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Reconceiving Ethics for Judicial Law Clerks

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ARTICLE

Gregory Bischoping

Reconceiving Ethics for Judicial Law Clerks

Abstract. Judicial law clerks hold a unique and critical position in our legal system. They play a central part in the functioning of the judiciary, oftentimes writing the first draft of their judge's opinions and serving as their trusted researcher and sounding board. Moreover, they are privy to the many highly confidential processes and private information behind the important work of the judiciary. It stands to reason the comprehensive set of ethical duties that bind the world of lawyers and judges should also provide guidance for judicial law clerks. The most important among those ethics rules is a duty of confidentiality. Without such a rule, after one's clerkship, nothing enforces the commonly known duty. It is difficult to study the extent to which chambers' confidences are breached in the practice of law, but books like *The Brethren* reveal the ways clerks have shared confidential judicial details with the public. Even the well-intentioned clerks, who make up the overwhelming majority, are given little to no guidance on the types of information they may ethically disclose. And there are other areas where guidance would be beneficial, such as post-clerkship recruiting and the limits on partisanship behavior during the clerkship.

During the clerkship, when clerks are bound by the judiciary's comprehensive guidance, they have limited ability to differentiate between that which is a contractual obligation and that which is a professional responsibility. Such line drawing is an important exercise in the practice of law, which is founded on an underlying lattice of professional ethics. After the clerkship, they are bound to the judiciary by little more than their personal sense of

responsibility and non-enforceable guidance. This Article will recommend that state bar associations consider providing additional guidance to law clerks, particularly by promulgating a rule establishing a duty of confidentiality to the judiciary following one's clerkship.

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I. INTRODUCTION: WHY WE SHOULD RECONCEIVE CLERKSHIP ETHICS

This Article will argue that the ethics model for federal term law clerks is inadequate. This is not a criticism of the judiciary's continued efforts to encourage ethical behavior. It is, however, a critique of the very concept of a contractual, temporary, and relationship-based ethics model, which runs counter to the ethos of our profession. Clerkship ethics are generally grounded in contractual duties owed to the judiciary,¹ personal respect for one's judge, and a desire to protect one's professional reputation. In practice, these forces almost always compel ethical behavior during the clerkship, and usually foster ethical behavior post-clerkship, but this is not universally true.² Former clerks are bound by few enduring professional

1. See, e.g., FED. JUD. CTR., MAINTAINING THE PUBLIC TRUST: ETHICS FOR FEDERAL JUDICIAL LAW CLERKS 1 (4th ed. 2018), https://www.fjc.gov/sites/default/files/materials/35/Maintaining_the_Public_Trust_Revised_4th_Edition_Public_2018.pdf [<https://perma.cc/NE3D-58T7>] (“[Law clerks] also need to familiarize [themselves] with and follow [their] judge’s ethical guidelines. These guidelines may differ from chambers to chambers.”).

2. Every so often, stories of especially outrageous behavior by current or former law clerks, either in their official or personal capacity, catch national attention. See Parker B. Potter, Jr., *Law Clerks Gone Wild*, 34 SEATTLE U.L. REV. 173, 184 (2010) (describing instances where law clerks broke the rules and wound up appearing in a written decision, such as the time a “law clerk convened the court” in his judge’s absence and read the trial transcript to the jury); see also Lisa Demer, *Former Law Clerk Sentenced to 4 Years for Voyeurism, Child Porn*, ANCHORAGE DAILY NEWS (Apr. 28, 2011), <https://www.adn.com/alaska-news/article/former-law-clerk-sentenced-4-years-voyeurism-child-porn/2011/04/29/> [<https://perma.cc/7K8T-QS9G>] (describing sentencing of former federal law clerk on “indecent viewing and child pornography charges”); George Khoury, *Court Clerk Has Sex in Judge’s Chambers, Sues to Get Job Back*, FINDLAW (Mar. 22, 2018, 1:30 PM), https://blogs.findlaw.com/greedy_associates/2018/03/court-clerk-has-sex-in-judges-chambers-sues-to-get-job-back.html [<https://perma.cc/F6RL-7CJD>] (detailing a law clerk’s punishment for sexual misconduct); David Lat, *A Law Clerk with a Gilded Résumé, Charged with Solicitation and Attempted Rape of a Young Boy*, ABOVE THE L. (Jan. 13, 2014, 11:32 AM), <https://abovethelaw.com/2014/01/a-law-clerk-with-a-gilded-resume-charged-with-solicitation-and-attempted-rape-of-a-young-boy/> [<https://perma.cc/ZRH8-6F6J>] (listing sexual misconduct allegations “against a former law clerk”); Todd Lighty, *Law Clerk in Judge Impersonation Case Is Charged with a Felony*, CHI. TRIB. (Oct. 21, 2016, 6:34 PM), <https://www.chicagotribune.com/news/breaking/ct-law-clerk-arraigned-20161021-story.html> [<https://perma.cc/6FLF-NE6F>] (describing a judicial candidate’s misconduct resulting in a false impersonation charge); Jessica Mendelson, *Federal Court Clerk Arrested for Allegedly Sharing Confidential Information with Gangs*, SEYFARTH (Aug. 28, 2012), <https://www.tradesecretslaw.com/2012/08/articles/trade-secrets/federal-court-clerk-arrested-for-allegedly-sharing-confidential-information-with-gangs/> [<https://perma.cc/HJL5-JQ6U>] (recounting a law clerk’s involvement with street gangs, including sharing confidential information).

rules of behavior and are offered limited guidance on suggested post-clerkship behavior.³

I do not suggest changing the current regulations on clerk behavior.⁴ Instead, I suggest adding a new layer to clerkship ethics: increased guidance by state bar organizations effectuated through carefully crafted professional rules of conduct. A new professional rule of ethics for clerks would fill the gaps in the current system, the most obvious being a continuing duty of confidentiality toward the judiciary upon completion of a clerkship. The benefits of a comprehensive professional rule are vast and would work harmoniously with the current structure. This harmonious system would protect the integrity of the judiciary, externalize complicated issues of post-clerkship regulation, and provide clerks with guidance on the contours of their professional responsibility; it draws a line in the sand between that which is a contractual duty to one's employer—the judiciary—and that which is a professional responsibility to the bar.

At a fundamental level, not all clerks and former clerks are bound by traditional ethics rules. Although the legal profession enjoys characterizing clerks as the hands of the judge,⁵ this metaphor is not an adequate basis for ethics policy, nor is it an authoritative basis to hold former clerks accountable. The profession is built on the principle that lawyers should develop, abide by, and enforce ethical rules and principles⁶—clerks can be no exception. The current model of clerkship ethics is intertwined with what is seen as a “special relationship” between the clerks and judges.⁷ Beyond this relationship, clerkship ethics are covered by a “patchwork” of rules:

3. FED. CIR. R. 50 (placing strict limits on former federal circuit employees, including law clerks); MODEL RULES OF PROF'L CONDUCT R. 1.12 (AM. BAR ASS'N 2021); 9TH CIR. R. 46-5.

4. See, e.g., FED. JUD. CTR., *supra* note 1, at 1 (discussing the “Code of Conduct for Judicial Employees, which has five canons”).

5. See, e.g., *id.* (providing “valuable assistance as [a law clerk's] judge resolves disputes that are of great importance to the parties, and often to the public”).

6. See, e.g., Henry W. Jessup, *The Ethics of the Legal Profession*, 101 ANNALS AM. ACAD. POL. & SOC. SCI. 16, 16 (1922) (“Law is a double profession. It has an objective and a subjective phase. In its subjective aspect it possesses a life of the spirit, a high and lofty ethic; higher than the gentleman's ‘noblesse oblige.’ It is equivalent to the ordination vow of a priest in the temple of Justice. It involves subjection to self-denying ordinances and domination by a spirit of unselfish service.”).

7. See John Paul Jones, *Some Ethical Considerations for Judicial Clerks*, 4 GEO. J. LEGAL ETHICS 771, 771–72 (1991) (“[T]he judges enjoying the energies and fresh perspectives of brand new professionals rated top among their contemporaries by law professors, and the law clerks obtaining tutorials by senior jurists regarded as among the best by their former peers at the bar.”).

Once a law clerk has been admitted to the bar, he will be bound by the standards expressed in his bar's code of professional responsibility. As the trusted agent of a judge, a clerk is regarded by some courts as bound by the judicial standards binding his principal. Law clerks in federal courts are bound by a code designed particularly for them. Law clerks in some state courts are expressly charged with adherence to particular local standards, although no code has yet been developed for general application to the conduct of law clerks in state courts. These clerks are therefore bound, if at all, only by the patchwork quilt consisting of bar standards applicable after admission and bench standards applicable by derivation.⁸

Clerks that come straight from law school are not members of any state bar until well-into, or even after, the completion of their clerkship.⁹ For these clerks, the Code of Conduct for Judicial Employees serves as a primary written ethics rules. Interpreting this code, the Federal Judicial Center (FJC) offers a Clerk's Handbook with clerkship specific obligations, which expressly and repeatedly incorporates the individualized wishes of judges.¹⁰ This code and handbook constitutes a system of rules determined by one's employing organization and cedes substantial power to one's direct superior; therefore, such a system of rules should be viewed as contractual obligations rather than professional ethics.¹¹ Thus, for clerks, contractual and ethical obligations are one and the same. What we are left with is an incomplete system: newly minted lawyers are given temporary, contractual, and

8. *Id.* at 772 (footnotes omitted).

9. Unlike the traditional timing of a clerkship, many judges now prefer clerks with work experience between law school and the clerkship. See *Qualifications, Salary, and Benefits*, OSCAR (Feb. 1, 2018), https://oscar.uscourts.gov/qualifications_salary_benefits#qualifications [<https://perma.cc/5N67-42P6>] (listing law clerk positions on the "Online System for Clerkship Application and Review" with salary enhancements for law clerks with work experience); see also *Panel Discussion: Judges' Perspectives on Law Clerk Hiring, Utilization, and Influence*, 98 MARQ. L. REV. 441, 443 (2014) (discussing the importance of "diversity of life experience" in prospective clerks). But clerkships still occur, to a large extent, immediately after law school. See Ad Hoc Committee on Law Clerk Hiring Announcement of Two-Year Pilot Plan dated Feb. 28, 2018, *Federal Law Clerk Hiring Plan, 3rd and 4th Pilot Years*, OSCAR (Oct. 2, 2020), https://oscar.uscourts.gov/federal_law_clerk_hiring_pilot [<https://perma.cc/9WPR-Q9WG>] (supporting a proposal for clerkships beginning after the second year of law school at a minimum as opposed to after the first year of study); Jeffrey B. Abramson, *Should a Clerk Ever Reveal Confidential Information?*, 63 JUDICATURE 361, 361 (1980) ("[C]lerkship is a valued interlude between law school and lawyering, a cap on one's legal education by way of example set by the judge as tutor.").

