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## Law Clerks Out of Context

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## Law Clerks Out of Context

PARKER B. POTTER, JR.\*

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### I. INTRODUCTION

In a previous article,<sup>1</sup> I examined judicial opinions in cases in which law clerks have gone wild, principally by doing things that law clerks just aren't supposed to do, such as convening court,<sup>2</sup> conducting independent factual investigations into matters before their

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1. See Parker B. Potter, Jr., *Law Clerks Gone Wild*, 34 SEATTLE U. L. REV. 173 (2010); see also Parker B. Potter, Jr., *Judges Gone Wild*, 37 OHIO N.U. L. REV. \_\_ (forthcoming) (discussing opinions in which judges have gone wild by referring to their law clerks in print); Parker B. Potter, Jr., *The Rhetorical Power of Law Clerks*, 40 SW. U. L. REV. \_\_ (forthcoming) (discussing the use of law clerks as a rhetorical device in judicial opinions).

2. See *Riley v. Deeds*, 56 F.3d 1117, 1118 (9th Cir. 1995).

judges,<sup>3</sup> or leaking drafts of opinions to the press.<sup>4</sup> Here, I focus on opinions in federal cases that discuss two other categories of unusual law-clerk activity, serving as a source of evidence, and going to court, as a litigant.<sup>5</sup>

The article is informed by my ten years of experience as a trial-court law clerk in the state and federal courts of New Hampshire. Things that caught my eye, and made it into the article, are incidents I read about in judicial opinions that struck me as very different from anything I had ever seen or heard about through the law-clerk grapevine. My purpose is two-fold. First, many of the opinions I discuss are downright entertaining. But beyond that, the unusual fact patterns that make those opinions entertaining also serve to point out things that might happen to a law clerk that are not covered in law school or the typical law-clerk training program. Accordingly, I intend for the article to have a practical dimension that underpins its entertainment value.

In Part II, I explore opinions in which law clerks have become sources of evidence in cases they were working on, as producers of exhibits, as affiants, or as witnesses. In discussing those opinions, I

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3. See *Kennedy v. Great Atl. & Pac. Tea Co.*, 551 F.2d 593, 594 (5th Cir. 1977).

4. See *Lamprecht v. FCC*, 958 F.2d 382, 403–04 (Buckley, J., concurring).

5. I did come across one law clerk who was so far out of context that his situation defies categorization. Specifically, the memorandum opinion in *Bethea v. Bristol Lodge Corp.* lists counsel for two of the defendants as follows: “Robert M. Britton, Philadelphia, PA, Jason H. Casell, Law Clerk to the Honorable Michael M. Baylson, United States District Judge, United States District Court for the Eastern District of Pennsylvania, Philadelphia, PA, for Defendants Godiva’s Bristol, Inc. and Divas Partners, Inc.” No. Civ.A. 01-612, 2003 WL 21146146, at \*1 (E.D. Pa. May 19, 2003). And, just in case reading about Judge Baylson’s law clerk appearing before another judge in the same district is not titillating enough, one needs only read the second paragraph of the opinion to discover that one of law clerk Casell’s clients was associated with “Divas International Gentlemen’s Club . . . , a restaurant and bar that provides entertainment in the form of topless dancing.” *Id.*; cf. *Doctor John’s, Inc. v. City of Sioux City*, 305 F. Supp. 2d 1022, 1027 (N.D. Iowa 2004) (judge sent law clerks out to examine “adult book store’s storefront display”); *Starshock, Inc. v. Shusted*, 370 F. Supp. 506, 507–08 (D.N.J.), *rev’d*, 493 F.2d 1401 (3d Cir. 1974) (unpublished table decision) (judge sent law clerks on “fact finding mission” to establishment offering “nude interpretive dancing”). Talk about law clerks out of context, not to mention a pretty nifty use of the “*cf.*” signal!

focus on both the process by which law clerks have become sources of evidence and the topics on which they have been asked to give evidence. Part III is devoted to cases in which law clerks have been litigants, and it serves as a guide to situations in which litigation is, and is not, a productive option for a law clerk who believes that he or she has been wronged.

## II. I SPY WITH MY LAW CLERK'S EYE

As a law clerk, I am accustomed to reading affidavits and listening to witness testimony. Making affidavits and giving testimony, however, are beyond my range of experience. And, indeed, the general rule is that information law clerks may have acquired during the course of their work as law clerks is inaccessible as evidence. As Judge Gilberto Gierbolini helpfully explained:

Equally meritless is appellant's contention that hearsay considerations give appellant the right to cross-examine the judge's law clerk due to the judge's statement that the law clerk assisted her in interpreting the disclosure statement. Section 1 of the *Federal Judicial Center's Law Clerk Handbook*, establishes in relevant part that:

A law clerk is a lawyer employed to assist a judge with as many administrative, clerical, and basic legal tasks as possible, so as to leave the judge more time for judging and critical decision-making . . . . Many judges discuss pending cases with their law clerks and confer with them about decisions . . . . The bankruptcy court clerk likewise participates in the broad range of tasks performed by the bankruptcy judge as a trial judge.

Pp. 1-2.

Clearly Judge de Jesús was entitled to seek and benefit from her law clerk's knowledge of accounting. Moreover, we are convinced by the record that, as exemplified by her careful questioning of appellant's accountant, she never delegated to her law clerk her duty to make the ultimate decision

in this case. We remind appellant that law clerks are “simply extensions of the judges at whose pleasure they serve.” *Oliva v. Heller*, 839 F.2d 37, 40 (2d Cir. 1988), citing *Oliva v. Heller*, 670 F. Supp. 523, 526 (S.D.N.Y. 1987). The presiding judge at a trial may not testify as a witness in that trial. Rule 605 of the Federal Rules of Evidence. Nor can a judge be subpoenaed to testify. *United States v. Alberico*, 453 F. Supp. 178 (D. Colo. 1977). Allowing cross-examination of a presiding judge would convert him or her into a witness. See also *Ouachita National Bank v. Tosco Corp.*, 686 F.2d 1291 (8th Cir. 1982), on rehearing, 716 F.2d 485 (8th Cir. 1983). Since a judge cannot testify in a case in which he/she is presiding, it follows that the judge’s law clerk, who is an extension of the judge, also may not testify.

The above can be expressed in a classical Aristotelian syllogism:

Major premise: An attorney cannot cross-examine the presiding judge regarding matters already decided or under the consideration of the judge;

Minor premise: Law clerks are extensions of the judge.

Conclusion: An attorney cannot cross-examine a law clerk under the above premises.<sup>6</sup>

In a recent case in which he allowed the counsel to a Special Master not to testify at a hearing conducted by the Special Master, Judge Eldon Fallon put things somewhat more succinctly: “[T]his situation was the same or similar to the situation in which a party sought to call the Court’s law clerk to testify which is routinely disallowed.”<sup>7</sup> Indeed, subpoenas for law clerks seem to be quashed as a matter of course.<sup>8</sup> In quashing the subpoenas at issue in *Terrazas v. Slagle*, Judge Sam Sparks elaborated, with considerable eloquence:

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6. *In re M.E.S., Inc.*, 148 B.R. 1, 3 (D.P.R. 1992).

7. *Turner v. Murphy Oil USA, Inc.*, 582 F. Supp. 2d 797, 806 (E.D. La. 2008).

8. See, e.g., *Terrazas v. Slagle*, 142 F.R.D. 136, 140 (W.D. Tex. 1992); see also *Loubser v. Pala*, No. 4:04 CV 75, 2007 WL 3232136, at \*7 (N.D. Ind. Oct. 29, 2007) (quashing “non-party subpoena [served] on Kevin Smith, the Clerk of the

All counsel admit that public inquiries by the litigants as to the internal operations and communications of the Court will, not may, destroy the integrity of our present legal system. This Court will not be a party to that destruction. Clearly the object of deposing these law clerks is to disqualify the judges, which power lies first with the judges themselves, and then with the United States Supreme Court or possibly the Fifth Circuit Court of Appeals in the event the Defendants choose to file a petition for writ of mandamus. Asking this judge to find deposing the judges' law clerks necessary under these circumstances is a usurpation of Judges Nowlin, Garwood, and Smith's authority and responsibilities. The judges, with full knowledge of the facts, have already determined there is no basis to require their recusal.

This Court will not be a party to permit the litigants to question law clerks of United States Judges and/or the United States Judges themselves with regard to their conduct in their determination of judicial decisions or their reasons for those decisions, and this Court will not be a party to assist the Defendants' counsel to disqualify these judges.<sup>9</sup>

As Judge Harold Baer explained, in similar circumstances:

I declined to grant Ms. Peters' request to have myself or my law clerk testify. I noted that legal and policy considerations prevent a judge who is presiding over a trial from being called as a witness or subjected to discovery, and this applies to evidentiary hearings as well. I noted, moreover, that Ms. Peters' motion for recusal further undercut her efforts to ob-

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Indiana Supreme Court, seeking the names of all law clerks and cases on which each clerk worked during the course of a four-year period"); *United States v. Roebuck*, 271 F. Supp. 2d 712, 717 (D.V.I. 2003) ("Judge Moore *sua sponte* quashed the subpoenas served on the law clerks as being unreasonable and unduly oppressive."). *Roebuck* involved, among other things, an attorney's attempt to have a judge recuse himself based upon her belief that the judge had responded negatively to her letter to the editor opposing the judge's reappointment. *Id.* at 714–15. For those who relish a good donnybrook between bench and bar, *Roebuck* is worth a read. See also *United States v. Roebuck*, 289 F. Supp. 2d 678 (D.V.I. 2003).

9. *Terrazas*, 142 F.R.D. at 139–40 (footnotes omitted).

tain the testimony of my law clerk . . . which is equally protected. Where a litigant has sought to depose a law clerk in a case where a recusal motion is pending, courts have typically denied the testimony, as allowing the law clerk to testify would in most cases dictate recusal.<sup>10</sup>

However, notwithstanding the general prohibition against extracting evidence from law clerks, law-clerk evidence in a variety of forms has found its way into court. Sometimes, a judge will refer

10. *Wolters Kluwer Fin. Servs. Inc. v. Scivantage*, 525 F. Supp. 2d 448, 533 (S.D.N.Y. 2007) (footnotes, citations, and internal punctuation marks omitted), *aff'd in part, rev'd in part*, 564 F.3d 110 (2d Cir. 2009).

In *United States v. Ferguson*, Judge Edward Weinfeld did disqualify himself, when a contrary decision would have placed him in the position of passing on the truthfulness of certain grand jury testimony offered by a former law clerk. 550 F. Supp. 1256, 1259–60 (S.D.N.Y. 1982). According to Judge Weinfeld:

The issue then is not the Court's own introspective capacity to sit in fair and honest judgment with respect to the controverted issues, but whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality. This is an objective standard and "where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial." My relationship to Pomerantz is so intimate and my esteem for him so high, as it is for all my many clerks through the years, that the "average person on the street" might reasonably conclude that no matter how strongly the Court states that Pomerantz's testimony will not enter into its judgment, nonetheless, in some imperceptible manner his testimony will intrude itself and be considered with respect to the suppression motions. This situation is quite unlike the prior motion to disqualify because a former law clerk had been assigned to prosecute the case. The mere fact of close relationship did not require disqualification. In this instance, however, credibility is a vital issue.

*Id.* (footnotes omitted). *Vaughn v. Westinghouse Electric Corp.*, 526 F. Supp. 1165 (E.D. Ark. 1981) presented a similar situation:

Counsel for plaintiff countered with an affidavit to the effect that one of this Court's law clerks had advised him that it was all right to wait to file his request for an allowance of fees. The law clerk involved filed his own affidavit, stating that no such advice had been given, whereupon this Court, feeling that it would give at least the appearance of impropriety for it to sit in judgment on the credibility of one of its own employees, recused itself. The case was then reassigned to another judge for a ruling on the then-pending question of attorneys' fees.

*Id.* at 1167–68.

informally to being provided with information by law clerks.<sup>11</sup> More frequently, a judge will make, or write, an off-hand comment about his or her reliance on the recollection<sup>12</sup> or the notes<sup>13</sup> of a law clerk

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11. *See, e.g.*, *McNeil-PPC, Inc. v. Pfizer Inc.*, 351 F. Supp. 2d 226, 243 n.15 (S.D.N.Y. 2005) (“The fourth version [of a television commercial] continues to run, and all three of my law clerks saw it broadcast during the weekend of January 1, 2005 at different times, including twice during the broadcast of the New York Giants-Dallas Cowboys football game.”); *In re Amino Acid Lysine Antitrust Litig.*, No. 95 C 7679, MDL No. 1083, 1996 WL 197671, at \*1 (N.D. Ill. Apr. 22, 1996) (reporting “what this Court’s law clerk has reported that he heard on National Public Radio”); *United States v. Kilpatrick*, 575 F. Supp. 325, 341 (D. Colo. 1983) (“[T]he atmosphere of the trial . . . was an atmosphere of unfairness and overreaching illustrated in small degree by *ex parte* telephone calls to my law clerk made by government counsel inquiring through the back door to learn my thinking as to some legal situations in the case. (Colloquy about this appears in the record, and, consistent with their denials of what so many others say, government counsel deny my law clerk’s statements as to the conversation.)”).

12. *See, e.g.*, *United States v. Sanchez*, 790 F.2d 245, 248 (2d Cir. 1986) (noting that district judge had found that defendant was present in court based in part on “the judge’s indication that his law clerk recalled that Sanchez had been present”); *Dominion Nutrition, Inc. v. Cesca*, 467 F. Supp. 2d 870, 874 (N.D. Ill. 2006) (“I glanced over at the jury and saw juror B, still sitting on A’s immediate right, swivel toward A and smile or smirk. I did not notice A’s reaction, but my law clerks, who corroborated my observation, told me they’d seen A nod emphatically in response to B. Apparently no one else in the courtroom observed the incident.”); *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 778 F. Supp. 1013, 1020 (E.D. Ark. 1991) (“I have conferred with my law clerk, Mrs. Deere who has assisted me in this case, and she has no recollection of such a motion or order being given to her.”); *Farkas v. Ellis*, 768 F. Supp. 476, 478 & n.3 (S.D.N.Y. 1991) (responding to plaintiff’s claim, in motion to recuse, that he failed to quell “lewd hand gestures and offensive vocal insults” during conference, Judge William Connor noted that neither he “nor his law clerk, who attended the conference, saw any such gestures”); *United States v. Andrews*, 754 F. Supp. 1197, 1200 n.2 (N.D. Ill. 1990) (“Although there was not a court reporter present at the meeting, the Court and its two law clerks recall that the government did no more than present a ‘sales pitch’ for a single trial.”); *Durflinger v. Artiles*, 563 F. Supp. 322, 327 (D. Kan. 1981) (“The Court did not exclude Dr. Dyck as a witness. Unfortunately, this dispute was resolved in chambers at a time when the court reporter was not present. It is the Court’s recollection, and that of two of his law clerks, who were present, that the Court stated that he could not exclude Dr. Dyck.”). *But see Wolters Kluwer*, 525 F. Supp. 2d at 456 n.28 (“Because Ms. Peters has put in issue *ex parte* and/or untranscribed conversations with myself or my law clerk by seeking the testimony of myself or my law clerk regarding those conversations in connection with her motion for my recusal, I will not rely on any independent recol-

in reconstructing some aspect of a case. Those references are of relatively little interest other than as a gentle warning to law clerks to keep their notes legible and presentable.

Of greater interest are cases in which law-clerk evidence has been introduced more formally. In the following section, I begin with a discussion of cases in which documents generated by law clerks have become exhibits at a hearing or trial. Next, I turn to cases involving affidavits from law clerks. I conclude with cases in which law clerks have been called upon to offer oral testimony. As a bit of a *leitmotif* in my discussions of law-clerk affidavits and testi-

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lection of myself or my law clerk as to the arguments Ms. Peters made in Chambers at this time.”).

13. *See* Lewis v. Ford Motor Co., 685 F. Supp. 2d 557, 572 (W.D. Pa. 2010) (“[A]ccording to notes of the law clerk who attended the conference on December 17, 2009, [plaintiffs’ counsel] did not advise the Court of this commitment and we therefore find no reason to grant an additional extension on that basis.”); Ass’n Concerned About Tomorrow, Inc. v. Slater, 40 F. Supp. 2d 823, 826 (N.D. Tex. 1998) (“Based on the pleadings, the evidence adduced at the July 1998 hearing, the stipulations, the arguments of counsel, the notes of the Court and the law clerk, the Court concludes that the Defendants have complied with the requirements of the National Environmental Policy Act . . . .”); Adams v. Rivera, 13 F. Supp. 2d 550, 551 n.3 (S.D.N.Y. 1998) (“Plaintiff’s attorney also contends that a conversation with Chambers caused him to believe, to his detriment, that if he and defense counsel were unable to agree upon fees, the Court would overlook the 14-day time limit in considering plaintiff’s motion . . . . [T]he notes and recollection of the law clerk with whom plaintiff’s counsel spoke clearly reflect that Chambers never stated or implied that a motion for attorneys’ fees, if filed, would not be dismissed on timeliness grounds.”); Virgin Islands Tree Boa v. Witt, 918 F. Supp. 879, 905 (D.V.I. 1996) (“THIS COURT issued an Opinion and Order in the above-captioned case signed and dated February 15, 1996. The Court subsequently learned that an error appeared on page 227 of Volume 2 of the transcript from the hearing on plaintiffs’ motion for preliminary injunction . . . . This Court consulted its own recollection of the testimony, the law clerk’s notes, and the affidavit of William M. Karr . . . . Each of these confirmed that thirty-two percent is the correct figure. The Court reporter has issued a correction to the transcript.”) (footnote omitted); Glover v. Johnson, 721 F. Supp. 808, 830 n.15 (E.D. Mich. 1989) (“I did not admit plaintiffs’ exhibit 46 at the time it was marked. There is no indication in the record that I admitted plaintiffs’ exhibit 46 thereafter. My handwritten bench notes, and those of my law clerk, are in accord that the exhibit was neither offered for admission nor admitted. It appears that the court reporter, William Rittinger, did not appreciate the distinction between marking an exhibit for purposes of identification and admitting it into evidence.”).

mony, I organize those sections on the basis of who sought the law clerks' evidence, beginning with cases in which that evidence has been elicited by parties and then moving to the more unusual situation in which evidence has been elicited by the court itself.

