennsylvania once took the opposite view. The law clerk in *Laffey v. Court of Common Pleas*,<sup>513</sup> Jane Laffey, was a member of the Pennsylvania bar, a resident of Cumberland County, and “employed on a full-time basis on the staff of Mr.

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507. *Moody*, 524 P.2d at 1263 n.5.

508. 678 N.Y.S.2d 47 (N.Y. App. Div. 1998).

509. *Id.* at 49.

510. *Id.*

511. *Id.*

512. *Id.*

513. 468 A.2d 1084 (Pa. 1983).

Justice Hutchinson of the Supreme Court of Pennsylvania.”<sup>514</sup> So far, so good. But, “[b]ecause petitioner’s full-time employment preclude[d] her from the active practice of law in Cumberland County, that County’s Board of Admissions recommended, pursuant to Rule 458, that petitioner’s name be stricken from the roll of members of the Cumberland County bar.” So, unlike Alaska and New York where state bar associations were given the green light to frog march law clerks into membership,<sup>515</sup> Cumberland County, Pennsylvania, bar association—for reasons that are unclear—wanted to push law clerks off the lily pad of bar membership.<sup>516</sup> On grounds that “the rules of local courts relating to membership in the bar have been superseded by [its] adoption of an integrated bar, and Pa. B.A.R. 201(a) provides that all members of that bar are members of the bar of all courts of this Commonwealth . . . ,” the Supreme Court of Pennsylvania issued a Writ of Prohibition barring Laffey’s exclusion from the Cumberland County bar.<sup>517</sup> *In re Lake*<sup>518</sup> represents yet another victory for law clerks. In *Lake*, the Louisiana State Bar Association Board of Governors denied Barbara Lake’s “application for an exemption from continuing legal education requirements[,]” ruling “that she was not entitled to restricted (inactive) status under La. Sup. Ct. Rule XXX, Rule 2(6), since she was ‘engaged in the practice of law in Louisiana’ by working as a law clerk for a federal judge.”<sup>519</sup> The Louisiana Supreme Court took a different view, “interpret[ing] [its] rules so as to allow a member of the Louisiana State Bar Association whose sole activities are service as a judicial law clerk, with never any clients or court appearances, to qualify for a ‘restricted status’ exemption from continuing legal education requirements.”<sup>520</sup>

I conclude this section on a high note, with three more law-clerk victories. The plaintiff in *In re Lewis*<sup>521</sup> was “employed as a law clerk in the Jefferson Family Court . . . .”<sup>522</sup> He was “a 1987 graduate of Western State University (“WSU”) College of Law in Fullerton, . . . California[,]” and had been admitted to the bars of both California (1993) and Indiana (2000).<sup>523</sup> However, when he sought admission to the Kentucky bar, “[t]he Board of Bar Examiners . . . concluded that the legal education Lewis

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514. *Id.* at 1085.

515. *See Sheley*, 620 P.2d 640; *see also Attorneys*, 678 N.Y.S.2d 47.

516. *See Laffey*, 468 A.2d 1084.

517. *Id.* at 1087.

518. 607 So. 2d 565 (La. 1992).

519. *Id.* at 565.

520. *Id.*

521. 86 S.W.3d 419 (Ky. 2002).

522. *Id.* at 420.

523. *Id.* at 419-20.

obtained at WSU [did] not satisfy the requirements of SCR 2.014(2)(a); thus, the Character and Fitness Committee recommend[ed] that his application be denied.”<sup>524</sup> To reach its decision, the Board of Bar Examiners (“Board”), hired the former dean of the Salmon P. Chase School of Law at Northern Kentucky University to examine the report produced by an ABA accreditation team in 1987 that resulted in denial of WSU’s application for accreditation.<sup>525</sup> Dean Grosse determined that in 1987, WSU was “providing a three-year course of study that was the substantial equivalent to the legal education then being provided by law schools in Kentucky.”<sup>526</sup> The Board rejected Dean Grosse’s report.<sup>527</sup> As the Supreme Court of Kentucky observed: “The differences of opinion between Dean Grosse and the Board reflects a fundamental difference in emphasis. Dean Grosse emphasized the quality of WSU’s faculty and curriculum. The Board emphasized WSU’s deficiencies in faculty-incentives and library facilities . . . .”<sup>528</sup> In the end, after a comprehensive analysis, the court agreed with Dean Grosse and determined that notwithstanding WSU’s lack of accreditation, “the applicant, Richard O. Lewis, graduated from ‘a law school accredited in the jurisdiction where it exists and which required the equivalent of a three-year course of study that [was] the substantial equivalent of the legal education provided by approved law schools in Kentucky.’”<sup>529</sup> In *Bennett v. State Bar of Nevada*,<sup>530</sup> graduates of a defunct law school petitioned the Supreme Court of Nevada for a waiver of the rule requiring graduation from an ABA-accredited law school for admission to the Nevada Bar.<sup>531</sup> Because the Nevada School of Law had ceased operations without achieving accreditation, the petitioners had no chance of satisfying the requirement.<sup>532</sup> In its decision to waive the accreditation requirement, the Supreme Court of Nevada assessed the quality of the education provided by the school, noting, among other things:

With respect to placement services, the inspection team noted that the placement program, operated by the dean’s secretary, had achieved commendable results in placing many graduates. Specifically, we note that certain petitioners have been and are

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524. *Id.* at 420.

525. *Id.*

526. *Lewis*, 86 S.W.3d at 420.

527. *See id.*

528. *Id.*

529. *Id.* at 423 (quoting KY. SUP. CT. R. 2.014(2)(a)).

530. 746 P.2d 143 (Nev. 1987).

531. *Id.* at 144.