10. See FED. JUD. CTR., *supra* note 1, at 14, 16, 24, 27–30 (providing examples of clerks being advised to ask their judge for their specific policy on an ethical question).

11. See *id.* at 1 (noting a judge may impose restrictions on his law clerk that go beyond the code).

relationship-based guidance and then expected to engage in self-regulation before and after departure from the judiciary.

II. THE ETHICS RULES GOVERNING LAW CLERKS

A. *Ethics During One's Clerkship*

There is a patchwork of regulations in place that, as a composite, guide the behavior of federal term law clerks while in chambers.¹² During their one- to two-year term, that patchwork includes respect for one's judge, state professional rules (if barred), and the judiciary's Code of Conduct.

1. Respect for One's Judge

Perhaps the most compelling reason to behave ethically is the tremendous amount of respect felt for one's judge.¹³ This respect manifests as a responsibility to protect the judge's reputation, a duty to ensure the quality and integrity of their decisions, and a desire to earn and maintain their trust and respect. For this reason, the compulsion to approach one's clerkship with integrity, confidentiality, and seriousness is internalized by most clerks, regardless of any written rule.

Born of this respect is the obligation to keep confidential the information private to the judge, both in their personal life and in their judicial decision-making. It is not uncommon for the relationship between judge and clerk to take on a "personal component."¹⁴ Thus, "[p]reserving the

12. Notably, while this Article will at times incorporate state court clerks into its analyses and many of the conclusions reached are transferrable to state court clerkships, the Article's focus will be on federal clerkships.

13. See Laura B. Bartell, *A Splendid Relationship—Judge and Law Clerk*, 52 LA. L. REV. 1429, 1429 (1992) (describing with reverence the relationship law clerks held with Judge Alvin B. Rubin); see also Gary Feinerman, Tribute, *Civility, Dignity, Respect, and Virtue*, 71 STAN. L. REV. ONLINE 140, 140 (2018) (offering tribute to Justice Kennedy from a former law clerk); Paul Horwitz, *Clerking for Grown-Ups: A Tribute to Judge Ed Carnes*, 69 ALA. L. REV. 663, 663, 665 (2018) (describing his desire to write a tribute to Judge Carnes that is "affectionate, admiring, glowing—almost worshipful,]" but arguing that "[t]he tendency of clerks to maintain a lifelong allegiance to their judges, and a lifelong commitment to burnishing their reputations, has a distorting effect on what ought to be a more mature and independent and less personality-oriented, worshipful, elite-establishment-oriented legal culture." (internal quotation marks omitted)).

14. See Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1232 (1981) (first citing *Chief Justice Vinson and His Law Clerks*, 49 NW. U.L. REV. 26, 26 (1954); then citing Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 717 (1946) (describing the clerks as confidants or friends of the judges they serve)).

confidentiality of judges' work [is] 'an honored tradition among law clerks.'"¹⁵

Because of their position, clerks have a unique view of their judges and other court personnel. They also have access to opinion drafts, internal memoranda, and information gleaned from discussions with judges, none of which are made public once a decision is reached. Prior to announcement of a decision, the clerk may have information concerning the scheduling of a case and its probable or certain outcome. Clerks who develop close personal relationships with their judges also may be aware of the judges' political philosophies or personal feelings about particular lawyers, litigants, other judges, or cases.¹⁶

A breach of such confidentiality would no doubt imperil the sanctity of the judicial system and weaken the substantial trust judges place in their clerks. In 1980, a survey was distributed to 375 state and federal judges.¹⁷ Of the 111 judges who participated, a majority responded that a breach of confidentiality would cause "a negative impact on the closeness of the relationship or on the range and type of discussions with clerks."¹⁸ Although highly compelling for most clerks, personal loyalty and respect are inadequate bases for a constitutionally significant ethical obligation. First, "[t]he only sanctions are a guilty conscience, disapproval, discharge, or a potentially negative impact on future employment opportunities if a breach is publicized."¹⁹ Further, the duty is unreliable and internal: individuals have differing understandings of what such loyalty demands, and clerks' closeness with their respective judges may vary dramatically. Additionally, some commentators have criticized the legal profession's idealized vision of the judge-clerk relationship.²⁰

15. Comment, *supra* note 14, at 1230 (quoting Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179, 1189 n.38 (1973)).

16. *Id.* at 1235.

17. *Id.* at 1263.

18. *Id.* at 1237, 1263.

19. *Id.* at 1244; *see also* COMM. ON CT. ADMIN. AND CASE MGMT., JUD. CONF. OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 145 (2d ed. 2010) (noting "Law Clerks have no statutorily defined duties, and therefore you have great discretion in what you assign to them").

20. *See* Horwitz, *supra* note 13, at 667–68, 673, 675 (noting multiple problematic results of the judge-clerk dynamic, including: (1) that "[former clerks] may absorb, and perpetuate, the system and the pathways that were responsible for their own clerkships rather than stand outside and critique

Critics have alternatively conceived a judicial clerk's personal loyalty as a "derivative duty" because "judicial clerks are the trusted agents of judges and . . . their conduct reflects on the judge," who is required "to act both professionally and ethically."²¹ Under this conception, the clerk is seen as an appendage of the judge and thus infused with at least a portion of their ethical and professional obligations, such as those described in the model judicial canons of behavior.²² Indeed, clerks often act on behalf of the judge in a manner resembling that of an agent. But such a conception is flawed for multiple reasons. First, Article III power exists solely in the judge, not the clerk, so it would be wrong to suggest the same ethical rules apply. Further, the constitutional mechanisms that enforce ethics for federal judges—a sworn oath and impeachment for violations thereof—are inapplicable to clerks, especially former clerks.²³ If clerks are derivatively

them[.]" which "contributes to a certain degree of immaturity in the American legal profession and culture[.]" (2) the entrenchment of ideological kinship between clerk and judge; and (3) the perpetuation of "our credential-obsessed profession[.]"²¹); see also Nancy Gertner, Essay, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88, 88 (2018) (describing how "[t]he #MeToo movement has cast all employment settings in a new, more critical light, including the judiciary"); Erin Coe, *EEOC's Lipnic on Sexual Harassment in the Courthouse*, LAW360 (Apr. 16, 2019, 9:40 PM), <https://www.law360.com/articles/1150616/eec-s-lipnic-on-sexual-harassment-in-the-courthouse> [<https://perma.cc/WJJP9-A4FB>] (discussing a task force report on abuse in the judiciary and "a cultural awakening and reckoning on this issue"); Catherine Crump, *Clerkships Are Invaluable for Young Lawyers. They Can Also Be a Setup for Abuse.*, WASH. POST (DEC. 15, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/15/when-women-law-clerks-are-harassed-they-often-have-nowhere-to-turn/?noredirect=on&utm_term=.22148b0790ea [<https://perma.cc/GS4D-BKFM>] (describing a culture of "worshipful silence"); Andrew Strickler, *Judiciary's Integrity Chief Talks Improving Workplace Culture*, LAW360 (Apr. 16, 2019, 8:29 PM), <https://www.law360.com/articles/1150406/judiciary-s-integrity-chief-talks-improving-workplace-culture> [<https://perma.cc/5PFW-LSTW>] ("One of the common criticisms of the judicial complaint process is a near total dearth of public information about allegations made against judges.").

21. JENNIFER L. SHEPPARD, IN CHAMBERS: A GUIDE FOR JUDICIAL CLERKS AND EXTERNS 47 (2012) (quoting Jones, *supra* note 7); see also Amany Ragab Hacking, *WOW! What a Clerkship! How to Maximize Law Students' Judicial Externships by Jumpstarting the Classroom Experience*, LAW.DU.EDU, <https://www.law.du.edu/documents/externships-7/Friday-145/Ragab-Hacking-Conf-Judicial-Presentation.pdf> [<https://perma.cc/7A3L-PZQ6>] ("Law clerks and externs are essentially an extension of the judge.").

22. See MODEL CODE OF JUD. CONDUCT CANONS 1–4 (AM. BAR ASS'N 2020) (listing the model judicial canons of behavior); see generally 2A JUD. CONF., GUIDE TO JUDICIARY POLICY: CODE OF CONDUCT FOR UNITED STATES JUDGES CH. 2 (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/2TJ7-DC6C>] [hereinafter CODE OF CONDUCT FOR UNITED STATES JUDGES] (providing detailed explanations of the model judicial canons of behavior).

23. Before reaching impeachment, the judiciary will usually conduct an internal investigation. The Special Committee on Judicial Ethics is empowered to investigate allegations of misconduct and report findings to the Circuit Judicial Council, which may then institute certain corrective measures

bound by the same duties as judges, then comparable investigative or enforcement procedures should attach to those duties, which they do not.²⁴ Additionally, federal judges are restricted by much more than sanctions from the judiciary or impeachment: “Judge Arnold often stated that the judiciary must have the ‘continuing consent of the governed,’ in order to do its job[.]”²⁵ a restrictive force holding much less power over a term law clerk. Moreover, it is the judge’s name that attaches to the opinion. A judge’s stature and respect within the legal community is immensely important, making their reputational stakes significantly greater than an

against federal judges. *Judicial Conduct and Discipline in the United States Federal Courts*, FED. JUD. CTR. (Sept. 17, 2014), <https://www.fjc.gov/content/judicial-conduct-and-discipline-united-states-federal-courts-english-original> [<https://perma.cc/EV2V-LLXE>] [hereinafter *Judicial Conduct and Discipline*]. “Corrective measures by the council may include temporarily suspending case assignments, providing informal counseling, or issuing censure or reprimand. Action by the Judicial Conference may include additional corrective measures and, if deemed appropriate, recommendation to the House of Representatives that the offending judge be impeached.” *Id.* State judges are bound by the rules of that state, which may include guidance from the state constitution and state bar. See MODEL RULES FOR JUD. DISCIPLINARY ENF’T R. 6 (AM. BAR ASS’N 2018) (providing a list of possible sanctions for unethical judicial conduct, usually overseen by the state’s highest court, including removal, suspension, limitation, reprimand, admonition, or deferred discipline agreement); see also CYNTHIA GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 1 (2002) (ebook) https://www.ncsc.org/__data/assets/pdf_file/0026/18881/study-of-state-judicial-discipline-sanctions.pdf [<https://perma.cc/6SHU-B5X5>] (surveying state judicial discipline systems and providing a framework for judicial discipline).