#### A. *Exhibiting Law-Clerk Work*

It is one thing for a judge to make a passing reference to information gleaned informally from a law clerk. It is another thing for some bit of evidence created by a law clerk to make it into an opinion as an actual exhibit. Notwithstanding the general rule that law clerks are paid to examine exhibits rather than create them, there are more than a few examples of documents generated by law clerks that have become exhibits.

The most common kind of law-clerk exhibit is a communication from a law clerk to a party that the party subsequently introduces as evidence. For example, in *Myers v. United States District Court*,<sup>14</sup> the plaintiff in a civil case in the district court petitioned for a writ of mandamus after the district court set his case for trial without a jury, and he attached, as an exhibit to his petition, a letter from the trial judge's law clerk informing him that his letter to the judge "inquiring whether [the judge] had been inadvertent in eliminating the jury . . . would be deemed a jury demand and that '(a) jury (would) be called for the trial as a matter of course, without further action by counsel.'" <sup>15</sup> The court of appeals issued the writ.<sup>16</sup> In *Berger v. Stinson*,<sup>17</sup> the federal judge ruling on a habeas corpus petition referred to a letter from the state trial judge's law clerk to show that, when ruling on the petitioner's motion for a new trial, the trial judge had not relied upon a particular bit of evidence.<sup>18</sup> And, in *United States ex rel. Walker v. Follette*,<sup>19</sup> a letter to a criminal defendant from the law clerk of the Chief Judge of the New York Court of Appeals was introduced to demonstrate, in the context of a habeas cor-

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14. 620 F.2d 741, 742 (9th Cir. 1989).

15. *Id.* at 743.

16. *Id.* at 744.

17. 97 F. Supp. 2d 359 (W.D.N.Y. 2000).

18. *Id.* at 362.

19. 274 F. Supp. 180 (S.D.N.Y. 1967).

pus petition, that the defendant had exhausted his state remedies.<sup>20</sup> Communications from law clerks have also been cited in arguments that previous state-court convictions did not support a sentence enhancement in a subsequent federal case,<sup>21</sup> that a prison had no basis for barring a prisoner from a work assignment he wanted because certain charges against him had been dropped,<sup>22</sup> and that the federal Bureau of Prisons had improperly calculated the sentence of a criminal defendant.<sup>23</sup>

Judges, as well, will cite to communications from law clerks to parties, typically to point out that a party has been placed on notice of some procedural aspect of a case, such as a request for supple-

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20. *Id.* at 182. Also, in the habeas context, in *Lindsey v. Cain*, the only available documentation that a state trial court had denied a criminal defendant's claims for post-conviction relief was "a minute entry indicating that the post-conviction application submitted May 13, 2004 was denied by the court . . . and a letter from Judge Hunter's law clerk to petitioner stating that the post-conviction pleadings filed February 24, 2003 and again on May 13, 2004 had been denied." Civil Action No. 05-1593, 2009 WL 1575466, at \*8 n.38 (E.D. La. May 29, 2009) (citation to the record omitted).

21. *See* United States v. Catlett, Nos. 4:05CR00275 SWW, 4:07CV01135 SWW, 2008 WL 3271560, at \*2 (E.D. Ark. Aug. 7, 2008) ("Catlett also submits a copy of a letter dated May 12, 2008, addressed to Catlett from a state court law clerk. The letter reads as follows . . .").

22. *Nicholas v. Kanode*, Civil Action No. 7:07-cv-00576, 2007 WL 4376145, at \*1 n.3 (W.D. Va. Dec. 13, 2007) ("Plaintiff submits a copy of a letter . . . from a law clerk for the La Crosse County Circuit Court . . . indicating that charges against plaintiff were dismissed . . .").

23. *Dorsey v. Driver*, Civil Action No. 1:07CV82, 2008 WL 4534351, at \*1 (N.D. W. Va. Oct. 7, 2008). Moreover, in response to the *Dorsey* petitioner's challenge to the law clerk's credibility, Magistrate Judge John Kaull wrote:

Of the three Judgment and Commitment Orders entered in petitioners' criminal case, not one of those orders states that the petitioner's D.C. sentence is to run concurrent to his violator sentence. Moreover, according to Judge Gardner's law clerk [Benjamin Kull], the audio of the petitioner's sentence specifically refutes the petitioner's claims that the sentencing judge intended for his sentences to run concurrent. Although the petitioner questions the credibility of Judge Gardner's law clerk, the petitioner has provided no evidence which would make this Court doubt the credibility or accuracy of Mr. Kull's statements of the case.

*Id.* at \*3.

mental briefing,<sup>24</sup> “the opportunity to comment on a proposed order,”<sup>25</sup> the need to respond to a motion to dismiss,<sup>26</sup> the option of delaying a trial,<sup>27</sup> or the inapplicability of the limitation period established by the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>28</sup> While the most common type of law-clerk exhibit is a communication from a law clerk to a party, on relatively rare occasion, an opinion has cited to more internal law-clerk communica-

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24. *John Gil Constr., Inc. v. Rivero*, 99 F. Supp. 2d 345, 356 n.19 (S.D.N.Y. 2000) (citing “letter from Rachel G. Skaistis, law clerk to Judge Scheindlin”).

25. *Yurman Studio, Inc. v. Castaneda*, Nos. 07 Civ. 1241(SAS), 07 Civ. 7862(SAS), 2009 WL 454275, at \*1 & n.4 (S.D.N.Y. Feb. 23, 2009) (citing “Email from Daniel Freeman, law clerk to Judge Scheindlin”).

26. *Cornish v. Norris Square United Presbyterian Cong’n*, No. 07-CV-3678, 2009 WL 1492662, at \*2 (E.D. Pa. May 27, 2009).

27. *Wood v. Valley Forge Life Ins. Co.*, No. 4:05-CV-00124GTE, 2006 WL 897656, at \*1 (E.D. Ark. Apr. 5, 2006).

28. *Davidson v. United States*, No. 00-CV-00869, 2000 WL 1772656, at \*1 (N.D.N.Y. Nov. 28, 2000). In *Davidson*, the petitioner “asked this court whether the then-newly enacted AEDPA would apply retroactively to him and, thus, require him to file his § 2255 motion by April 22, 1997.” *Id.* “By reply letter dated March 17, 1997, this court, by its law clerk, advised Davidson that language contained in *Lozada v. United States*, 107 F.3d 1011 (2d Cir. 1997) and *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996) suggested that the AEDPA’s statute of limitations did not apply to him and, therefore, he would not need an extension of time to file his § 2255 motion.” *Id.* Subsequently, both *Lozada* and *Reyes* were overruled. *See id.* at \*1 n.1. In response, the petitioner argued “that, but for this court’s letter assuring him that he was not subject to the one-year statute of limitations, he would have timely filed his § 2255 motion.” *Id.* at \*2. The court agreed:

Here, Davidson’s detrimental reliance on this court’s March 1997 letter advising him that the statute of limitations did not apply to his § 2255 motion constitutes a rare and exceptional circumstance which warrants equitable tolling. If not for the letter, Davidson may have timely filed his motion. In addition, Davidson cannot be faulted for the delay in filing his motion. Davidson undoubtedly read this court’s letter to mean that he was operating under § 2255 as it existed prior to the enactment of the AEDPA. Prior to the enactment of the AEDPA, of course, Davidson could have made his motion “at any time.” *See Mickens v. United States*, 148 F.3d [145,] 147 [(2d Cir. 1998)]. Given the rare circumstances surrounding this motion, the court determines that Davidson acted with reasonable diligence. In sum, the court is compelled to equitably toll the statute of limitations and deem Davidson’s submission timely filed.

*Id.*

tions, including an e-mail from a law clerk to a clerk of court,<sup>29</sup> a law clerk's "minutes" of a settlement conference,<sup>30</sup> a memorandum to chambers from a law clerk,<sup>31</sup> and a memorandum for the file.<sup>32</sup> In *McGarvey v. Penske Automotive Group, Inc.*, one party made the bold move of relying on a law clerk's bench memo from another court.<sup>33</sup> In the words of a rather incredulous Judge Jerome Simandle:

Perhaps as a result of the absence of authority interpreting section 2302(c), the parties devote considerable attention to a document submitted by Plaintiffs in support of their summary judgment motion, which Plaintiffs characterize as the opinion of the New Jersey Superior Court, Law Division in the matter of *Baldino v. Classic Nissan of Turnersville*, and which Defendants characterize as a bench memorandum from "Matt Hill" to "Judge Morgan" in that matter. In the document, which is difficult to read and which is heavily marked with underlines and handwritten observations, Matt Hill appears to advise Judge Morgan that a warranty identical to that at issue herein "likely violates the anti-tying provisions of the MMWA because the underlying goal of preserving consumer choice is stifled." Plaintiffs argue that the document "was adopted, along with its reasoning, as . . . [Judge

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29. *Byrne v. Liquid Asphalt Sys., Inc.*, 250 F. Supp. 2d 84, 87 n.1 (E.D.N.Y. 2003) ("According to chamber's records, after the time allotted by the rules had passed without a response from Plaintiffs, the Court instructed the deputy clerk to call Plaintiffs' counsel. This request is memorialized in an e-mail dated November 14, 2002. (E-mail from Alicia Huffman, law clerk to Judge Gregory Carman, to Susan Duong, deputy clerk for the Eastern District of New York (Nov. 14, 2002, 09:45 EST) (on file with Judge Gregory W. Carman).)").

30. *Schwartzman, Inc. v. ACF Indus., Inc.*, 167 F.R.D. 694, 696 (D.N.M. 1996).

31. *Lebron v. Powell*, 217 F.R.D. 72, 73 (D.D.C. 2003) ("A memorandum to my chambers filed by my law clerk indicates that on August 23, 2000 I spoke to counsel who advised me that they were creating a new proposed schedule.").

32. *United States v. Pflugst*, 477 F.2d 177, 196 n.10 (2d Cir. 1973) ("The statement of facts of the incident [involving a jury question] is drawn from memoranda dictated by the trial judge, his law clerk and the deputy court clerk shortly after defense counsel moved for a mistrial based on the delay in answering the [jury's] reasonable doubt note.").

33. 639 F. Supp. 2d 450, 458 n.9 (D.N.J. 2009).

Morgan's] determination in denying defendants' motion to dismiss in *Baldino* . . . ." In support of this argument, Plaintiffs' attorney, Simon Paris, Esq., states in a sworn certification that he

spoke to Ann Marie Cohen, New Jersey Superior Court-Law Division, Gloucester County, Civil Division-Team Leader. Ms. Cohen confirmed with Judge Morgan that the accompanying Memorandum of Law from Matt Hill . . . [was] incorporated into the February 18, 2005 Orders as the Court's basis for those Orders.

The Court will devote less attention to the *Baldino* document than do the parties herein. It is quite surprising that a party would urge this Court to place any weight upon a law clerk's bench memo that, by double hearsay, is said to have been adopted by a Superior Court judge, whose order is silent on the matter. Even if the document were characterized as the "basis" for the court's orders—a characterization that is belied by the form and contents of the document, notwithstanding Mr. Paris' Certification—it would amount at most to persuasive authority, "entitled only to that weight that its power to persuade compels." *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Com'n*, 327 F.3d 1019, 1043 (10th Cir. 2003). The persuasive power of the *Baldino* document is limited—it devotes a perfunctory ten lines to the application of section 2302(c) to the IBEX warranty. The Court thus does not rely upon that document in rendering its decision herein.<sup>34</sup>

Finally, in a case in which several defendants sought her disqualification, Judge Shira Scheindlin, in a survey of other cases with similar circumstances, quoted a newspaper article that quoted another judge's law clerk as saying: "As soon as he was assigned the case, [Judge Dennis Montali] immediately undertook steps to sell those

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34. *Id.* (citations to the record omitted).

stocks, and he sold them before any of the parties made any appearance in this case and before he made any decision in this case.”<sup>35</sup>

### B. *Law Clerk Saith What?*

The law-clerk exhibits discussed above are mostly documents created during the course of litigation but not for the purpose of litigation. An affidavit, on the other hand, is a document generated specifically for use in support of a pleading or at a hearing. Thus, a law clerk who gives an affidavit is a giant step closer to the field of play than a law clerk whose letter to a litigant ends up being cited in a judicial opinion. In this section, I discuss cases in which affidavits have been solicited from law clerks, with a focus on the subject matter of those affidavits.

I begin with the most bodacious law-clerk affidavits of all time, the ones solicited by Judge Mitchell Cohen, from his law clerks, in *Starshock, Inc. v. Shusted*.<sup>36</sup> In that case, in order to rule on the plaintiff’s request for a temporary restraining order to prevent local law-enforcement officials from closing down his entertainment establishment, Club Lido, the court was required to determine whether “‘nude interpretive dancing’ [is] embraced within the guarantees of Freedom of Speech under the First Amendment to the United States Constitution.”<sup>37</sup> After a hearing on the plaintiff’s request, “an agreement was reached between the parties and the Court wherein the Club would be allowed to open on February 4, 1974 at which time a video tape would be made for the Court’s review to determine if an injunction should issue.”<sup>38</sup> However, “[m]uch to the dismay of the Court, technical developments occurred allegedly due to the jostling of the cinematographer by the throngs of curious patrons, resulting in an unsatisfactory viewing.”<sup>39</sup> As Judge Cohen further explained:

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35. *In re* Initial Pub. Offering Sec. Litig., 174 F. Supp. 2d 70, 88 (S.D.N.Y. 2001).

36. 370 F. Supp. 506, 507–08 (D.N.J.), *rev’d*, 493 F.2d 1401 (3d Cir. 1974) (unpublished table decision).

37. *Starshock*, 370 F. Supp. at 507.

38. *Id.*

39. *Id.*

The tape, lacking the artistry of a Cecil B. DeMille production, and the Court, mindful of the possible restraint employed by the entertainers with knowledge that their performance was being taped for judicial scrutiny, dispatched its two law clerks, unannounced and unheralded, to the scene on a fact finding mission to make a more objective and comprehensive examination of the Club's activities . . . . It might be said that this mission was a far cry from the routine duties of a judicial law clerk.<sup>40</sup>

Many other things might also be said, such as “No Shinola, Sherlock!”<sup>41</sup> In any event, upon their return from the club, Judge Cohen's law clerks executed affidavits.<sup>42</sup> Based on those affidavits, the videotape, and several still photographs, the judge made rather extensive factual findings<sup>43</sup> and, based on those findings, ruled that the

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40. *Id.* at 507–08. Judge Cohen sent his law clerks, it seems, because “a personal visit [by him] . . . was not deemed feasible.” *Id.* at 507. Good call. As judicial opinions go, *Starshock* has legs. The trial judge in *Expo, Inc. v. City of Passaic*, in reliance on *Starshock*, sent the court's law clerks to view performances at an establishment called Top Tomato, “as well as performances at nearby go-go shows.” 373 A.2d 1045, 1047 (N.J. Super. Ct. Law Div. 1977).

41. *See* *FCC v. Pacifica Found.*, 438 U.S. 726, 752–53 (1978) (quoting George Carlin routine that identifies the typically brown animal waste product with which shinola shoe polish is sometimes confused); *McIsaac v. State*, No. 01-90-00894-CR, 1992 WL 2257, at \*2 (Tex. Ct. App. Jan. 9, 1992) (reporting defense attorney's response to witness's answer on cross-examination: “No [typically brown animal waste product], Sherlock. Will you please answer my question.”).

42. *Starshock*, 370 F. Supp. at 508. Whether or not they also executed cold showers was discretely left undisclosed.

43. *Id.* Among the more colorful are these:

There are two girls dancing simultaneously—one in the center of each bar. They apparently enter from an “undressing” room located on the side of the Club. As the girls walk from the room to the stage, they are covered with sheer negligee-type garments. Upon reaching the stage, they disrobe and stand poised waiting for the first throbbing notes to sound. The girls “dance” to four numbers, then dress and leave. They are, of course, immediately replaced by two new girls.

