

TO BE OR NOT TO BE?: SOME LEGAL ETHICS FOR JUDICIAL LAW CLERKS

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Law clerks should strive to think like judges while always remembering they are not. Because clerks' duties are derivative of the judicial office they are meant to serve, they must live up to the standards of conduct applicable to their judicial principal. While there is no legislation or rules of professional conduct in Canada which are specifically tailored to apply to law clerks, lawyers' rules or the "law of lawyering" is less important for facilitating ethical practice than is the exercise of good judgment. Law clerks can develop their judgment by assisting those whose job it is to render judgment. Understanding the fine line between being a decision-maker and a facilitator of decisions helps to inform the law clerk's proper role. Their primary assignment is no broader than to make their judge the best judge possible.

Les auxiliaires juridiques doivent s'efforcer de penser comme des juges, sans toutefois oublier qu'ils ne sont pas des juges. Les auxiliaires doivent respecter les normes d'éthique qui s'imposent aux juges, puisque leurs devoirs découlent de la fonction judiciaire. Il n'existe ni corpus législatif ni règles déontologiques s'appliquant spécifiquement aux auxiliaires juridiques. Au plan de la pratique éthique, il est toutefois plus important pour un auxiliaire juridique d'exercer un bon jugement que de se fier à des règles déontologiques destinées aux avocats. Les auxiliaires juridiques peuvent développer un tel jugement en collaborant de près avec leurs juges respectifs. En apprenant à faire la distinction entre le rôle du décideur et le rôle de celui qui aide le décideur, l'auxiliaire juridique comprendra mieux la place qu'il doit occuper au sein du processus décisionnel. La fonction principale de l'auxiliaire juridique est simple : permettre à son juge de tendre vers l'excellence.

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There is a need for short-term clerks at the elbows of our judges, respecting the traditions of their place, knowing who they are and what the law expects them to do: to prod their judges, to expand their judges' awareness, to test their judges' conclusions, to color their judges' thinking and embellish their judges' writing, and then to go their separate ways.¹

... [T]he traditional separation of moral theory from moral practice is self-limiting. Every goal-directed human activity... has some moral theory behind it; while such theory may be thought of as an abstraction, divorced from "practice," it may also be conceived of as a practical knowledge of the human self, which helps us to analyse the required conditions of right action. To be morally engaged we need deeply to understand who we are and this in turn requires the opportunity to know, to do, and to reflect on what we do.²

1. Introduction

Law clerks should strive to think like judges while always remembering they are not. That law clerks' ethics tracks some of the basic concerns in judicial ethics reflects a fundamental tension inherent in the clerkship institution, namely, that clerks are not judges even though their functions overlap with those of judges. That tension arises not because clerks are "parajudges,"³ but because their functions are derivative of the judicial function, arising out of and dependent upon the judicial office held by the judge they serve.

Building on theoretical premises concerning the inadequacy of codes of conduct in regulating the real-world practice of lawyers, premises which find support in the empirical legal ethics literature on lawyers at work, this article seeks to give practical insight to law clerks in their often delicate and challenging functions of assisting judges in fulfilling their duties. One of the goals of the article is to sensitize clerks to some of the prototypical, everyday scenarios arising in chambers which from the clerk's perspective have heightened ethical dimensions, and thus to facilitate the exercise of judgment which lies at the heart of being a good law clerk.

¹ John Bilyeu Oakley and Robert S Thompson, "Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges" (1979) 67 Cal L Rev 1286 at 1317 [Oakley and Thompson, "Law Clerks"].

² Julian Webb, "Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education" (1998) 25:1 JL & Soc'y 134 at 142 [footnotes omitted].

³ Bernard Schwartz, *Decision: How the Supreme Court Decides Cases* (New York: Oxford University Press, 1996) at 52, cited in Artemus Ward and David L Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York: New York University Press, 2006) at 228.

In keeping with the further premise that biographical, first-personal, anthropological and empirical literature are rich sources for facilitating ethical reflection,⁴ this article examines the vast body of work (not all of it scholarly⁵) – particularly in the United States,⁶ and to a lesser degree in Canada⁷ – in the form of published personal reminiscences of former law clerks,⁸ judicial biographies,⁹ judges’ reflections on how they work,¹⁰

⁴ John M Conley, “How Bad Is It Out There?: Teaching and Learning About the State of the Legal Profession in North Carolina” (2003-2004) 82:6 NCL Rev 1943.

⁵ Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon & Schuster, 1979); Edward Lazarus, *Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court* (New York: Penguin Books, 1998). These books exemplify some of the most serious ethical breaches of which law clerks are capable.

⁶ Ward and Weiden, *supra* note 3; Todd C Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (Stanford: Stanford University Press, 2006); Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007); Carolyn Shapiro, “The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court” (2009-2010) 37:1 Fla St UL Rev 101; Sally J Kenney, “Puppeteers or Agents? What Lazarus’s Closed Chambers Adds to Our Understanding of Law Clerks at the US Supreme Court” (2000) 25:1 Law & Soc Inquiry 185 [Kenney, “Puppeteers or Agents”].

⁷ Michael John Herman, “Law Clerking at the Supreme Court of Canada” (1975) 13 Osgoode Hall LJ 279; Mitchell McInnes, Janet Bolton and Natalie Derzko, “Clerking at the Supreme Court of Canada” (1994-1995) 33:1 Alta L Rev 58; Lorne Sossin, “The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada” (1996) 30:2 UBC Law Rev 279.

⁸ Lana Caswell Garcia, “The Role and the Experiences of Supreme Court Law Clerks: An Annotated Bibliography” (1977) 70:3 Law Libr J 338; Laura B Bartell, “A Splendid Relationship – Judge and Law Clerk” (1991-1992) 52:6 La L Rev 1429; Laura Krugman Ray, “Clerk and Justice: The Ties That Bind John Paul Stevens and Wiley B Rutledge” (2008-2009) 41:1 Conn L Rev 211; Stewart Macaulay, “The Judge as Mentor: A Personal Memoir” (1986) 36:2 J Legal Educ 144; Alfred McCormack, “A Law Clerk’s Recollections” (1946) 46:5 Colum L Rev 710; Geraldine Szott Moohr, “One Kind of Legacy: Judge Sprouse’s Law Clerks” (1995-1996) 98:1 W Va L Rev 17; Stephen L Wasby, “‘Why Clerk? What Did I Get Out of It?’” (2006) 56:3 J Legal Educ 411; Robert Yalden, “Working with Bertha Wilson: Perspectives on Liberty, Judicial Decision-Making and a Judge’s Role” (2008) 41 Sup Ct L Rev (2d) 297.

⁹ Scott Messenger, “The Judge as Mentor: Oliver Wendell Holmes, Jr, and His Law Clerks” (1999) 11:1 Yale JL & Human 119; Robert J Sharpe and Kent Roach, *Brian Dickson: A Judge’s Journey* (Toronto: University of Toronto Press, 2003).

¹⁰ Bertha Wilson, “Decision-Making in the Supreme Court” (1986) 36 UTLJ 227; Frank M Coffin, *On Appeal: Courts, Lawyering, and Judging* (New York: WW Norton, 1994); Benjamin N Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921); John Paul Stevens, “Some Thoughts on Judicial Restraint” (1982-1983) 66:5 Judicature 177.

social science perspectives on courts and clerks,¹¹ legal ethics research applied to law clerks,¹² qualitative empirical surveys of judges and law clerks,¹³ and court ethnographies.¹⁴ Themes which arise in this body of work are the genesis, to a large extent, of the everyday scenarios faced by law clerks described in this article which have heightened ethical dimensions.

¹¹ Sally J Kenney, "Beyond Principals and Agents: Seeing Courts As Organizations By Comparing Supreme Court *Référendaires* at the European Court of Justice and Law Clerks at the US Supreme Court" (2000) 33:5 *Comparative Political Studies* 593 [Kenney, "Beyond Principals"]; Chester A Newland, "Personal Assistants to Supreme Court Justices: The Law Clerks" (1960-1961) 40 *Or L Rev* 299; Nadine J Wichern, "A Court of Clerks, Not of Men: Serving Justice in the Media Age" (1999-2000) 49:2 *DePaul L Rev* 621; Todd C Peppers and Christopher Zorn, "Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment" (2008-2009) 58:1 *DePaul L Rev* 51; Paul J Wahlbeck, James F Spriggs II and Lee Sigelman, "Ghostwriters on the Court? A Stylistic Analysis of US Supreme Court Opinion Drafts" (2002) 30:2 *American Politics Research* 166; Norman Dorsen, "Law Clerks in Appellate Courts in the United States" (1963) 26 *Mod L Rev* 265; Donald R Songer and Julia Siripurapu, "The Unanimous Decisions of the Supreme Court of Canada as a Test of the Attitudinal Model" (2009) 42:1 *Can J of Pol Sci* 65; Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, "Extraneous Factors in Judicial Decisions" (2011) 108:17 *Proceedings of the National Academy of Sciences of the United States of America* 6889.

¹² John Paul Jones, "Some Ethical Considerations for Judicial Clerks" (1990-1991) 4:4 *Geo J Legal Ethics* 771; Alex Kozinski, "Conduct Unbecoming" (1998-1999) 108:4 *Yale LJ* 835 [Kozinski, "Conduct Unbecoming"]; Kathleen Maher, "Hire Standards: Firms Must Proceed Carefully When Employing a Judge's Former Law Clerk" (2002) 88:8 *ABA J* 56; Todd C Peppers, Michael W Giles and Bridget Tainer-Parkin, "Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks" (2008) 71:2 *Alb L Rev* 623; David Lane, "Bush v Gore, Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality" (2004-2005) 18:3 *Geo J Legal Ethics* 863; Kevin D Swan, "Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations" (1987) 62:4 *Wash L Rev* 813.