24. It is worth noting that “[t]here have been only 15 judicial impeachments in U.S. history, and only eight U.S. judges have been convicted and removed.” *Judicial Conduct and Discipline*, *supra* note 23. Critics have argued the enforcement of judicial misconduct needs improvement, especially in the context of the #MeToo movement and particularly in state courts. See Nancy L. Sholes, Note, *Judicial Ethics: A Sensitive Subject*, 26 SUFFOLK U.L. REV. 379, 403 (1992) (suggesting interpretative analysis of ethical rules to deter judicial misconduct); Aebra Coe, *Escape Hatch Remains for Judges Accused of Misconduct*, LAW360 (Apr. 17, 2019, 8:51 PM), <https://www.law360.com/articles/1151097> [<https://perma.cc/U9GA-DC3T>] (suggesting a judge could step down when faced with potential misconduct sanctions because rules governing conduct only apply to sitting judges); Erin Coe, *Discipline Rare for State Judges in Sexual Misconduct Cases*, Employment Authority, LAW360 (Apr. 15, 2019, 10:10 PM), <https://www.law360.com/employment-authority/articles/1149299/discipline-rare-for-state-judges-in-sexual-misconduct-cases> [<https://perma.cc/FP27-N67S>] (“There are lots of different factors in determining an appropriate sanction.”); Erin Coe, *State of Confusion: Wall of Secrecy Surrounds Sexual Harassment in State Courts*, LAW360 (Apr. 16, 2019), <https://www.law360.com/articles/1149753/print?section=aerospace> [<https://perma.cc/3M6P-6HT2>] (“One of the things we’ve learned from #MeToo is that complaints are often not isolated . . .” (internal quotation marks omitted)).

25. Stephen B. Burbank, *Judicial Independence, Judicial Accountability, & Interbranch Relations*, 95 GEO. L.J. 909, 914 (2007) (quoting Richard S. Arnold, *From the Bench Judges and the Public*, 9 LITIG. 5, 5 (1983)).

anonymous law clerk.²⁶ Numerous additional forces constrain judicial behavior,²⁷ which makes this “derivative” conception an inappropriate doctrine upon which to base clerkship ethics. Lastly, not all clerkships live up to the idealized vision of mentorship, friendship, and intellectual transformation, and not all judge-clerk relationships are equally close; thus making this relationship the basis of an ethical duty may not be fair or effective for all law clerks.²⁸

2. State Professional Rules of Conduct

Law clerks, if barred, are bound by the professional rules of the state in which they are barred.²⁹ As one commentator observed, however:

Two problems arise First, many clerks are not members of the bar during their clerkships and therefore would not be bound by the Code. Second, even for those clerks who are members of the bar, it is unclear whether the judge can be considered a “client” of the clerk, because the traditional clerk assigned to a particular judge is employed to assist that judge in performing a public function rather than to represent his or her personal interests.³⁰

While there are a growing number of clerks with prior legal work experience, a large portion begin immediately upon graduation from law school and are

26. See, e.g., Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMP. L. 228, 228 (2009) (“Reputation is crucial in many arenas, and judging is no exception. A judge with a good reputation will enjoy the esteem of his friends and colleagues and may have chances for advancement to higher courts. If particularly well-known, he or she will have a legacy that endures long after death . . .”).

27. See Burbank, *supra* note 25, at 912 (discussing goals for judicial accountability); Charles G. Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RESV. L. REV. 911, 916–17 (2006) (characterizing accountability as an instrumental value promoting distinct ends); see also Philip L. Dubois, *Accountability, Independence, & the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 49 (1986) (discussing the impact of elections on judicial accountability).

28. See Paul Horwitz, *Clerkships Are, or Can Be, Just Jobs. Maybe It's Better That Way*, PRAWFSBLAWG (Dec. 11, 2017), <https://prawfsblawg.blogs.com/prawfsblawg/2017/12/clerkships-are-or-can-be-just-jobs-maybe-its-better-that-way.html#comments> [<https://perma.cc/K42Q-QTNZ>] (“Of course, many clerks don’t have this kind of experience. Their clerkship is indeed just a job. It might be one of the best jobs one ever has, but it is still just a job. And the judge one works for is clearly one’s boss: not one’s second father or mother, grandfather or grandmother, or friend, or even necessarily one’s mentor . . .”).

29. This Article will rely on the ABA Model Rules of Professional Conduct, though each state has rules that vary from the model rules. See generally MODEL RULES OF PROF’L CONDUCT R. 1–8.5, 1.12 (AM. BAR ASS’N 2021) (providing A.B.A. standards for regulating and maintaining the integrity of the legal profession).

30. Comment, *supra* note 14, at 1245–46.

thus unbarred. For those who are barred, there remains a question of which rules would apply. Even if the professional rules of behavior are interpreted to their outermost extreme, the tangible guidance provided to law clerks is left wanting.

Firstly, clerks are not permitted to work on matters in private practice on which they worked as clerk, under Rule 1.12. Then, if we assume that a clerk's client is some combination of their judge, the judiciary, the Constitution, and the American public, then certain rules could theoretically apply. The clerk could have duties related to competence,³¹ diligence,³² confidentiality,³³ conflicts of interest,³⁴ and integrity.³⁵ However, applying those rules to clerks strains the intent of the Model Rules. How can we possibly equate an attorney's relationship with a client to a clerk's relationship with the judiciary, a judge, or the public? The relationships are fundamentally different. This difference causes the type of information we wish for clerks to keep confidential to also be different and, perhaps, more restrictive than Rule 1.6 contemplates.³⁶ Even if these model rules were applied to clerks, their meaning would be vastly different than as applied to an attorney representing a traditional client, and clerks are left in the dark on the contextual meaning of the rules.

31. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 (AM. BAR ASS'N 2021) ("A [clerk] shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

32. *Id.* at R. 1.3 ("A [clerk] shall act with reasonable diligence and promptness in representing a client.").

33. *Id.* at R. 1.6.

34. *Id.* at R. 1.11. Rule 1.11(d)(2)(ii) expressly permits law clerk hiring: "[A] lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b)." *Id.* at R. 1.11(d)(2)(ii). This subsection does not act as a standalone rule regulating law clerk behavior, but acts as an exception to the general prohibition against "negotiate[ing] for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially . . ." *Id.*

35. *Id.* at R. 8.4 (providing examples of what constitutes professional misconduct).

36. For instance, even with the informed consent of the parties, information might still be best kept confidential for the protection of third parties. *Id.* at R. 1.6(a) (requiring an attorney to obtain a client's informed consent to reveal confidential information). Whether a clerk may divulge information to prevent a crime or fraud seems like a different question than whether a representing attorney may do so. *Id.* at R. 1.6(b)(2) (permitting a lawyer to reveal a client's confidential information under certain circumstances). Additionally, a clerk should not disclose certain types of personal information about her judge, even if it is unrelated to any pending case, to avoid parties gaining improper insight into the functioning of chambers. *Id.* at R. 1.6.

The duties of competence, diligence, and integrity are perhaps more readily applied to clerks.³⁷ Unfortunately, or perhaps fortunately, competence and diligence are the duties least in need of formalization, because the clerk's employer or supervisor can directly monitor her clerks and mete out discipline for incompetent or negligent work. Rule 8.4 prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation[,]" as well as conduct "that is prejudicial to the administration of justice[,]"³⁸ and the rule is not limited to the attorney-client relationship, making it well-suited to govern clerk behavior. However, Rule 8.4 provides little behavioral guidance within the nuanced ethical landscape of a federal clerkship.³⁹ It could be useful for sanctioning clearly malfeasant or dishonest clerks, but it does little to define the contours of a clerk's ethical obligations.⁴⁰ In sum, Rule 8.4 restricts the role of clerks. Rule 1.12 even more directly limits the ability of former clerks to represent parties on matters they were privy to as clerks.⁴¹ But the vast majority of rules have limited applicability, providing minimal guidance to a clerk seeking direction on how to handle complex situations.⁴² The role of a code of ethics is as much about providing guidance to the attorney of integrity as it is about sanctioning the malfeasant attorney.

37. *Id.* at R. 1.1, 1.3, 8.4.

38. *Id.* at R. 8.4.

39. *Id.* at R. 8.4 (listing loosely associated categories of prohibited behavior).

40. One possible, though unprecedented, interpretation of Rule 8.4 would be to infuse the words "prejudicial to the administration of justice" with the Code of Conduct for Judicial Employees and the Clerk's Handbook. *Id.* at R. 8.4(d). A breach of the Code of Conduct would be a breach of Rule 8.4. On top of requiring significant interpretation outside its intent, Rule 8.4 thus construed would still offer limited guidance to clerks post-clerkship, as the judicial code itself predominantly deals with during-clerkship activities.

41. Rule 1.12(a) places strict limits on some former clerks. *See id.* at R. 1.12(a) ("[A] lawyer shall not represent anyone in connection with a matter in which the lawyer *participated personally and substantially* as a . . . law clerk" unless they obtain written consent from all parties (emphasis added)). This rule helpfully governs potential conflicts involving barred former law clerks. It is not, however comprehensive in its scope, but is limited to preventing a clerk with insider knowledge of a specific dispute to work on that dispute.

42. Former clerks may find some direction from former employers when attempting to avoid disqualification from cases due to a conflict. 9TH CIR. R. 46-5 (prohibiting former employees from participating or assisting in any matters that were pending before the court during their employment, but allowing an exception for those who show they "had no direct or indirect involvement with the case"). *Cf. infra* text accompanying note 108 (highlighting the potential appearance of impropriety in ungoverned areas).

A professional rule defining a clerk's obligations, if drafted properly, could bind both barred as well as unbarred clerks.⁴³ State bar associations already regulate the unauthorized practice of law by lawyers not admitted to practice in that state's jurisdiction.⁴⁴ This scope of authority is vast and seems limited by the governed individual's desire to practice as a member of the legal profession.⁴⁵ It can be assumed that federal clerks place a high value on authorization to practice law in their jurisdiction of choice, regardless of whether they are currently barred. State sanctions in the jurisdiction in which the federal court is located would affect that authorization and give teeth to a state's oversight of clerk ethics.

3. The Federal Code of Conduct for Judicial Employees

Clerks, along with all other judiciary employees, are bound by the Code of Conduct for Judicial Employees.⁴⁶ The code contains five canons, including that “[a] Judicial Employee Should”: (1) “Uphold the Integrity and Independence of the judiciary and of the Judicial Employee’s Office”;

43. Such a rule fits squarely within the purpose of bar associations “to benefit the general public by protecting and strengthening the administration of justice, by enhancing public understanding of and respect for law and legal institutions, and by identifying and advocating needed changes in the law and opposing those they consider undesirable.” Quintin Johnstone, *Bar Associations: Policies and Performances*, 15 YALE L. & POL’Y REV. 193, 195–96 (1996).

44. MODEL RULES OF PROF’L CONDUCT R. 8.5 cmt. 1 (AM. BAR ASS’N 2021) (“It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction.”).