The girls are completely nude as they gyrate with varying degrees of intensity. They bump, grind and bounce to the strains of contemporary rock music while the audience looks on sipping their one dollar soft drinks, with expressions of deep thought, nervousness, or amusement. While the girls carefully avoided fondling themselves or carrying on con-

club's nude interpretive dancing was not protected speech.<sup>44</sup> Consequently, he denied the plaintiff's request for preliminary injunctive relief.<sup>45</sup>

The most unsurprising topic of law-clerk affidavits, and presumably the least contentious, is the realm of procedure. In *Anderson v. Keane*,<sup>46</sup> a habeas corpus action under 28 U.S.C. § 2254, U.S. District Judge Colleen McMahon turned to an affidavit from the law clerk of a state trial judge (who had since died) in order to ascertain why an issue concerning verdict sheets had not been raised on direct appeal.<sup>47</sup> The demise of a state-court judge also precipitated, at least in part, the procurement of law-clerk affidavits in *Lucas v. United States*,<sup>48</sup> a habeas corpus proceeding under 28 U.S.C. § 2255, in which the circumstances surrounding a previous state-court conviction were at issue:

Unfortunately, as was noted above, there is no transcript of the state court proceeding. In addition, the Honorable Marc Westbrook, the presiding judge in that proceeding, was killed in a car accident in 2005. As such, the court must rely

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versations with the patrons, the movements of their generously endowed torsos left absolutely nothing to the imagination. Indeed, those persons sitting at the bar were able to distinguish the quarter-inch letters of a tattoo located on the derriere of one young lady which identified her as "Property of the Dragon's Motorcycle Gang."

*Id.* at 508.

44. *Id.* He then elaborated:

It is determined that the performances offered at the Club Lido fall far short of presenting an issue of "speech" sufficiently important to outweigh the State of New Jersey's interest in curtailing nudity in public places. In no way can the movements of the "Ladies of the Ensemble" performed in unabashed nudity be considered an art form containing the slightest iota of "self-expression." "Swan Lake", it was not! Although advertised as "Nude Interpretive Dancing", it was neither interpretive or dancing—just nude, a "Go-go" performance bereft of outer dress. What we have here is the cheap exploitation of human sexuality for purely commercial purposes.

*Id.* at 509.

45. *Id.* at 510.

46. 283 F. Supp. 2d 936 (S.D.N.Y. 2003).

47. *Id.* at 943.

48. Cr. No. 3:05-076-0-MBS, 2010 WL 412554 (D.S.C. Jan. 26, 2010).

on other evidence to determine whether Movant knowingly and voluntarily waived his right to counsel prior to pleading guilty in his state court proceeding . . . .

The government also produced evidence from two of Judge Westbrook's former law clerks. The affidavit of Alan M. Wilson ("Wilson") indicates that "it was Judge Westbrook's habit and routine practice to advise [ ] *pro se* defendants of their right to counsel, including the right to appointed counsel if they could not afford an attorney, as well as to make a finding that their waiver of counsel was voluntarily and intelligently made prior to accepting a guilty plea." In Wilson's opinion, Judge Westbrook "would never have accepted a guilty plea without first having found on the record that the decision to plead guilty was freely, voluntarily and intelligently made." The deposition of Judge Brian W. Jeffcoat, another former clerk of Judge Westbrook, indicated that Judge Jeffcoat never saw Judge Westbrook accept a guilty plea without first making a finding on the record that the guilty plea was freely and voluntarily made. Judge Jeffcoat further stated that Judge Westbrook took his time with *pro se* defendants to make sure they understood what was going on and did not wish to have an attorney.

Movant produced the affidavit of Coconut Pantsari, who was the court reporter for Judge Westbrook the day Movant was sentenced. Ms. Pantsari had no memory of Movant's guilty plea, but indicated that Judge Westbrook took pleas rather rapidly and that any warnings regarding the dangers of proceeding without an attorney given to Movant "would have been perfunctory."

Based upon the foregoing evidence and looking at the record as a whole, the court finds that Defendant knowingly and voluntarily waived his right to counsel in the underlying state court proceeding.<sup>49</sup>

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49. *Id.* at \*3-4 (citations to the record omitted).

The circumstances surrounding the entry of a default in a state-court case were at issue in *Sterling Factors, Inc. v. Whelan*,<sup>50</sup> in which U.S. District Judge Owen Forrester was faced with dueling affidavits from the law clerk and the attorneys involved in the state-court proceeding.<sup>51</sup> In *Merit Finance Co. of Kingsport v. Service Finance Co. of Greenwood*,<sup>52</sup> Judge Robert Hemphill both cited and appended in full an affidavit from his law clerk to demonstrate that the defendants had been notified of a hearing on the plaintiff's motion for a default judgment.<sup>53</sup> In *Lehman v. United States*,<sup>54</sup> the "plaintiff and her counsel . . . filed affidavits averring that they were informed by the trial Judge's law clerk . . . that [the] plaintiff could remain at home . . . until she received a telephone communication from her counsel to come to Philadelphia for the trial."<sup>55</sup> Judge Charles Kraft was not persuaded: "This allegation is expressly contradicted by the averments of an affidavit, filed by the law clerk [at] the Court's direction."<sup>56</sup>

The law-clerk affidavit in *Yagman v. Republic Insurance*<sup>57</sup> was also judicially solicited.<sup>58</sup> There, Judge William Keller sanctioned an attorney under Rule 11 of the Federal Rules of Civil Procedure, 18 U.S.C. § 401, and the court's inherent power<sup>59</sup> for, among other "pestiferous conduct,"<sup>60</sup> disobeying an order that he had issued.<sup>61</sup> In support of his determination that the attorney understood his order, Judge Keller wrote: "Yagman ignores the issue posited by the Court that any ambiguity with respect to the Court's request for copies of

50. 245 B.R. 698, 701 (N.D. Ga. 2000).

51. *Id.* at 702.

52. 38 F.R.D. 482 (D.S.C. 1965).

53. *Id.* at 483, 485; *see also* N'Jai v. Floyd, Civil Case No. 07-1506, 2009 WL 1531594, at \*11 & n.26 (W.D. Pa. May 29, 2009) (citing affidavits from judge's courtroom deputy clerk and former law clerk as well as the court's data quality analyst, Unix/Linux systems administrator, and webmaster/trainer to demonstrate that court had "heard *nothing* further from Plaintiff in the next 30 days").

54. 313 F. Supp. 249 (E.D. Pa. 1970).

55. *Id.* at 250.

56. *Id.* at 250 n.1.

57. 137 F.R.D. 310 (C.D. Cal. 1991).

58. *Id.* at 311.

59. *Id.* at 311-12.

60. *Id.* at 318.

61. *Id.* at 317.

the papers in *Manuel L. Real, Chief Judge, United States District Court for Central District of California v. Stephen Yagman* was clarified telephonically by my law clerk.”<sup>62</sup> Judge Keller cited the declaration of his law clerk,<sup>63</sup> which he appended in full,<sup>64</sup> and then, for good measure, he explained that “[i]t is appropriate for a court to consider the conduct of the Judge’s law clerk.”<sup>65</sup> In the end, the sanctions did not stick. As the Ninth Circuit pointed out, the order by Judge Keller that attorney Yagman supposedly disobeyed “specifically requested a complaint and pleadings which did not exist.”<sup>66</sup> The court of appeals then explained: “It was objectively impossible for Yagman to comply with the terms of the written order. Though the court’s law clerk may have requested other documents, this request was not part of the court’s order and therefore cannot serve as the basis for a finding of contempt.”<sup>67</sup> On that basis, the Ninth Circuit held that the imposition of sanctions was an abuse of discretion.<sup>68</sup>

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62. *Id.* at 315.

63. *Yagman*, 137 F.R.D. at 315 n.4.

64. *Id.* at 319–20.

65. *Id.* at 315 n.4 (citing *Bus. Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 545–46 (1991)).

66. *Yagman v. Republic Ins.*, 987 F.2d 622, 629 (9th Cir. 1993).

67. *Id.*

68. *Id.* Attorney Yagman continued to tangle with Judge Keller. Shortly after Judge Keller sanctioned him, “Yagman was quoted as saying that Judge Keller ‘has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-semitism.’” *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1434 (9th Cir. 1995). Yagman was found to have told a reporter “that Judge Keller was ‘drunk on the bench.’” *Id.* Regarding the “drunk on the bench” comment:

The primary evidence . . . consist[ed] of testimony from one of Judge Keller’s former law clerks. The law clerk testified that a reporter called the chambers seeking comment on Yagman’s “drunk on the bench” statement. The witness did not claim he had spoken with the reporter himself; rather, he testified that the reporter spoke to his co-clerk and that he (the witness) happened to be in the room with the co-clerk when the call came in. The witness did not explain how he came to know what the reporter was saying at the remote end of the telephone line, but presumably he was testifying as to what the co-clerk said the reporter said Yagman said.

Law clerks have also been asked to give affidavits to document things they did, or did not do, in particular cases. For example, in *Porcaro v. United States*,<sup>69</sup> “[t]he government filed affidavits from both the law clerk and the courtroom clerk who said they never discussed possible sentences with petitioner or his counsel or said that he would receive a one year sentence if he plead guilty.”<sup>70</sup> And in *McCulloch v. Hartford Life & Accident Insurance Co.*,<sup>71</sup> in which the plaintiff moved for Judge Alan Nevas’s recusal based on the post-clerkship employment of one of his law clerks, the judge solicited an affidavit from that former law clerk that explained his involvement in the plaintiff’s case during his post-clerkship employment.<sup>72</sup>

Among the more interesting law-clerk affidavits are those in which law clerks have provided testimony concerning the conduct of

*Id.* at 1441 n.20 (citation omitted). For the conduct described above, as well as other intemperate remarks about Judge Keller, and after a hearing at which Judge Keller’s former law clerk testified, the Standing Committee on Discipline for the Central District of California suspended Yagman from practice in the district. *Id.* at 1433. The Ninth Circuit reversed. *Id.* at 1445. Yagman 2, Judge Keller 0.

69. 832 F.2d 208 (1st Cir. 1987).

70. *Id.* at 213.

71. No. 3:01CV1115(AHN), 2005 WL 3144656 (D. Conn. Nov. 23, 2005).

72. *Id.* at \*2. In *McCulloch*, the plaintiff’s attorney claimed that “the Court’s new law clerk told him that the law clerk who was working on the case had left and had taken the court file with him so that he could finish the pending motions.” *Id.* at \*1. According to the former law clerk’s affidavit:

At the time his clerkship ended on September 1, 2005, his work on this case was substantially finished. He did not take the court file with him when he left. He commenced his employment with the Firm on September 6, 2005. After he started working at the Firm he had no substantive discussions about this case with the Court and did not discuss the merits of the pending motions with the Court. His work consisted of finishing up the drafts, primarily editing and doing some minor research. He submitted his drafts to the Court sometime during the last week of September 2005.

*Id.* at \*2. Judge Nevas added: “The drafts he submitted were revised, edited, and reviewed by the Court before they were issued on September 29 and 30, 2005.” *Id.* While there is no reason to fault Judge Nevas’s determination that recusal was not warranted, it is not difficult to see the problems that can arise when work on judicial opinions is conducted by those other than court employees, such as lawyers working for private firms. Note to self: Remember to complete all unfinished work before leaving clerkship.

their judges. In *Greer v. Minnesota*,<sup>73</sup> a habeas corpus proceeding pursuant to 28 U.S.C. § 2254, the petitioner

obtained and submitted affidavits from two law clerks for the [state-court] trial judge who stated that “the trial judge appeared ‘visibly angry at defense counsel’ during Greer’s trial; that he told them he had ‘denied defense counsel’s challenges for cause because he was angry with them’; and that, contrary to his common practice he had not sent jury questionnaires to the attorneys.”<sup>74</sup>

Clearly, there were some pretty interesting goings on during and after Mr. Greer’s trial but, sadly for students of trial advocacy and habeas practice, the *Greer* opinion says little more than what I have quoted and leaves much to the imagination, including just how the petitioner got such crucial (and critical) affidavits from the trial judge’s law clerks. While the Minnesota Supreme Court “did conclude that it was ‘unlikely that the law clerks’ affidavits would have formed the basis for removal of Judge Crump,”<sup>75</sup> it ultimately determined that the claim supported by the law-clerk affidavits was procedurally barred, thus preventing both it, and the federal habeas court, from reaching that claim on the merits.<sup>76</sup>

Perhaps the most noteworthy law-clerk affidavits were those given by the law clerks of Judge Paul Riley of the Southern District of Illinois. According to Judge Richard Mills, “[t]he late Paul E. Riley, United States District Judge for the Southern District of Illinois, had a penchant for communicating *ex parte* with jurors in cases in which he was the presiding judge.”<sup>77</sup> In at least seven cases, criminal defendants convicted after jury trials before Judge Riley moved for

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73. 493 F.3d 952 (8th Cir. 2007).

74. *Id.* at 956.

75. *Id.* at 957 (quoting *Greer v. State*, 673 N.W.2d 151, 157 (Minn. 2004)).

76. *Greer*, 493 F.3d at 957–58. While no court ever had to consider the affidavits given by Judge Crump’s law clerks, Judge Crump was subjected to another kind of wildness; he and six jurors gave testimony at a post-trial *Schwartz* hearing. *Id.* at 955–56. (“In Minnesota courts, a *Schwartz* hearing is used when jury impartiality is disputed and allows for the examination of the jurors on the record in the presence of counsel for all parties.” *Id.* at 956 n.3 (citing *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301, 303 (Minn. 1960))).

77. *United States v. Hodges*, 189 F. Supp. 2d 855, 857 (S.D. Ill. 2002).

new trials based in part on Judge Riley's ex parte communications with jurors, and, in those cases, law-clerk affidavits were offered as evidence of the communications at issue.

In *United States v. Davis*,<sup>78</sup> Judge Riley's permanent law clerk, Sheila Hunsicker, testified by affidavit that the judge excused the defendant and counsel from the courtroom, but remained, along with her, "while the jurors viewed the firearms and ammunition marked as exhibits in the case."<sup>79</sup> She further testified:

[W]hile the jury was viewing the exhibits, Judge Riley questioned whether the Defendant could have concealed all of the weapons under his trench coat. I walked over to Judge Riley and asked him to not talk to the jurors while they were looking at the exhibits. He got mad, pointed toward the door, and indicated that I should leave the courtroom. I left the building.<sup>80</sup>

Charles Davis got a new trial.<sup>81</sup> *United States v. Von Briggs*<sup>82</sup> involved similar circumstances and the same law clerk:

Judge Riley informed Von Briggs and counsel that they would be excused from the courtroom while the jurors viewed the drugs and the firearms marked as exhibits in the case but that he would remain to ensure that no one ingested any of the narcotics and that no one was shot with one of the firearms. According to her affidavit, Sheila Hunsicker also remained in the courtroom while the jury viewed the evidence. Hunsicker testified that while the jury was viewing the exhibits, she observed Judge Riley inform one of the jurors that certain markings on a gun clip (which had been admitted into evidence) were not very important or did not really matter. In addition, Hunsicker testified that she noticed Judge Riley interacting with the jurors as they viewed the

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78. 109 F. Supp. 2d 991 (S.D. Ill. 2000).

79. *Id.* at 993.

80. *Id.* at 996.

81. *Id.* at 997.

82. 109 F. Supp. 2d 1004 (S.D. Ill. 2000).

evidence and observed him making facial expressions which she believed revealed his anti-prosecutorial sentiments.<sup>83</sup>

Like Davis, Marlenhuff Von Briggs got a new trial.<sup>84</sup> And in *United States v. Quilling*,<sup>85</sup> Gary Quilling got a new trial based in part on law clerk Hunsicker's affidavit, which corroborated a court reporter's affidavit testimony that "she observed Judge Riley telling the jurors in Quilling's case that 'this is ridiculous' . . . [and] that Judge Riley made derogatory remarks to the jury . . . regarding the Government's attorney."<sup>86</sup>

Judge Riley's other four cases that went before Judge Mills involved Judge Riley's other law clerk, David Agay.<sup>87</sup> In each case, Judge Mills wrote something like this:

During an interview by Chief Judge Gilbert, Agay informed Chief Judge Gilbert that, during his tenure as Judge Riley's law clerk, he assisted Judge Riley in only four trials: *United States v. Bradley*, 98-30149, *United States v. Bishawi*, 97-40044, *United States v. Alexander*, 99-30067, and *United States v. Hodges*, 99-40009. Of those four trials, Agay had a specific recollection that Judge Riley entered the jury room and spoke with the jury while they were deliberating in three of the four cases, although he could not specify in which of the three cases the improper contact had occurred. Moreover, in his affidavit, Agay testified that "[o]n some occasions, I was not present in chambers when the jury sent a note. Sometimes, Judge Riley would receive the note, read it, go into the jury room, and close the door."<sup>88</sup>

He then added something like this:

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83. *Id.* at 1005–06 (footnote omitted).

84. *Id.* at 1008.

85. 109 F. Supp. 2d 1009 (S.D. Ill. 2000).

86. *Id.* at 1011.

87. See *United States v. Alexander*, 110 F. Supp. 2d 762, 766 (S.D. Ill. 2000); *United States v. Bishawi*, 109 F. Supp. 2d 997, 1001 (S.D. Ill. 2000); *United States v. Bradley*, 109 F. Supp. 2d 984, 989 (S.D. Ill. 2000); *United States v. Hodges*, 110 F. Supp. 2d 768, 771 (S.D. Ill. 2000).

88. *Hodges*, 110 F. Supp. 2d at 772.

In addition, Agay testified that he “observed Judge Riley speaking to jurors outside the courtroom on several occasions.” Although Agay went on to say that the discussions merely concerned mundane matters such as the weather, given Judge Riley’s improprieties with juries in other cases, the Court is concerned that even these, perhaps, innocent contacts with the juries might have had an influence on the juries’ partiality despite Agay’s statement that he did not see or hear Judge Riley discuss the substances of any case during these contacts. At a minimum, given the circumstances surrounding these seven cases and Judge Riley’s medical condition, it leaves one with the impression that “[s]omething is rotten in the state of Denmark.”<sup>89</sup>

Judge Mills granted new trials to the defendants in *Hodges*, *Alexander*, *Bishawi*, and *Bradley*,<sup>90</sup> but, in *Bishawi* and *Hodges*, the government appealed successfully and, after evidentiary hearings on remand, prevailed in the district court, on grounds that Ahmad Bishawi and Carlan Hodges had not been harmed by Judge Riley’s ex parte contacts with the juries in their trials.<sup>91</sup>

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89. *Id.* at 772–73 n.6 (quoting WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 4).