532. *Id.* at 145.

currently employed as law clerks with Nevada district court judges, [and] a United States district court judge . . . .<sup>533</sup>

Finally, in *In re Houlahan*,<sup>534</sup> a law clerk for the Macomb County Circuit Court passed the Michigan bar examination, and was determined to be of satisfactory moral character by the Michigan bar examiner, but was denied admission to the bar because he was a Canadian citizen.<sup>535</sup> The Michigan Supreme Court ordered Houlahan's admission to the bar.<sup>536</sup> Oh, Canada!

### C. Conditions of Employment

As every law clerk learns during the first few days of orientation, there are certain things—such as practicing law or engaging in political activity—that law clerks are not allowed to do. Several law clerks, however, have been seduced by the siren song of life outside the cocoon of clerkship, and have sued for the right to do what the law clerk code of conduct says can't be done.

In *State v. Johnson*,<sup>537</sup> “a current, active law clerk working in Section ‘H’ of the Orleans Parish Criminal District Court enrolled as counsel of record to represent a defendant in a case to be tried before Section ‘G’ of that court.”<sup>538</sup> The trial judge in Section G “ordered the law clerk’s name removed as counsel of record for the defendant,”<sup>539</sup> and on appeal, the Louisiana Court of Appeal affirmed, holding that “law clerks may not be allowed to engage in active practice before any of the judges in the court for which he works.”<sup>540</sup> The court based its ruling on the “appearance of impropriety” provisions of the Louisiana Canons of Judicial Ethics and identified three possible channels of communication available to law clerks that are not available to general practitioners.<sup>541</sup> The court also relied on the Louisiana Rules of Professional Responsibility, and in particular, the rules

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533. *Id.* at 147.

534. 209 N.W.2d 250 (Mich. 1973).

535. *Id.* at 251.

536. *Id.* (citing *In re Griffiths*, 413 U.S. 717 (1973) (holding that Connecticut rule barring non-citizens from bar membership violated 14th-Amendment guarantee of equal-protection)).

537. 529 So. 2d 157 (La. Ct. App. 1988).

538. *Id.* at 157.

539. *Id.*

540. *Id.*

541. *Id.* Specifically, the court noted that: (1) “the law clerks working for different judges in the same court often have an extensive network by which they communicate with and assist each other with research and other legal problems[;]” (2) “the law clerk in question might have direct contact with the judge in question at some point in his tenure at the court[;]” and (3) “though it is remote, the clerk might have an avenue to communicate with other judges in the court through the judge for whom he works.” *Johnson*, 529 So. 2d at 157, 158.

pertaining to conflicts of interest and the rule under which “it is professional misconduct for an attorney to ‘state or imply an ability to influence improperly a judge.’”<sup>542</sup> While the court was careful to note that there was no evidence “that the attorney/law clerk in this case [had] had any contact with the trial judge involved,” the court nonetheless found it necessary to impose “a rule prohibiting law clerks from practicing before judges in the court where they are employed.”<sup>543</sup> However, it went on to state: “This rule is not intended to extend to a law clerk practicing with the permission of his employer judge in courts other than the one by which he is employed. That is a matter to be decided by the two of them.”<sup>544</sup>

The two law clerks in *In re Prohibition of Political Activities by Court-Appointed Employees*<sup>545</sup> did not want to practice law, but rather petitioned the Supreme Court of Pennsylvania for exemptions from directives barring court-appointed employees from engaging in political activities so they could run for positions on local school boards.<sup>546</sup> In the course of denying the law clerks’ petitions, the court rejected their argument that they would not be engaging in political activity “because they were nominated on both major party tickets and [were] virtually assured of election.”<sup>547</sup> In the words of the court:

We cannot accept this argument; even were a political campaign held to be non-political because no other person has been nominated to office, the argument overlooks the fact that it is the holding of the office as well as the obtaining of it which is interdicted. Nor can we agree with petitioners Gobel and Silvestri that election to the office of school director, because it pertains to public education, is not election to a political office. Thus we conclude that each of the petitioners is covered by the directives in question.<sup>548</sup>

In *Aranoff v. Bryan*,<sup>549</sup> a law clerk petitioned the Vermont Supreme Court for declaratory and injunctive relief from the imposition of discipline against her under the canon of the Vermont Law Clerk Code of Conduct barring political activity,<sup>550</sup> but the court dismissed her petition because she

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542. *Id.* at 158 (quoting LA. R. OF PROF’L CONDUCT R. 8.4(E) (2005)).

543. *Id.*

544. *Id.*

545. 375 A.2d 1257 (Pa. 1977).

546. *Id.* at 1258.

547. *Id.* at 1260.

548. *Id.*

549. 569 A.2d 466 (Vt. 1989).

550. *Id.* at 467. Specifically, the law clerk in *Aranoff* alleged that she was told:

brought it in the wrong forum, did “not name defendants who might be liable for the harm alleged,”<sup>551</sup> failed to exhaust her administrative remedies, and presented an unripe constitutional claim.<sup>552</sup>

#### *D. Employer Conduct*

I continue with a section that is actually a bit out of place in an article titled *Law Clerks Gone Wild*. The law clerks in this section were, or perceived themselves to have been, the victims of wildness perpetrated by their employers, either individual or institutional. Instead of reacting wildly, the law clerks in this section responded tamely, or least civilly, by initiating legal action against the judges and other court officials who tormented them.