45. State bar association authority to enforce disciplinary action is delegated from the state’s highest court. See *Professional Discipline*, WASH. STATE BAR ASS’N (June 8, 2021), <https://www.wsba.org/for-legal-professionals/professional-discipline> [<https://perma.cc/Q3HK-9VEC>] (indicating the Washington Supreme Court has exclusive authority over the state’s lawyer disciplinary system). In Delaware, the highest court’s authority can be found “[p]ursuant to the Court’s inherent power and authority over the regulation of the legal profession . . .” DEL. LAW.’S R. OF DISCIPLINARY PROC. R. 1.

46. See 2A JUD. CONF., GUIDE TO JUDICIARY POLICY: CODE OF CONDUCT FOR JUDICIAL EMPLOYEES CH. 3, § 310.30(a), § 310.30(b) (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_judicial_employees_effective_march_12_2019.pdf [<https://perma.cc/BK9A-6H99>] [hereinafter CODE OF CONDUCT FOR JUDICIAL EMPLOYEES] (defining “Member of Judge’s Personal Staff” as “a judge’s secretary or judicial assistant, a judge’s law clerk, intern, extern, or other volunteer court employee, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge’s personal staff”).

(2) “Avoid Impropriety and the Appearance of Impropriety in All Activities”; (3) “Adhere to Appropriate Standards in Performing the Duties of the Office”; (4) “In Engaging in Outside Activities, . . . Avoid the Risk of Conflict with Official Duties, . . . Avoid the Appearance of Impropriety, and . . . Comply with Disclosure Requirements”; and (5) “Refrain from Inappropriate Political Activity[.]”⁴⁷ The Judicial Conference Committee on Codes of Conduct has published numerous “formal advisory opinions on ethical issues that are frequently raised or have broad application.”⁴⁸ A handful of these opinions provide guidance for common situations law clerks specifically face, including: situations where a party is represented by a clerk’s spouse’s law firm;⁴⁹ a child of the judge wishes to serve as a law clerk;⁵⁰ a clerk’s future employer is involved in the case;⁵¹ a clerk wishes to attain a conflicts list of case assignments;⁵² allowable social media usage;⁵³ and a clerk’s participation in educational seminars.⁵⁴ There is also an internal compendium of ethical advisory opinions, but this compendium is confidential to the judiciary.

For direct and comprehensive advice on their ethical responsibilities, a clerk turns to *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks*, a handbook promulgated by the FJC explaining how the Code of Conduct for Judicial Employees applies to law clerks.⁵⁵ This “Clerk’s Handbook” is not an independent source of authority, but an interpretation of the five canons in the Code of Conduct. The thirty-eight page pamphlet contains sections on: general approaches to an ethics question; confidentiality; conflicts of interest; political activities, online activities, and gifts; community activities; and career development.⁵⁶ The Clerk’s Handbook is

47. See *id.* § 320 (listing canons of conduct for judicial employees).

48. *Published Advisory Opinions*, U.S. CTS., <https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies/published-advisory-opinions> [<https://perma.cc/FP3Z-VPVE>].

49. 2B JUD. CONF., GUIDE TO JUDICIARY POLICY: PUBLISHED ADVISORY OPINIONS CH. 2, No. 51, at 66 (2019), <https://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf> [<https://perma.cc/KW5C-F9ZW>] [hereinafter GUIDE TO JUDICIARY POL’Y, PUBLISHED ADVISORY OPINIONS].

50. *Id.* at 88.

51. *Id.* at 110.

52. *Id.* at 213.

53. *Id.* at 224.

54. *Id.* at 245.

55. See FED. JUD. CTR., *supra* note 1, at 2 (“To help you get started, the federal judiciary’s ethics committee, known as the Judicial Conference Committee on Codes of Conduct (the Committee), prepared this pamphlet in cooperation with the Federal Judicial Center. This pamphlet provides an overview of your ethical obligations as well as resources you can consult for further information.”).

56. *Id.* at iii.

typically assigned on the first day of the clerkship and conveys the responsibility and ethical duties that attach to the role of the clerk.⁵⁷ It provides helpful descriptions of the ethical obstacles a clerk may face,⁵⁸ with examples as well as references to outside sources one can look for advice. The locations a clerk can look to for guidance include: (1) The Code of Conduct for Judicial Employees; (2) The Ethics Reform Act of 1989 and regulations promulgated under the Judicial Conference; (3) Judicial Conference Committee Advisory Opinions on Codes of Conduct; and (4) the Compendium of Selected Opinions.⁵⁹

The judiciary's Code of Conduct, advisory opinions, Clerk's Handbook, and confidential compendium, while framed as ethics rules, are best seen as contractual obligations of judicial employees.⁶⁰ In fact, formal guidance by the Advisory Committee notes that "The Code of Conduct for Judicial Employees applies only to 'employees of the Judicial Branch,' not to prospective employees[.]" and "[a]s with prospective clerks, the Code and [Section] 7353 do not apply to former clerks[.]"⁶¹ Interestingly, the FJC's Clerk's Handbook offers conflicting counsel: "Although many of your obligations are the same as those of other federal judicial employees, certain restrictions are more stringent *because of your special position in relation to the judge. Some obligations continue after your service to the court concludes.*"⁶² Specifically, the handbook reads "[d]uring your clerkship, you will learn a broad range of confidential information. . . . You have a *strict obligation* to keep this information confidential, unless your judge specifically authorizes you to disclose it. *This obligation continues after your court service concludes.*"⁶³ This

57. *See id.* at 1 ("Scrupulously follow these canons and the other rules that govern your conduct. Do not assume that good intentions are enough.").

58. For instance, the Handbook explains when a clerk is allowed to reference her role in the court on social media or online activities. *See id.* at 17 (providing examples of a clerk's permissible and impermissible use of social media during a clerkship).

59. *See id.* at 3 ("The Compendium contains summaries of confidential advice that the Committee has offered in response to individual inquiries from judges and judicial employees.").

60. On the U.S. Courts' website, the Code of Conduct for Judicial Employees is described as follows: "Employees of the federal Judiciary are expected to observe high standards of conduct so that the integrity and independence of the Judiciary are preserved and the judicial employee's office reflects a devotion to serving the public." *Ethics Policies*, U.S. CTS., <https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies> [<https://perma.cc/NY7U-VR3P>].

61. GUIDE TO JUDICIARY POL'Y, PUBLISHED ADVISORY OPINIONS, *supra* note 49, at 125–26.

62. FED. JUD. CTR., *supra* note 1 (emphasis added).

63. *Id.* at 5 (emphasis added).

statement appears to contradict the judiciary's formal advisory opinions; perhaps the FJC sees federal clerks as bound by something more than just the Code of Conduct for Judicial Employees.⁶⁴ The most likely explanation, from the wording of the Clerk's Handbook and the traditional understanding of a clerkship, is that the FJC views clerks through the appendage of the judge framework. As I will discuss, this is an imperfect basis for a constitutionally imperative ethical obligation. Although the Code of Conduct for Judicial Employees, with clerk specific guidance, provides a useful and temporarily binding set of duties, it is not equivalent to or an adequate substitute for a professional rule of behavior.

B. *Ethics After One's Clerkship*

During one's clerkship term, ethics guidelines are comprehensive. However, formal advisory opinions tell us the authority behind the Code of Conduct for Judicial Employees does not continue post (or pre-⁶⁵) clerkship. Thus, clerks are left wondering how to treat ethical dilemmas that emerge later but relate to the clerkship.⁶⁶ Former clerks can turn to the

64. The Clerk's Handbook references the continuing obligations once more:

Finally, your ethical obligations impose certain ongoing restrictions that follow you to the next step in your career. You may not participate in any matter that was pending before your judge during your clerkship. Your judge may have a policy about whether you may appear before the judge and, if so, how much time must first elapse. The court for which you clerked may also place restrictions on your participation and appearance in matters. It may be helpful to check on these restrictions before your clerkship ends. And, of course, your confidentiality obligations continue.

Id. at 25; *cf.* FED. CIR. R. 50 (prohibiting an attorney's participation in a case when that attorney is a former employee, such as a law clerk); 9TH CIR. R. 46-5 (excepting prohibited participation in a case if an attorney shows they did not directly or indirectly participate in such a case during their employment); MODEL RULES OF PROF'L CONDUCT R. 1.12(a) (Am. Bar Ass'n 2021) (restricting an attorney's participation in a case when that attorney participated personally and substantially in such case during her clerkship).

65. Although this article focuses on the need for ethical rules to govern attorney behavior post-clerkship, the time prior to a clerkship is even less regulated, and neither the Judiciary's Code of Conduct, nor any other authority offers guidance or purports to adequately govern this period. Especially with the growing number of lawyers working in private or public practice prior to their clerkship, there are countless situations one could envision that call for the exercise of ethical judgment relating to one's upcoming clerkship. *See, e.g.*, CODE OF CONDUCT FOR JUDICIAL EMPLOYEES, *supra* note 46, at 1 ("This Code of Conduct applies to all employees of the judicial branch, including interns, externs, and other volunteer court employees . . .").

66. Even if we accept, at face value, the Clerk's Handbook requirement that former clerks continue to follow a duty of confidentiality and avoid conflicts of interest, there are other duties that should continue. Just as current clerks are not permitted to leverage their position in the Judiciary for

same sources described in the previous section: their state bar, their continued respect for their judge, and the demands of maintaining a strong professional reputation.

Now that the clerkship term has passed, it is safer to assume that a law clerk is a member of a state bar. The judiciary, the judge, and the United States are still not the clerk's client (or former client), and Rules 8.4 and 1.12 remain the only directly applicable authorities.⁶⁷ And while a state bar might be more likely to investigate and sanction a practicing attorney under those rules for abusing her former position in the judiciary,⁶⁸ this potential for increased oversight does little to offer guidance for complex scenarios to former clerks.

The clerk's continued respect and loyalty to the judge is now perhaps the strongest force preventing unethical exploitation of the experience. Such a basis for ethical responsibility is innately personal, and it is unwise to expect all attorneys to practice equivalent judgment in balancing the interests of their former employer with the interests of their current client. Attorneys have financial incentives and a duty to zealously advocate for their clients,⁶⁹ and a personal relationship to one's judge should not be institutionally relied upon as the bulwark against behavior that could benefit one's client at the expense of the judiciary. Lastly, the appendage conception of the clerk breaks down entirely post-clerkship. How can an attorney representing a client and appearing before the court in her own name remain an arm of the judge?

personal gain, so too should former clerks be prevented from using their prior judicial position to their improper personal advantage, for instance, promising access to one's judge in exchange for personal benefit. An example might be a law professor who previously clerked for a prominent judge promising a clerkship recommendation to a law student mentee, but only if that student jumps through a series of exploitive and inappropriate hoops.

67. MODEL RULES OF PROF'L CONDUCT R. 8.4 (governing an attorney's misconduct); *Id.* at R. 1.12(a) (prohibiting clerks from working on cases with which they had substantial involvement).