90. *Alexander*, 110 F. Supp. 2d at 768; *Bishawi*, 109 F. Supp. 2d at 1004; *Bradley*, 109 F. Supp. 2d at 991; *Hodges*, 110 F. Supp. 2d at 774.

91. *United States v. Bishawi*, 186 F. Supp. 2d 889, 893–94 (S.D. Ill. 2002) (“[S]everal jurors testified that Judge Riley came into the jury room and/or into the jury’s break room and spoke with them about the weather, about television programs, and about why the trial had been cancelled one day.”); *United States v. Hodges*, 189 F. Supp. 2d 855, 862 (S.D. Ill. 2002) (“[T]he juror who testified that Judge Riley entered the jury room during deliberations stated that Judge Riley was only in the jury room briefly (about a minute or as long as it takes to walk into the kitchen to get a soft drink out of the refrigerator), that Judge Riley did not say anything or make any unusual gestures, and that, although he thought it peculiar for Judge Riley to be in the jury room during the deliberations, Judge Riley’s presence did not affect the verdict”). While Judge Mills ruled in favor of the government in *Bishawi* and *Hodges*, he made no secret of his opinion of Judge Riley’s conduct, calling it “inappropriate and unbecoming a judicial officer . . . [and] a disservice to the United States District Court for the Southern District of Illinois, to the legal profession, and to the federal judiciary.” *Hodges*, 189 F. Supp. 2d at 861. He concluded: “Judge Riley’s conduct in this cause is not to be countenanced; his actions reflect adversely upon the integrity of the judicial system.” *Id.* at 862; *see also Bishawi*, 186 F. Supp. 2d at 895.

Notwithstanding the examples discussed above, there are at least some law-clerk affidavits about judicial conduct that are not critical of the judges they discuss. For example, in *Hathcock v. Navistar International Transportation Corp.*,<sup>92</sup> Judge Ross Anderson responded to the defendant's motion to recuse him for bias by soliciting an affidavit from his law clerk "stating that the court in large measure had adopted the factual predicate from the proposed order drafted by the [plaintiff's] counsel, but had drawn independent legal conclusions."<sup>93</sup> Judge Anderson denied the motion.<sup>94</sup> The court of appeals vacated the judgment and remanded for reconsideration,<sup>95</sup> stating:

Though probably insufficient to merit recusal in isolation, the judge's *ex parte* contacts requesting the Hathcocks' counsel to draft at least the factual basis of a default order, and possibly its legal conclusions as well, do not foster an impression of objectivity, particularly since Navistar was never given an opportunity to respond to the proposed order. We are also troubled by the judge's willingness to involve the court as a participant in ongoing litigation by directing his law clerk to file an affidavit in response to the Hathcocks' recusal motion.<sup>96</sup>

The law-clerk affidavit in *United States v. Zichettello*<sup>97</sup> neither criticized the law clerk's judge nor praised her.<sup>98</sup> Rather, that affidavit, along with one from the judge,<sup>99</sup> merely purported to describe the process by which jury instructions were prepared in chambers,<sup>100</sup> which, ultimately, the court of appeals found wanting.<sup>101</sup> While the

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92. 53 F.3d 36 (4th Cir. 1995).

93. *Id.* at 39.

94. *Id.*

95. *Id.* at 41.

96. *Id.* (citation omitted).

97. 208 F.3d 72 (2d Cir. 2000).

98. *Id.* at 92.

99. *Id.* at 89.

100. *Id.* at 89–92.

101. *Id.* at 97–98. The court concluded: "[W]hether we have the power to order a change in such a practice is unclear. We review judgments, and our review of the convictions and sentences here may not be an appropriate vehicle for the fine tun-

court's description of the instruction-preparation process, including the law clerk's role therein, and the court's appraisal of the law clerk's affidavit<sup>102</sup> are of moderate interest, at least to those who help prepare jury instructions, the real law-clerk wildness in *Zichettello* involved the way in which the issue came to light in the first place:

On April 9, after the government's [appellate] brief had been filed, the government moved to "correct the record so that it reflects the charge given to the jury . . . ."

Three days after the government's brief was filed, the person who had served as the trial judge's law clerk ("Law Clerk") during the trial—he had left in September 1998, after two years of service—encountered a former Assistant United States Attorney ("AUSA") who had been one of the lead prosecutors in the case. The occasion was a social event at Fordham Law School. The AUSA and her husband, a Fordham law professor ("Law Professor"), depicted the ensuing conversation as follows. The AUSA told the Law Clerk that she did not remember the district judge giving the instructions described in Point I of the appellants' brief. The Law Clerk said that he also did not remember them. The Law Professor recalled the Law Clerk also saying he had actually returned to the judge's chambers and found that the instructions in the "script" read to the jury by the judge were different from those in the transcript upon which the appellants' brief relied. The Law Clerk recalls the conversation with the AUSA and remembers telling her that he believed that the charge described by appellants was correct on the law. He does not recall mentioning a script or saying that the language in question was not in the script.

This conversation prompted the government to inquire further into the charge issue. Days later, the government communicated with the court reporter, Vincent Bologna, who had transcribed the jury instructions. Bologna told the gov-

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ing of this practice. However, we invite the judges of the Southern District to consider revision." *Id.* at 98 (footnote omitted).

102. *Id.* at 94–97.

ernment that the language challenged by appellants was not, in his view, actually read to the jury. Based on this and documents provided by Bologna, the government concluded that there was compelling evidence that the record certified to this court was in error on an issue material to the appeal.

The AUSA contacted the attorneys who represented appellants at trial and asked them whether they remembered hearing the challenged language during the jury charge. The attorneys all stated in substance that they did not remember whether the district court actually uttered the challenged words. The government thereafter contacted appellants' appellate counsel to seek their consent to amend the transcript and strike Point I of the Hartman, Lysaght, and Kramer brief. Understandably, appellate counsel did not consent to the request. Accordingly, the government filed the present motion to amend in this court. We thereafter invited the district judge to submit her version of events in writing. She responded with an affidavit and submitted as well an affidavit of the Law Clerk.<sup>103</sup>

While the court of appeals had much to say about many aspects of the trial court's practices and procedures, it reported, without comment, the conversation at the Fordham social event at which the former law clerk spilled a few more legumes than I would have let out of my bean pot in a similar situation.

I conclude this section with an affidavit-assisted trip from the frying pan straight into the fire. In *Jones v. Clinton*<sup>104</sup> (yes, *that* Clinton), one of the House Managers of the presidential impeachment trial contacted Judge Susan Webber Wright, who was presiding over Paula Jones's suit against President Clinton, and told Judge Wright that he was thinking about calling her as a witness in the impeachment trial.<sup>105</sup> Judge Wright was never asked to testify,<sup>106</sup> but her law clerk was not so lucky: "Later, a representative of the House Managers requested and, with my permission, received an affidavit

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103. *Zichettello*, 208 F.3d at 88–89 (citations to the record omitted).

104. 36 F. Supp. 2d 1118 (E.D. Ark. 1999).

105. *Id.* at 1124 n.11.

106. *Id.*

concerning the President's deposition from my law clerk, Barry W. Ward, who attended the President's deposition."<sup>107</sup> Law clerks have given a few affidavits over the years, but it will be quite a long time, I suspect, before any law-clerk affidavit can top the one Barry Ward gave.

### C. *From the Mouths of Law Clerks*

The final step in the transformation from observer to participant, from law clerk to witness, occurs when a court takes formal testimony from a law clerk. Like the previous section, this section is organized primarily on the basis of the topics on which law clerks have been asked to testify. Those topics include, among others, issues related to the operation of juries, other trial-related procedural matters, the imposition of sanctions on attorneys and judges, and determinations of competence.

#### 1. *Jury Issues*

Law clerks have been called to testify about jury-related issues in a variety of ways, sometimes during the course of trial by the presiding judges for whom they worked, sometimes after the fact.

*United States v. Bradley*<sup>108</sup> involved the removal of a juror named Jefferson for sleeping during trial.<sup>109</sup> Before the sleeping issue arose, Jefferson was moved from one spot in the jury box to another because of "an odor problem,"<sup>110</sup> and "[l]ater the Assistant United States Attorney told the court he thought that Jefferson was eating paper."<sup>111</sup> After another juror told the court, under oath, that she had overheard Jefferson say that she had made up her own mind and would not listen to the court, "[t]he court then told the parties that it had noticed Jefferson sleeping."<sup>112</sup> Thereafter, the court

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107. *Id.*

108. 173 F.3d 225 (3d Cir. 1999).

109. *Id.* at 228.

110. *Id.*

111. *Id.*

112. *Id.*

swore in one of its law clerks, who testified that during the government's closing, she had noticed Jefferson sleeping. The defendants had the opportunity to cross-examine the clerk but did not do so. The court expressed its desire to question Jefferson, but the defendants opposed that procedure.<sup>113</sup>

Subsequently, "[t]he court . . . stated that it had observed that Jefferson had not been paying attention during the defendants' summation."<sup>114</sup> The defendants then "urged the court to examine Jefferson."<sup>115</sup> It declined to do so and dismissed her from the jury without questioning her.<sup>116</sup> The court of appeals affirmed, ruling that it was not improper for the trial court to dismiss Jefferson for sleeping without a voir dire of her:

The court had a legitimate basis to dismiss Jefferson. Under Fed. R. Crim. P. 24(c), a court may dismiss jurors if they "become or are found to be unable or disqualified to perform their duties." The defendants argue that the court's stated reason for dismissing Jefferson, that she was sleeping, was only a "pretext," and that the court and the government had singled her out and were looking for ways to remove her. But the record shows that the court dismissed her for *inability to serve* as a juror, and that the court had sufficient information to support the dismissal and so did not have to voir dire her or the other jurors with respect to this point. *See, e.g., United States v. Bertoli*, 40 F.3d [1384,] 1395 [(3d Cir. 1994)]; *United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1994).

The defendants downplay the fact that the court itself noticed Jefferson sleeping: first, when it overheard someone snoring loudly during the government's summation, then, when it observed Jefferson snoring during the defendants' summation; thus, its dismissal was not solely based on its law

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113. *Id.* at 228–29.

114. *Bradley*, 173 F.3d at 229.

115. *Id.*

116. *Id.*

clerk's observations. The court could take judicial notice of the conduct of a juror in open court. *See, e.g., United States v. Carter*, 433 F.2d 874, 876 (10th Cir. 1970). Moreover, the court did not base its decision on ex parte communications with its clerk. Rather, it put the clerk on the stand to be cross-examined. The defendants refused to question the clerk, and now argue that this is because they did not want to risk attacking the court through its extension, the clerk. Yet the defendants' attorneys were quite willing to argue with the court itself regarding its observation that Jefferson was sleeping, and were willing to question whether the court had observed other jurors sleeping as well.<sup>117</sup>

In *Otis Elevator Co. v. Coyle Realty Co.*,<sup>118</sup> the issue was whether the jury had been "improperly coerced or subjected to undue influence."<sup>119</sup> The trial court held a post-trial hearing on that issue, at which the following transpired:

The jury foreman testified that the bailiff physically pushed him back into the jury room, and that the jury was forced to deliberate after it had clearly reached an impasse as if a verdict were a condition of release from "prison." The foreman's testimony was contradicted by several witnesses at the post-trial hearing. The law clerk of the judge presented uncontroverted testimony that when she told the foreman that the presiding judge would declare a mistrial and dismiss the jury, he requested additional time for deliberation.<sup>120</sup>

In *United States v. Florea*,<sup>121</sup> a law clerk was called by his or her judge, in a hearing held on the day a criminal defendant was sentenced, to describe the manner in which certain tape recordings were played for a jury during its deliberations.<sup>122</sup> In *Cigna Fire Under-*

117. *Id.* at 230.

118. 838 F.2d 467 (unpublished table decision), 1988 WL 4623 (4th Cir. Jan. 14, 1988).

119. *Id.* at \*1.

120. *Id.*

121. 541 F.2d 568 (6th Cir. 1976).

122. *Id.* at 570-71.

*writers Co. v. MacDonald & Johnson, Inc.*,<sup>123</sup> Judge Douglas Woodlock took testimony from a number of people, including a law clerk to Judge Frank Freedman, at a hearing to determine whether Judge Freedman had had ex parte contact with the jury during a trial he had conducted.<sup>124</sup> Finally, in what can only be described as an extraordinary habeas corpus proceeding, Judge Charles Briant held an evidentiary hearing on the issue of racial composition of juries in New York state-court criminal proceedings in which he heard from, among others, “a former law clerk to a state Supreme Court Justice in Bronx County who testified, based on his observations of 12 to 15 voir direes from 1978 to 1980, that 60 to 75% of the jurors called were dark skinned.”<sup>125</sup>

The cases discussed above are all appellate opinions discussing law-clerk testimony taken in the court below. There are, however, several district-court opinions in which judges discuss testimony they have taken from their own law clerks. In *United States v. Kohne*,<sup>126</sup> Judge Rabe Marsh sequestered the jury in a criminal case and had three jury attendants “sworn to safeguard the jury.”<sup>127</sup> One of those attendants was his law clerk.<sup>128</sup> After one juror submitted a written statement claiming coercion by other jurors,<sup>129</sup> and the defendants filed a motion for a new trial,<sup>130</sup> Judge Marsh held a hearing at which he questioned the jury attendants, including his law clerk.<sup>131</sup> In *United States v. Lopez-Martinez*,<sup>132</sup> Judge Stephen McNamee held a post-trial evidentiary hearing on a criminal defendant’s motion for a new trial, at which he questioned a law clerk of his who had “discovered a piece of paper containing legal terms and definitions” in

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123. 86 F.3d 1260 (1st Cir. 1996).

124. *Id.* at 1272–73. Judge Woodlock determined that “Judge Freedman had no secret communication with the jury outside the presence of counsel.” *Id.* at 1273.

125. *Roman v. Abrams*, 822 F.2d 214, 219 (2d Cir. 1987).

126. 358 F. Supp. 1046 (W.D. Pa. 1973).

127. *Id.* at 1048 n.2.

128. *Id.* at 1048.

129. *Id.* at 1047.

130. *Id.*

131. *Id.* at 1048.

132. No. CR 05-1145-PHX-SMM, 2007 WL 604912 (D. Ariz. Feb. 22, 2007).

the jury room shortly after the jury had been discharged.<sup>133</sup> And in *Red Star Towing & Transportation Co. v. "Ming Giant,"*<sup>134</sup> Judge Pierre Leval put his law clerk on the stand, in a post-trial hearing, to testify about what happened immediately after the jury returned a verdict in a case in which counsel for one party was found to have provided the jury with information that the judge had ruled inadmissible:

My law clerk, Mr. Mark Dooks, testified as follows to what occurred after the end of the jury deliberations: On Saturday, February 6, 1982, as soon as the jury left the courtroom, Mr. Friedman stood up and said that he wanted to remove all of his exhibits from the jury room. Mr. Leonard suggested that the task could be postponed until the following Monday but Mr. Friedman insisted it should be done immediately. Mr. Dooks asked Mr. Bowes not to permit anyone into the jury room until it was checked. After the jurors left the room, he entered and found PX 337B with other pla-

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133. *Id.* at \*1. In the process of ruling against the defendant, on grounds that "the record failed to establish that any deliberating juror was aware of the extrinsic information," Judge McNamee was able, rather deftly, to avoid being in the position of resolving a credibility battle between his law clerk and one of the jurors:

In reaching this finding, the Court considered the inconsistent testimony regarding the state of the extrinsic information when it was discovered by the law clerk. The law clerk testified that the sheet of paper containing the legal terms was sitting outside of the manilla envelope when it was discovered while the Alternate testified that he never removed the paper from [the] manilla envelope in which it was sealed. The Court need not be concerned with determining how the envelope [became] unsealed in light of the testimony of the deliberating jurors. The Court[ ] is only concerned with determining whether any of the jurors who deliberated in this matter were aware of the extraneous information and the affirmative testimony of the jurors resolved this question. Not a single juror recalled seeing the extraneous information before the evidentiary hearing . . . . Therefore, in light of the testimony of the jurors who participated in the deliberations in this matter, the Court finds that a new trial is unnecessary because not a single juror participating in the deliberations was even aware of the extrinsic information.

*Id.* at \*3. *Lopez-Martinez* clearly points out the discomfort that can ensue when a law clerk climbs into the witness box, especially the one in his or her own judge's courtroom.

134. 552 F. Supp. 367 (S.D.N.Y. 1982).

cards. He then asked me to come into the jury room before dismissing the lawyers. He testified that after he showed me PX 337B, I brought it into the courtroom and told the lawyers that I was surprised to find it in the jury room after I had so clearly ruled it not in evidence . . . .