¹³ Oakley and Thompson, "Law Clerks," *supra* note 1 (balancing the conflicting demands of confidentiality and openness in the judicial process by interviewing judges and constructing anonymized profiles of hypothetical judges' views on the use of law clerks); David Crump, "Law Clerks: Their Roles and Relationships with Their Judges" (1985-1986) 69:4 *Judicature* 236.

¹⁴ Jonathan Matthew Cohen, *Inside Appellate Courts: The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals* (Ann Arbor: University of Michigan Press, 2002). The author conducted numerous open-ended interviews with judges, law clerks, and judges' administrative assistants in three circuits, and became a participant observer during which time he himself served as a law clerk, attended conferences between judges and their clerks, and ate lunch and socialized with the judges both inside and outside work. See especially 16-19 for the author's description of his unprecedented access to the decision-making process.

Part 2 begins with a brief discussion of the theoretical and empirical literature concerning the influence of codes of conduct on legal practice, as well as law clerk codes of conduct in the United States. Part 3 describes the special nature of the judge-clerk relationship, which has numerous dimensions including mentor-mentee, teacher-student, employer-employee, and client-lawyer. Part 4 examines the influence that law clerks have on judges. Part 5 discusses some everyday issues faced by law clerks which have heightened ethical dimensions, including writing bench memoranda; questions of confidentiality (including discussion with other law clerks, comments to the media, and the publication of articles); impartiality (including courtroom presence and demeanour, civic, charitable and political activity, and conflicts of interest); post-clerkship employment; and assessing prospective law clerk applications.

Understanding the fine line between being a decision-maker and a facilitator of decisions helps to inform the law clerk's proper role. That is why clerks must strive to think like judges while always remembering they are not.

2. Rules of Practice and Codes of Conduct

It is a supreme irony that the promulgation of codes of conduct for law clerks in the United States occurred in response to one of the most infamous ethical breaches by law clerks, namely, the disclosure by law clerks of information which was included in the tell-all book *The Brethren: Inside the Supreme Court*, published in 1979. Legislative-like solutions to problems normally target some mischief, and mischief there certainly was. This instance of fundamental disloyalty and grave breach of judge-clerk confidentiality widened the gap between justice and clerk.¹⁵ In 1981 the Judicial Conference of the United States, the statutory judicial body tasked with policy-making for the administration of US courts, adopted the *Code of Conduct for Law Clerks*. The Code can be found in the *Law Clerk Handbook*,¹⁶ which was developed by the Federal Judicial Center, itself a

¹⁵ In particular, the book's publication resulted thereafter in Justice White being less open with his staff and distancing himself from his clerks; see Peppers, *supra* note 6 at 166.

¹⁶ The Honourable Alvin B Rubin and Laura B Bartell, *Law Clerk Handbook* (Washington: Federal Judicial Center, 1989) at 165-69. The Handbook states at xi (emphasis added): "For the judge, clerks who understand the role they are asked to play and who perform their tasks well become *personal extensions* who enable the judge to perform judicial duties more efficiently. The purpose of this handbook is to help law clerks understand tasks they will be asked to undertake and to perform them more effectively." See also *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks* (Washington: Federal Judicial Center, 2002), online: <<http://ftp.resource.org/courts.gov/fjc/ethics01.pdf>>. This manual helpfully discusses issues pertaining to

statutory body created on the recommendation of the Judicial Conference. In 1989, the US Supreme Court subsequently adopted a code of conduct that was inspired from and reflects much of the substance of the Judicial Conference's code. The *Code of Conduct for Law Clerks* was subsequently replaced in 1995 with the *Code of Conduct for Judicial Employees*.¹⁷

The *Code of Conduct for Judicial Employees*, like its predecessor, is concerned with a number of basic ethical issues including integrity and independence, impropriety, impartiality and diligence, outside law-related activities and outside non-law-related activities including civic and charitable activities, extra-employment sources of income, and political activity.

That law clerks' legal ethics tracks some of the basic issues in judicial ethics can be seen from a comparison of the US *Code of Conduct for Judicial Employees* with the Canadian Judicial Council's *Ethical Principles for Judges*.¹⁸ The basic ethical issues set out in the *Ethical Principles for Judges* are quite similar to the US Code: independence (Principle 2), integrity (Principle 3), diligence (Principle 4), equality (Principle 5), and impartiality (Principle 6) which includes judicial demeanour, civic and charitable activity, political activity, and conflicts of interest. In view of this similarity, and also of the everyday role which clerks play in the decision-making process, it is curious that the *Ethical Principles for Judges* does not mention judges' relationships with law clerks. While clerks are not the ones who make the decisions, they do participate in the decision-making process as facilitators of decisions. The nature of their participation is derivative of their professional relationship with their judge and their judge's duties. Clerks' functions are completely dependent upon their judges' functions. That clerks are judicial agents explains the similarities between legal ethics for law clerks and judicial ethics.

This brief comparative overview of codes of conduct for judges and law clerks invites a broader inquiry concerning the concrete effects and practical influence of codes of conduct on legal practice. An important empirical study has found that the majority of lawyers practising in Ontario

confidentiality, conflicts of interest, outside legal activities, dealing with prospective employers during the clerkship period, outside professional, social and community activities, receipt of gifts and honoraria, and political activity.

¹⁷ See the Appendix to the *Chambers Handbook for Judges' Law Clerks and Secretaries* (Washington: Federal Judicial Center, 1994) at 170ff, online: <<http://ftp.resource.org/courts.gov/fjc/chambers.pdf>>.

¹⁸ (Ottawa: Canadian Judicial Council, 1998), online: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_1998_en.pdf>.

did not find the *Professional Conduct Handbook* containing the *Ontario Rules of Professional Conduct* to be a useful tool.¹⁹ On the one hand, this finding begs the question whether there is a need for better codes of conduct. Certainly it is a fair interpretation of these findings that rules of professional practice would be more instructive to practitioners if they were more tailored to and contextualized in specific practice areas. That is a somewhat intuitive hypothesis.

On the other hand, though, these findings may at the same time point to a deeper issue concerning the inadequacy of rules in regulating the ethics of professional practice. Indeed, a logical corollary to a philosophical premise of a school of thinking called virtue ethics – namely, that life is too complex to be instructively and exhaustively governed by rules – is the empirical reality that legal practice abounds with the exercise of discretion.²⁰ Legal ethics is not so much about role-specific rules or the “law of lawyering,” but rather about exercising judgment responsibly and justifiably. Responsibility and justification in legal ethics should encompass broader concerns than the mere existence of legal authority. The authors describe how social scientific studies of legal practitioners demonstrate that despite the rule-rich environment of legal practice, lawyers’ work inevitably involves discretion and choice. That discretion is not only or even primarily shaped and constrained by rules of professional responsibility, which themselves require judgment in order to be applied in context, but also by informal norms arising in the lawyer’s professional practice context (for example, “firm culture”) as well as the personal character of the lawyer.²¹ The very recognition that there are discretionary choices which must be regularly made in legal practice is an important ethical lesson in itself. The recognition of discretion guides moral development.²² This realization is all the more important when one considers that it is the everyday, unspectacular ethical lapses which pose the greatest threat to the integrity of the legal system.²³

Legislative solutions to ethical problems are often inadequate on their own because rules cannot fully capture the subtleties and complexities of the everyday reality of practising lawyers. The reason why all things are

¹⁹ Margaret Ann Wilkinson, Christa Walker and Peter Mercer, “Do Codes of Ethics Actually Shape Legal Practice?” (2000) 45 McGill LJ 645.

²⁰ Michael Robertson and Kieran Tranter, “Grounding Legal Ethics Learning in Social Scientific Studies of Lawyers at Work” (2006) 9:2 Legal Ethics 211.

²¹ *Ibid* at 222-23.

²² Jay Martin, *The Education of John Dewey: A Biography* (New York: Columbia University Press, 2002) at 121.

²³ Jocelyn Downie and Richard Devlin, “Are Law Schools Amoral Boot Camps?” (2008) 16:1 Literary Review of Canada 6.

not determined by law is that law is defective owing to its universality.²⁴ Nonetheless, it should not be overly surprising that legalism – the ethical attitude which defines moral conduct in terms of following and manipulating rules – pervades much of the discussion of legal ethics. Because lawyers trade in rules they have a predilection to conceive of problems in terms of rules – legal ethics as the “law of lawyering” – as well as a deep-rooted reflex to deal with problems by promulgating more of them or amending the existing ones.

There are no laws or rules of professional conduct in Canada which are specifically tailored to apply to law clerks. Even if there were, however, simply learning the rules bearing on law clerks would not fully equip law clerks to properly fulfill their functions or to locate those rules, and the institutions within which they are lived, meaningfully in the real world.²⁵ Indeed, because following rules is a social practice which is informed by background, contextual social understandings, following and applying rules cannot be separated from personal engagement in the world.²⁶

According to the mechanic-philosopher Matthew B Crawford,

Appreciating the situated character of the kind of thinking we do at work is important, because the degradation of work is often based on efforts to replace the intuitive judgments of practitioners with rule following, and codify knowledge into abstract systems of symbols that then stand in for situated knowledge.