68. *Id.* at R. 8.4, 1.12(A) (governing violations of prejudicial conduct toward the administration of justice and assisting a judge in a violation of judicial conduct).

69. For a discussion on the appropriate "zeal" with which attorneys should approach advocacy, see, e.g., Paul C. Saunders, *Whatever Happened to 'Zealous Advocacy'?*, 245 N.Y.L.J. 47, 47 (2011) ("There are those like Sylvia Stevens, the assistant general counsel of the Oregon State Bar, who believe that zealousness is 'the highest manifestation of professionalism.' Others like John Conlon, the managing attorney for SAFECO Insurance Companies, believe that 'zealous advocacy is not viewed so much as an ethical responsibility as it is a weapon to use to club opponents.'" (footnote omitted)).

A new duty does grow post-clerkship—the need to protect one’s name and reputation as a practicing attorney.⁷⁰ This reputational responsibility is multifaceted, and attorneys cultivate different reputations depending on the clients they represent.⁷¹ However, it befits any attorney who frequently appears before the court to protect their reputation, at least in the eyes of the judge, as ethical, responsible, and honest.⁷² The judge is more likely to trust that arguments from an attorney of high standing are legally and factually accurate. Former law clerks are valued by firms and clients in part for their ability to bring an already trusted reputation before the judge,⁷³ and this reputation is not something many clerks would readily jeopardize. Still, as a profession we do not trust legal ethics to reputational incentives, for a multitude of reasons, nor should we do so for former clerks.

This leaves the judiciary’s code of conduct and related authorities. The formal advisory opinions associated with the code, and the code itself, explicitly state the code only applies to “employees of the Judicial Branch,” not former clerks,⁷⁴ even if the Clerk’s Handbook and other advisory opinions suggest post-clerkship obligations.⁷⁵ The handbook’s call for continuing ethical obligations seems to fit within the age-old conception of a clerk as bound by an ethereal authority that unites the clerk and her judge.

70. See Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 173 (2008) (discussing the ways in which a lawyer’s reputation is pivotal in attracting clients); Chantal Bechervaise, *Why Does Reputation Matter So Much to Law Firms?*, TAKE IT PERSONEL-LY (June 19, 2016), <https://takeitpersonally.com/2016/06/19/why-does-reputation-matter-so-much-to-law-firms/> [https://perma.cc/E5YL-51TR] (“Reputation is of the highest importance to attorneys, because it drives a big portion of their demand among clients.”); Philip W. Thomas, *Mississippi Judges Stress the Importance of Professional Reputation*, MS LITIG. REV. & COMMENT. (Sept. 2, 2014), <https://www.mslitigationreview.com/2014/09/articles/general-1/mississippi-judges-stress-the-importance-of-professional-reputation/> [https://perma.cc/TM5S-53FJ] (providing comments regarding a recurrent theme during interviews placing an importance on an attorney’s reputation with judges).

71. Zacharias, *supra* note 70, at 179 (“Just as there are various kinds of reputation, a single reputation can have multiple effects.”).

72. See generally, Thomas, *supra* note 70 (“[T]reat your clients, your adversaries, your peers and the court with respect and courtesy . . . and be honest and straightforward in your presentations to the court.” (internal quotation marks omitted)).

73. Garoupa & Ginsburg, *supra* note 26, at 229 (identifying important roles judicial reputation plays on professional norms).

74. See *supra* text accompanying note 61; GUIDE TO JUDICIARY POL’Y, PUBLISHED ADVISORY OPINIONS, *supra* note 49, at 124–26 (applying the Code of Conduct only to Judicial Branch employees, not prospective or former employees, which would include former law clerks).

75. See GUIDE TO JUDICIARY POL’Y, PUBLISHED ADVISORY OPINIONS, *supra* note 49, at 213 (mandating judicial employees “should never disclose any confidential information” binding “clerks even after their clerkships end[]”); see also FED. JUD. CTR., *supra* note 1, at 25 (“[Y]our ethical obligations impose certain ongoing restrictions that follow you to the next step in your career.”).

This conception, however, is inadequate to ensure the ethical behavior of practicing attorneys.

III. WHY DO WE NEED A NEW FRAMEWORK?

A. Ensuring the Protection of Confidential Information

1. A Continuing Ethical Obligation Post-Clerkship

A clerk's ability to keep confidential judiciary information confidential is just as important post-clerkship as it is during the clerkship. "Preserving the confidentiality of judges' work has been 'an honored tradition among law clerks[.]'"⁷⁶ This confidentiality protects the sanctity of judicial decisions, the appearance of impartiality, and maintains a fair playing field among parties.⁷⁷ While the duty is rigidly protected via a code of conduct during one's clerkship, after one's clerkship loyalty and reputation seem to be the chief enforcers of continued confidentiality. As one commentator lamented nearly forty years-ago, in response to the publication of a book peering inside the Supreme Court, "[t]his traditional secrecy recently was shattered by the publication of *The Brethren* The authors of *The Brethren* asserted that 170 former law clerks were among their anonymous sources and that 'dozens of sources' handed over conference notes, diaries, unpublished opinion drafts, and internal memoranda between [Supreme Court] Justices."⁷⁸ The commentator concluded that "[n]either the loyalty of clerks nor the remedies usually provided under contractual or fiduciary theories furnish sufficient assurance that confidential information will be protected."⁷⁹ Books providing controversial insight to the judiciary, and especially the Supreme Court, have only increased since the 1979 publication of *The Brethren*.⁸⁰

76. Comment, *supra* note 14, at 1230 (quoting Wright, *supra* note 15).

77. See, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 22, at 11 (promoting public confidence "when judges take appropriate action based on reliable information of likely misconduct").

78. Comment, *supra* note 14, at 1230 (footnotes omitted) (quoting BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 4 (1979)).

79. *Id.* at 1262.

80. See Joan Biskupic, *Ex-Supreme Court Clerk's Book Breaks the Silence*, WASH. POST (Mar. 4, 1998), <https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/wp030498.htm?noredirect=on> [<https://perma.cc/392Y-FFYU>] (providing controversial insight into

The Volume 129 editors of the *University of Pennsylvania Law Review* proposed

a set of guidelines be adopted to govern the law clerk's confidentiality duty, with enforcement varying according to the type of information involved. . . . The guidelines would be [enforced] by disciplinary action similar to that currently used to enforce the ABA Code of Professional Responsibility. The proposed guidelines, if adopted, thus would provide law clerks with a clear, uniform idea of the scope of their confidentiality duty.⁸¹

Four decades later, I propose a similar solution for reasons including, but more expansive than, a duty of confidentiality.

The reasons for continued clerkship confidentiality extend beyond preventing improper insight into the judicial decision-making process. A duty of confidentiality would work to prevent all manners of subversion and exploitation of the judiciary. While Supreme Court tell-alls make for clear-cut examples of a breach of confidentiality, much more insidious behavior is possible. A particularly colorful example of an attempt at such subversion comes from a Massachusetts disbarment proceeding, *In re Crossen*.⁸²

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

the judiciary); see also Ronald Collins, *New or Forthcoming Books on the Supreme Court, Including One by Justice Stephen Breyer*, SCOTUSBLOG (Aug. 10, 2015, 10:07 AM), <https://www.scotusblog.com/2015/08/new-or-forthcoming-books-on-the-supreme-court-including-one-by-justice-stephen-breyer/> [<https://perma.cc/36K3-RYH7>] (listing “[e]ighteen new or forthcoming books” providing this insight); Tony Mauro, *New Book Tells Inside Stories of Feuding Justices, Anger Toward Trump*, THE NAT'L L.J. (Sept. 4, 2018, 12:30 PM), <https://www.law.com/nationallawjournal/2018/09/04/new-book-tells-inside-stories-of-feuding-justices-anger-toward-trump/?slreturn=20190508131227> <https://perma.cc/6YQJ-MVUP> (“telling behind-the-scenes stories about U.S. Supreme Court justices . . .”).

81. Comment, *supra* note 14, at 1262.

82. *In re Crossen*, 880 N.E.2d 352 (Mass. 2008).

decided the outcome of the case prior to hearing evidence. The job interview ruse was continued several weeks later in New York City, essentially in an effort to elicit more specific, and hopefully admissible, evidence of prejudgment by the trial judge. Finally, when the results of the two fake job interviews yielded less than the lawyers had hoped they would, a third interview was arranged with the law clerk—this time in Boston—for the purpose of “brac[ing]” the former law clerk. This included revealing that the job offer was false and threatening to go public with information that would be damaging to the former law clerk, unless the law clerk cooperated with the lawyers by signing a statement that would more clearly support the claim of the trial judge’s prejudgment. Instead, the former law clerk went to the FBI and participated in a reverse sting that eventually resulted in the exposure of the lawyers and bar discipline proceedings.⁸³

The Massachusetts Bar found that the ruse ran “afoul of proscriptions on lying, deceiving, and making misrepresentations.”⁸⁴ However, the author of the above passage commented that “courts should be concerned that their former clerks, and apparently some lawyers, generally do not share this understanding[]” that “ex parte contacts with law clerks and judges generally, [are] clearly an impermissible interference with a judge-law clerk confidential relationship that would be inconsistent with fundamental principles governing the administration of justice.”⁸⁵ Left unanswered is whether discipline could be applied to the law clerk. If a lawyer asks a former clerk for insider judiciary information for clearly improper purposes, what could happen to the clerk if they willingly oblige?

There are many reasons why clerks make valuable attorneys; for one, law firms value a clerk’s insight into the judicial decision-making processes. It is striking that disciplinary rules do not appear to prevent a clerk from disclosing confidential information during, for example, the above fraudulent recruitment.⁸⁶ It is possible that, in a situation where the clerk

83. Charles W. Sorenson, Jr., *Are Law Clerks Fair Game? Invading Judicial Confidentiality*, 43 VAL. U.L. REV. 1, 2–3 (2008) (alteration in original) (footnotes omitted).

84. *Id.* at 3.

85. *Id.* at 4–5.

86. On the other hand, there might be circumstances under which a clerk should be permitted to disclose confidential insight into judicial decision-making. For instance, what if they have good reason to believe the judge is making a decision for improper reasons, such as an undisclosed conflict of interest or bias? An interesting example is seen in a Minnesota criminal trial where affidavits from the trial judge’s law clerks were employed by a party in the appeal process. See Peter N. Thompson,

sold the information for a job offer or other monetary reward, it would reflect poorly upon their fitness to practice as an attorney. Ultimately, however, there may be limited enforceable duty to keep the information confidential.⁸⁷

Some disclosures by former clerks are likely harmless or even beneficial to the fair administration of justice. Former clerks often advise their superiors and their clients on the preferences of a judge, court, or circuit: perhaps the judge strictly adheres to time constraints at hearings, is skeptical of motions for summary judgment in bench trials, or finds grammatical mistakes particularly noxious. Maybe a circuit frequently draws insight from a different circuit for a particular area of law. Armed with this knowledge, the former clerk can advocate on behalf of her client effectively and efficiently. Rather than tainting the administration of justice, this insight likely facilitates the efficient use of judicial resources.