Perhaps the most notorious case of this genre is *In re Seaman*.<sup>553</sup> In that case, a former law clerk to Judge Edward Seaman of the New Jersey Superior Court filed a complaint against the judge with the Advisory Committee on Judicial Conduct (“ACJC”).<sup>554</sup> The law clerk charged Judge Seaman with repeatedly making sexual comments to her and touching her in an inappropriate manner.<sup>555</sup> The ACJC found, by clear and convincing evidence, that Judge Seaman had committed many of the acts with which he had been charged, ruled that his conduct violated multiple canons of the New Jersey Code of Judicial Conduct, and “recommended that [Judge Seaman] receive a public censure.”<sup>556</sup> The Supreme Court of New Jersey did the ACJC one better and suspended Judge Seaman from his judicial office for sixty days without pay.<sup>557</sup>

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that she [could] not write articles for a monthly newspaper serving Vermont’s lesbian and gay population; that she [could] not remain a secretary of the Vermont Coalition of Lesbians and Gay Men, allegedly because it is a political organization; that she [could] not serve such organization in a ministerial capacity; that she [could] not actively disseminate information for the organization; that she [could] not wear buttons or affix bumper stickers to her car tending to indicate sexual orientation; and that she [could] not use her residence as a “safe home” for lesbians or gay men needing shelter.

*Id.*

551. *Id.* at 469.

552. *Id.* at 470.

553. 627 A.2d 106 (N.J. 1993).

554. *Id.* at 108.

555. *Id.* at 109. The specific charges are set out in considerable detail in the opinion and need not be repeated here. *See id.* at 111.

556. *Id.* at 109.

557. *Seaman*, 627 A.2d at 124. In the portion of its opinion discussing the law clerk’s failure to report Judge Seaman’s conduct earlier than she did, the court described the nature of a judicial clerkship:

The notoriety of *Seaman* is amply demonstrated in *In re Subryan*,<sup>558</sup> another New Jersey judicial-discipline proceeding in which the complaining law clerk “testified that [Judge Randolph Subryan] told her she would ‘turn [him] into Judge Seaman.’”<sup>559</sup> While it hardly seems fair to credit the law clerk for transforming a Subryan into a Seaman—Judge Subryan seems to have accomplished that on his own—there are indeed parallels between *Subryan* and *Seaman*. In each case, a judge was charged with sexually harassing a law clerk, both verbally and physically,<sup>560</sup> and in both cases, the Supreme Court of New Jersey opted for a sixty-day suspension rather than the public censure recommended by the ACJC.<sup>561</sup> There are, however, several differences. For one, unlike Judge Seaman, who was disciplined for both verbal and physical harassment,<sup>562</sup> Judge Subryan was disciplined only for his physical harassment, which consisted of kissing his law clerk against her will.<sup>563</sup> And, at least based upon the opinions in the two cases, it

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Plaintiff’s reticence is particularly understandable in the context of a judicial clerkship. The judge-clerk relationship is unique. The importance of a judicial clerkship to the career of a young lawyer is enormous. A judicial clerkship can be an auspicious beginning to a legal career. See Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant’s Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CALIF. L. REV. 401, 403-04 (1993) (describing importance of clerkship to future careers of new lawyers). Judicial clerkships are marked by both strong dependence and a significant power imbalance between judge and clerk. See Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1129-31, 1153-61 (1973). The vulnerability of a clerk to a judge is even greater than that in most supervisor-employee relationships. By alienating his or her judge, a clerk risks great professional jeopardy.

Accordingly, we find that complainant’s failure to complain sooner, and her continued kindnesses toward respondent, can be viewed as a need to maintain appearances, and, indeed, served to mask her resentment of respondent’s offensive conduct. That conclusion is strongly supported by the power dynamics inherent in a judicial clerkship.

*Id.* at 120.

558. 900 A.2d 809 (N.J. 2006).

559. *Id.* at 813. Regarding that testimony, and Judge Subryan’s response to it, the court had this to say:

When questioned about his comment, respondent claimed never to have heard of Judge Seaman, a claim we find incredible. The Court’s opinion in *Seaman* was issued on July 16, 1993, approximately five months after respondent’s appointment to the bench and four months before his first participation in the Judicial College, the judiciary’s annual three-day education conference. The case attracted significant public attention at the time and sexual harassment training was provided in every vicinage for judges and staff alike.

*Id.*

560. *Id.* at 811; *Seaman*, 627 A.2d at 111.

561. *Subryan*, 900 A.2d. at 819; *Seaman*, 627 A.2d at 124.

562. *Seaman*, 627 A.2d at 124.

563. *Subryan*, 900 A.2d at 814-17. Regarding the non-physical harassment, see *id.* at 813-14 (describing the conduct), the court explained:

appears that only the law clerk in *Subryan* took the additional step of filing a civil action against the judge who harassed her.<sup>564</sup>

In what appears to be the longest-running lawsuit brought by a law-clerk plaintiff, Margaret Bichsel, who was serving as a permanent law clerk in the Ramsey County, Minnesota, juvenile court, sued the State of Minnesota and Ramsey County for “breach of contract, promissory estoppel, whistleblowing, sex discrimination, reprisal, assault and battery,

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In our view, the question is not whether there is clear and convincing evidence that the judge and others made comments and jokes in chambers about gender and sex, and even about pornographic pictures -- there is ample evidence they did. The question is whether those comments and jokes violated the *Code of Judicial Conduct*. Although the issue is closely poised, we find that they did not. The record suggests that the people who participated in the banter believed it to be harmless. Because of the possibility that some of those present could be offended, however, jokes and comments about gender and sex are simply not appropriate in this setting. A judge always must maintain a dignified environment, whether in the courtroom or in the relative informality and privacy of his or her chambers.

*Id.* at 814.