[...]

The experienced mind can get good at integrating an extraordinarily large number of variables and detecting a coherent pattern. It is the pattern that is attended to, not the individual variables. Our ability to make good judgments is holistic in character and arises from repeated confrontations with real things: comprehensive entities that are grasped all at once, in a manner that may be incapable of explicit articulation. This tacit dimension of knowledge puts limits on the reduction of jobs to rule following. It is not just the firefighter’s *intervention* that is inherently in situ ... His knowledge, too, arises in particular places: places where there are fires.²⁷

²⁴ Aristotle, *Nicomachean Ethics*, John L. Ackrill *et al.*, eds (Oxford: Oxford University Press, 1998) at Book V, Ch. 10, lines 28-30.

²⁵ See, by analogy, Webb, *supra* note 2 at 137.

²⁶ Charles Taylor, “To Follow a Rule” in Richard Shusterman, ed, *Bourdieu: A Critical Reader* (Oxford: Blackwell Publishers, 1999) 29.

²⁷ Matthew B Crawford, *Shop Class as Soulcraft: An Inquiry into the Value of Work* (New York, Penguin Books, 2009) at 166-7 and 168-9, reference omitted.

Recognizing the deficiencies of rules also gives us reasons to turn to ethical theory, since theory may enable us to correct those deficiencies in the way it can inform practical judgment.²⁸ As Webber reminds us, “Theoretical reflection is an important way to refine judgement, probably the most important (and most elusive) quality in a practitioner.”²⁹ Yet it is not only practice that needs theory, but rather that each one needs the other: there is an “intimate, constitutive relationship between doctrine and theory, on the one hand, and the underlying facts of legal life, on the other.”³⁰ The insufficiency of rules also means that we need mentors and teachers. Ethical reflection embraces complementary dimensions of rules and roles.³¹ Rules of professional conduct can be helpful, but like role models they are most beneficial when they raise ethical issues without definitively answering them:³² legal ethics rules should be drafted to be not only directive but also pedagogic.

The preceding discussion of the intersection between theory and practice, rules of professional conduct, and the overlap between ethics for judges and law clerks has sought to highlight a central feature of the ethical fulfillment of law clerks’ duties – the recognition of discretion and the importance of situation-specific judgment. Thankfully, even amongst those voices most critical of the value of judicial clerkships, there still appears to be a recognition that the unstructured intimacy of working for a judge can facilitate mentorship, allowing the clerk to learn that “useful but ineffable quality known as ‘judgment,’ the capacity to sense the tacit limits of propriety and plausibility that govern ostensibly discretionary decisions.”³³ In a self-referential process of “learning by doing,”³⁴ law

²⁸ Martha C Nussbaum, “Why Practice Needs Ethical Theory: Particularism, Principle, and Bad Behaviour” in Steven J Burton, ed, *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr* (Cambridge, Cambridge University Press, 2000) 50.

²⁹ Jeremy Webber, “Legal Research, the Law Schools and the Profession” (2004) 26:4 *Sydney L Rev* 565 at 585-86.

³⁰ Peter H Schuck, “Why Don’t Law Professors Do More Empirical Research?” (1989) 39:3 *J Legal Educ* 323 at 334.

³¹ For discussion of a complementary approach to virtues and rules, see Joshua Wilner, “Service to the Nation: A Living Legal Value for Justice Lawyers in Canada” (2009) 32:1 *Dal LJ* 177 at 207-13.

³² Reed Elizabeth Loder, “Tighter Rules of Professional Conduct: Saltwater to Thirst?” (1987-1988) 1:2 *Geo J Legal Ethics* 311 at 330.

³³ William H Simon, “Judicial Clerkships and Elite Professional Culture” (1986) 36:2 *J Legal Educ* 129 at 135.

³⁴ In the *Nicomachean Ethics*, *supra* note 24 at Book II, Ch. 1, lines 30-35, Aristotle says:

[B]ut excellences we get by first exercising them, as also happens in the case of the arts as well. For the things we have to learn before we can do, we learn by doing,

clerks develop the judgment which is required for the exercise of their role in the very exercise of that role in assisting those whose job it is to render judgment – the judges themselves.

3. *The Special Nature of the Judge-Clerk Relationship*

The dynamics of any particular relationship will inevitably be based on individual personalities, and as such the following general discussion does have its limitations. Yet the relationship between judge and clerk is not completely idiosyncratic. The relationship has several facets, including employer-employee, teacher-student, client-lawyer, and lawyer-lawyer.³⁵

According to Judge Alex Kozinski, “The relationship between judge and clerk is professional only in part; it is also a close human relationship, one that endures long after the clerkship ends. By accepting a judge’s clerkship offer, a young lawyer becomes part of the judge’s extended family, a disciple, an ally, quite possibly a friend.”³⁶ Judge Patricia Wald calls particular attention to the personal aspects of the relationship in her often-quoted insight that the “judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair.”³⁷ From these judges’ perspectives, it seems, the ideal relationship transcends the personal and professional. This is perhaps the fundamental characteristic of mentorship. The judge as mentor and teacher can help to facilitate the development of the clerk’s judgment.

The relationship between judges and clerks is an odd, paradoxical mix of partnership and subservience, collaboration and subordination.³⁸ Or, put

e.g. men become builders by building and lyre-players by playing the lyre; so too we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts.

See also Rubin and Bartell, *supra* note 16 at 3:

A clerk learns by doing and by participating in making real decisions. The education of a clerk is pragmatic and practical. The clerk learns by association with the judge, who was formerly an accomplished practitioner or educator, and by attending trials, conferences, or oral arguments.

³⁵ *The Code of Conduct for Law Clerks of the Supreme Court of the United States*, Canon 2, cited in Daniel J Meador, Thomas E Baker and Joan E Steinman, *Appellate Courts: Structures, Functions, Processes, and Personnel*, 2d ed (Lexisnexis, 2006) at 489, n 15.

³⁶ Alex Kozinski, “Confessions of a Bad Apple” (1990-1991) 100:6 Yale LJ 1707 at 1708 [Kozinski, “Confessions”].

³⁷ The Honourable Patricia M Wald, “Selecting Law Clerks” (1990-1991) 89:1 Mich L Rev 152 at 153.

³⁸ Bennett Boskey, “Mr Chief Justice Stone” (1945-1946) 59:8 Harv L Rev 1200 (describing how Chief Justice Stone viewed his clerks as partners, albeit junior partners);

differently, the subordination is itself a type of cooperation.³⁹ The judge depends on her clerk, and that can foster a sense of responsibility in the clerk.⁴⁰ When one's judge at times considers himself to be the student and not the teacher,⁴¹ the judge is placing trust in his clerk. The clerk is a junior partner, as Justice Felix Frankfurter has noted, yet junior only in years: "In the realm of the mind there is no hierarchy."⁴²

Clerks must recognize, however, that they are also junior in responsibility. They must always know their place, and recognize that they are dependent on their judges on a deeper level, since it is the clerk's function to assist the judge. The clerk's function is derivative of the judicial function. It is this aspect of the relationship – the fact that law clerks are "personal extensions"⁴³ of the judge – which explains the link between judicial ethics and law clerks' ethics, as well as the fundamental tension that clerks are not judges even though their functions overlap with those of judges. Clerks are the trusted agents of "their" judge, and as such clerks may be bound by the judicial standards binding their principal.⁴⁴ As already discussed, the law clerk codes of conduct in the US overlap to a great extent with the issues raised in the *Ethical Principles for Judges*. In certain cases, this sort of overlap may be explicit: for example, Canon 3A(4) of the *Code of Conduct for United States Judges* restricts judges from having *ex parte* communications with persons not participating in a proceeding, and extends this restriction by providing that judges should make reasonable efforts to ensure that law clerks comply with it. The law clerk's duty is derivative of the judge's duty, and the judge is tasked with enforcing it. Everything a clerk does reflects back on his or her judge. Clerks are "officially attached to the court."⁴⁵

Highlighting a different aspect of the relationship, now retired US Supreme Court Justice John Paul Stevens has remarked that the close and

the preface to Ward and Weiden, *supra* note 3 at 1 speaks of "awesome responsibility and complete subservience."

³⁹ Stewart Macaulay, *supra* note 8 at 146; Coffin, *supra* note 10 at 193-94.

⁴⁰ Paul A Freund, "Mr Justice Brandeis: A Centennial Memoir" (1956-1957) 70:5 Harv L Rev at 769. At 776, cited in Ward and Weiden, *supra* note 3 at 64. According to one of Justice Brandeis' former clerks, "The illusion was carefully fostered that the Justice was relying indeed depending, on the criticism and collaboration of his law clerk. How could one fail to miss the moral implications of [that] responsibility?"

⁴¹ Coffin, *supra* note 10 at 120-21.

⁴² Cited in Ward and Weiden, *supra* note 3 at 41, 104; for the same idea, see Sharpe and Roach, *supra* note 9 at 210.

⁴³ Rubin and Bartell, *supra* note 16.

⁴⁴ Jones, *supra* note 12 at 772.