After the above described testimony, Mr. Friedman took the stand again, in part to refute the possible inference from Mr. Drooks' testimony that his impatience to enter the jury room resulted from a desire to remove the incriminating exhibit. He stated that it was his uniform practice to secure all exhibits as rapidly as possible after trial so as to insure their preservation for appeal. This position was, however, significantly weakened by the testimony of Yangming counsel, Mr. Gotimer, that on Saturday evening after the end of the trial, Mr. Friedman did not remove the remaining exhibits. They remained in the courtroom over the weekend, and Mr. Friedman relied on defense counsel to pick up his exhibits for him. Defense counsel collected all the exhibits and forwarded plaintiff's exhibits to Mr. Friedman under covering letter nearly two weeks later. It appears that Mr. Friedman's sense of urgency to take possession of his exhibits diminished substantially after the court's discovery of PX 337B.

I conclude on overwhelming evidence that, through willful misconduct of plaintiff's counsel, the jury was sent an exhibit that had been excluded from the evidence because of its unsubstantiated, inaccurate and misleading nature.<sup>135</sup>

## 2. *Procedural Matters*

As intimate participants in what goes on backstage in the courthouse, law clerks are privy to all manner of information on procedural matters. When procedure is civil, all is well, and no law clerk needs to spill his or her guts.<sup>136</sup> But, when things have gone awry,

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135. *Id.* at 384 (citations to the record omitted).

136. Spill your guts? Spill the beans? I suppose that on certain occasions, after the proper dietary input, there's no meaningful distinction.

law clerks have been called to testify about the ordinarily sequestered world in which they work.

In *United States v. Reich*,<sup>137</sup> Perry Reich was convicted of “forgery of a judge’s signature, [and] of corruptly obstructing a judicial proceeding.”<sup>138</sup> In support of the second charge,

Judge Mann’s law clerk testified that the forged Order wasted judicial resources in requiring Judge Mann to issue an Order [disavowing the forged Order] and to communicate to Judge Korman and the Second Circuit that the forged Order did not come from her, and to discuss the forged order at a status conference with the parties.<sup>139</sup>

The testifying law clerk in *Velazquez v. National Presto Industries*<sup>140</sup> was called to shed light on “the terms of the ‘settlement understanding’ that emerged from the two settlement conferences that the court had supervised.”<sup>141</sup> In order to determine those terms, the court supplemented its “own recollection of the conferences” by “hear[ing] argument from counsel, elicit[ing] sworn testimony from its own law clerk, and consider[ing] affidavits of counsel who were present at the conference.”<sup>142</sup>

Also somewhat procedural, but further off the beaten track, is the law-clerk testimony in *Vietnamese Fishermen’s Association v. Knights of the Ku Klux Klan*<sup>143</sup> in which the plaintiffs sought, among other relief, injunctions against “a variety of alleged unlawful acts of violence and intimidation against the plaintiff class . . . .”<sup>144</sup> In that case, one of the defendants, who was Grand Dragon of the Ku Klux Klan in Texas, moved to disqualify the trial judge “on the grounds of personal bias or prejudice against the defendants.”<sup>145</sup> In his affidavit,

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137. 420 F. Supp. 2d 75 (E.D.N.Y. 2006), *aff’d*, 479 F.3d 179 (2d Cir. 2007).

138. *Reich*, 420 F. Supp. 2d at 77.

139. *Id.* at 84.

140. 884 F.2d 492 (9th Cir. 1989).

141. *Id.* at 494.

142. *Id.*

143. 518 F. Supp. 1017 (S.D. Tex. 1981).

144. *Id.* at 1017.

145. *Id.* at 1018.

Mr. Beam, the Grand Dragon . . . assert[ed] that [the] judge's impartiality has been demonstrated by instructing her law clerk to inquire of counsel for the plaintiffs whether they would be intimidated or in any way adversely affected in the presentation of their case if Mr. Beam or other members of the Ku Klux Klan wore their Klan robes at court hearings.<sup>146</sup>

In her order on the motion to disqualify, Judge Gabrielle McDonald wrote:

At the hearing on this motion, counsel for the defendants called as its witness, Charles K. Barber, the law clerk of Judge McDonald who was referred to in the Affidavit of Defendant Beam. Mr. Barber testified that although he was not the law clerk primarily assigned to the case, he had participated in a conversation in chambers with the Judge concerning the wearing of Klansmen robes by party's witnesses and spectators at the scheduled hearing on the preliminary injunction. Defendant Beam had worn a Klansman robe to his initial deposition and the attorneys for plaintiffs sought a protective order in part because they contended that Mr. Beam was wearing a gun under the robe. Mr. Barber testified that the judge was in Biloxi, Mississippi (at a judicial meeting) and he was responsible for remaining in contact with the attorneys to determine if additional rulings were needed by the Court. During a telephone conversation with Judge McDonald he was advised that the judge was not aware of the plaintiffs' position with respect to the wearing of Klansmen robes and considered that it would be appropriate to hear from them before making a final determination. On the day in question when Mr. Barber spoke with Mr. Dees and Adamo, the United States Deputy Marshal had advised Mr. Barber that the attorneys wanted to speak with him about one of the witnesses' failure to appear at a scheduled deposition. Mr. Barber went to the deposition room in the federal building to speak with the attorneys about that situation. As he

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146. *Id.*

reached the floor where the depositions were being held, counsel for the defendant was leaving, however, Mr. Barber spoke with attorneys for the parties about the witness who failed to appear. After this conversation, counsel for defendant left the area and it occurred to Mr. Barber as an after thought that he might raise the question of the wearing of Klansmen robes in the courtroom. Mr. Barber raised this issue with counsel for the plaintiffs. Before counsel for the plaintiffs responded, he summoned counsel for the defendants. The matter was then discussed with all counsel present. Mr. Barber testified that Judge McDonald did not instruct him to make an ex parte contact, but instructed him to make the inquiry and the matter would be discussed in greater detail with the attorneys upon her return.<sup>147</sup>

To make a long story short, Judge McDonald denied the motion to disqualify herself.<sup>148</sup>

*Vietnamese Fishermen's Association* is just one of a number of cases in which law clerks have been called upon to provide information about communications with parties or attorneys.<sup>149</sup> For exam-

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147. *Id.* at 1018–19.

148. *Id.* at 1020. In another case involving a motion to disqualify a judge, *Jewelry Repair Enterprises, Inc. v. E & S Associates, Inc.*, Judge Herbert Hutton's law clerk and courtroom deputy both testified about a communication between the courtroom deputy and counsel for one of the parties. No. CIV. A. 95-7300, 1996 WL 311462, at \*3–4 (E.D. Pa. June 4, 1996). While Judge McDonald, in *Vietnamese Fishermen's Ass'n*, and Judge Hutton, in *Jewelry Repair*, both admitted the testimony of their law clerks, Judge Bernard Snyder of the Court of Common Pleas of Philadelphia, one of the defendants in *Lipson v. Snyder* took a different approach. CIV. A. No. 85-1118, 1989 WL 79779 (E.D. Pa. July 7, 1989). In the state-court action underlying the section 1983 conspiracy claim brought by Herbert Lipson, Judge Snyder conducted a recusal hearing at which he "refused to admit the testimony of one of his former law clerks, offered on the issue of his alleged bias and partiality." *Id.* at \*3 n.1. For that conduct, and a litany of other malfeasance, the Pennsylvania Supreme Court removed Judge Snyder from office. *Id.* at \*1.

149. In fact, most of the procedural matters about which law clerks have been called to testify have involved communications between law clerks and others. However, on several occasions law clerks have been called to testify on speedy-trial issues in criminal cases. See, e.g., *United States v. Favaloro*, 493 F.2d 623, 626 (2d Cir. 1974) (Moore, J., dissenting); *United States v. Arnett*, No. CR-F-95-

ple, in *McCormack v. Schindler (In re Orbitec Corp.)*,<sup>150</sup> in a hearing in the court below, the trial judge's law clerk informed the court, albeit not under oath, that he or she had not provided misinformation to one of the parties concerning the date on which a decision had been rendered.<sup>151</sup> Unlike the law clerk in *McCormack*, the law clerk in *United States v. Wade*<sup>152</sup> did step into the witness box, having been called to testify in a post-trial evidentiary hearing about a telephone call he placed to defense counsel in a criminal trial.<sup>153</sup> The defendant's counsel claimed he was misled into putting his client on the witness stand based upon the law clerk's alleged report "that the [trial] judge was not going to instruct the jury on possession, as a lesser included offense to the main charge of possession with intent to distribute narcotics."<sup>154</sup> This is what happened at the evidentiary hearing:

Mr. Weiner called Daniel Schneider, the judge's law clerk, as a witness. Schneider was asked whether he called Mr. Weiner's law office leaving a message for him with his secretary to the effect that Judge Kinneary will not charge on the lesser included offense of possession of heroin and possession of cocaine.

The law clerk's response was:

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5287 OWW, 2006 WL 2796448, at \*4 (E.D. Cal. July 20, 2006); *United States v. Altro*, 358 F. Supp. 1034, 1036 (E.D.N.Y. 1973). *Favaloro* and *Altro* involved the same case, and law-clerk testimony was necessary, at least in part, because Judge George Rosling, the original trial judge, died after he had denied the defendant's motion to dismiss on speedy-trial grounds, but before he had the opportunity to issue findings of fact and rulings of law in support of his decision. *See Altro*, 358 F. Supp. at 1036. The unavailability of a judge also brought his law clerk to the witness stand in *Williams v. Horn*, in which a reconstruction hearing was held in order to determine the reasons why the judge had certified a juvenile as an adult. No. CIV. A. 93-3334, 2000 WL 1207165, at \*2 (E.D. Pa. Aug. 23, 2000).

150. 520 F.2d 358 (2d Cir. 1975).

151. *Id.* at 360. The party, in turn, had relied upon the law clerk's alleged misinformation in an attempt to avoid the consequences of failing to file a timely notice of appeal. *Id.* at 359-60.

152. 522 F.2d 1271 (6th Cir. 1975).

153. *Id.* at 1271.

154. *Id.*

I don't know what she wrote down but I don't believe the message I gave her was what you just said.

The law clerk was then interrogated as to his telephone conversation with Mr. Weiner as follows:

Q. Do you recall at that time telling me that the Court informed you to inform me that it . . . was not going to charge on the lesser included offenses in this particular matter?

A. No, I didn't tell you that.

Q. What did you tell me?

A. I told you the gist of what I remember telling you was that the Judge's present thinking or his present inclination was not to instruct on the lesser included offense of possession. However, you should prepare instructions regarding the lesser included offense stating your position on this point and also any other instructions you wanted the Court to charge the jury on.<sup>155</sup>

The law clerk testified to similar effect on cross-examination, as did an Assistant United States Attorney who the law clerk had telephoned at the same time he telephoned defense counsel.<sup>156</sup> Accord-

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155. *Id.*

156. *Id.* at 1271-72. While an Assistant United States Attorney did take the stand in *Wade*, the judge's refusal to permit the defendant to call the prosecutor to the stand was at issue in *United States v. Robles*, 5 F.3d 543 (unpublished table decision), 1993 WL 379831 (9th Cir. Dec. 3, 1993). The court of appeals described the defendant/appellant's argument:

Next, appellant claims error in the trial court's refusal to permit him to call as a witness Assistant United States Attorney Kevin Rooney, the prosecutor in the instant trial, who allegedly made statements casting doubt on the veracity of Government witness Alma Fuentes who also testified during the initial trial. The testimony at issue stems from conversations allegedly occurring between Rooney and the court's Law Clerk, Christine Nelson, wherein Rooney allegedly acknowledged that Fuentes did not tell the truth in her trial testimony. Ms. Nelson testified at a hearing during the initial trial that "Mr. Rooney said to me that Alma Fuentes had not been truthful on the stand." While conceding that there was some

ing to the appellate court, the judge conducting the post-trial hearing “credited the testimony of the law clerk and the Assistant United States Attorney, rather than the testimony of [defense counsel] Mr. Weiner, as he was privileged to do.”<sup>157</sup> In other words, defense counsel was unable to pin the tail on the law clerk. Whether Mr. Weiner’s client was ever able to pin the tail on his attorney, by means of a claim for ineffective assistance of counsel, is a tale for another donkey to tell.

Remaining within the realm of criminal proceedings, U.S. District Judge John Sirica’s law clerk once found himself in the witness box at a sentencing hearing. As reported by the court of appeals:

A few moments later, the sentencing hearing flew off on a revealing tangent when the trial judge read a letter submitted by the appellant. The letter, from his attorney, referred to a visit the lawyer had made to the judge’s law clerk. In it he reported that in the clerk’s opinion ‘there was only one way to get a light sentence from Judge [Sirica] and that was to confess that you did the robbery, to apologize four or five times and to say that you were willing to turn over a new leaf.’ The trial judge then called his clerk to the witness stand and interrogated him concerning his conversation with the attorney. The clerk affirmed that the letter fairly reflected the substance of his comments to the lawyer. He stated, ‘It has always been my opinion that you view sentencing differently when someone admits guilt rather than maintaining innocence.’ He added, however, ‘This has nothing to do with private conversations we have had in chambers. It is from things I have heard while sitting in that seat during sentencing hearings.’

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dispute as to whether Rooney was referring to Fuentes’ entire testimony or just that part concerning when she received her immunity, appellant asserts that it is “undisputed” that Rooney “felt at least some portion of Alma Fuentes’ testimony was untruthful.” This testimony, appellant argues, would have permitted the impeachment of Alma Fuentes and constituted evidence of prosecutorial misconduct.

*Id.* at \*4. The court of appeals did not agree. *Id.* at \*5.

157. *Wade*, 522 F.2d at 1272.

The judge himself then commented upon his reactions to defendants found guilty by the jury who continued to assert their innocence at allocution. He went on, 'I hope sometime I hear some defendant say, 'Judge, I am sorry, I am sorry for what I did.' That is what I have in mind.'<sup>158</sup>

The defendant's conviction was affirmed, but the case was remanded for resentencing.<sup>159</sup>

In *United States v. Parker*,<sup>160</sup> the trial judge was faced with the defendant's motion for a new trial based upon "[a]n affidavit . . . alleging that the affiant had observed what she said indicated that United States marshals and a law clerk had made improper contact with the jurors."<sup>161</sup> In response, the trial judge "interrogated the United States marshals and his law clerk."<sup>162</sup> Those interrogations were recorded, but conducted in camera.<sup>163</sup> In response to the defendant/appellant's objection that "the defense attorney was not present at the in camera examination of the jury foreman, law clerk and marshal,"<sup>164</sup> the court of appeals ruled: "While the better practice would have been to have the attorneys present, appellant can show no harm or prejudice arising from the court's actions. At most, the exclusion of counsel from the in camera investigation is harmless error."<sup>165</sup>

I conclude this section with *Shiwlochan v. Portuondo*,<sup>166</sup> a real jaw dropper, and the kind of case that inspired me to write this article in the first place. *Shiwlochan* involved a habeas corpus petition that was granted in part based upon ineffective assistance of counsel.<sup>167</sup> Judge David Trager held an evidentiary hearing, a portion of which he described as follows:

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158. *Scott v. United States*, 419 F.2d 264, 267 (D.C. Cir. 1969).

159. *Id.* at 279.

160. 549 F.2d 998 (5th Cir. 1977).

161. *Id.* at 1000.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* (citations omitted).

166. 345 F. Supp. 2d 242 (E.D.N.Y. 2004).

167. *Id.* at 270.

Peter Dunne, who served as the principal law clerk to Judge John Leahy from August, 1986 to December, 1996, also testified on behalf of respondent. His duties as law clerk included conferencing and negotiating dispositions in all cases pending before Judge Leahy, writing all of the judge's decisions and drafting jury instructions. Dunne testified that Judge Leahy became involved with disposing of a case only after Dunne reached an agreement with the parties. He also claimed that while Judge Leahy ordinarily did not offer a particular sentence to a defendant, the judge had a "policy not to take any disposition once jury selection began."

Although Dunne had no recollection of the facts of petitioner's case, he testified he made it a habit to be with the judge during trials because "Judge Leahy needed watching. I needed to make sure that everything he did was right."<sup>168</sup>

I am hard pressed to improve on the marginal note I made when I first discovered this case: "Wow."

### 3. *Sanctions*

As front-row spectators of the rich pageant that is the American judicial system, law clerks are well positioned to get an eyeful of the good, the bad, and the ugly of courtroom practice.<sup>169</sup> When the bad gets ugly, judges are sometimes compelled to target the offending attorney with sanctions, and, when a law clerk gets caught up in the

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168. *Id.* at 256 (citations to the record omitted).

169. As Judge Edward Weinfeld explained in an opinion finding Attorney Stanley Cohen guilty of criminal contempt in a trial before Judge Dudley Bonsal:

In addition to the acts or statements contained in the trial transcript, the government, to support the charge, relied upon the testimony of one of Judge Bonsal's law clerks, who was present throughout the entire trial and who described the respondent's expressions, manner of speaking, bearing and attitude with reference to each cited particular.