564. *Id.* at 811 n.1 (“We note that J.B.’s civil action was settled, without admission of fault . . .”). As it turns out, even a successful law-clerk lawsuit against a judge has certain perils for the law clerk. In *McIntosh v. Minnesota State District Courts, Minneapolis LOC*, No. C5-94-1803, 1995 WL 25235 (Minn. Ct. App. Jan. 24, 1995), law clerk Susan McIntosh and another courthouse employee sued a judge for whom McIntosh had previously worked. *Id.* at \*1. (The opinion does not indicate the factual basis for the suit or the causes of action under which it was brought.) The parties successfully mediated the lawsuit, but thereafter, McIntosh quit her clerkship, due at least in part to her displeasure over the fact that confidential information from the mediation had been revealed to the judge for whom she was then working. *Id.* After McIntosh quit her clerkship, her application for re-employment insurance benefits was denied. *Id.* The denial was affirmed on appeal. *Id.* at \*3. In affirming the denial of benefits, the court explained:

McIntosh argues that her relationship with Judge Alton was irreparably damaged by the disclosure of confidential information concerning the mediation. But personality conflicts or irreconcilable differences between an employee and a supervisor or coworker generally do not provide the employee with good cause to quit. *Bongiovanni v. Vanlor Invs.*, 370 N.W.2d 697, 699 (Minn. App. 1985). Furthermore, there is no evidence that McIntosh’s relationship with Judge Alton had become irreparably damaged. Rather, Judge Alton attempted to talk with McIntosh and asked her to return to work.

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McIntosh also argues that she had reasonable cause to fear for her safety upon learning that Judge Rice was working in the Hennepin County Government Center after the mediation was concluded. Judge Rice, however, had not recently taken any action that could be considered threatening to McIntosh; in fact, McIntosh had not seen Judge Rice while she was at work during the month preceding her resignation.

*McIntosh*, 1995 WL 25235, at \*2.



and defamation.”<sup>565</sup> The Minnesota Court of Appeals described the factual underpinnings of Bichsel’s case:

Throughout her employment as the juvenile court law clerk, Bichsel reported without success, in memos and in meetings, to [juvenile court administrator Mike] Calvert, [district court administrator Sue] Alliegro, [special courts administrator Bob] Bauer, and at least one judge, problems about: court orders not processed properly; her concerns about being paid for overtime; incidents in which she allegedly was harassed or treated abusively by her co-workers, Calvert and Bauer; and, other concerns about court administrative problems. In November 1992, Bichsel refused to log any more overtime hours because Calvert and Bauer refused to compensate her. Matters did not improve, and Bichsel retained counsel in December 1992.

Bichsel’s allegations of sex discrimination were investigated in 1993. Bichsel met with the judge conducting the investigation, and brought copies of court orders to document abuses that she had perceived in the system. The judge indicated he was investigating only the discrimination claim; he later concluded that there was tension in the workplace, but Bichsel had not been sexually discriminated against.

In May 1993, while Bichsel was on medical leave, respondent state’s attorney notified Bichsel’s attorney that Bichsel would be reassigned to the civil service division. When questioned, the state’s attorney indicated Bichsel could accept the new assignment, quit or remain on medical leave.<sup>566</sup>

The trial court granted summary judgment to the defendants on all of Bichsel’s claims.<sup>567</sup> On appeal, Bichsel won reversal with respect to her whistleblower claim,<sup>568</sup> as well as her claims for assault and battery<sup>569</sup> and reprisal.<sup>570</sup>

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565. *Bichsel v. State*, No. C1-95-240, 1995 WL 434444, at \*1 (Minn. Ct. App. July 25, 1995). Bichsel seems also to have made a claim under the Government Data Practices Act, which did not come before the appellate court. *Id.* at \*2.

566. *Id.* at \*1-2.

567. *Id.* at \*2.

568. *Id.* at \*5.

569. *Bichsel*, 1995 WL 434444, at \*4.

570. *Id.* at \*7.

The interesting legal issue in *Bichsel* arose from the fact that “[d]uring discovery, Bichsel revealed that she had turned over to her attorneys copies of approximately 3400 juvenile court orders that she had in her possession.”<sup>571</sup> Subsequently:

Respondents filed a petition for an order to show cause why [Bichsel] should not be held in contempt for retaining the documents, all of which were confidential pursuant to statute and court rules. In opposing the petition, Bichsel’s attorneys argued that the documents were kept confidential and were needed to prove Bichsel’s claims that state and federal laws had been violated. After a hearing, the district court held Bichsel in contempt until she delivered the documents, under seal, to the court for safekeeping. Bichsel complied with the court’s order.<sup>572</sup>

At summary judgment, the trial court found “that the after-acquired evidence that [Bichsel] had copied confidential court files barred all of her claims.”<sup>573</sup> The court of appeals reversed that ruling, noting that in *McKennon v. Nashville Banner Publishing Co.*,<sup>574</sup> the Supreme Court of the United States had “rejected a rule under which a discrimination plaintiff can be barred completely from recovery based on after-acquired evidence that would have provided the employer with a legitimate basis for dismissing the plaintiff, if the employee had discovered the evidence prior to the plaintiff’s termination.”<sup>575</sup> Moreover, the court rejected the respondent’s argument that *McKennon* applied only to Bichsel’s discrimination claims.<sup>576</sup>

“On remand . . . the county and state again moved for summary judgment on Bichsel’s remaining claims, arguing, among other things, that the state and county were entitled to official and statutory immunity and that Bichsel had failed to establish an essential element of her whistleblower action.”<sup>577</sup> The trial court denied the defendants’ motion<sup>578</sup> and the court of appeals affirmed.<sup>579</sup> Unhappily for Bichsel, however, her third and final trip up the appellate ladder was not so successful; at trial, the jury found that she

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571. *Id.* at \*2.

572. *Id.*

573. *Id.*

574. 513 U.S. 352 (1995).

575. *Bichsel*, 1995 WL 434444, at \*2.

576. *Id.* at \*3.

577. *Bichsel v. State*, No. C0-97-475, 1997 WL 600704, at \*1 (Minn. Ct. App. Sept. 30, 1997).