We can, however, push this hypothetical into controversial territory. Perhaps the judge confided to the clerk on a private occasion that she would like to see the law move in a particular direction. The utilization of this private musing feels much more like a confidential look inside the wheels of justice than effective or fair advocacy. Then again, if that musing is consistent with the judge's public statements or dicta in prior cases then maybe it could be ethically disclosed to one's client. Continuing on this path, what if the former clerk is aware the judge is expecting a child at the end of the summer, and as a result, advises her firm to file a particularly important motion in April rather than August? This also carries an air of impropriety; the spreading of that information does not clearly benefit the judicial process. At best, its disclosure prejudices the other party; at worst, it weakens the integrity of the judiciary. In sum, the forces preventing a

Confidentiality in Chambers: Is Private Judicial Action the Public's Business?, 62 BENCH & BAR 14, 16 (2005) ("[The trial judge] told the law clerks that he had 'denied defense counsel's challenges for cause because he was angry with them.' . . . The Supreme Court never questioned the propriety of the judge's law clerks working with, or at least supplying affidavits to defense counsel revealing private communications with the trial judge.") (quoting *Greer v. Minnesota*, 673 N.W.2d 151, 154 (Minn. 2004)). The commentator goes on to describe how under-developed this area of the law is, with little in the way of tangible law preventing the continued use of law clerk affidavits to undermine judicial decisions. *Id.* at 17. He suggests seven possible solutions, including a clerk's code of conduct, criminal laws, a statutory privilege, a common law rule, an evidence rule, an ethics code development, or a contractual confidentiality. *Id.* at 17-18. Today, Rule 1.12(a) might prohibit such law clerk affidavits related to matter on which they worked, if such affidavits were used in the representation of a client.

87. See FED. CIR. R. 50 (restricting an attorney's appearance before the court).

clerk's disclosure of this personal information are her loyalty to the judge and respect for the judiciary.

2. Providing Former Clerks Guidance

An ethics rule would not just prevent the disclosure of confidential information; it would provide clerks with guidance on when they may, or even should, disclose private happenings in chambers. As highlighted in the prior section, there could be innumerable hypothetical situations where a clerk or former clerk needs advice on whether information should be kept confidential. The bar could serve a useful role by offering guidance to them on the propriety of certain disclosures, beyond merely forbidding participation in matters the clerk worked on in chambers.⁸⁸

3. An Ear to Turn to When Confidentiality No Longer Applies

The Clerk's Handbook explicitly and repeatedly notes that the confidentiality "obligation does not apply to misconduct, including sexual or other harassment, by your judge or any person."⁸⁹ A robust, clear, and supportive reporting system is important for law clerks, given the possibility of abuse,⁹⁰ and the judiciary has undergone significant efforts in recent years

88. See Stuart C. Gilman, *Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons*, PREM 3 (2005), <https://www.oecd.org/mena/governance/35521418.pdf> [<https://perma.cc/99GN-NZK9>] ("[C]odes carry general obligations and admonitions, but they are far more than that. They often capture a vision of excellence, of what individuals and societies should be striving for and what they can achieve. In this sense codes, which are often mistaken as part of law or general statements of mere aspiration, are some of the most important statements of civic expectation."); see also *id.* at 7 ("Codes are not designed for 'bad' people, but for the persons who want to act ethically.").

89. FED. JUD. CTR., *supra* note 1, at 5.

90. See Alison Frankel, *Breaking the Law Clerks' Code of Silence: The Sexual Misconduct Claims Against Judge Kozinski*, REUTERS (Dec. 13, 2017, 3:57 PM), <https://www.reuters.com/article/us-otc-kozinski/breaking-the-law-clerks-code-of-silence-the-sexual-misconduct-claims-against-judge-kozinski-idUSKBN1E72YX> [<https://perma.cc/SHP4-GF5A>] (discussing the sexual misconduct allegations against Judge Kozinski and the challenges clerks face when reporting inappropriate conduct); Dana Liebelson et. al., *Law Clerks Say Federal Judiciary Isn't Equipped to Handle Sexual Harassment*, HUFFPOST (Dec. 20, 2017, 8:47 PM), https://www.huffingtonpost.com/entry/federal-court-clerk-sexual-harassment-judges_us_5a3acf5ac4b025f99e1449f8 [<https://perma.cc/6U5Z-EMJ8>]; Staci Zaretsky, *Federal Judge Allegedly Has Affair with Law Clerk, Goes to Jail over Domestic Violence Incident*, ABOVE THE L. (Aug. 12, 2014, 12:14 PM), <https://abovethelaw.com/2014/08/federal-judge-allegedly-has-affair-with-law-clerk-goes-to-jail-over-domestic-violence-incident/> [<https://perma.cc/BMP4-HV95>]. Compare Gertner, *supra* note 20, at 89–90 (describing the Equal Employment Opportunity complaint process and acknowledging rules governing harassment are so vague they are

to fortify its mechanisms for handling both reporting and misconduct.⁹¹ This Article does not address the judiciary's internal systems, but rather suggests that a model professional rule on clerk and former clerk confidentiality would provide important external guidance on what may be fairly and ethically disclosed.

Accusing one's superior of misconduct carries grave professional and legal consequences, and a clerk may take comfort in external confirmation of the ethics and professionalism of their actions. The bar has the capability of offering advice on the ramifications of reporting information one's judge or former judge may not want publicized. State bar associations would, of course, need to enter such a delicate arena with reserve and nuance. This Article does not offer a specific proposal but envisions a committee of members of the bar available for judiciary ethics questions, perhaps consisting of former judges and clerks, as well as subject matter experts on types of abuse that might be reported.

B. *Reporting Violations and Policing Improper Conduct by Clerks*

What happens when a clerk breaches the Code of Conduct for Judicial Employees? Who reports the breach? The answer is, likely too often, no one. If the breach is detected at all, it is likely by a party appearing before the judge. Of course, the misconduct could also be detected by other members of chambers, but it is not a robust policy to expect that friends and colleagues of a clerk will readily suspect or report their unethical behavior. In an informative example, the plaintiff in a high profile civil rape case discovered that a law clerk “was sending text messages to [the defendant's] attorney, . . . [at] Zuckerman Spaeder (the firm where [the clerk's] father [was] also a partner), who she befriended over an unrelated legal matter where he represented her pro bono.”⁹² Released text messages

virtually unavailable to employees and judges) *with* Coe, *supra* note 20 (discovering “a cultural awakening and reckoning on” the issue of sexual harassment).

91. See *Judicial Conference Approves Package of Workplace Conduct Reforms*, U.S. CTS. (Mar. 12, 2019), <https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms> [<https://perma.cc/8FFR-C77X>] (“The federal Judiciary’s national policy-making body today approved a package of workplace conduct-related amendments stating the obligations of judges and Judiciary employees to report reliable information likely to constitute misconduct; making clear that confidentiality obligations should never be an obstacle to reporting judicial misconduct or disability; and specifying that retaliation for disclosing misconduct is itself misconduct.”).

92. See Joe Patrice, *Law Clerk Busted Getting Chummy with Lawyer Appearing Before the Court*, ABOVE THE L. (Oct. 22, 2015, 4:57 PM), <https://abovethelaw.com/2015/10/law-clerk-busted-getting->

stated “[y]ou’re going to owe me a beer, FYI,” and “[y]es, as of 3:34 today, you owe me a beer (or wine!)[,]” with the trial judge having issued a key decision at that exact moment.⁹³ District Court Judge Reggie Walton for the District of Columbia denied plaintiff’s motion for his recusal, writing: “To be sure, the Court does not condone these comments even though they were made in jest. There was no factual basis for them, and they should not have been made. . . . [H]owever, the ill-advised conduct by the law clerk provides no basis for the court to recuse itself,” and the court screened her from working on it.⁹⁴ After her clerkship ended, she became a trial lawyer at the United States Justice Department.⁹⁵

Conduct comparable to that law clerk by a practicing attorney could lead to a state bar investigation, and it is worth noting she is not the first or only clerk to find herself in the pages of a decision.⁹⁶ In this case, the law clerk faced very little consequence, beyond reputational damage. While she undoubtedly disappointed her judge, his written opinion stated that her actions were “in jest.”⁹⁷ Section 3(B)(6) of the Code of Conduct for United States Judges reads “[a] judge should take appropriate action upon receipt of reliable information indicating the likelihood that a judge’s conduct contravened this Code, that a judicial employee’s conduct contravened the Code of Conduct for Judicial Employees, or that a lawyer violated applicable rules of professional conduct.”⁹⁸ This suggestion of a duty to

chummy-with-lawyer-appearing-before-the-court/?rf=1 [https://perma.cc/M6NT-TD4C]
(elucidating the circumstances and context surrounding the story).

93. *Id.*

94. *Doe v. Cabrera*, 134 F. Supp. 3d 439, 441–42 (D.D.C. 2015).

95. Debra Cassens Weiss, *Law Clerk’s ‘Owe Me a Beer’ Text to Big Law Associate Leads to Review by Federal Judge*, A.B.A. J. (Oct. 22, 2015, 9:37 AM), http://www.abajournal.com/news/article/law-clerks_owe_me_a_beer_text_to_biglaw_associate_leads_to_review_by_federa [https://perma.cc/K74R-89BZ].

96. See Parker B. Potter, Jr., *Law Clerks Out of Context*, 9 U.N.H.L. REV. 67, 68 (2010) (discussing cases “in which law clerks have become sources of evidence in cases they were working on, as producers of exhibits, as affiants, or as witnesses.”).

97. Her actions violated the Code of Conduct for Judicial Employees regardless of whether they were serious or in jest because, at the very least, she created an appearance of bias. See, e.g., FED. JUD. CIR., *supra* note 1, at 5 (imposing a strict obligation on law clerks to keep case-related matters confidential).

98. CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 22, at 7; see generally Leslie W. Abramson, *The Judge’s Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751 (1997) (discussing judges’ duty to report other judges and lawyers engaging in unprofessional conduct).

report seems to include current law clerks, but the appropriate response is unclear. In this example, Judge Walton publicly acknowledged the event⁹⁹ and, in all likelihood, privately chastised the clerk. It is, however, questionable whether any judge should bear responsibility for determining the appropriate discipline in such a situation.