⁴⁵ Rubin and Bartell, *supra* note 16 at 20.

confidential loyalty that develops between clerks and their judges is much like the lawyer-client relationship. Like a lawyer, the clerk cannot tell his client, the judge, what to do. He can only suggest what can happen if he does or does not do something.⁴⁶ It is commonly recognized that when clerks prepare bench memos for their judges they are giving them legal “advice.”⁴⁷ This is sure to raise a chuckle, a bit like the picture of a child giving “advice” to a parent. Yet even a child can help to stimulate a parent’s thoughts. Being a law clerk is, in many ways, an everyday exercise in professional diplomacy: the job description normally requires that the clerk gives her legal opinion, exercising judgment as to the disposition of a case, to a judge who is wiser and more experienced. Clerks judge without rendering judgment. That is precisely why they must always remember that they are not judges, even while they are striving to think like them.

One reason why the lawyer-client analogy does not exactly fit the clerk-judge relationship is that clients are not normally more experienced in the law than their lawyer is. Clients may be trained in the law, of course, but this is not the standard case. A second, more fundamental, reason why the lawyer-client analogy is inapt is that it is inaccurate to describe a judge as a client, at least a traditional kind of client. The reason is that a clerk assigned to a particular judge is employed to assist the judge in performing a public function, rather than to represent the judge’s personal interests. In this way, the clerk’s professional role seems more akin to that of a government lawyer than to that of a lawyer representing a private client.⁴⁸ The employment status of law clerks reinforces this point, since clerks are normally hired as public servants⁴⁹ who are paid with public funds. They are not paid by their judges, but by the court administration.

Like that of government lawyers, the law clerk’s role may raise questions about who clerks are meant to be serving, and how the public interest component of their functions can inform their day-to-day duties.⁵⁰ To say that clerks serve the “public interest” raises an ambiguity as to whether a law clerk’s “client” is his particular judge or rather the court as an institutional whole, or even perhaps “the law” itself. For some, the view that clerks serve the public interest means that clerks are meant to assist

⁴⁶ Ward and Weiden, *supra* note 3 at 245.

⁴⁷ See e.g. Kozinski, “Confessions,” *supra* note 35 at 1723; Kozinski, “Conduct Unbecoming,” *supra* note 12 at 842, n 38.

⁴⁸ Mary L Kevlin, “The Law Clerk’s Duty of Confidentiality” (1980-1981) 129:5 U Pa L Rev 1230 at 1246.

⁴⁹ See e.g. the *Values and Ethics Code for the Public Service*, online: <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/dwnld/vec-cve-eng.pdf>.

⁵⁰ For a discussion of these two issues in the context of lawyers working at the federal Department of Justice, see Wilner, *supra* note 31 at 191-200.

their judge in carrying out the court's judicial functions, rather than the judge's personal or private interest. Seen from this perspective, the client would be the court and those in charge of its administration, presumably including the judges, when they are engaged in the conduct of public business.⁵¹ A clerk's offer of employment may not specify a particular judge, even though judges interview and select their clerks. Some clerks may even be assigned to more than one judge. Clerks may also be accountable to a public service manager and thus to the court as an institution. A judge has even questioned, although perhaps somewhat rhetorically, "whether a law clerk's true client is not the public, rather than the Justice."⁵²

From a practical perspective, it is fair to say that clerks see themselves as accountable – even solely accountable – to their judge. They receive their assignments from their judge and they normally write their bench memos with their judge as the sole intended reader. A well-known judge and a professor, himself a former clerk, are of the view that clerks "are accountable to no one, except the judge they serve."⁵³ Because a law clerk assists with a judge's performance of her public functions, the clerk's ethical duties are derivative of the judicial function. This suggests that clerks themselves have public duties flowing from the judicial office held by the judge whom they serve. As can be seen from the earlier discussion of law clerk codes of conduct, clerks do have ethical obligations which are analogous to judicial duties. The justification for the requirement that law clerks be impartial, for example, would seem to be rooted entirely in the detrimental manner in which a biased clerk would reflect on the perception of the judge's role in administering justice. It is also true that clerks "have no independent responsibility to further the rule of law or explicate constitutional principles; rather, they must provide the Justices with the support they need to accomplish these goals."⁵⁴ Yet from this judicial statement it can be concluded that clerks do have a responsibility to further the rule of law, but it is a responsibility that is derivative of and dependent upon the judicial office which is held by the clerk's judge. The clerk's obligation is owed to the judge in the judge's capacity as judge. Put differently, the clerk has public obligations because the clerk's function

⁵¹ Kevlin, *supra* note 47 at 1247.

⁵² Kozinski, "Conduct Unbecoming," *supra* note 12 at 842, n 38. It is also worth noting that staff law clerks hired on a permanent basis, as opposed to fixed terms, work for the court as a whole: Meador, Baker and Steinman, *supra* note 34 at 496; Oakley and Thompson, "Law Clerks," *supra* note 1 at 1288. This may have the potential of subtly altering the judicial function.

⁵³ Sharpe and Roach, *supra* note 9 at 207. This appears to be a fairly common view: see e.g. Cohen, *supra* note 14 at 88.

⁵⁴ Kozinski, "Conduct Unbecoming," *supra* note 12 at 842, n 38.

derives from the judge's office. The *Law Clerk Handbook* states that "[t]he clerk, like the judge, holds a position of public trust and must comply with the demanding requisites of that position."⁵⁵

This does not mean, however, that clerks must always agree with their judges. In many cases clerks may not properly fulfill their functions unless they give their judge their honest view of the merits of a case, even and perhaps especially if that is not in accord with the judge's view. But the "duty to disagree" in this sort of case is owed not to the public or to the court but to the office of the judge. Part of the support a judge may need is someone who, in appropriate circumstances, respectfully disagrees with him. As stated in the *Law Clerk Handbook*:

Respect does not mean subservience: A clerk should not fear to express an opinion contrary to the judge's when asked, and most judges expect and invite their clerks to question the judge's views. Judges frequently seek the reactions of their clerks to the issues raised in pending cases, both for the value of being exposed to varying viewpoints and to train their clerks in the process of legal decision-making. Judges may also ask clerks to express an independent view after reaching a tentative decision. They may do this to test the clerk's conclusion or reasoning abilities ... If, however, the judge should then reach a conclusion that differs from the clerk's, the clerk should carry out the judge's instructions with the utmost fidelity. The ultimate responsibility for fulfilling the duties of the judge's office is the judge's. One judge put it pithily: "The commission from the President issues to me, not my law clerk, and it was I who took the oath of office."⁵⁶

To respect the traditions of their place and to avoid any delusion of judicial grandeur, clerks must always remember that their fundamental duty is no broader than to support the judicial office which is held by their judge. As will be seen in the next section, their function is not to decide cases but rather to assist and facilitate decisions. A law clerk's primary assignment, according to McLachlin CJC, is to make her judge the best judge possible.⁵⁷ Understanding the fine line between being a decision-maker and a facilitator of decisions helps to inform the law clerk's proper role.

4. *Law Clerks' Influence on Judges*

Any discussion of the influence law clerks have on judges requires a proper definition of terms, for it is too often simply assumed that

⁵⁵ Rubin and Bartell, *supra* note 16 at 11. See also *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks*, *supra* note 16.

⁵⁶ Rubin and Bartell, *supra* note 16 at 15-16.

⁵⁷ Judge D Brock Hornby, *Working Effectively with your Judge: An Outline for Remarks* (Federal Judicial Center, 2008) at 1.

“influence” is a bad word in the judicial sphere, the elephant in chambers. It is important, that is, not to confuse different forms of influence. Influence is not necessarily undue influence. It was Dickson CJC’s view that clerks “do not exert – or for that matter – attempt to exert undue or unwarranted influence in the process. We judges know how to decide a case and why. The clerks do, however, greatly facilitate the work of each member of the Court.”⁵⁸ Former Chief Justice Rehnquist of the US Supreme Court nicely captured the ambiguity between the functions of decision-making and decision-enhancing⁵⁹ when he stated, “The line between having clerks help with one’s work, and supervising subordinates in the performance of their work may be a hazy one, but it is at the heart... [of] the fundamental concept of ‘judging.’”⁶⁰

The pernicious form of influence views the clerk as “judicial ghostwriter,”⁶¹ “puppet master,”⁶² “a shadow bench of second justices,”⁶³ or “legal Rasputin.”⁶⁴ Yet it is important to note that there are

normative or qualitative distinctions between some Justices’ desire on the one hand to have their law clerks speak their minds, to challenge their thinking, and to ensure that the Justice considers all relevant facts and legal arguments with, on the other hand, the occasional law clerk’s efforts to be a “mission-inspired crusader” who successfully manipulates her Justice to reach results or write opinions that the Justice would not reach on his own.⁶⁵

Indeed, it is entirely appropriate for a clerk to shape a judge’s perception of a case by engaging in candid and open policy debates, as opposed to deception in memorandum writing, and more work needs to be done in order to understand the formal and informal institutional norms imposed on clerks and the different types of and multiple paths through which influence can be exercised.⁶⁶ The discussion of law clerk influence undertaken here is based on the assumption that manipulation through intentional deception will occur only in the rarest and most extreme cases, and that therefore the much more interesting and important questions are to be found in exploring the healthy dimensions of clerk influence.

⁵⁸ Sharpe and Roach, *supra* note 9 at 208.

⁵⁹ Meador, Baker and Steinman, *supra* note 35 at 595.

⁶⁰ DM O’Brien, *Storm Center: The Supreme Court in American Politics*, 2d ed (New York: Norton, 1991) at 167, cited in Sossin, *supra* note 7 at 297, n 53.