*In re Cohen*, 370 F. Supp. 1166, 1168 (S.D.N.Y. 1973) (footnotes omitted). Judge Weinfeld elaborated: "In noting respondent's manner of speech, bearing and attitude, the Court accepts the testimony of Judge Bonsal's clerk, and the findings of respondent's manner during such incidents are based thereon." *Id.* at 1171 n.27. Among other things, the law clerk testified that, at one sidebar conference, "respondent raised his voice so that the jury could hear." *Id.* at 1171.

crossfire, that is sometimes enough to punch his or her ticket to the witness box.<sup>170</sup>

In *Nabkey v. Hoffius*,<sup>171</sup> Judge David McKeague held a *pro se* litigant in contempt for violating his orders to return juror questionnaires and not to contact members of the jury or venire.<sup>172</sup> At the contempt hearing, Judge McKeague received testimony from, and directly examined, several deputy clerks, a case manager, and his law clerk.<sup>173</sup> At a show-cause hearing in *Jimenez v. Coca-Cola Co.*,<sup>174</sup> after which Judge Roslyn Silver imposed a variety of limitations on plaintiff Joe Jimenez's access to the courthouse, the judge took testimony from one of her law clerks:

Finally, a law clerk for this Court testified that he received telephone calls from Mr. Jimenez in early 2001. Mr. Jimenez inquired about the status of his case and accused the Court and the arbitrator handling the union matter of conspiring with his attorney and Defendant Coca-Cola. The law clerk also testified that after the Court granted Defendant's Motion for Summary Judgment, Mr. Jimenez telephoned again in September 2001, indicating his intention to appeal and stating that he would "then take care of all the bad people afterwards."<sup>175</sup>

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170. Getting the law clerk into the witness box can be essential, at least according to some jurists. See *Ahmed v. Reiss Steamship Co. (In re Jaques)*, 761 F.2d 302, 309 (6th Cir. 1985) (Hillman, J., dissenting) (explaining, in dissent from affirmance of trial court's contempt sanctions: "The judge's 'findings' were based on ex parte accounts related to her by her law clerk and the district court in Baltimore. There can be no question she was incompetent as a witness to render such testimony.") (citing FED. R. EVID. 602, 605, 802). While the law clerk did not testify at the contempt hearing, lucky spectators had the pleasure of hearing Attorney Jaques justify a previous failure to appear by explaining to Judge Ann Aldridge "that he 'had the screaming itches in the crotch . . . [and] wasn't here because [he] would have been scratching [his] testicles constantly if [he] had been here.'" *Id.* at 305. As Jerry Lee Lewis might say, "Goodness, gracious . . ."

171. 827 F. Supp. 450 (W.D. Mich. 1993), *aff'd sub nom.* *Nabkey v. 61st Dist. Court*, 79 F.3d 1148 (6th Cir. 1996) (unpublished table decision).

172. *Nabkey*, 827 F. Supp. at 457.

173. *Id.* at 453.

174. No. 99-1631-PHX-ROS, 2001 WL 1654802, at \*1 (D. Ariz. Dec. 13, 2001).

175. *Id.* at \*2, \*4 (citation omitted).

Now there's a procedural posture they don't train you for in law school.

An entirely different set of circumstances, equally uncovered in most law-school curricula, are those that came to pass in *United States v. Columbia Broadcasting System, Inc.*,<sup>176</sup> in which the Fifth Circuit reversed a conviction for criminal contempt based on CBS's violation of "district court orders banning the publication of sketches of courtroom scenes."<sup>177</sup> At the show-cause hearing on the contempt citation, the prosecution called the judge's law clerk because the court orders that CBS was charged with violating "were delivered orally in the judge's chambers" and without a court reporter present.<sup>178</sup> As the court of appeals explained in reversing the contempt conviction:

We are faced with the unusual setting of a judge trying a case in which he was a principal actor in the factual issues to be determined. Essential to the proof of the prosecution's case were acts committed by the judge himself, i.e. the verbal, unrecorded orders. The judge had to determine whether what he said was said was really said. He obviously could not be a witness and a judge in the same proceeding. To prove what the judge must have thought he already knew, his secretary, his law clerk and a local reporter were called as prosecution witnesses.

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The recondite niceties of contempt law coupled with the strange milieu of a judge passing on the clarity of his own orders, which had to be substantiated largely by his own legal staff, should make us particularly sensitive to the demands of justice, and more particularly, to the appearance of justice. The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the

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176. 497 F.2d 107 (5th Cir. 1974).

177. *Id.* at 108, 110.

178. *Id.* at 108.

judicial process from any hint or appearance of bias is the palladium of our judicial system.<sup>179</sup>

*Santa Maria v. Metro-North Commuter Railroad*<sup>180</sup> is another case in which the court of appeals sided with an alleged contemnor rather than the trial judge, notwithstanding the testimony of the judge's law clerk.<sup>181</sup> In that case, Judge Kevin Duffy spent much of the trial sparring with Attorney Joseph Smukler, an out-of-town lawyer.<sup>182</sup> Midway through trial, the judge accused Attorney Smukler of coaching his witnesses:

[A]fter chiding Smukler for having "poorly, if ever, prepared," the court said, "[O]thers saw you motioning to the witnesses, the four witnesses you had [meaning the fellow conductors] during cross-examination, indicating what the answer should be." Smukler denied this as "absolutely untrue." The judge's law clerk was then called as a witness and said that Smukler motioned either in an affirmative or negative way during the cross-examinations.<sup>183</sup>

On the basis of other conduct, Judge Duffy found Attorney Smukler in contempt<sup>184</sup> but subsequently vacated that finding.<sup>185</sup> However, four days into the trial, Judge Duffy denied Attorney Smuckler's late-filed motion request for admission *pro hac vice*.<sup>186</sup> In the end, the court of appeals vacated and remanded, holding that "the trial judge's attitude, his treatment of Smukler, and the abrupt change of counsel midway through trial sufficiently prejudiced the plaintiff so as to require a new trial."<sup>187</sup>

Finally, while most of the law clerks mentioned in this section were called upon to testify about the conduct of parties or counsel

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179. *Id.* at 109 (citing *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Grizzell v. Wainwright*, 481 F.2d 405 (5th Cir. 1973)).

180. 81 F.3d 265, 266–67 (2d Cir. 1996).

181. *Id.* at 275.

182. *See id.* at 266–71.

183. *Id.* at 270.

184. *Id.*

185. *Id.* at 271.

186. *Santa Maria*, 81 F.3d at 274.

187. *Id.* at 266–67.

who appeared before their judges, at least one law clerk has had to testify about her own conduct at a show-cause hearing. In *Eisenberg v. University of New Mexico*:<sup>188</sup>

Ms. Torres, the attorney representing the plaintiff in the underlying case, filed a motion for [a] new trial following a jury verdict against her client. In her motion, she alleged that Judge Edwin L. Mechem's law clerk had engaged in prejudicial ex parte conduct in regard to sending requested exhibits to the jury during deliberations. Ms. Torres attached her own affidavit to the motion, further alleging that during jury instruction discussions between respective counsel and the law clerk in the judge's conference room, this same law clerk indicated that she was being represented by a member of defense counsel's law firm. The motion for new trial was denied, and no appeal was taken. Judge Mechem subsequently issued an order to show cause as to why Ms. Torres should not be sanctioned under Rule 11 for failure to conduct an adequate inquiry into the truth and accuracy of her statement regarding the law clerk's involvement with defense counsel's law firm. After issuing the order, Judge Mechem recused himself from the show cause proceedings, and Judge James Parker was assigned to hear the case.<sup>189</sup>

Attorney Torres subsequently filed a second affidavit in which she "further alleged that during a court recess, the law clerk had made a second remark to the effect that she was being represented by a member of defense counsel's law firm."<sup>190</sup> At the show-cause hearing, "Judge Parker heard testimony from Ms. Torres, the law clerk, both defense counsel, the court reporter, and Ms. Torres's attorney."<sup>191</sup> Finding that the remarks Ms. Torres attributed to the law clerk had not been made, Judge Parker imposed Rule 11 sanctions on

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188. 936 F.2d 1131 (10th Cir. 1991).

189. *Id.* at 1132–33.

190. *Id.* at 1133.

191. *Id.*

Ms. Torres.<sup>192</sup> The court of appeals, while not completely on board with Judge Parker's decision, affirmed.<sup>193</sup>

Then there is the one that got away, an imposition of sanctions that was reversed on appeal largely because the law clerk of the judge who imposed the sanctions did not testify. In *LaSalle National Bank v. First Connecticut Holding Group, L.L.C. XXIII*,<sup>194</sup> Judge Faith Hochberg sanctioned two attorneys, under 28 U.S.C. § 1927, for misrepresentations allegedly made to the judge's law clerk in two telephone conversations that had the effect of unreasonably multiplying the proceedings.<sup>195</sup> The rub was that while the attorneys testified about what they told the law clerk, the law clerk did not testify.<sup>196</sup> More specifically:

The law clerk's version of events . . . was never placed on the record, and Rosen's counsel was not able to cross examine her regarding any inconsistencies with Rosen's account, or explore whether differing recollections merely resulted from an innocent misunderstanding. Consequently, the only sworn testimony regarding the communications between the law clerk and Rosen came from Rosen. Nevertheless, the court rejected Rosen's testimony outright. The court did so by taking "judicial notice" that Rosen had used the term "defense counsel" rather than "borrower's counsel" in his communications with the law clerk.<sup>197</sup>

The court of appeals took issue with trial court's fact finding:

The court took judicial notice of those two conversations even though the court did not hear any part of the disputed conversations and had no way of knowing what was said other than asking the law clerk; the only participant other than Rosen. We must, therefore, conclude that the judge's certainty as to the substance of Rosen's communications with her chambers was based on private discussions she had with

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192. *Id.*

193. *Eisenberg*, 936 F.2d at 1137.

194. 287 F.3d 279 (3d Cir. 2002).

195. *Id.* at 288, 292.

196. *Id.* at 287.

197. *Id.*

her law clerk—discussions that neither Rosen nor his attorney were privy to or informed of.

There is absolutely no way that the contents of Rosen’s disputed conversations with the judge’s law clerk even remotely satisfies the requirements for judicial notice in [Federal] Rule [of Evidence] 201(b). The contents of those conversations are certainly not a matter of common knowledge, nor are they easily provable from a source whose accuracy cannot reasonably be questioned. *See*[,] *e.g.*[,] *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000) (taking judicial notice of the contents of properly authenticated public disclosure documents filed with the SEC); *Policemen’s Benevolent Ass’n v. Washington Township*, 850 F.2d 133, 137 (3d Cir. 1988) (taking judicial notice of Township’s police force regulations); *Gov’t of the Virgin Islands v. Testamark*, 528 F.2d 742, 743 (3d Cir. 1976) (upholding judicial notice of defendant’s prior conviction).

We certainly understand that a judge would be most reluctant to allow his/her law clerk to be called to the witness stand and questioned under oath under the circumstances here. Moreover, we are not unsympathetic to the dilemma this created for the judge. However, that dilemma does not justify short circuiting the fact finding process by a mantra-like reliance on “judicial notice.” This is especially true in light of the severe consequences that flowed from the court’s resolution of the factual dispute about the conversations with the law clerk. The court’s conclusion regarding those conversations was a key factor in finding bad faith. Yet, Rosen was not able to confront the only witness who could possibly corroborate or dispute his version of the conversations. Thus, not only was the court’s resort to “judicial notice” improper, it also denied Rosen “a meaningful opportunity to be heard.” *Fellheimer v. Charter Tech.*, 57 F.3d 1215, 1227 (3d Cir. 1995).<sup>198</sup>

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198. *Id.* at 290–91 (footnote omitted).

So, while law clerks are often regarded as their judges' right hands,<sup>199</sup> law clerks and judges appear not to be conjoined in such a way that a law clerk's knowledge is properly subject to judicial notice. The court of appeals did recognize that the attorneys who were sanctioned could have called the law clerk themselves but also noted the problems posed by such an approach:

Of course, Marshall could have called the law clerk to the stand on behalf of Rosen at the Show Cause hearing. However, we also recognize that an attorney would be reluctant (to say the least) to call a law clerk to the witness stand to testify before the very judge the clerk was clerking for under circumstances that might require a fairly aggressive cross examination in front of the "clerk's judge." Under these circumstances, it is hardly appropriate, practical, or fair to require the "opposing" party to call a judge's law clerk to the witness stand.<sup>200</sup>

Attorneys are not the only courtroom denizens who are subject to sanctions. Judges, too, have standards to which they must adhere, and, when they fail to do so, or appear to fail, law-clerk testimony sometimes follows. For example, in *United States v. Campbell*,<sup>201</sup> Judge Robert Campbell of the District of Columbia Superior Court was convicted of bribery, and Judge Campbell's law clerk testified, presumably for the defense, that he or she had never seen the judge in the presence of one of the other defendants from whom the judge had been accused of taking bribes.<sup>202</sup> In another case involving judi-

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199. See, e.g., *Dedication Ceremony for the Conrad B. Duberstein Bankruptcy Courthouse*, 13 AM. BANKR. INST. L. REV. 1, 20 (2005) ("[W]here would I have been without . . . my other right-hand-man, my law clerk, David Capucilli."); Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 391 n. 89 (1991) ("Unlike law clerks, who have special relationships with individual judges, ordinarily acting as a 'right-hand person' for the judge—vigorously debating issues with the judge and helping the judge write opinions—central staff attorneys have more institutional responsibilities.") (citation omitted).

200. *Id.* at 291 n.7.

201. 702 F.2d 262 (D.C. Cir. 1983).

202. *Id.* at 287.

cial misconduct,<sup>203</sup> the Eleventh Circuit denied motions to quash subpoenas served on, among others, current and former law clerks of Judge Alcee Hastings.<sup>204</sup>

#### 4. *Litigant Competency*

Law clerks have also been called to testify about the competence of the parties appearing before their judges. In *United States v. Tesfa*,<sup>205</sup> Judge William Ditter described such a situation, in the context of a criminal defendant's challenge to his conviction based on, among other things, a claim that "he was denied due process because the court improperly found that he was competent to stand trial."<sup>206</sup> In the words of Judge Ditter:

On November 22, 1974, the day after the jury returned a verdict of guilty, the court commenced a posttrial competency hearing. At the outset, I stated for the record certain observations regarding the defendant's behavior of which I had made notes throughout the course of the trial. I thereupon called to the witness stand, in succession, one of my law clerks and my courtroom deputy, who had, at my instruction recorded their observations of the defendant's conduct in the courtroom both when court was and was not in session. The

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203. See *Williams v. Mercer (In re Certain Complaints)*, 783 F.2d 1488, 1491 (11th Cir. 1986). The charges against Judge Alcee Hastings included allegations that he

had allowed *ex parte* contacts between his law clerk and counsel in pending cases concerning substantive issues in those cases and concerning the content of orders and opinions not yet entered, and had "completely abdicated and delegated" his judicial decision-making authority to his law clerk.

*Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 96 n.12 (D.C. Cir. 1987).

204. *Williams*, 783 F.2d at 1524.

205. 404 F. Supp. 1259 (E.D. Pa. 1975), *aff'd sub nom.* *United States v. Green*, 544 F.2d 138 (3d Cir. 1976).

206. *Tesfa*, 404 F. Supp. at 1260.

three of us made ourselves available for questioning by both defense counsel and the assistant United States attorney.<sup>207</sup>

In *United States v. Green*,<sup>208</sup> the *Tesfa* appeal, the court of appeals described Judge Ditter's hearing in somewhat more detail:

At intervals, throughout the course of the trial, it was reported to the court that the defendant was not communicating with defense counsel or assisting in the presentation of his defense. However, it was also reported to the court that when out of the view of the prosecutor, his counsel, the jury and the trial judge, the defendant's behavior was substantially different from the appearances of mental impairment he gave in the presence of the above-listed persons. On November 22, 1974, at a post-trial competency hearing, the trial judge revealed that from October 30 he had maintained careful notes of the defendant's behavior in the court room and had directed his law clerks to observe and record the defendant's actions when the defendant was outside of his observation. Each law clerk testified to observations consistent with an affected pose of mental impairment at times, including staring into space, looking at his fingers, holding them up and moving them around, laughing at inappropriate times, staring at people, etc. However, when the above-listed persons were not present, "Mr. Tesfa perked up and went to talk to his mother and talked to the marshals, got a cigarette from them and acted in a rather normal manner, seemed to easily communicate with them . . . and when the attorneys and Your Honor came back in he resumed his staring during the jury

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207. *Id.* at 1264 (footnote omitted). After describing the hearing, Judge Ditter took pains to distinguish his case from *Starshock, Inc. v. Shusted*, 493 F.2d 1401 (3d Cir. 1974) (unpublished table decision), in which the court of appeals

held that supplementation of the record before a district court by affidavits of the trial judge's law clerks constituted error where that fact was not disclosed to counsel for the losing party and the court handed down its opinion before counsel had an opportunity to see the affidavits or cross-examine the affiants.

*Tesfa*, 404 F. Supp. at 1264 n.5.

208. 544 F.2d 138, 140 (3d Cir. 1976).

selection.” Also, the defendant appeared to pay close attention to the expert testimony presented by both sides.<sup>209</sup>

The court of appeals endorsed Judge Ditter’s approach, noting that “[w]e have concluded that under the circumstances of the present case, it was not reversible error for the trial judge . . . to instruct his law clerks to monitor the defendant’s behavior”<sup>210</sup> and explaining that “we think that the trial judge’s actions in recording the defendant’s actions and instructing his law clerks to do so comports with [the] standards outlined in *United States v. Liddy*.”<sup>211</sup>

### 5. *Future Dangerousness*

*United States v. Johnson*<sup>212</sup> also involved law-clerk testimony about a defendant’s out-of-court demeanor, but in a slightly different context.<sup>213</sup> In *Johnson*, Judge Mark Bennett allowed his former law clerk to testify during the penalty phase of Angela Johnson’s murder trial.<sup>214</sup> In a motion for post-judgment relief, Johnson argued

that the court erred in allowing its former law clerk to testify to statements she purportedly overheard Johnson make in the law clerk’s presence when the court itself was a witness to Johnson’s subsequent letter of apology that had been misplaced or lost and where the court’s remedy denied Johnson the opportunity to take the sting out of the evidence and created a false impression for the jury.<sup>215</sup>

Johnson made the statement at issue in the hallway outside the courtroom in which Judge Bennett had sentenced another defendant.<sup>216</sup> In the presence of Judge Bennett’s law clerk, Johnson made comments that the law clerk believed to contain threats against the

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209. *Id.* at 143–44 (footnotes and citations omitted).