578. *Id.*

579. *Id.* at \*4.

had failed to prove certain elements of her whistleblower claim, and the Minnesota Court of Appeals affirmed.<sup>580</sup>

*E. Bang*

Anyone who has read this far deserves a reward, so I have decided that rather than ending with a whimper, this article will be going out with a bang.<sup>581</sup> Don't say I didn't warn you.

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580. *Bichsel v. State*, No. C7-99-39, 1999 WL 543200, at \*1 (Minn. Ct. App. July 27, 1999).

581. To shed a ray of light on my literary reference, I turn to Judge Milton Shadur, one of the bench's leading experts on both bangs and whimpers:

As permitted by *Pearson*, this Court determines expressly that the conduct of the Department defendants did not violate any clearly established constitutional right possessed by William, so that those defendants are insulated from liability by the doctrine of qualified immunity. Because that potential liability is all that has remained of the claims originally advanced in this lawsuit, it presents the legal equivalent of what T.S. Eliot described in *The Waste Land*:

“This is the way the world ends.  
Not with a bang but a whimper.”

*Atkins v. City of Chicago*, 632 F. Supp. 2d 851, 854 (N.D. Ill. 2009) (citing *Pearson v. Callahan*, 555 U.S. 223 (2009)). See also *Clark Consulting, Inc. v. Richardson*, No. 07 C 7231, 2009 WL 424541, at \*1 (N.D. Ill. Feb. 19, 2009) (“After counsel for plaintiff Clark Consulting, Inc . . . evoked memories of T.S. Eliot’s *The Hollow Men* by a with-prejudice voluntary dismissal of its action against R. Scott Richardson . . .”) (footnote omitted); *Walker v. Calumet City*, 578 F. Supp. 2d 1059, 1060 (N.D. Ill. 2008) (“All that remains in this once-hotly-contested but now closed case is the parties’ dispute as to . . . a fee award . . . . But ‘all that remains’ is not at all a reaffirmation of T.S. Eliot’s ‘This is the way the world ends Not with a bang but a whimper,’ for the legal efforts by Walker’s counsel that ultimately led to her material success, coupled with the dismissal of the action on mootness grounds, were intensive, extensive and . . . expensive.”) (footnotes omitted); *Patterson v. Edgar*, No. 92 C 3139, 1992 WL 132547, at \*1 (N.D. Ill. June 3, 1992) (“This action, which began as an emergency matter . . . has ended as T.S. Eliot’s now-classic phrase describes the end of the world in *The Hollow Men*: ‘Not with a bang but a whimper.’”); *Coleman v. McLaren*, 631 F. Supp. 749, 763 (N.D. Ill. 1985) (“With due apologies to T.S. Eliot’s *The Hollow Men*, plaintiffs’ ‘world ends not with a bang but a whimper.’ Their seven-year season in this federal court lawsuit has ended with a final strikeout. Defendants’ motions to dismiss this action for want of subject matter jurisdiction are granted.”); *Kennedy v. Nicastro*, 546 F. Supp. 267, 267 (N.D. Ill. 1982) (“This action, like the world in T.S. Eliot’s *The Hollow Man*, has ended ‘not with a bang but a whimper.’ Plaintiffs have never generated a complaint that has survived a motion to dismiss.”). It is impossible not to admire a judge who has maintained his commitment to a literary reference for twenty-seven years and through 1086 volumes of the *Federal Supplement*.

Then, as if T.S. Eliot was not enough, Judge Shadur jumped down the rabbit hole into the following footnote:

It was a toss-up whether the current situation is best described by the quotation in the text or by this description of the ultimate disappearance of the Cheshire Cat in Lewis Carroll’s *Alice’s Adventures in Wonderland* ch. 6:

“[I]t vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.”

Once upon a time, “Judge [Bernard] Snyder presided over the non-jury trial of a case in which NABCOR and Frank Maiorana sought to recover damages from Philadelphia National Bank.”<sup>582</sup> The plaintiffs, represented by Gustine J. Pelagatti, prevailed, to the tune of \$8.7 million.<sup>583</sup> At the time of the NABCOR litigation, Jill Cohen was Judge Snyder’s law clerk.<sup>584</sup>

During the period of Jill Cohen’s clerkship, Judge Snyder had also presided at a trial in which James R. Edgehill alleged that he had been libeled by Philadelphia Magazine. In the Edgehill action, a petition for the recusal of Judge Snyder was filed by Philadelphia Magazine, and Jill Cohen was named as a witness. Although she was not permitted to testify, an offer of proof was made and included an accusation of improper conduct on the part of the trial judge. The offer of proof also contained references to alleged improprieties during the NABCOR trial.<sup>585</sup>

Then things got interesting:

At the time when this offer of proof became known publicly via the news media, post-trial motions had already been filed in the NABCOR action and were then awaiting disposition. Counsel for PNB suggested to Pelagatti that he was considering the use of Jill Cohen’s testimony as a basis on which to attack NABCOR’s verdict

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*Atkins*, 632 F. Supp. 2d at 854 n.4. And, for the record, Judge Shadur is no slouch when it comes to references to the works of Lewis Carroll. See Parker B. Potter, Jr., *Wondering About Alice: Judicial References to Alice in Wonderland and Through the Looking Glass*, 28 WHITTIER L. REV. 175, 177 n.7 (2006) (also noting Judge Shadur’s references to the Shakespearean phrase “paint the lily” and the works of Franz Kafka).

P.S., I thought of ending this Article with a “Bam” rather than a “Bang,” but I’m sure you will agree that, for purposes of this Article anyway, Judge Shadur and T.S. Eliot have served up a much tastier metaphor than Emeril Lagasse’s monosyllabic okra-flavored mumbo gumbo.