⁶¹ Meador, Baker and Steinman, *supra* note 35 at 485.

⁶² Peppers, *supra* note 6 at 2.

⁶³ Sharpe and Roach, *supra* note 9 at 208.

⁶⁴ William H Rehnquist, “Who writes decisions of the Supreme Court?” *US News & World Report* (13 December 1957) 74.

⁶⁵ Shapiro, *supra* note 6 at 112 [footnote omitted].

⁶⁶ Peppers and Zorn, *supra* note 11.

Three other issues are also discussed in this section, namely, the potential that clerks may unintentionally mislead their judges by adopting too strong an advocacy position; the impact on judicial independence of the choice between short-term clerks who are recent law school graduates and more experienced lawyers occupying permanent positions in court central staffs; and finally the participation of clerks in assisting with the preparation of reasons.

To the extent that clerks influence their judges, except for the few examples of intentional or unintentional deception, judges have sought out this influence themselves. Judges are not required to hire clerks. The fact that they do speaks not only to the established nature of clerkship programs in many courts across Canada, but also to the positive influence which judges themselves believe clerks can have on their work.

The nature of this positive influence will be reflected in what judges look for in clerks. Good clerks will have a good influence on their judges' work. Although somewhat impressionistic taken on its own, the following judicial perspective captures much wisdom in its succinctness. In discussing a prospective clerk with a recommender, Justice Lewis F Powell stated, "Obviously I want someone of an independent mind who will test, as well as stimulate, my own thinking."⁶⁷ This statement describes three fundamental ways in which clerks can have a positive influence on the decision-making process: they offer a different perspective on cases; they test their judge's thinking; and they stimulate their judge's thinking. These three modes of influence are taken up in turn below.

Clerks should be independent-minded. As already indicated, respect does not mean subservience. Clerks should strive to think like a judge, which does not mean they should strive to think like their own judge. Part of what enhances a judge's decision-making is the ability to take into account and synthesize a number of different perspectives. That contributes to the quality of justice and its administration, since "four eyes see more than two."⁶⁸ What is being sought is a fresh perspective. In most cases the practice in collegial courts of having different clerks write memos for the same case is not a waste of resources – although clerks may find the duplication of work disheartening – but rather may serve to enhance judicial independence. Indeed, some judges prefer that clerks not look at the bench memoranda from other chambers while preparing their own memorandum, thereby ensuring an independent look at a case.⁶⁹ The

⁶⁷ Cited in Ward and Weiden, *supra* note 3 at 50.

⁶⁸ Kenney, "Beyond Principals," *supra* note 11 at 611.

⁶⁹ Cohen, *supra* note 14 at 103.

potential for a clerk's reasoning to be influenced or contaminated is even greater when it comes to the clerk hearing the position of the clerk's own judge. For this reason, some judges make a specific point of never telling their clerks which way they are leaning before the clerks complete their research, recognizing the importance of clerks approaching the legal issues with "a fresh mind."⁷⁰

The "vitalizing contribution"⁷¹ of clerks arises not only from their relative youth and zealous inexperience, but also from the fact that they are normally recent law school graduates. As such, clerks are in a position to communicate to the bench contemporary intellectual currents in legal scholarship.⁷² It is inappropriate, however, for clerks to have *ex parte* communications concerning pending cases with professors and thereby allow themselves to be used as an intellectual channel to the judiciary for a particular school of legal thinking. The practice of law professors sending unsolicited and in some cases unpublished manuscripts to clerks who were former students, in the hopes of influencing decisions, ceased when McLachlin CJC wrote a letter to Canadian law deans asking them to inform their professors and graduate students about the impropriety of attempting to become unseen interveners in cases.⁷³ The letter expresses the view that procedural fairness precludes the court from receiving materials that have not been circulated to the parties.⁷⁴

And yet it is uncontroversial that law clerks' influence as part of the administration of justice modifies the adversarial system of decision-making by bringing to the judge's attention arguments and authorities not submitted or examined by the parties.⁷⁵ The ability to influence by reference is a function carrying great ethical responsibility which clerks must take seriously. It is ultimately up to the judge whether to cite authorities in the judgment to which the parties have not referred. If the authority is particularly applicable and susceptible of determining the result, it may be appropriate for the court to request further submissions from the parties.⁷⁶ Whether or not the court in its discretion decides to go

⁷⁰ Songer and Siripurapu, *supra* note 11 at 71.

⁷¹ Coffin, *supra* note 10 at 76.

⁷² Dorsen, *supra* note 11 at 270; Oakley and Thompson, "Law Clerks," *supra* note 1 at 1312.

⁷³ Luiza Chwialkowska, "Law professors may have tried to influence court secretly: Chief Justice issues "warning," *The National Post* (25 September 2000) A1.

⁷⁴ *Ibid.*

⁷⁵ Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson Ltd, 1987) at 297, 352.

⁷⁶ The Honourable JO Wilson, *A Book for Judges* (Ottawa: Minister of Supply and Services Canada, 1980) at 88-89.

back to the parties to seek further comments, it would seem that referring to sources not cited by the parties is more justifiable in cases where the issues at stake go beyond the immediate, private interests of the litigants and encompass important public dimensions, such as in constitutional cases.

Scholarship can play an important role in assisting judges to analyze these types of issues. This is not to suggest, of course, that law schools are or should be the mere hand-maidens of the judiciary; a university is not merely the teaching and research arm of practice, but a parallel branch of the legal profession, whose very value lies in its creative distance from the humdrum of everyday practice.⁷⁷ Nor is it meant to suggest that a judge's chambers are an ivory tower requiring a recent law school graduate to provide a "pipeline to reality,"⁷⁸ or that judges do not read widely from various sources, including legal scholarship. The point is merely that one important way in which law clerks can assist their judges is by offering a fresh perspective of an independent mind.

The impact of the clerk's perspective, or the influence the clerk may in certain circumstances have on her judge, will normally be inversely proportional to the judge's sense of expertise in the area of law raised by a case.⁷⁹ All else being equal, clerks will not be as influential where their judges have strong, clear preferences, and clerks will be more influential in those cases where their judges are somewhat undecided, particularly when a genuinely new issue arises which may introduce generational differences in how to think about an issue.⁸⁰

Clerks should not only be independent-minded; they should in addition seek to test their judge's thinking. Clerks may serve as a "sparring partner or discussant"⁸¹ and should be prepared to do "intellectual combat"⁸² with their judge. The ideal relationship between judge and law clerk has been described as being composed of two factors, namely, the

⁷⁷ Webber, *supra* note 29. Yet law professors' distance from the profession also risks losing the creative potential of scholarship to inform human problems and institutions. As the pragmatist philosopher John Dewey stated, "Philosophy recovers itself when it ceases to be a device for dealing with the problems of philosophers and becomes a method, cultivated by philosophers, for dealing with the problems of men;" see Jo Ann Boydston, ed, *The Middle Works of John Dewey, 1899-1924*, vol 10 (Carbondale: Southern Illinois University Press, 1997) at 46.

⁷⁸ Crump, *supra* note 13 at 237.

⁷⁹ Cohen, *supra* note 14 at 49.

⁸⁰ Kenney, "Beyond Principals," *supra* note 11 at 618-19; Sharpe and Roach, *supra* note 9 at 210.

⁸¹ Kenney, *ibid* at 611.

⁸² Dorsen, *supra* note 11 at 268.

judge must retain responsibility for decision-making, and the clerk acts as a challenger and agitator, carrying the adversary process into the chambers and forcing the judge to justify each step of the decision-making process.⁸³ As the authors explain, “The institutional features of the traditional clerkship which promote these factors are the youth and recent affinity to academia of the law clerk and the predetermined tenure of the clerkship.”⁸⁴ The impact of the clerk’s tenure on judicial independence, whether as a recent law school graduate serving for a fixed term or as a permanent staff lawyer, will be discussed further below.

The important point here is that law clerks do a disservice to their role and their judge if they fail to speak up and raise with their judge what they take to be principled disagreement as to how a case could be decided. As one judge put it, “There may, indeed, be those among my colleagues who like clerks with marshmallow personalities, but most realize that you must have law clerks who will talk back to you precisely because everyone else will not.”⁸⁵ Indeed, when applying for a judicial clerkship, one way to have an unsuccessful interview with a judge is to keep agreeing with him!⁸⁶ As another judge put it, “We need to test ideas before exposing them to the hard probing of colleagues. We need assurances, but even more important, criticism from knowledgeable persons who are loyal and unambiguously committed to us.”⁸⁷ We should never confuse dissent with disloyalty.⁸⁸ The clerk is meant to challenge her judge not for the sake of the challenge itself, but rather to assist the judge by catching errors and helping to make the judge’s positions more defensible, thus facilitating decision-making. Indeed, “Clerks more frequently help judges tighten their ideas rather than change their minds.”⁸⁹ As will be discussed further below, it is not the clerk’s role to attempt to convince her judge.

Thirdly, clerks should seek to stimulate their judges’ thinking. It is often stated that judges use their clerks as “sounding boards.”⁹⁰ In this process of open, searching, and tentative discussion, where a judge is

⁸³ John Bilyeu Oakley and Robert S Thompson, *Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in American Courts* (Berkeley: University of California Press, 1980) at 37 (empirical and historical study of the use of law clerks by American judges).

⁸⁴ *Ibid.*

⁸⁵ Kozinski, “Confessions,” *supra* note 36 at 1726.