210. *Id.* at 146.

211. *Id.* (citing *United States v. Liddy*, 509 F.2d 428, 438 (D.C. Cir. 1974)).

212. 403 F. Supp. 2d 721 (N.D. Iowa 2005), *aff’d and remanded*, 495 F.3d 951 (8th Cir. 2007).

213. *Johnson*, 403 F. Supp. 2d at 852–53.

214. *Id.* at 852.

215. *Id.* at 852–53.

216. *Id.* at 853.

judge.<sup>217</sup> Judge Bennett allowed his law clerk to testify about those comments at the penalty phase of Johnson's trial, with two limitations: "the court did not allow the government to elicit or allow the former clerk to testify that she was a 'law clerk' under the undersigned's direct supervision,"<sup>218</sup> and "to avoid potential prejudice, the court barred the government from eliciting testimony that the former clerk believed that Johnson's threats had been directed at the undersigned."<sup>219</sup> In response to Johnson's motion for post-judgment relief, Judge Bennett ruled "that the testimony of the former clerk, as limited, was relevant to the issue of Johnson's future dangerousness, because it related to threats by Johnson to law enforcement officers and government officials."<sup>220</sup> The testimony was not unfairly prejudicial, Judge Bennett ruled, because of the two limitations he placed on it, precluding the former clerk from indicating her close employment relationship with him and from giving her opinion of the character of Johnson's comments.<sup>221</sup> Accordingly, Judge Bennett denied Johnson's request for relief as it related to the admission of the former law clerk's testimony.<sup>222</sup>

### III. LAW-CLERK LITIGANTS

In Part II, I discussed cases in which law clerks have made the move from the law clerk's desk to the witness box. This Part is devoted to cases in which law clerks have made a similarly short but significant trip, from chambers to the courthouse intake window. That is, I discuss law-clerk litigants.

Before doing so, I offer two caveats. First, because this article is targeted toward the "clerkigentsia,"<sup>223</sup> I have chosen to exclude cases in which a litigant's status as a law clerk is mentioned, but his or her

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217. *Id.*

218. *Id.*

219. *Johnson*, 403 F. Supp. 2d at 853.

220. *Id.* at 854 (citing *Moore v. Johnson*, 225 F.3d 495, 500 (5th Cir. 2000)).

221. *Johnson*, 403 F. Supp. 2d at 854.

222. *Id.*

223. See Potter, *Law Clerks Gone Wild*, *supra* note 1, at 175 n.7 ("The clerkigentsia consists of former law clerks, current law clerks, and those aspiring to be law clerks.").

duties as a law clerk are tangential to the issue being litigated.<sup>224</sup> Second, my discussion is limited to law clerks as plaintiffs; while dozens and dozens of law clerks have been named as defendants on account of actions they took as law clerks, they tend to remain defendants relatively briefly, owing to the extension of the doctrine of judicial immunity to law clerks,<sup>225</sup> which allows a law clerk named as a defendant to move quite speedily from “OMG” to “LOL.”

Of course, judicial immunity for law clerks goes only so far. It does not provide protection for conduct outside the friendly confines

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224. See, e.g., *United States v. Schay*, 746 F. Supp. 877, 877 (E.D. Ark. 1990), *rev'd sub nom.* *White v. Pence*, 961 F.2d 776 (8th Cir. 1992) (in which the United States sued landlord under Fair Housing Act for refusing to rent house to black lawyer who was serving as law clerk to federal judge); *Doe v. United Servs. Life Ins. Co.*, 123 F.R.D. 437, 439 n.1 (S.D.N.Y. 1988) (allowing plaintiff suing life insurance company to vindicate the rights of homosexuals to do so under a pseudonym, but rejecting plaintiff's argument that anonymity was necessary because of “the effect [the] case might have on his status as a law clerk to a federal judge”); *Black v. Sullivan*, 561 F. Supp. 1050, 1072 (D. Me. 1983) (noting that application for law-clerk position in Maine established domiciliary intent necessary to qualify as state resident for purposes of qualifying for in-state tuition rate); *Dobson v. Camden*, 502 F. Supp. 679, 679 (S.D. Tex. 1980) (referring to suit brought by law clerks charging City of Houston, and others, with race and sex discrimination); *Sheley v. Alaska Bar Ass'n*, 620 P.2d 640, 646 (Alaska 1980) (holding that state rule barring law clerk in Texas from taking Alaska bar exam until she had resided in Alaska for thirty days violated privileges and immunities clause of federal constitution).

225. See *Gollomp v. Spitzer*, 568 F.3d 355, 365 (2d Cir. 2009) (“In addition, Muldoon is entitled to absolute immunity as a law clerk to a state court judge because he was acting in a judicial capacity.”) (citing *Oliva v. Heller*, 839 F.2d 37, 40 (2d Cir. 1988)); cf. *Reddy v. O'Connor*, 520 F. Supp. 2d 124, 132 (D.D.C. 2007) (explaining that principles of “supervisory responsibility” precluded district court from issuing orders compelling Supreme Court law clerks to take particular actions) (citing *Marin v. Suter (In re Marin)*, 956 F.2d 339, 340 (D.C. Cir. 1992)).

Even though the law clerk in *Fixel v. United States* enjoyed immunity, Judge Howard McKibben addressed the merits of Dennis Fixel's complaint anyway, which allowed him to characterize Fixel's claims against a *pro se* law clerk as frivolous as a matter of law. 737 F. Supp. 593, 595, 598 (D. Nev. 1990). And, in *DeFerro v. Coco*, Judge Marvin Katz recognized that Judge Nicholas Cipriani's law clerk, Dennis O'Connell, was “entitled to absolute immunity under the quasi-judicial immunity doctrine” but based his decision on O'Connell's “uncontroverted affidavit, [in which he testified that] he acted pursuant to Judge Cipriani's directive and instructions.” 719 F. Supp. 379, 381 (E.D. Pa. 1989).

of chambers.<sup>226</sup> Nor does judicial immunity outlive the term of a clerkship. In an opinion in a criminal case, Judge Richard Clifton began with what must be the most mortifying words ever written about a former law clerk: “This case presents the disappointing story of a promising federal appellate law clerk gone bad.”<sup>227</sup> According to Judge Clifton, “Robert Gordon, a graduate of Stanford Law School and a former law clerk for one of our colleagues, a judge on the U.S. Court of Appeals for the Seventh Circuit, embezzled millions of dollars in cash and stock from his employer, Cisco Systems.”<sup>228</sup> In *United States v. Jefferson*,<sup>229</sup> Judge Thomas Ellis described defendant William Jefferson in the following way:

Defendant is the currently sitting member of the United States House of Representatives representing Louisiana’s 2nd Congressional District, an office he has held since 1991. He is a graduate of Harvard Law School and a former law clerk for the late United States District Judge Alvin B. Rubin. Prior to his election to Congress he was a member of the Louisiana state senate, and following his election to Congress he earned a graduate law degree in tax law from the Georgetown University Law Center.<sup>230</sup>

Jefferson was convicted of eleven of the sixteen counts in the indictment against him.<sup>231</sup> The former law clerk in *In re Violation of Rule 50*<sup>232</sup> did not go nearly as bad as Robert Gordon or William Jefferson, but, nonetheless, he was given a “strong admonishment” by the Federal Circuit after he prepared and filed a brief in a case that was pending before that court during his tenure as a law clerk

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226. *See, e.g.*, *United States v. McGill*, 964 F.2d 222, 229 (3d Cir. 1992) (noting defendant was charged with evading taxes on, among other things, income earned by from “a part-time job as a law clerk to a Philadelphia judge”).

227. *United States v. Gordon*, 393 F.3d 1044, 1047–48 (9th Cir. 2004).

228. *Id.* at 1048.

229. 562 F. Supp. 2d 707 (E.D. Va.), *aff’d*, 546 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (U.S. 2009).

230. *Jefferson*, 562 F. Supp. 2d at 709.

231. *See* Richard Simon, *Congressman Who Had Cash in Freezer Is Convicted of 11 Criminal Counts*, L.A. TIMES, Aug. 6, 2009, <http://articles.latimes.com/2009/aug/06/nation/na-jefferson6>.

232. 78 F.3d 574 (Fed. Cir. 1996).

there.<sup>233</sup> Whether it is due to the prescience of judges who hire law clerks, or the moral clarity of those who serve as law clerks, the law-clerk field appears to have been infested by only a very few bad seeds; *Gordon*, *Jefferson*, and *Violation of Rule 50* are the only cases of their kind I was able to find.<sup>234</sup>

Turning then, from law clerks in the cross-hairs, as defendants, to law clerks driving the litigation train, as plaintiffs, I examine three categories of cases: those in which law clerks have litigated in an attempt to make something good happen, those in which they have litigated in an attempt to keep something bad from happening, and those in which they have sought to recover after something bad has already happened to them.

In *Metsch v. United States*,<sup>235</sup> Lawrence Metsch became a hero to law clerks everywhere when he sued for, and won, a retroactive sala-

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233. *Id.* at 576.

234. There may be a fourth law clerk gone bad in *Henderson v. Johnson*, but I cannot be sure. In that case, an inmate incarcerated on state criminal charges, and who was seeking a writ of habeas corpus, “allege[d] that [Joseph] Goodson, a fellow inmate who represented that he was a lawyer and a former law clerk to a United States District Judge, assisted him in preparing and filing his petition.” 1 F. Supp. 2d 650, 655 (N.D. Tex. 1998). The opinion does not indicate whether Goodson really was a former law clerk, but it does establish that Goodson malpracticed his “client,” Henderson:

Henderson contends that Goodson agreed to prepare the petition and informed him that he filed it on August 26, 1996. When Henderson became concerned that he had not received any pleadings in his case, he talked with Goodson, who urged him not to contact the court because of the sensitive nature of the proceedings and the potential that he would “screw everything up.” Henderson finally wrote to the court clerk on July 23, 1997, almost 11 months after Goodson had supposedly filed the petition. When the clerk informed Henderson that no petition had been filed, he confronted Goodson, who denied that he had not filed the petition and produced a copy of a petition that appeared to bear a legitimate file stamp from this court. Henderson in turn asked the clerk’s office whether a mistake had occurred, and learned that the seal was not the district clerk’s and that no petition had been filed. Henderson concluded that Goodson had created the stamp to hide the truth.

*Id.* So, while Goodson may or may not have been a law clerk gone bad, he was most certainly a bad law clerk. Sadly for Henderson, the court ruled that Goodson’s malpractice did not constitute an “extraordinary circumstance” sufficient to excuse the late filing of Henderson’s habeas petition. *Id.*

235. 381 F. Supp. 484 (S.D. Fla. 1974).

ry increase.<sup>236</sup> Factually, Metsch's boss, United States Circuit Judge Bryan Simpson, attempted to promote Metsch from the position of "Associate Law Clerk" to that of "Senior Law Clerk," but the Director of the Administrative Office of the United States Courts rejected Judge Simpson's request to reclassify Metsch, citing a wage and price freeze mandated by an Executive Order.<sup>237</sup> In the district court, Judge William Mehrrens ruled that the Administrative Office misapplied the Executive Order and granted summary judgment to Metsch.<sup>238</sup>

In contrast with Metsch, who successfully sued to bring about a happy ending, Antonio Mareno, the law-clerk plaintiff in *Mareno v. Re*<sup>239</sup> brought suit in an attempt to avoid the consequences of a very unhappy ending, his judge's death.<sup>240</sup> Mareno worked for Judge Scovel Richardson of the United States Customs Court for more than twenty years, up until the judge died.<sup>241</sup> Shortly after Judge Richardson's passing, Chief Judge Edward Re informed Mareno that his employment would terminate on the six-month anniversary of Judge Richardson's death.<sup>242</sup> Mareno sued Chief Judge Re, asserting constitutional liberty and property interests in his continued employment.<sup>243</sup> District Judge Charles Haight was not persuaded, ruling that the language of the statute governing the employment of law clerks was "inimical to the concept of a property interest in employment by the court."<sup>244</sup> The plaintiff law clerk in *Silvestri v. Barbie-*

236. *Id.* at 487.

237. *Id.* at 485–86. In fact, the Director rejected Judge Simpson's request to reclassify Metsch, "along with fifty-one other requests for promotions or reclassifications within the category of 'law clerk' and 'secretary' during the period of the [wage] freeze." *Id.* at 485.

238. *Id.* at 487.

239. 568 F. Supp. 17 (S.D.N.Y.), *aff'd*, 742 F.2d 1430 (2d Cir. 1983).

240. *Mareno*, 568 F. Supp. at 17.

241. *Id.*

242. *Id.* at 20.

243. *Id.* at 17.

244. *Id.* at 20; *see also* Potter v. Mosley, 211 F.3d 1274, 1274 (9th Cir. 2000) (unpublished table decision) (ruling that a state-court law clerk "was an at-will employee and, therefore . . . had no constitutionally protected interest in keeping his job" and "had no constitutionally protected right to obtain a new appointment a number of months after he had been terminated").

*ri*<sup>245</sup> was equally unsuccessful in his efforts to enjoin his termination.<sup>246</sup> In *Silvestri*, a state-court law clerk “became a candidate for the office of School Director in a school district in Allegheny County and received the nominations of both parties.”<sup>247</sup> Subsequently,

he was notified of directives sent by the defendant Alexander F. Barbieri, Court Administrator of Pennsylvania, to the Judges and Justices-of-the-Peace in Pennsylvania calling their attention to the regulations of the Supreme Court of Pennsylvania, which prohibit employees of the Judiciary in the State of Pennsylvania from engaging in political activities [and then he] was threatened with discharge unless he withdrew from the candidacy for office.<sup>248</sup>

Rather than withdrawing, Silvestri filed suit in federal court seeking “injunctive relief against his threatened discharge.”<sup>249</sup> As it turns out, he sought similar relief in the state courts of Pennsylvania nearly simultaneously, and, because the Pennsylvania Supreme Court ruled against him while his federal-court action was pending, the federal court concluded its consideration by denying relief on grounds of res judicata and abstention.<sup>250</sup> The school district’s gain was the Court of Common Pleas’ loss.

The plaintiff in *Sheppard v. Beerman*<sup>251</sup> was not a law clerk, but, rather, a former law clerk.<sup>252</sup> Specifically, “Brian Sheppard served as a law clerk to New York State Supreme Court Justice Leon Beerman from 1986 until he was fired on December 11, 1990.”<sup>253</sup> The facts of the case are remarkable:

[O]n December 6, 1990, Sheppard and Judge Beerman had conferred on the Judge’s contemplated action on a speedy trial motion in *People v. Mason & Williams*, a pending mur-

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245. 434 F. Supp. 1200 (W.D. Pa. 1977).

246. *Id.* at 1202.

247. *Id.* at 1201.

248. *Id.*

249. *Id.*

250. *Id.* at 1202.

251. 317 F.3d 351 (2d Cir. 2003) [hereinafter *Sheppard III*].

252. *Id.* at 352.

253. *Id.* at 353.

der case. Judge Beerman asked Sheppard to draft a decision that would set the case for trial after the coming Christmas holiday season. Sheppard, however, believed that such a disposition would be unfairly prejudicial to Williams and not based on the merits. Sheppard felt that Judge Beerman, under pressure from the prosecution, was railroading Williams. Sheppard stated at his deposition that the prosecutor was upset about the lenient sentence Williams previously had received in a related drug case, and the negative publicity generated thereby. Sheppard also believed that Judge Beerman had unfairly accommodated the prosecution's request to delay the trial until January on the notion that a trial during the holiday season would be less likely to result in a conviction.

On the morning of December 7, 1990, Sheppard came to chambers and declared that he would not work on the speedy trial motion in the Williams case because of his belief that the defendant was being "railroaded." Beerman responded that, although Sheppard was not being discharged, if he felt that way he should seek other employment.

In response, Sheppard called Judge Beerman a "corrupt son of a bitch," but he quickly apologized for the characterization. Sheppard then informed Beerman that he had preserved extensive notes of other judicial misconduct by Beerman during the preceding four years. When asked by Judge Beerman to provide examples, Sheppard noted a case that Beerman had allegedly assigned to himself in order to exact revenge against the accused. He told Judge Beerman that he would go public with the notes if he was forced to resign. Then Judge Beerman called Sheppard "disturbed" and "disloyal." After the confrontation, Sheppard offered to go home but Judge Beerman instructed him to work the rest of the day, which he did.

Judge Beerman testified during his deposition that he conferred with his son, an attorney, that evening, and decided that he and Sheppard should part ways. Judge Beerman also testified that he had resolved to speak with Administrative Judge Alfred Lerner about the incident when he returned to

the courthouse on the following Monday, December 10, 1990.

Sheppard did not show up for work that Monday. On Tuesday, December 11, Judge Beerman met with Judge Lerner about the incident. Judge Lerner was astonished by Sheppard's behavior and confirmed Judge Beerman's view that Sheppard could no longer remain in either Judge Beerman's employ, or indeed, in the employ of the court system.