With a professional rule as guidance, a clerk could be considered a potential lawyer whose professional misconduct warrants bar discipline.¹⁰⁰ Under this conception, objective guidance and precedent would serve as a helpful source of reference when dealing with misconduct. While judges would still be in a position to take employment related action, a professional rule will make ethical or professional determinations for a young lawyer, rather than a judge with whom they have a personal relationship. As mentioned, the relationship between judge and clerk can be lastingly close which may make it difficult for a judge to consider the merits of a clerk's misconduct without bias.¹⁰¹ Additionally, lawyers appearing before the judge would have the ability, and perhaps obligation, to report the clerk's conduct to the state bar,¹⁰² as opposed to having only the unpalatable option of reporting a clerk to her judge. Much of the legal ethics landscape is built on duties to report colleagues' misconduct,¹⁰³ thus the judiciary

99. *Doe v. Cabrera*, 134 F. Supp. 3d 439, 443–44 (D.D.C. 2015) (acknowledging the indiscretion and providing steps for moving forward).

100. Whether the clerk is a lawyer may turn on whether they have been admitted into a state's bar association. *See, e.g.*, David Lat, *Elizabeth Wurtzel: Can She Call Herself a 'Lawyer' Without Having Passed the Bar?*, ABOVE THE L. (July 27, 2009, 4:00 PM), <https://abovethelaw.com/2009/07/elizabeth-wurtzel-can-she-call-herself-a-lawyer-without-having-passed-the-bar/> [https://perma.cc/KRB2-CE4U] (discussing how proclaiming oneself as a lawyer without being admitted to a bar in any state could be a violation of the New York Judiciary Laws).

101. Some jurisdictions go so far as to prevent former clerks from appearing before their judge for a designated amount of time post-clerkship. *See* ADVISORY COMM. ON JUD. CONDUCT OF THE D.C. CTS, ADVISORY OPINION NO. 13: DISQUALIFICATION WHEN FORMER CLERKS APPEAR BEFORE JUDGES (July 9, 2014) <https://www.dccourts.gov/sites/default/files/divisionspdfs/Disqualification-When-Former-Law-Clerks-Appear-Before-Judges-7-9-14.pdf> [https://perma.cc/32WH-TF7K] (noting “an appearance within a short period of time after the end of the clerkship could, in some circumstances, cause a reasonable person to question a judge's impartiality, and a waiting period may alleviate this concern[.]” and suggesting “as a general rule of thumb . . . law clerks should not appear before the judges for whom they clerked within a year after the end of the clerkship”); *see also* FED. CIR. R. 50 (restricting counsel from appearing when they are a former employee, including for law school credit); 9TH CIR. R. 46-5 (prohibiting a former employee from participating “in any case that was pending before the Court during the employee's period of employment”).

102. MODEL RULES OF PROF'L CONDUCT R. 8.3 (AM. BAR ASS'N 2021).

103. *See id.* (discussing a lawyer's ethical duty to report misconduct of another lawyer or judge).

would benefit from treating clerks more similarly to attorneys rather than nonlegal judicial staff.

C. *Drawing the Line Between Employer Rules and Attorney Ethics*

The Clerk's Handbook reads, "If you identify a potential ethics problem, . . . consult with your judge as soon as possible, even if your initial investigation suggests a clear-cut answer. Individual judges or courts may set standards that exceed the standards set by the Code and related rules and opinions discussed above."¹⁰⁴ A code of ethics should consist of a single set of rules with the same outcome for similarly situated individuals.¹⁰⁵ These rules may admittedly vary based on jurisdiction but should not vary with one's superior. This does not mean that judges should lack the authority to ask their clerks to follow chamber-specific rules, but these rules should not be woven into the very fabric of clerkship ethics. Such a framework feeds into the problematic conception of a clerk as an appendage of their judge. A model professional rule on clerk behavior would clarify the line between ethical rules and employer expectations.

1. Post-Clerkship Recruiting

One particular area in need of uniform ethical treatment is law clerk recruiting. As most federal clerkships are term limited, chambers often see multiple clerks depart for private or public practice every year. The Clerk's Handbook reads:

First, a job search may create new conflicts of interest. Ask your judge if you may apply for a job with a firm that represents a party currently before the court. If you interviewed with a firm but have not accepted an offer, your judge has discretion about whether you may work on matters involving the

104. FED. JUD. CTR., *supra* note 1, at 3; *supra* note 64 and accompanying text.

105. One commentator suggests,

[C]odes of ethics can function as a professional statement. That is[,] it expresses the public service's commitments to a specific set of moral standards. This has both cognitive and emotive value. Cognitively it gives a person joining a profession, civil service, a clear set of value to which they are expected to subscribe. Not all individuals are comfortable working as civil servants and codes can clarify expectations. Codes can help provide the pride of belonging to a group or a profession. Pride is a critical emotion in motivating individuals to see themselves as professional.

Gilman, *supra* note 88, at 9–10 (footnote omitted).

firm. Once you have accepted an offer, however, the ethics rules take the decision out of your judge's hands. You may not work on any pending or future cases involving your future employer.¹⁰⁶

The pamphlet goes on to offer guidance on confidentiality, gifts or benefits, and conflicts of interest.¹⁰⁷ However, it concludes by, again, opening the ethical rules to the discretion of the judge for post-clerkship appearances.¹⁰⁸

In the context of recruiting, a model ethics rule is especially important for defining what is ethically required and what is employer required. This dividing line is missing from the current system and is especially important because law firms and other recruiting organizations may be unaware of the preferences of individual judges.¹⁰⁹ This means that law firms may act overcautious or unintentionally induce unethical behavior in recruiting clerks, unaware that a judge or court has set boundaries exceeding the judiciary's floor. A bar rule would ensure that both clerks and law firms (or other employers) behave ethically throughout the recruiting process, while clerks may have to follow more restrictive guidelines based on the preferences of the judiciary, the court, and the judge.¹¹⁰ Certain states have begun issuing rules on this front, a trend the model rules committee should consider.¹¹¹

106. FED. JUD. CTR., *supra* note 1, at 24.

107. *Id.* at 25.

108. *Id.*; *see supra* note 64 and accompanying text. An interesting empirical study found that certiorari petitions filed by former Supreme Court clerks were five times more likely to result in the Court's granting of certiorari. HUCHEN LIU & JONATHAN P. KASTELLEK, *THE REVOLVING DOOR IN JUDICIAL POLITICS: FORMER CLERKS AND AGENDA SETTING ON THE U.S. SUPREME COURT* 17–18 (2021), https://scholar.princeton.edu/sites/default/files/clerks_cert_paper.pdf [<https://perma.cc/2D9R-JAM5>]; *see also* Adam Liptak, *Law Firms Pay Supreme Court Clerks \$400,000 Bonuses. What Are They Buying?*, N.Y. TIMES (Sept. 21, 2020), <https://www.nytimes.com/2020/09/21/us/politics/supreme-court-clerk-bonuses.html> [<https://perma.cc/Q7Q4-F2BE>] (discussing a recent study's findings that “[f]ormer clerks were 16 percentage points more likely to attract the votes of the justice for whom they had worked[,]” and noting that “[t]he relationship increased their chances of obtaining their former boss's vote to about 73 percent, from about 57 percent”).

109. Section 2.5-1 of the Judiciary Compendium provides additional guidance to clerks on recruiting practices but is confidential to the Judiciary so not available to law firms. FED. JUD. CTR., *supra* note 1, at 26.

110. Many federal courts have individualized policies. *See* FED. JUD. CTR., *supra* note 1, at 16, 25, 30 (referring clerks to various policies covering online activities, examples of restrictions on participation and appearance, and a number of possible limitations on careers).

111. *See* Cynthia Gray, *Law Clerks' and Future Employers*, JUD. ETHICS & DISCIPLINE: A BLOG OF THE CTR. FOR JUD. ETHICS OF THE NAT'L CTR. FOR STATE CTS. (Sept. 13, 2016), <https://>

2. Partisan Behavior and Training

The judiciary prohibits clerks from “engaging in both partisan and nonpartisan political activity” and asks that clerks “[e]xercise considerable caution before engaging in activities with obvious political overtones”¹¹² The rules are stringent—“[y]ou should not even take passive actions that might link you with a political issue, such as displaying a political sign or bumper sticker”¹¹³—and for good reason. The impartiality of the clerk reflects on the impartiality of the court. In this digital age, there are infinite online ways a clerk could act, or appear to act, political.¹¹⁴ On this front, the FJC guidance again cedes authority to the court and judge.¹¹⁵

Judges and courts should be able to ask more of clerks than ethics demand, but it is important to define what is ethically mandated and what is employer mandated.¹¹⁶ An ethics baseline would also assist judges who

nscsjudicialethicsblog.org/2016/09/13/law-clerks-and-future-employers/ [https://perma.cc/CNH8-GX7V] (describing Texas and Delaware rules governing certain aspects of law clerk recruitment, such as the acceptance of bonuses).

112. FED. JUD. CTR., *supra* note 1, at 14.

113. *Id.*

114. Something as subtle as liking a Facebook post could reveal a clerk’s political opinion. However, there must be a line between what is ethical and unethical. For example, a clerk should not be ethically barred from using social media, even though social media companies collect data on the subtlest acts, such as where you click and where your mouse lingers, all of which reveals political preference. See Michael Grothaus, *Facebook Confirms It Tracks Your Mouse Movements on the Screen*, FAST CO. (June 13, 2018), <https://www.fastcompany.com/40584539/facebook-confirms-it-tracks-your-mouse-movements-on-the-screen> [https://perma.cc/BB9S-HSDE] (illuminating the new method which Facebook uses to track consumers).

115. See FED. JUD. CTR., *supra* note 1, at 16–17 (“Be sure to find out whether your court, your judge, or both have policies that govern online activities during your clerkship, and [obtain] your judge’s permission before participating in such activities. Also ask for your court’s policies regarding use of government computers and computer services. You cannot exercise too much [caution] with online activities.”); see generally Norman H. Meyer, Jr., *Social Media and the Ethical Court Employee*, 26 CT. MANAGER 5 (2012) https://nacmnet.org/sites/default/files/SocialMedia-and-the-Ethical-Court-Employee_NormMeyer.pdf [https://perma.cc/4S5Y-WJCK] (offering advice on how to behave within the Code of Conduct for Court Professionals in a digital era).

116. See Elie Mystal, *Obvious Important News for New Clerks*, ABOVE THE L., (Sept. 17, 2008, 3:08 PM), <https://abovethelaw.com/2008/09/obvious-important-news-for-new-clerks/> [https://perma.cc/9E7J-ZYDG] (acknowledging the Clerk’s Handbook restrictions on political activities, and determining that pasting an Obama bumper sticker would violate Canon Five of the Code of Conduct for Judicial Employees).

may lack the technological savvy to concretely advise their clerks.¹¹⁷ Additionally, the regulation of a clerk's political speech is deeply entangled with the First Amendment, and state bars are uniquely-well positioned to track the First Amendment.¹¹⁸ There are practical obstacles and reputational stakes associated with challenging the constitutionality of the judiciary's code of conduct,¹¹⁹ which lessen when challenging rules promulgated by state bar associations.