⁸⁶ Peppers, *supra* note 6 at 101.

⁸⁷ Wald, *supra* note 37 at 153.

⁸⁸ A famous phrase of broadcast journalist Edward R Murrow in 1954.

⁸⁹ Cohen, *supra* note 14 at 111.

⁹⁰ See e.g. Kenney, “Beyond Principals,” *supra* note 11 at 602; Jones, *supra* note 12 at 776.

taking initial steps towards a decision, the judge's ability to bounce ideas off her clerk can stimulate the decision-making process. For similar reasons, a bench memo should be written in such a way as to serve as a "stimulus for the judge's own mind."⁹¹ A memo in which a position is taken too absolutely may serve to hinder further thought, rather than facilitating it. Thus clerks should be careful not to advocate too strongly in their memos, but rather should themselves adopt a searching, tentative and exploratory mode of analysis, even while taking an ultimate position as to how the case could be decided and why. The issue of bench memo writing is discussed further below.

Another important issue concerning law clerk influence is the choice of tenure and type of law clerks, more specifically whether they are recent graduates serving for fixed terms or permanent, more experienced staff lawyers. This question has important implications for judicial independence. On the one hand, it has been suggested on a number of occasions that the neophyte nature of young term clerks enhances judicial independence. On the other hand, it has also been suggested that although judges may rely more on the judgment of permanent staff clerks, these clerks tend to challenge judges' positions less than term clerks do. These are two important reasons for preferring green term clerks over practiced staff clerks.

In the US Supreme Court in the late 1930s, career appointments for law clerks gave way to term appointments when an informal norm developed whereby clerkships should last only a single year; as Ward and Weiden explain, "Justices were concerned that clerks who remained too long could gain some measure of undue influence and saw limiting the clerkship as an important check on this potential abuse. Also, limiting clerkships to recent law school graduates provided an additional safeguard."⁹² In the same way, a former law clerk to Justice Powell has suggested that "the limited, one-year clerkship norm is an institutional rule with the consequence of preventing law clerks from fully mastering the job and consolidating power."⁹³ It is, in fact, the clerk's limited tenure as compared to that of the judge which is thought to keep the respective roles

⁹¹ Coffin, *supra* note 10 at 72.

⁹² Ward and Weiden, *supra* note 3 at 36.

⁹³ Peppers, *supra* note 6 at 207. See also McInnes, Bolton and Derzko, *supra* note 7 at 78 ("Because a term of employment at the Supreme Court of Canada rarely exceeds twelve months, even the most ambitious clerk would find it difficult to win from a judge the degree of confidence required for the exercise of significant influence"); Sossin, *supra* note 7 at 308 ("Most importantly, the clerks' lack of experience and lack of tenure ensures that the influence of any one clerk on any one Justice's decision making will be fleeting at best").

of clerk and judge in proper perspective.⁹⁴ That term clerks only serve for a fixed period helps them to know their place.

As compared to term clerks, there is an apprehension that staff clerks may come to dominate courts over time in subtle ways, thereby potentially eroding judicial independence. Some judges have expressed the concern that the longer they worked with a clerk, the more they would come to rely on the clerk's judgment, and the more they would risk inadvertently over-delegating their judicial responsibilities.⁹⁵ While the annual turnover of term clerks can increase administrative problems, the problems with short-term clerks are outweighed by the "subtle adverse effects of institutionalism" associated with staff clerks.⁹⁶

A second problem with staff clerks is that even though they may gain more influence than short-term clerks, they are less likely to actively challenge judges' tentative positions. They may gain more influence, that is, but they are less likely to use it in those instances where they disagree with a judge. Because staff clerks are normally less assertive and their criticisms are generally more subdued, a permanent clerk system and an overreliance on staff clerks, according to Justice William O Douglas, "would mean the end of the seasoning of the pudding – it would eliminate the spice that fresh young minds [bring] to the job."⁹⁷ The three forms of positive influence described which clerks can have on judges – by offering a fresh perspective on a case, serving as stimulators of thought, and challenging judges intellectually – would be diminished.

To conclude this section, the discussion of the influence of law clerks on their judges would not be complete without an examination of the involvement of clerks in the preparation of their judges' reasons. Although this has not been the author's personal experience, depending on the judge some clerks may be asked to prepare a first draft of a judgment. This is perhaps the most controversial aspect of law clerks' functions. The *Ethical Principles for Judges* states, "The proper preparation of judgments is frequently difficult and time consuming. However, the decision and reasons should be produced by the judge as soon as reasonably possible, having due regard to the urgency of the matter and other special circumstances."⁹⁸

⁹⁴ Oakley and Thompson, "Law Clerks," *supra* note 1 at 1295.

⁹⁵ *Ibid* at 1300.

⁹⁶ *Ibid* at 1292, n 31.

⁹⁷ Kevlin, *supra* note 48 at 1233, n 20; Oakley and Thompson, "Law Clerks," *supra* note 1 at 1312.

⁹⁸ *Supra* note 18 at 21.

In *Closed Chambers*, the publication of which evinces an even greater ethical breach of confidentiality than *The Brethren* because it is authored not by journalists but by a former US Supreme Court clerk, the author makes a much-cited comment on the power of the first draft of a judgment:

And it is here, in wielding the enormous power of the first draft and, specifically, in the selection of words, structure, and materials, that clerks may exercise their greatest influence. For while everything they write passes through the filter of their Justices' scrutiny, this scrutiny is directed at an essentially complete product and often amounts to little more than a surface polish. Rarely do the Justices disassemble the drafts they've been given to examine the crucial choices that went into their design.⁹⁹

It is easy for clerks to over-emphasize their influence in the decision-making process – a potential which is more likely when the clerk agrees with her judge¹⁰⁰ – and the author appears to simply assume an answer. That said, it is by now common knowledge in legal circles at least that judges may give their clerks the responsibility to prepare first drafts of judgments, and in some cases judges decide to use those drafts or portions of them, even relatively unchanged, in their judgments. For those who would argue that in choosing not to prepare first drafts or revise their clerks' drafts, which is different from reviewing them, judges do not properly shoulder the intellectual and legal responsibility for deciding the case, their complaints lie not with law clerks, who simply fulfill the mandate they are given, but rather with the judges themselves who choose to delegate their duties in this way. When it comes to drafting judgments, law clerks only have the influence which judges allow them to have.

While it is difficult to set out hard and fast rules, so long as a judge reviews a clerk's draft with a critical eye and remains prepared in principle to make any necessary revisions so that the final product accurately reflects the judge's thinking, no over-delegation has occurred.

5. Everyday Scenarios for Law Clerks Which Have Heightened Ethical Dimensions

The basic aim of this section of the article dovetails with the proposed proper function of codes of conduct, namely, to sensitize law clerks to some of the everyday aspects of their role for which the careful, prudent exercise of good judgment is particularly important. If highlighting important sites of ethical discretion can be pedagogical, it is more important to raise questions and frame issues than to provide definitive

⁹⁹ Lazarus, *supra* note 5 at 273.

¹⁰⁰ Shapiro, *supra* note 6 at 113.

answers. To do otherwise would be to restrict the development and exercise of law clerks' individual judgment in specific circumstances. Developing judgment requires exercising judgment, in much the same way that becoming more fit requires physical exercise or building muscles requires weightlifting. The recognition of discretion, as already indicated, guides moral development. A code of conduct which purports to simply provide the right thing to do in a given situation removes the heavy lifting from ethical decision-making, risking leaving the individual with an atrophied sense of judgment. By contrast, it is hoped that identifying ethically sensitive areas will assist law clerks in improving their judgment for themselves by pointing to the need for some ethical aerobics.

The ethically sensitive areas discussed below are organized into the following general categories: writing bench memoranda; confidentiality (including discussion with other law clerks, comments to the media, and the publication of articles); impartiality (including courtroom presence and demeanour, civic, charitable and political activity, and conflicts of interest); post-clerkship employment; and assessing prospective law clerk applications. These issues are taken up in turn.

A) Bench Memos

The tension that law clerks should strive to think like judges while always remembering they are not is perhaps most strongly evident in the qualities of a good bench memo, the main work product of law clerks. A bench memo is best understood as a "road map of the case"¹⁰¹ which appropriately navigates this tension. Clerks should not sacrifice for the sake of getting to a final destination the analysis of other potential routes. The purpose of a bench memo is not to convince the judge as to how to decide the case but instead to lay a foundation for a decision, to facilitate a decision. As one judge put it, a bench memo is a repository or an audit of the factual and legal aspects of a case.¹⁰²

What does it mean to think like a judge? There are, of course, many different judicial philosophies and models of decision-making.¹⁰³ Judicial decisions, like other government decisions, involve "question[s] of practical wisdom, to be exercised in a context, not of abstract theory, but of human realities."¹⁰⁴ It has already been suggested that practical wisdom

¹⁰¹ Cohen, *supra* note 14 at 91.

¹⁰² *Ibid* at 97.

¹⁰³ Some of these are colourfully reflected, for example, in the *faux* judgments in the made up case of the "Speluncean Explorers"; see Lon L Fuller, "The Case of the Speluncean Explorers" (1948-1949) 62:4 Harv L Rev 616.

¹⁰⁴ *Ibid* at 637-38.