582. *Cohen v. Pelagatti*, 493 A.2d 767, 769 (Pa. Super. Ct. 1985).

583. *Id.*

584. *Id.*

585. *Id.* Judge Snyder’s refusal to admit his law clerk’s testimony was one of a number of actions in the *Edgehill* and *NABCOR* cases that landed him in hot water with Pennsylvania’s Judicial Inquiry and Review Board (“Board”). See *In re Jud. Inq. & Rev. Bd. v. Snyder*, 523 A.2d 294, 295-98 (Pa. 1987). That hot water consisted of a recommendation that Judge Snyder be removed from the bench of the Court of Common Pleas. *Id.* at 295. However, before the Supreme Court of Pennsylvania had a chance to hear argument on the Board’s recommendation, “the electors in the City of Philadelphia denied Judge Snyder’s quest for retention as a Common Pleas judge, thus rendering moot the question of whether this Court should remove him from judicial office.” *Id.* at 298 (citation omitted). Even though Judge Snyder was shown the door by the voters, the Supreme Court of Pennsylvania took the additional prophylactic step of “finding him ineligible hereafter to hold any judicial office.” *Id.* at 299. Several years later, however, that same court did Judge Snyder a solid by reversing a decision of the Commonwealth Court which affirmed a decision of the State Employees Retirement Board to terminate the payment of Judge Snyder’s pension benefits. See *Snyder v. State Emp.’s Ret. Bd.*, 621 A.2d 563 (Pa. 1993).

against PNB. Pelagatti thereupon caused subpoenas to be issued ex parte to various educational institutions, including Enfield Middle School, Springfield Township Board of Education, Franklin and Marshall College, Temple University and the Delaware Law School, for the production of Jill Cohen's scholastic records. Pelagatti also suggested that Jill Cohen had a record of psychiatric disorders and attempted to use a subpoena to obtain records from Fairmount Farms. It appears, however, that those records did not pertain in any way to the present appellee.<sup>586</sup>

In "an action in equity to enjoin the further issuance of subpoenas for her records and also to prevent the dissemination of information already obtained[.]"<sup>587</sup> Cohen prevailed in the trial court, which issued an order enjoining attorney Pelagatti from: "(1) issuing subpoenas under the *NABCOR* caption to acquire documents concerning plaintiff, Jill R. Cohen; (2) reviewing any documents which have been produced pursuant to subpoenas previously issued under the *NABCOR* caption; (3) disseminating any information contained in such documents; and (4) otherwise invading or intruding upon plaintiff's privacy."<sup>588</sup> The appellate court found attorney Pelagatti's conduct improper<sup>589</sup> and affirmed the trial court's issuance of an injunction.<sup>590</sup> In so ruling, the court noted both that Pelagatti had altered the subpoena form<sup>591</sup> and that Cohen was not the proper target of a subpoena in the first place, because "neither she nor the custodians of her records were parties to the *NABCOR* action or any other action in which [Pelagatti's clients] had an interest."<sup>592</sup>

*Cohen v. Pelagatti*<sup>593</sup> was not the only case in which Cohen and Pelagatti tangled; they also crossed swords in *Pelagatti v. Cohen*.<sup>594</sup> My one-time 1L legal writing instructor would surely counsel me to paraphrase the facts of the case, but I decline to do so, in the hope of providing readers with at least a hint of the charge I got when I read these words straight from the (electronic) pages of the *Atlantic Reporter*:

The matter before us arises from a rather complex and bizarre history, which has recently been discussed in part in the related case

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586. *Cohen*, 493 A.2d at 769.

587. *Id.*

588. *Id.* at 769 n.1.

589. *Id.* at 770.

590. *Id.* at 771.

591. *Cohen*, 493 A.2d at 769.

592. *Id.* at 770.

593. 493 A.2d 767.

594. 536 A.2d 1337 (Pa. Super. Ct. 1987).

of *Cohen v. Pelagatti*. The relevant portion of that history is as follows: On April 12, 1983, the Honorable Bernard Snyder of the Philadelphia Court of Common Pleas handed down a decision in the case of *National Auto Brokers Corporation (“NABOR”) v. Philadelphia National Bank (“PNB”)*, . . . awarding the NABCOR plaintiffs a multi-million dollar verdict. NABCOR had been represented by Gustine Pelagatti . . . ; PNB had been represented by Gregory M. Harvey . . . .

On May 6, 1983, in an unrelated case, *Edgehill v. Municipal Publications*, . . . Judge Snyder again awarded a multi-million dollar plaintiff’s verdict. A motion for Judge Snyder’s disqualification was filed by Municipal’s attorney, David Marion . . . . On July 14, 1983, the motion was heard before Judge Snyder. Marion called Jill R. Cohen . . . to testify in support of recusal. Cohen had been Judge Snyder’s law clerk while the *NABCOR* and *Edgehill* decisions were pending, and was prepared to testify that both NABCOR counsel Pelagatti and *Edgehill*’s counsel, M. Mark Mendel, had improperly colluded with Judge Snyder prior to verdict. An offer of proof as to the substance of Cohen’s proposed testimony was made in chambers. The testimony was disallowed; that afternoon, however, Marion called a press conference, in which he gave a detailed accounting of the substance of Cohen’s disallowed testimony. Both Cohen and her attorney, Gregory Magarity, . . . declined public comment. As a result of Marion’s conference, however, Cohen’s allegations were publicly disseminated through several newspaper articles and television newscasts.

On July 18, 1983, Cohen signed an affidavit, prepared by Marion, stating that she was prepared to give sworn testimony in conformity with Marion’s July 14 offer of proof. That same day, Gregory Harvey, counsel for PNB in the *NABCOR* case, telephoned Pelagatti, and indicated that he intended to use Cohen’s affidavit, and Marion’s offer of proof attached thereto, as the basis for a motion requesting that *NABCOR* be reopened, and that Judge Snyder be disqualified from further participation in *NABCOR*.