When Sheppard arrived at work on December 11, four days after the confrontation, court officers informed him that Judge Beerman had fired him. Sheppard was forced to leave immediately and was not allowed to take his belongings with him. Several days later, Sheppard was permitted to return to chambers, accompanied by court officers, to retrieve his personal belongings.<sup>254</sup>

The opinion quoted above is the third (and final) Second Circuit opinion in the *Sheppard* case.<sup>255</sup> The first *Sheppard* appellate opinion provides additional detail:

Both before and after his discharge . . . Sheppard's property was searched by Beerman or by others at his direction. Specifically, Sheppard's file cabinets and desk drawers were searched, and a box of his personal file cards was seized and removed to Beerman's private office and examined . . . .

Following his discharge, Sheppard returned to Beerman's courtroom on a number of occasions. On January 18, 1991, while attending Beerman's calendar call, Sheppard began ruffling through court files. Beerman subsequently directed him to leave the courtroom if he wished to examine documents. On January 28, 1991, Beerman told an attorney not to speak with Sheppard and warned Sheppard not to involve himself in the cases Sheppard had worked on when he was a clerk. On February 11, 1991, Sheppard was told not to keep

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254. *Id.*

255. *See* Sheppard v. Beerman, 18 F.3d 147 (2d Cir. 1994) [hereinafter *Sheppard I*]; Sheppard v. Beerman, 94 F.3d 823 (2d Cir. 1996) [hereinafter *Sheppard II*].

coming in and out of the courtroom, and was told to be quiet when he sought to reply to this direction.<sup>256</sup>

Sheppard sued Judge Beerman, asserting, among other things, that the judge violated his right to free speech under the First and Fourteenth Amendments.<sup>257</sup>

In affirming the district court's grant of summary judgment to Judge Beerman, the court of appeals pointed out that "[a] government official may . . . fire an employee for speaking on a matter of public concern if the employee's speech is reasonably likely to disrupt the effective functioning of the office, and the employee is fired to prevent this disruption."<sup>258</sup> In holding that Judge Beerman's prediction that Sheppard's speech would be disruptive, the court explained:

We stated in *Sheppard II* that "[i]f a judge cannot believe that his clerk is competent, loyal, and discreet, the working relationship between the two is not just injured, it is nonexistent." 94 F.3d at 829. Indeed, in their role as employees, law clerks amount to "extensions of the judges at whose pleasure they serve." *Oliva v. Heller*, 839 F.2d 37, 40 (2d Cir. 1988) (quoting *Oliva v. Heller*, 670 F. Supp. 523, 526 (S.D.N.Y. 1987)). Thus, at the very minimum, a respectful, if not congenial, relationship between clerk and judge is a prerequisite to a productive work environment within a judge's chambers.

During the incident in question, it is undisputed that Sheppard yelled at Judge Beerman and called him an obscene epithet. Sheppard's outburst was grossly disrespectful and an expression of personal contempt for Judge Beerman. Given the nature of the judge-clerk relationship, we conclude that Judge Beerman's prediction that Sheppard's outburst would disrupt the efficient operation of chambers was eminently reasonable.<sup>259</sup>

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256. *Sheppard I*, 18 F.3d at 150.

257. *Sheppard III*, 317 F.3d at 354.

258. *Id.* at 355 (citing *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Jeffries v. Harleston*, 52 F.3d 9, 12-13 (2d Cir. 1995)).

259. *Sheppard III*, 317 F.3d at 355.

The court continued:

For similar reasons, we find that the potential disruptiveness to Judge Beerman's chambers outweighed whatever value there was in Sheppard's speech. The vitriolic manner in which Sheppard expressed himself, regardless of the substance of his remarks, made a harmonious working relationship between Sheppard and Beerman difficult to imagine. Sheppard's use of the word "corrupt" and his several references to Beerman's alleged misconduct during his invective are not of sufficient import to outweigh the potential disruption his outburst caused.

Where an employee, such as Sheppard, "holds an extremely confidential or highly placed advisory position, it would be unlikely [for] the *Pickering* balance . . . to be struck in his favor." *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997). Sheppard was undoubtedly in such a position here, and we agree with the district court that the *Pickering* factors favor Judge Beerman.<sup>260</sup>

One would think that most law clerks would be able to predict, without the benefit of an opinion from a federal court of appeals, that job security is not enhanced by calling a judge a "corrupt son of a bitch." But now we know for certain.

*Jakomas v. McFalls*<sup>261</sup> involved a less histrionic law clerk and a seemingly much more culpable judge.<sup>262</sup> The plaintiffs in that case, "the former tipstaff, law clerk, and secretary for Judge Patrick H. McFalls, Jr., of the Court of Common Pleas of Allegheny County, Pennsylvania,"<sup>263</sup> alleged that they "observed behavior indicating that Judge McFalls was under the influence of alcohol and/or drugs while performing his official duties."<sup>264</sup> More specifically, they alleged that on one occasion, "he arrived late to court, dressed in vaca-

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260. *Id.* at 355–56 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

261. 229 F. Supp. 2d 412 (W.D. Pa. 2002).

262. *Id.* at 416.

263. *Id.* Sadly, I still have no clue what a "tipstaff" might be, thus raising the possibility—however slight—that I might be one myself, without even knowing it.

264. *Id.* at 417.

tion clothes and sandals and still under the influence of alcohol,”<sup>265</sup> and that “[d]uring the course of [a] jury trial, a bottle of vodka dropped out of his pocket in front of people.”<sup>266</sup> Concerned about the situation, “Barbara Joseph [the judge’s secretary and husband of the judge’s law clerk, James Joseph] confronted Judge McFalls about his use of alcohol [and,] [a]ccording to the Amended Complaint, the Judge replied ‘Are you threatening me?’”<sup>267</sup> Thereafter, the secretary and law clerk told an administrative judge that Judge McFalls “was drunk at times while on the bench and while deciding cases.”<sup>268</sup> Subsequently:

[Administrative] Judge James and President Judge Robert Kelly scheduled a meeting with Judge McFalls to be held upon his return from the Cayman Islands. Judge James told the plaintiffs that he would confront Judge McFalls and give him the opportunity to go to alcohol rehabilitation. If he refused, then Judge James would report the conduct to the Supreme Court.

On November 13, 2001, the plaintiffs telephoned Judge McFalls in the Cayman Islands, and told him that Judge James wanted to see him as soon as he returned. James Joseph told the Judge that he should be prepared because the meeting was called to discuss his drinking behavior.

On the morning of November 14, 2001, an Allegheny County Deputy Sheriff handed Barbara Joseph two envelopes—one for herself and one for her husband James. The letters, dated November 13, 2001, stated: “Effective immediately, you are discharged from your position.”

The deputy sheriff then escorted Barbara Joseph from the building, telling her that he had been “instructed to deposit [her] on the sidewalk outside the building.” According to the Amended Complaint, Judge McFalls later called James Jo-

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265. *Id.*

266. *Id.*

267. *Jakomas*, 229 F. Supp. 2d at 417.

268. *Id.* at 418.

seph and told him: “I had to carpet bomb you, because you wanted to send me to rehabilitation.”<sup>269</sup>

In response to being carpet bombed, Judge McFalls’s former secretary and law clerk (along with the tipstaff) sued “Judge McFalls in both his official and individual capacities” and Allegheny County, asserting a free-speech claim under the First and Fourteenth Amendments and a claim under the Pennsylvania Whistleblower law.<sup>270</sup> Both defendants moved to dismiss, and, of the various claims asserted, the court dismissed all but the free-speech claim against Judge McFalls in his individual capacity.<sup>271</sup>

The law clerk in *Graves v. Wayne County Third Circuit Court*,<sup>272</sup> Karen Graves, claimed that she was fired for missing too much time due to her pregnancy.<sup>273</sup> She sued the court in which she had worked and the judge for whom she had worked, under Title VII.<sup>274</sup> The defendants moved to dismiss, and prevailed, on grounds that, as a law clerk, Graves was not an employee for purposes of Title VII.<sup>275</sup> In *Childress v. United States*,<sup>276</sup> a *pro se* law clerk “employed by the District Court for the District of South Carolina”<sup>277</sup> responded to his termination by filing suit in state court against the Chief Deputy Clerk of the federal court.<sup>278</sup> Specifically, he “allege[d] that Defendant Donelan prepared a performance appraisal containing defamatory statements and that these statements tortiously interfered with his employment contract.”<sup>279</sup> Childress’s suit took a brief detour, but ended up going nowhere: “The United States Attorney’s office

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269. *Id.* As I have indicated, the facts of this case were not proven by affidavit or at trial but were drawn from the complaint. Still, one might reasonably assume that there was least some fire to accompany the smoke, given that Judge McFalls resigned his judicial office as part of an agreement to settle formal charges filed against him by the Judicial Conduct Board. *Id.* at 419.

270. *Id.* at 416.

271. *Id.* at 431.

272. No. 08-11168, 2008 WL 3318726 (E.D. Mich. Aug. 8, 2008).

273. *Id.* at \*1.

274. *Id.*

275. *Id.* at \*3.

276. No. 3:07-cv-03312, 2008 WL 6716458 (D.S.C. Mar. 13, 2008).

277. *Id.* at \*1.

278. *Id.*

279. *Id.*

removed the case from state court to the federal district court.”<sup>280</sup> In federal court, Donelan successfully moved to substitute the United States as the defendant in the case,<sup>281</sup> and then the United States was granted dismissal on grounds of sovereign immunity.<sup>282</sup>

Perhaps the most interesting instance of law-clerk litigation is the one that unfolded in the District of Arizona. It is impossible to improve on the narrative provided by Judge Frederick Martone:

This is an action by Luz Hellman against Judge Sheldon Weisberg pursuant to 42 U.S.C. § 1983, alleging violation of her First Amendment rights, and against the State of Arizona under Title VII, 42 U.S.C. § 2000e, and the Arizona Civil Rights Act, A.R.S. §§ 41-1461-67, alleging retaliation.

....

Hellman worked at the Arizona Court of Appeals as a judicial assistant to Judge Jefferson Lankford. She married him in 2001, and then resigned. In 2003, she rejoined the court to work as a judicial assistant to Judge Donn Kessler. She stated that she was “finally in a position to get some things changed around here,” that she was going to “stir the pot,” “do something about Judge [Susan] Ehrlich,” and was “in the process of contacting Judge Ehrlich’s former law clerks.”

In 2005, Hellman met Regina Pangerl, a law clerk for Judge Ehrlich. Pangerl told Hellman that Judge Ehrlich had made discriminatory comments about Pangerl’s Mormon religion. Hellman took it upon herself to contact Keith Stott, the Executive Director of the Arizona Commission on Judicial Conduct, to discuss the matter. She later accompanied Pangerl to meet with Stott so that Pangerl could file a complaint against Judge Ehrlich. Eventually, Pangerl transferred from Judge Ehrlich’s chambers to Judge Weisberg’s chambers for the remainder of her clerkship term. On November 4, 2005, Pangerl filed a charge of discrimination with the

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280. *Id.*

281. *Id.* at \*5.

282. *Childress*, 2008 WL 6716458, at \*5.

Equal Employment Opportunity Commission (“EEOC”) against the State of Arizona, claiming religious discrimination and harassment by Judge Ehrlich.

On November 23, 2005, Judge Weisberg, then Chief Judge of the Arizona Court of Appeals, wrote a memorandum informing his judicial colleagues of Pangerl’s EEOC claim. Judge Weisberg’s memorandum was marked “*CONFIDENTIAL*” and provided, “[o]f course, it goes without saying, that this is a confidential matter.” He stated that “[b]ased upon the information and knowledge available to me, I do not believe any of Pangerl’s allegations.” He asked the other judges to “contact [him] immediately if [they had] any information relevant to Pangerl’s Charge of Discrimination. The memorandum was delivered to each Court of Appeals judge in an envelope marked “confidential.” On November 25, 2005, Judge Lankford wrote a memorandum in response to Judge Weisberg’s, which he delivered in an envelope marked “confidential.” On November 27, 2005, without obtaining permission from either judge, Hellman made copies of the Weisberg and Lankford memoranda and gave them to Pangerl. The next day an Associated Press reporter contacted Judge Weisberg about the judges’ memoranda, and later that day an Associated Press story revealed content from both memoranda.

After the memoranda were delivered to Pangerl and leaked to the press, Hellman arranged a meeting with Judges Weisberg, Kessler, and Gemmill to confess her role in the leak. She tape-recorded the meeting without the judges’ knowledge or consent. She admitted that she understood that she was “gonna get the eye from a lot of people, and [was] okay with that.” She was insolent and rude to Judge Weisberg and called the Court of Appeals a “gutless court that has very little integrity.” She displayed a shockingly inappropriate understanding of her role at the court.

In response to her misappropriation and disclosure of the memoranda, Judge Weisberg informed the other judges that only Judge Kessler, her direct supervisor, had disciplinary power over her. Exercising remarkable restraint, Judge Kess-

ler chose not to terminate her for her gross insubordination. Many employers would have escorted her out of the building. He did conclude that her release of the two court memoranda violated the Arizona Code of Conduct for Judicial Employees and Rule 123, Rules of the Arizona Supreme Court, both of which require employees and judges to maintain the confidentiality of court and personnel information. Judge Kessler informed Hellman that her disclosure of confidential court memoranda could be deemed theft under state law, and stated that he would put a note in her personnel file regarding the incident.

Hellman claims that she suffered retaliation as a result of disclosing the memoranda. She claims that she was reprimanded, threatened with termination and criminal prosecution, and shunned by her co-workers. She complained to Judge Kessler about a hostile and retaliatory work environment. Judge Kessler in turn reported the complaints to Judge Weisberg. Hellman claims to have experienced gastrointestinal problems, stress, and other medical problems.

On January 5, 2006, Hellman filed a charge of discrimination with the EEOC claiming retaliation for engaging in protected activity, which she described as “providing two memorandums [sic] to an employee who had filed a charge of discrimination with the EEOC.” The Court of Appeals engaged an independent lawyer to investigate Hellman’s allegations. That lawyer concluded that Hellman’s retaliation allegations were unsubstantiated. In late September 2006, Hellman resigned as a result of the “continued ostracization that she suffered.”<sup>283</sup>

Hellman’s suit made it out of the starting gate but got nowhere near the finish line; Judge Martone granted the defendants’ motions for summary judgment.<sup>284</sup> He ruled that the disclosure of confidential

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283. *Hellman v. Weisberg*, No. CV-06-1465-PHX-FJM, 2007 WL 4218973, at \*1–2 (D. Ariz. Dec. 3, 2007), *aff’d*, 360 F. App’x. 776 (9th Cir. 2009) (footnotes and citations to the record omitted).

284. *Id.* at \*10.

information, in clear violation of Hellman's duties as a law clerk, was not a protected activity for purposes of a Title VII retaliation claim,<sup>285</sup> and that, for purposes of her First Amendment claim, the misappropriation and disclosure of confidential memoranda between judges was not constitutionally protected speech.<sup>286</sup> For those of you keeping score, Judge Martone's grant of summary judgment was affirmed on appeal.<sup>287</sup>

#### IV. CONCLUSION

Every courtroom I have ever worked in has a special little desk just for law clerks. But the lesson of this article is that, under the right circumstances, law clerks can pop up almost anywhere else in a courtroom, from the gallery to the witness box to the tables reserved for litigants and their counsel.<sup>288</sup> From my survey of law clerks out of context, I have been able to distill some small bits of advice for those who work at the elbows of judges.

First, for those who are disinclined to produce affidavits or to testify, the best way to avoid being called on to give evidence is to avoid having evidence to give. Given the typical subject matter of law-clerk testimony, one of the best ways to remain untainted by potential evidence is to avoid or minimize contact with litigants and their counsel. Generally speaking, what happens in chambers stays in chambers, but when law clerks communicate with people outside chambers, they create the possibility of being asked to give evidence about their communications. So, for all you law clerks out there,

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285. *Id.* at \*5.

286. *Id.* at \*9.

287. *Hellman v. Weisberg*, 360 F. App'x. 776, 779 (9th Cir. 2009).

288. Beyond that, there are legions of law clerks who have ended up in the best seat in the house, on the bench, serving as judges. *See Lucas v. United States*, Cr. No. 3:05-0760-MBS, 2010 WL 412554, at \*3 (D.S.C. Jan. 26, 2010) ("The deposition of Judge Brian W. Jeffcoat, another former law clerk of Judge Westbrook . . ."); Frances R. Hill, *Constitutive Voting and Participatory Association: Contested Constitutional Claims in Primary Elections*, 64 U. MIAMI L. REV. 535, 571 (2010) (noting that William Rehnquist once served as a law clerk to Justice Robert Jackson). One former law clerk who later landed on the bench is my father in law, Herbert L. Chabot, who was the third U.S. Tax Court law clerk to later serve as a Tax Court judge.

tight lips can help keep you out of the witness box. If, however, you cannot keep your lips buttoned because, for example, your judge directs you to have contact with litigants or attorneys, it is always a good idea not to say or write anything you would not be comfortable reading in the *Federal Reporter*.

On the other hand, for those who might enjoy a trip to the witness box, the trick is to have evidence to give. There are not many opportunities to acquire useful evidence, and the best ones arise when you are sitting in the courtroom. Resist the urge to let your mind wander, and keep an eagle eye on the litigants, the attorneys, and the jury. You just might see something the court will need to know about later.

My final piece of advice is for potential law-clerk plaintiffs. Save yourself the filing fee. The courthouse is, indisputably, a great place to work, but the courtroom is rarely a good place to seek relief when your dream job turns into a nightmare.