(otherwise known as judgment) also lies at the heart of ethics. It is the fundamental precondition to ethical action, since no amount of commitment to ethics codes, character, or cost-benefit analysis will necessarily lead to ethical action and results without the individual's capacity to apply rules, virtues and utilitarian balancing in a specific factual context. That is what practical wisdom allows for: it is the maestro that conducts the whole symphony.¹⁰⁵ Similarly, the judicial fidelity to law and a sensitive appreciation of the limits of the judicial role cannot lead to just results without judgment. Fortunately, law clerks can improve their sense of judgment through their close working association with a judge. Clerks can learn judgment by exercising judgment – learning by doing – and by seeing and attempting to mimic the manner in which it is exercised by those whose very job description is to do precisely that. Judges have the potential to be good role models precisely because practical wisdom is at the heart of what they do every day.¹⁰⁶

To think like a judge involves, amongst other things, consciously correcting for personal biases and predilections, having self-awareness, challenging one's own beliefs, and perceiving one's choices as problematic. This perception, in turn, leads to a more conscious awareness of decision-making, to greater care in identifying options and assumptions, and to increased creativity in overcoming difficulties.¹⁰⁷ Judge Learned Hand, for example, "had a deep-rooted open-mindedness and skepticism about his work, a capacity to doubt his own tentative conclusions and to insist on putting them to the test of the most rigorous analysis."¹⁰⁸ In general, some mental dispositions that contribute to real-world performance are the tendency to collect information before making up one's mind, seek various points of view before coming to a conclusion, think extensively about a problem before responding, calibrate the degree of strength of one's opinions to the degree of evidence available, think about future consequences before taking action, explicitly weigh pluses and minuses of a situation before making a decision, and seek nuance and avoid absolutism.¹⁰⁹

¹⁰⁵ Barry Schwartz and Kenneth Sharpe, *Practical Wisdom: The Right Way To Do the Right Thing* (New York: Riverhead Books, 2010) at 280.

¹⁰⁶ *Ibid* at 18.

¹⁰⁷ Daryl Koehn, "What Is Practical Judgement?" (2000) 8:3-4 *Professional Ethics* at 14-16.

¹⁰⁸ Gerald Gunther, *Learned Hand: The Man and The Judge* (New York: Knopf, 1994) at 290, cited in Sossin, *supra* note 7 at 293, n 43.

¹⁰⁹ Keith E Stanovich, *What Intelligence Tests Miss: The Psychology of Rational Thought* (New Haven: Yale University Press, 2009) at 31-32, cited in David Brooks, *The Social Animal: The Hidden Sources of Love, Character, and Achievement* (New York: Random House, 2011) at 166.

An important part of the judicial intellectual ideal is knowing one's own mind.¹¹⁰ It is perhaps odd that self-knowledge is considered a virtue for officials whose function in applying law is meant in theory to be completely independent of idiosyncratic, personal attributes. Yet it is precisely to escape the tyranny of the subjective that judges are meant to have self-knowledge. In matters both judicial and ethical, viewing the person as internal to the process of decision-making, rather than external to it, allows for the transcendence of the personal. As Justice Cardozo reminds us with characteristic flourish in his famous lectures *The Nature of the Judicial Process*:

Something of Pascal's spirit of self-search and self-reproach must come at moments to the man who finds himself summoned to the duty of shaping the progress of the law. The very breadth and scope of the opportunity to give expression to his finer self seem to point the accusing finger of disparagement and scorn. What am I that in these great movements onward, this rush and sweep of forces, my petty personality should deflect them by a hairbreadth? Why should the pure light of truth be broken up and impregnated and colored with any element of my being? Such doubts and hesitations besiege one now and again. The truth is, however, that all these inward questionings are born of the hope and desire to transcend the limitations which hedge our human nature.

A willingness to see the self accurately and a propensity to put oneself in perspective are the basic elements of humility,¹¹¹ and humility is perhaps the most fundamental attribute of the judicial temperament.¹¹² The trouble, however, is that law clerks as a class may be susceptible to the hubris of academic stardom. They may not have had the pedagogical experience of failure. They may be too sure of themselves, too confident in their own abilities, too easily seduced by the arrogance of certainty.¹¹³ Thus, while the circumspectness, reserve and self-questioning that is characteristic of wise judges is also characteristic of good law clerks, that impulse of self-abnegation may not always be found amongst law clerks.

No rule can describe or prescribe how to write a bench memo in such a way that assumes the writer's views may be wrong, or be subject to

¹¹⁰ Kenney, "Puppeteers or Agents," *supra* note 6 at 219.

¹¹¹ J Andrew Morris, Céleste M Brotheridge and John C Urbanski, "Bringing humility to leadership: Antecedents and consequences of leader humility" (2005) 58:10 *Human Relations* 1323 at 1331.

¹¹² RA Macdonald, "La faculté de discernement / Exercising Judgement" in *Quel juge pour quelle société: Actes du Congrès de la magistrature 2008* (Quebec: Conseil de la magistrature, 2009) 53.

¹¹³ Christopher R Drahozal, "The 'Arrogance of Certainty': Trust, Confidentiality, and the Supreme Court" (1998-1999) 47:1 *U Kan L Rev* 121.

principled disagreement, so as to facilitate the ultimate making of the decision. Yet that is precisely the manner in which law clerks should write their bench memos.

Assistance in decision-making consists in being a stimulus of mind, a kind of teacher.¹¹⁴ Judicial self-questioning does not normally happen in judgments – it happens behind the scenes – whereas law clerk self-questioning should happen in bench memos. While at least some clerks see their role as persuaders,¹¹⁵ the better view is that it is not the clerk’s job to convince his judge of the position taken in the bench memorandum. It would be a serious ethical mistake to forget this. While a clerk is not doing his job if he does not take a position in a bench memorandum, he commits a subtle ethical mistake if the memorandum is written on the flawed assumption that the goal is to convince the judge. It would be unrealistic to suggest that clerks are not disappointed when their judges do not end up agreeing with them or that in some cases bench memos are not “prototype or aspirant opinion[s],”¹¹⁶ but that is not the point. The point is simply that it is the clerk’s role to offer another perspective, which is not meant to decide the case but to assist the judge in deciding the case. If the clerk believes, even implicitly, that he has failed if his judge does not end up agreeing with him, the clerk may be more likely to adopt the stance of an advocate in his memoranda. Yet a bench memorandum is not a factum even though it is meant to put forth a defensible position, nor is it a judgment even though it is often a “prototype or aspirant” judgment.

In the preparation of bench memos, the law clerk’s proper role is ambiguous and difficult to define concretely, since it combines aspects of the functions of advocate and judge, yet does not fit exactly with either of them. Understanding the fine line between being a decision-maker and a facilitator of decisions helps to inform the law clerk’s proper role. It is in navigating these ambiguities that clerks must recognize the important fact of their discretion and exercise good judgment in how and what they write.

It is in shading into the region of lawyerly advocacy or judicial minimalism that inspired and well-meaning clerks may unconsciously mislead their judges. The unintended deception may arise, on the one hand, due to the advocate’s penchant to inflate and emphasize the beneficial and minimize and ignore the detrimental, or, on the other hand, due to the judicial norm of restraint restricting what the judge should normally say in

¹¹⁴ Peppers, *supra* note 6 at 62 (noting that Justice Brandeis was of the view that all else being equal, it is always preferable to hire a clerk whom there is reason to believe will become a law teacher).

¹¹⁵ Ward and Weiden, *supra* note 3 at 187.

¹¹⁶ Coffin, *supra* note 10 at 194.

a judgment to that which is necessary in order to decide the case. Any unintended deception, of course, will not be long-lived since judges read all the materials, not only their clerk's bench memo. To avoid unintentional misleading, clerks must be conscious of characterization; it is possible to massage issues, facts, interpretations and the law in such a way as to support a position. That is what lawyers do. If clerks become too wedded to a position, that unfortunately is what they will end up doing as well.¹¹⁷

How strongly a position is taken in a memo is, of course, a matter of degree. In light of the Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons* (2006), it may be justifiable for law clerks to take on a greater advocacy role when considering cases involving unrepresented litigants. But here again, the preferred approach is one of balance and objectivity.¹¹⁸

B) Confidentiality

The foundation of the relationship between judge and clerk is assured confidentiality extending throughout life.¹¹⁹ According to a survey of judges in the United States, the law clerk's duty of confidentiality may in principle be rooted in a number of sources, including moral obligation, professional responsibility, fiduciary or contractual obligation, and court rule or statute.¹²⁰ The purpose of confidentiality is to promote free and open debate and discussion, independent judicial reasoning, and preserve confidence in the administration of justice.¹²¹ While it may seem counterintuitive that a shroud of secrecy over the decision-making process could preserve confidence in the justice system, this is an important effect of confidentiality. The reason is that judges often initially consider factors

¹¹⁷ Sossin, *supra* note 7 at 302 (“[C]lerks are asked to both express an opinion of their own and to summarize objectively the opinions of others. Naturally, the boundary between these two distinct roles blurs and clerks frequently and sometimes unintentionally end up acting as advocates for one position or the other.”) In discussing the writing of bench memos, the authors of “Clerking at the Supreme Court of Canada,” *supra* note 7 observe at 74,

The exercise is, of course, based on analysis rather than advocacy. While a clerk typically arrives at a recommendation, generally speaking, it is not the proper function of a clerk to champion one side or another in an appeal. Rather, a clerk should provide his or her judge with a critical examination of the parties' arguments and a thorough exegesis of the applicable law.