On August 5, 1983, Pelagatti attempted by phone to dissuade Harvey from taking such action, by relating that he had information that “a Jill Cohen” had been a mental patient at Fairmount State Hospital in May, 1981. He further indicated to Harvey that he

would further investigate the background of law clerk Jill Cohen, to determine if the two Jill Cohens were the same person, if Harvey filed a motion for recusal based on Cohen's July 18 affidavit.

On August 9, 1983, Harvey informed Pelagatti that he would be filing a motion for recusal anyway, and using Cohen as a witness in support thereof. As a result, Pelagatti began that same day to issue *ex parte* subpoenas, under the *NABCOR* caption, to obtain Cohen's educational records, in order to determine if Cohen had taken a medical leave of absence in May, 1981, or had had a history of mental illness during her school years.

On August 18, 1983 Cohen's attorney . . . phoned Pelagatti's office, and informed Pelagatti's employee, Stephen W. Bruccoleri . . . that he strongly objected to the *ex parte* subpoenas, and wanted Pelagatti to stop issuing subpoenas and making remarks characterizing his client as the "Jill Cohen" from Fairmount Farms. He further requested a letter from Pelagatti, stating Pelagatti's position as to the issuance of said subpoenas, and confirming Pelagatti's phone remarks to Harvey connecting Magarity's client to Fairmount Farms. In response, Pelagatti that day submitted a letter to Harvey under the *NABCOR* caption, and forwarded a carbon copy of said letter to Magarity. Upon receipt of Pelagatti's letter, Harvey wrote a reply letter, indicating what he believed to be inaccuracies in Pelagatti's account of their phone conversation, and accusing Pelagatti of an "abuse of (the) process" in the issuance of the *ex parte* subpoenas. Additionally, Harvey contacted Frederick N. Tulsy, a reporter with the Philadelphia Inquirer, and spoke with him concerning the subpoenas.

On the following morning, August 19, 1983, an article by Tulsy appeared in the Inquirer, discussing the subpoenas at some length. The article also made mention, once again, of the substance of Cohen's disallowed testimony, and contained Harvey's personal comments that Pelagatti's actions were "an abuse of process" and "exactly the conduct which (was) described" in Cohen's testimony. Cohen, Pelagatti, and Magarity did not comment in the Tulsy article; however, to protect Cohen from further harassment, Magarity obtained a temporary restraining order from the Honorable Berel Caesar. The order precluded Pelagatti from issuing any further subpoenas to obtain Cohen's records, and from

publishing any further statements connecting Cohen with Fairmount Farms.

On the morning of August 20, 1983, Magarity filed a one million dollar lawsuit, on Cohen's behalf, against Pelagatti and the *NABCOR* plaintiffs, alleging defamation, invasion of privacy, abuse of process, and intentional infliction of emotional distress. Later that day, another Tulsy article appeared in the *Inquirer*, reporting the filing of Cohen's suit, and the issuance of the temporary restraining order the previous day. This Tulsy article did contain some comments from Magarity, who referred to Pelagatti's use of subpoenas as "improper" and "possibly illegal."

Pursuant to Judge Caesar's restraining order, preliminary injunction hearings were held before the Honorable Harry A. Takiff, on August 24, 1983 and September 7, 1983. On September 16, 1983, Judge Takiff granted Cohen's request for a preliminary injunction, and forbade Pelagatti from issuing further subpoenas requesting Cohen's records, reviewing and/or disseminating any information in the records acquired prior to the restraining order, or otherwise invading Cohen's privacy. The events of the hearing, and the contents of Judge Takiff's Memorandum and Order, were reported in various newspaper articles.

On October 15, 1983, Gregory Harvey filed a motion for the recusal of Judge Snyder from further involvement in the *NABCOR* proceeding. The motion was supported by David Marion's July 14 offer of proof in the *Edgehill* recusal hearings, and Cohen's July 18 affidavit.<sup>595</sup>

As my good friend the Frito Bandito might say, Ay, ay, ay, ay.<sup>596</sup>

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595. *Id.* at 1338-40 (footnotes omitted).

596. A confession. I am not actually friends with the Frito Bandito. However, I did go to college with the son of the advertising executive who invented him. Perhaps that makes my college chum the Frito Bandito's brother. But I digress:

In 1968 Frito-Lay began a new Fritos advertising campaign featuring the Frito Bandito, a Mexican bandit complete with a long mustache, sombrero, and six-gun who spoke in a heavy accent. Ads showed the cartoon character robbing and scheming to get his beloved Fritos corn chips. The campaign quickly drew heavy criticism from Mexican American groups who alleged that it showed a prejudice against Mexican Americans and perpetuated a stereotype. Responding to the protests, radio and television stations in California began pulling Frito



In any event, in *Pelagatti v. Cohen*, which made its way to the Pennsylvania Superior Court two years after *Cohen v. Pelagatti* was decided, Pelagatti sued Cohen and a host of others, including counsel for the defendants in both *Edgehill* and *NABCOR*.<sup>597</sup> Based upon the facts described above, Pelagatti advanced claims of “Conspiracy to Obstruct Justice,” “Obstruction of Justice,” “Conspiracy to Interfere with Contractual Relationship,” “Interfering with Contractual Relationship,” “Conspiracy to Libel and Slander,” “Libel and Slander,” and “Negligence.”<sup>598</sup> The trial court “dismissed the entire complaint, as to all defendants, with prejudice.”<sup>599</sup> As to Cohen, all’s well that ends well. As to law clerks reading this article, several rulings of law stand out.