An ethics rule governing political activity would also benefit the judiciary by regulating pre-clerkship behavior. In recent years, politically motivated organizations have offered pre-clerkship training programs. For example, the Heritage Foundation offered a "training academy as a service to the judiciary" with the goal of giving "incoming law clerks some of the tools that they are unlikely to learn in law school and that will enable them to hit

117. See Robert Ambrogi, *It Is Time to Extend the Duty of Tech Competence to Judges*, ABOVE THE L. (May 6, 2019, 3:47 PM), <https://abovethelaw.com/2019/05/it-is-time-to-extend-the-duty-of-tech-competence-to-judges/?rf=1> [<https://perma.cc/8QDV-MNBG>] (discussing how judges often lack technological competence).

118. See Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998) (discussing regular clashes between state bars and the First Amendment, indicating their special position in regulating the speech of court officials); see also *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (upholding the State Bar of Florida's regulation of professional commercial speech); *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110–11 (1990) (determining "the public censure of petitioner for violating [the advertising rule] violates the First Amendment" and reversed a state supreme court's judgment); *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 478–79 (1988) (permitting state bar's regulation of lawyers' commercial speech, but rejecting its application to truthful and nondeceptive advertisements); *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. Of Ohio*, 471 U.S. 626, 643 (1985) (indicating states must tread carefully when interfering with dissemination of accurate information); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (identifying strong interest of states to regulate commercial speech that harms the public).

119. Although there is an irony to members of the judiciary suing the judiciary, it is not unheard of. See Zach Parker, *Judge Sharon Marchman Sues Other Judges, Law Clerk in Federal Court*, THE OUACHITA CITIZEN (Apr. 19, 2016), http://www.hannapub.com/ouachitacitizen/news/local_state_headlines/updated-judge-sharon-marchman-sues-other-judges-law-clerk-in/article_cecc1776-0670-11e6-9fe7-cb41c01d3b9d.html [<https://perma.cc/7ZP3-CHQ6>] (discussing Judge Sharon Marchman suit against four other judges and a law clerk); Robert Patrick, *Lincoln County Clerk Sues Judges, Saying They Improperly Stripped Her of Power*, ST. LOUIS POST-DISPATCH (May 21, 2019), https://www.stltoday.com/news/local/crime-and-courts/lincoln-county-clerk-sues-judges-saying-they-improperly-stripped-her/article_865f7e90-c573-5da7-8298-b886741f84d4.html [<https://perma.cc/NQY9-SLSV>] (reporting a circuit clerk's suit "against three local judges and their colleagues" for prohibiting her from "hir[ing] and fir[ing] her employees"); John Simerman, *Orleans Court Clerk Sues Judge Byron C. Williams, Claiming Sexual Harassment and Groping*, THE NEW ORLEANS ADVOC. (July 13, 2018, 5:30 PM), https://www.theadvocate.com/new_orleans/news/courts/article_88c87cde-86e7-11e8-8555-63684973384b.html [<https://perma.cc/7K52-5T7A>] (reporting a clerk's suit against her judge for sexual misconduct).

the ground running and excel[.]”¹²⁰ The Heritage Foundation is historically conservative, and some commentators alleged that it used its program to indoctrinate clerks in conservative judicial values.¹²¹ A clerk’s involvement in such a program could implicate the court’s appearance of impartiality. In February 2019, the Judiciary Committee on Codes of Conduct responded to potentially partisan training programs by issuing an advisory opinion regarding when it is appropriate for judicial employees to attend educational activities.¹²² A segment was directed to future law clerks specifically:

It is the Committee’s view that *a judge has the discretion* to instruct a future law clerk regarding pre-employment educational opportunities that may have an impact on the clerkship. A future law clerk should consult his or her appointing authority for guidance. *The appointing authority should recognize that future law clerks are not fully subject to the Employees’ Code until they enter into service, so care should be taken by the judge to ensure that a directive not to participate in First Amendment protected activity be limited to the extent actually necessary to protect the judiciary from the identified harm.*¹²³

This advisory opinion expressly acknowledges its limitations as applied to prospective clerks. Although the Heritage Foundation academy was “exclusively for attendees who, as of the dates of their respective applications, have already accepted offers for federal clerkships with start dates in 2019[.]”¹²⁴ nothing prevented the organization from accepting law

120. *Heritage Foundation to Host Federal Clerkship Training Academy*, THE HERITAGE FOUND. (Nov. 21, 2018), <https://www.heritage.org/press/heritage-foundation-host-federal-clerkship-training-academy> [https://perma.cc/6JVK-3AME] (internal quotation marks omitted).

121. See Adam Liptak, *Conservative Heritage Foundation Revives Training Academy for Judicial Clerks*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/heritage-foundation-clerks-training-academy.html> [https://perma.cc/K3MT-LLR2] (“The conservative legal movement has worked hard to identify and cultivate promising law students and young lawyers, partly to ensure a deep bench of potential judicial nominees.”); see also Todd C. Peppers, *Invasion of the Clerkship Snatchers? The Rise and Fall of the Federal Clerkship Training Academy*, LAW.COM: NAT’L L.J. (Oct. 25, 2018, 12:22 PM), <https://www.law.com/nationallawjournal/2018/10/25/invasion-of-the-clerkship-snatchers-the-rise-and-fall-of-the-federal-clerkship-training-academy/?sreturn=20190513151958> [https://perma.cc/W6AX-3P37] (“[T]he cornerstone of this preparation would be teaching attendees originalist and textualist judicial philosophies.”).

122. See GUIDE TO JUDICIARY POL’Y, PUBLISHED ADVISORY OPINIONS, *supra* note 49, at 243 (establishing the need for new rules governing judicial participation in educational programs).

123. *Id.* at 250 (emphasis added).

124. *Heritage Foundation to Host Federal Clerkship Training Academy*, *supra* note 120.

students who applied but were yet to accept a clerkship. A model rule governing political activity by clerks and future clerks could deter the formation of politically motivated educational seminars by offering guidance throughout their pre-, during-, and post-clerkship obligations. Such a rule would not only reach the clerks, but the organizers and speakers at such events. It would lessen the current burden on the judiciary to exert its authority on future clerks.

IV. PROPOSAL: A COMPREHENSIVE BUT NON-INVASIVE MODEL RULE GOVERNING CLERKS

A model professional rule of ethics governing law clerks would provide clarity to the ethical obligations of clerks, give authority to pre- and post-clerkship ethical duties, and add foundation to the complicated patchwork of current rules. With state-by-state adoption of these rules, state and federal clerks would be covered, as the Code of Conduct for Judicial Employees applies only to federal employees. Certain states have issued guidance for law clerks, but most rely on general employee rules interpreted for clerks in a similar but less comprehensive way than the Federal Judiciary.¹²⁵

Clerks serve an important and unique role within our legal system, and their ethical behavior protects the integrity of the judicial process. The Federal Judiciary advises current clerks of their ethical responsibilities, but it lacks sound authority to regulate former clerks; external guidance would be immensely beneficial. The Code of Conduct for Judicial Employees and Clerk's Handbook should be interpreted as employer restrictions, which leaves a vacuum for state bar associations to fill with true ethics rules. A model rule for clerks would, at minimum, provide guidance on clerk's confidentiality, conflicts of interest, and partisan behavior. It would give specific guidance for recruiting and interviewing, geared toward both the law clerk and the recruiting entity. Lastly, the rule would be delicately and

125. For instance, New York "law clerks are subject to the [general] rules Governing Conduct of Nonjudicial Court employees[,] . . . certain sections of the rules governing Judicial Conduct[.]" and "the New York Code of Professional Responsibility" including reporting requirements for career changes between public and private practice. Jeremy R. Feinberg, *Law Clerk Ethics in New York State*, N.Y. LEGAL ETHICS REP. (Dec. 2007), <http://www.newyorklegaethics.com/law-clerk-ethics-in-new-york-state/> [<https://perma.cc/H2MM-L4PC>]; see also MARYLAND JUDICIAL ETHICS COMMITTEE, OPINION REQUEST NO. 2017-21: A JUDGE'S DISCLOSURE OBLIGATIONS REGARDING FORMER LAW CLERKS 2-3 (2017), <https://www.courts.state.md.us/sites/default/files/import/ethics/pdfs/2017-21.pdf> [<https://perma.cc/5TCQ-MDEB>] (interpreting Maryland's judicial code of conduct to determine when the judge must recuse himself when a former clerk appears before the court).

narrowly worded, to avoid overstepping the authority of the judiciary and the judge. Instead, it would lay out baseline expectations and fill the gaps in the current structure.

V. CONCLUSION

The current ethics rules for law clerks are founded on temporary contractual obligations, few post ethical obligations, and a flawed conception of clerks as appendages of their judges.¹²⁶ Respect and admiration for one's judge can and should be a cornerstone of one's clerkship. However, it does not follow that this respect should be institutionalized as the basis of clerk ethics. Instead, both clerks and the judiciary would benefit from a uniform professional code of conduct so that clerks may have enduring guidance on the ways in which they should handle the important, complex, and sensitive responsibilities with which they are entrusted. "Codes are not designed for 'bad' people, but for the persons who want to act ethically. The bad person will seldom follow a code, while most people—especially public servants—welcome ethical guidance in difficult or unclear situations."¹²⁷ Judges possess decades of professional wisdom and are the subject of professional and public scrutiny, as well as constitutional restrictions.¹²⁸ By contrast, law clerks have little experience and operate in relative anonymity;¹²⁹ thus the manner in which we promulgate ethics is integral to the success of law clerks.

Perhaps the strongest counterargument to this proposed rule is that bar involvement would threaten the independence of the judiciary by redundantly intruding into an already effective system.¹³⁰ This Article's response is twofold: first, the most important purpose of such a rule is to inform and guide post-clerkship activity, not to meddle in the discipline of current clerks. Second, the rule's purpose is narrow and cautious: to guide the legal profession's baseline expectations of these young, but influential,

126. See, e.g., FED. JUD. CTR., *supra* note 1 (governing a federal law clerk's conduct).

127. Gilman, *supra* note 88, at 7.

128. MODEL CODE OF JUD. CONDUCT CANONS 1–4 (AM. BAR ASS'N 2020); see also Sholes, *supra* note 24, at 381 ("[T]he public has since developed the enlightened perception that judicial behavior should reflect a judge's position of considerable authority.").

129. See generally FED. JUD. CTR., *supra* note 1 (addressing a federal law clerk's conduct when dealing with attorneys, the press, and online activities among other restrictions).

130. For example, rules governing a former law clerk's practice may seem redundant. FED. CIR. R. 50.

attorneys. The symbolism of such a rule is in many ways more important than actual disciplinary measures. This is because it will allow law clerks to understand the distinction between their professional responsibilities and their employer requirements. In sum, a well-thought-out rule of ethics for law clerks would only strengthen and protect the integrity of the judiciary.