¹¹⁸ Regarding adjudicative duties, the *Ethical Principles for Judges*, *supra* note 18 states at 20, “While doing whatever is possible to prevent unfair disadvantage to the unrepresented party, the judge must be careful to preserve his or her impartiality.”

¹¹⁹ Coffin, *supra* note 10 at 78.

¹²⁰ Kevlin, *supra* note 48 at 1243.

¹²¹ *Ibid.*

which should be and ultimately are considered irrelevant to the disposition of the case.¹²² Disclosure of informal communications preceding the decision would only serve to distort the creative, tentative, experimental process of decision-making and could operate as a “leaden blanket smothering discourse.”¹²³

Because of the inherently confidential nature of the judge-clerk relationship, law clerks should presume that any information they have gained from their employment is confidential and should not be disclosed to anyone for any reason. There are, however, some potential exceptions.

On collegial courts, law clerks can benefit from discussing pending cases with their fellow clerks. Some judges encourage this, while others do not permit it. On one end of the spectrum are judges who view clerks as working for the court as a whole, considering undirected clerk communication as a responsibility of the job. On the other end of the spectrum lie those judges who view such communications as often taking the form of inappropriate lobbying of another chambers, or hindering the clerk’s ability to provide an independent view.¹²⁴ These exchanges do influence the advice given to the judges.¹²⁵ Even in those instances where discussion amongst clerks is permitted, good judgment and a sensitive appreciation of the context are required in order to assess the limits of these potentially fruitful discussions. The exchanging of ideas and debate amongst clerks may facilitate better analysis and enhance the educational value of a clerkship.¹²⁶ The clerk network can also serve as a vehicle for inter-chambers communication.¹²⁷ A balance must be found between the benefit of cross-fertilization of good minds and the hazard of wasting time talking too much.¹²⁸ Clerks working on appellate courts must live a similar balance between collegiality and independence as judges do.

A more controversial exception to confidentiality is whether clerks should be permitted to make public comments concerning the nature of their work and the cases they work on, whether in response to questions from the media or academic researchers, or in the form of published articles. With respect to media comments, a prudent approach is simply to avoid them entirely. Consistent with the derivative nature of the clerk’s duties, which arise from the clerk’s professional relationship with the

¹²² *Ibid* at 1240.

¹²³ Coffin, *supra* note 10 at 79.

¹²⁴ Cohen, *supra* note 14 at 143-45.

¹²⁵ Sharpe and Roach, *supra* note 9 at 211.

¹²⁶ Herman, *supra* note 7 at 279; Kevlin, *supra* note 48 at 1254.

¹²⁷ Cohen, *supra* note 14 at 139.

¹²⁸ Coffin, *supra* note 10 at 204.

clerk's judge, everything a clerk does reflects back on his or her judge. Sometimes the best way to avoid ethical mistakes is simply to avoid the circumstances which can give rise to them. Former Chief Justice Dickson, however, appears to have had a more flexible attitude, counseling against any hard and fast rule: in appropriate cases and depending on the judge's confidence in his clerk, discussions with reporters on the content of judgments which have already been released could be appropriate.¹²⁹ This is a somewhat controversial view, and when in doubt the best approach is for a clerk to ask his or her judge.

A similar approach is appropriate with respect to clerks publishing articles. By the very nature of their functions and their temporary insider status as aides to the third branch of government, law clerks must give up the ability to freely speak their minds publicly on certain subjects. If they are not prepared to do so they should not accept a clerkship position, which often includes a confidentiality agreement as a condition of employment. Once again, the best approach is for the clerk to ask his judge.

C) Impartiality

Following the organization of the *Ethical Principles for Judges*, impartiality is used as the organizing principle which subsumes courtroom presence and demeanour, civic, charitable and political activity, and conflicts of interest.

Judges and clerks must not only be impartial but also be seen to be. Impartiality is not the absence of personal opinions, which is an impossible state of affairs, but rather the psychological state of being open-minded and critically self-aware of one's own intellectual leanings. It has been said that minds, like parachutes, only function when open.

The comportment of law clerks in court during the hearings for the cases they have worked on raises potential problems in the perception of the administration of justice. Law clerk impartiality, that is, extends to courtroom demeanour.¹³⁰ Law clerks must be circumspect in any informal interactions they may have with the parties, such as during court breaks and in the hallways. Polite, reserved small talk may be harmless, yet the potential always arises for the perception of favouritism. Of course, any discussion of the merits of the case is inappropriate. While lawyers will normally be aware that such discussions with clerks are inappropriate, the parties themselves may not, and in their engagement with their case they

¹²⁹ Sharpe and Roach, *supra* note 9 at 291.

¹³⁰ Rubin and Bartell, *supra* note 16 at 20.

may be keen to discuss the issues with the clerks. Clerks should not place themselves in a position where they are used, or perceived to be used, as a conduit voice to their judge outside of the formal and public adjudication process.

Impartiality and the perception of impartiality are also critically at play in the community involvement of law clerks. They must be prudent in any civic, charitable, and political activities in which they take part, particularly if these involve remuneration. If a clerk is involved with an organization which is a frequent participant in cases which come before the court, for example as an intervener, the clerk could find herself in a real, potential or perceived conflict of interest. In many cases, and perhaps even the standard case, clerks will be required by the terms of their employment to devote their full time and effort to their functions, and will be specifically precluded from accepting outside employment during the term of their clerkship. General public service policies also regulate the political activities of public servants with a view to balancing the need for an impartial public service with the political rights of the public servants who compose it.

D) Post-clerkship Employment

Because clerkships normally last for only one year, often serving as a bridge between law school and law practice, it is normal for clerks to be searching for employment and undergoing interviews during their clerkships. This can lead to possible conflicts of interests and the appearance of impropriety during the clerkship, and can persist in different forms following its completion.¹³¹ Judges who are close to retiring from public office are often faced with similar ethical issues when searching for post-judicial employment.¹³² When in doubt, during their employment it would be prudent for clerks to inform their judges about any potential conflicts of interest raised by their job hunting. Following employment, judges' chambers and clerks may arrange "cooling-off periods" during which clerks agree not to argue cases before their former judge. Interestingly, the *Ethical Principles for Judges* provides for cooling-off

¹³¹ See e.g. Jones, *supra* note 12 at 777; Maher, *supra* note 12; Swan, *supra* note 12.

¹³² See e.g. *Ethical Principles for Judges*, *supra* note 18 at 52:

Related issues, requiring similar approaches, may arise in relation to overtures to the judge while still on the bench for post-judicial employment. Such overtures may come from law firms or prospective employers. There is a risk that the judge's self-interest and duty would appear to conflict in the eyes of a reasonable, fair minded and informed person considering the matter. A judge should examine such overtures in this light. It should also be remembered that the conduct of former judges may affect public perception of the judiciary.

periods for recently appointed judges hearing cases being argued by former clients or by members of the judge's former law firm or government department.¹³³

E) Assessment of Prospective Law Clerk Applications

In certain cases clerks may be called upon to play a role in assisting their judge in selecting a future clerk. The influence of clerks in these circumstances may be more in reducing the chances of some applicants, as opposed to picking the successful candidates who receive interviews, by culling the applications to a manageable short-list.¹³⁴ If called upon to assist with this process, clerks should be alive to the fact that their involvement is rife with the subtle potential for favouritism based on irrelevant personal connections, conflicts of interest, and subjectivity. Clerks may have a tendency to favour applicants from their own law school,¹³⁵ and they may also know of the applicant's reputation at school, share mutual acquaintances with the applicant, and themselves be indebted to members of the applicant's law faculty for reference letters.¹³⁶

As a matter of fairness, therefore, clerks should place their recommendations in context by being explicit with their judge about how well they know particular applicants or their referees. Impartiality is not a psychological state of complete neutrality between various outcomes, but rather self-awareness and self-questioning concerning potential biases.

That is the most that can realistically be asked of clerks, and the judges whom they serve, in all of the functions they perform.

6. Conclusion

The derivative character of the law clerk's responsibilities, being dependent upon the judicial function, explains the interrelated and overlapping nature of law clerk ethics and judicial ethics. The agent must adopt and live up to the ethical standards of his principal. At the same time, an agent perverts his role if he thinks he is the principal, if the clerk inflates the fact of his being subject to judicial standards of ethics into a delusion of judicial grandeur. Clerks must adopt standards of judicial ethics for themselves not because they are judges, but because they serve judges in a

¹³³ *Ibid* at 51-52. See also Karen O'Connor and John R Hermann, "The Clerk Connection: Appearances Before the Supreme Court by Former Law Clerks" (1994-1995) 78:5 *Judicature* 247.

¹³⁴ Sossin, *supra* note 7 at 286.

¹³⁵ Herman, *supra* note 7 at 68.

¹³⁶ Sossin, *supra* note 7 at 286, n 26.

relationship of cooperation, service, and subordination. In order to stay true to their proper role – to know their place – clerks must remember that their duty is no broader than to support the judicial office which is held by their judges. It is not their role to persuade or to render judgment but rather to facilitate the decision-making process, to make their judge the best judge possible. Exercising judgment without rendering judgment is perhaps the best way to develop the practical wisdom that is essential not only for being a good law clerk, but for being a good professional.

When the clerkship year comes to an end, after a year of learning by doing and from the fruitful mistakes that come from doing, clerks will carry those lessons with them when they go, as they must, their separate ways.