Four of Pelagatti’s claims alleged that Cohen and the other defendants “conspired to obstruct, and did in fact obstruct, justice by employing: (1) Cohen’s ‘perjured’ proposed testimony; [and] (2) Cohen’s ‘false verification’ of that testimony . . . .”<sup>600</sup> But, as the court explained:

With respect to the alleged “perjured” testimony and “false verification” given by Jill Cohen, it is well settled that private witnesses, as well as counsel, are absolutely immune from damages liability for testimony, albeit false, given or used in judicial proceedings. Clearly, an offer of proof, summarizing the substance of proposed testimony, and an affidavit attesting to the veracity of that testimony are two of the more obvious examples of communications within the confines of judicial proceedings. Hence, Cohen’s proposed testimony and affidavit cannot now form the basis of a damages claim against either Cohen or her attorney . . . .<sup>601</sup>

Four more claims asserted that Cohen and others were involved in “a conspiracy to interfere, and interference with, [Pelagatti’s] contractual relationship with the NABCOR plaintiffs in the *NABCOR* litigation . . . .”<sup>602</sup> Those claims were based upon allegations that:

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Bandito spots off the air. Frito-Lay finally ended the campaign in 1970.

*Frito-Lay North America Company Profile*, REFERENCE FOR BUSINESS, ENCYCLOPEDIA OF BUSINESS, 2ND ED., <http://www.referenceforbusiness.com/history/En-Ge/Frito-Lay-North-America.html> (last visited Oct. 23, 2011).

597. *Pelagatti*, 536 A.2d at 1340.

598. *Id.*

599. *Id.*

600. *Id.* at 1341.

601. *Id.* at 1342 (citations omitted).

602. *Pelagatti*, 536 A.2d at 1342.

(1) the solicitation by Magarity of the August 18 letter, in which Pelagatti committed to writing his previous phone remarks connecting “a Jill Cohen” with Fairmount Farms; (2) the use of that letter by Cohen and Magarity in the filing of Cohen’s “sham” trespass and equity actions; (3) the “leaking” of the Pelagatti letter to the press by Harvey; and (4) the statements to the press made by Marion, Harvey and Magarity, were all perpetrated with the specific intent of depriving appellant Pelagatti of his contingent fee in the *NABCOR* case, and of injuring his business reputation.<sup>603</sup>

In affirming the dismissal of those four claims against Cohen, the court “encounter[ed] no difficulty in finding the Cohen lawsuits . . . to be absolutely privileged,”<sup>604</sup> and then went on to report that “Cohen’s equity action, in fact, has already been upheld, by a panel of this Court, as a legitimate action seeking relief to which Cohen was entitled.”<sup>605</sup> Finally, the court affirmed dismissal of the libel and slander claims, as to Cohen, on grounds that the statements on which those claims were based were subject to absolute privilege, since those communications were made in the course of judicial proceedings.<sup>606</sup> So, while Cohen was sucked up into Pelagatti’s howling vortex of litigation, she was set back down again with nary a scratch, other than any attorneys’ fees for which she may have been nicked.

#### IX. CONCLUSION

So here we are. I have played out my string of state-court law-clerk stories, and we find ourselves resting comfortably in the shadow cast by the heading that says “Conclusion.” Custom and practice in the law-review industry suggest that I now owe you some sort of cerebral synthesis and summary. In *Law Clerks Gone Wild*, I snuck out the back door by calling it a day after celebrating the fact that I was able to find only three federal law clerks who had done things on their own that had created reversible error.<sup>607</sup> In an attempt to assuage my guilty conscience, I will try to do better here.

Each of the cases I have discussed has its own little moral, and alert readers will already have learned that law clerks should not send confidential bench memoranda to district attorneys,<sup>608</sup> force jurors to

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603. *Id.*

604. *Id.* at 1343.

605. *Id.* at 1343 n.5.

606. *Id.* at 1344.

607. See Potter, *supra* note 1, at 233.

608. See *Ivan*, 1999 WL 331668, at \*1, 3.

continue deliberating,<sup>609</sup> or hang out in the jury room.<sup>610</sup> The broader lesson to law-clerk readers is that a law clerk, just like any miscreant who comes up against Dirty Harry Callahan, has got to know his or her limitations. Most of the reversible errors committed by law clerks (with or without the assistance of their judges) and most of the appellate admonitions of law-clerk conduct have resulted when law clerks—usually with the best of intentions—have crossed a line and done something that was more properly done by some other participant in the judicial process, typically a judge. Law-clerk conduct is indeed circumscribed in a variety of ways, but for the typical law clerk, i.e., one hired for a one- or two-year term, those restrictions come off soon enough, and I am sure that most former law clerks would agree that spending a year or two with slightly clipped wings is a small price to pay for the chance to watch the litigation process from the catbird seat. The second lesson for law clerks is somewhat a converse of the first one. Specifically, while there are a few things that law clerks cannot do, there are also things that cannot be done to law clerks without consequences to the individuals or institutions who try to do those things. Not every law-clerk plaintiff described in this article was successful, but more than enough prevailed to make it clear that when genuinely aggrieved, a law clerk should stand his or her ground. My final lesson is for attorneys who might be inclined to help their clients by picking on a law clerk. Law clerks have messed up from time to time, and when they have, relief has been granted. But the success rate for litigants who have attacked law-clerk conduct is not very high. If you are going to sling mud at a law clerk, make sure your handful of muck is good and sticky, because if it does not adhere, your claim will lay an egg, and the yoke will be on you.

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609. See *People v. Cassell*, 880 N.Y.S.2d 303, 304 (N.Y. App. Div. 2009).

610. See *State v. White*, 138 S.W.3d 783, 788 (Mo. Ct. App. 2004).