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LEGAL ETHICS AND JUDICIAL LAW CLERKS: A NEW DOCTRINAL ACCOUNT

Andrew Flavelle Martin*

Abstract

Judicial law clerks are largely overlooked in the Canadian legal literature. This article provides a new doctrinal account of the ethical obligations of law clerks that is rooted in the fact that at least some of the major work of law clerks constitutes the practice of law—and thus that law clerks’ ethics are lawyers’ ethics. It argues that the lawyer’s duty to encourage respect for the administration of justice transposes some of the ethical obligations of the judge into professional obligations of the law clerk. The article also argues that the law societies’ regulatory and disciplinary jurisdiction over law clerks is at least largely incompatible with judicial independence.

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Introduction

Judicial law clerks have become an accepted and apparently integral part of the Canadian judicial apparatus. Nonetheless, there is no compelling doctrinal account of the functions of law clerks. These functions have important implications for how law clerks are regulated and how their ethical obligations compare to those of lawyers, on the one hand, and judges, on the other.

The last decade has seen an explosion of Canadian legal literature on public sector lawyers.¹ However, there is little Canadian legal literature on judicial law clerks, and only some of that is recent.² Most of this literature focuses on articulating the role and duties of law clerks,³ and most specifically deals with law clerks at the Supreme Court of Canada.⁴ In the only Canadian article that explicitly addresses ethics for law clerks,⁵ Josh Wilner argues that law clerks' ethical duties are "derivative" of those of their judges because their functions are derivative of those of their judges.⁶ However,

¹ Jennifer Leitch, "A Less Private Practice: Government Lawyers and Legal Ethics" (2020) 43:1 Dal LJ 315; Andrew Flavelle Martin, "The Implications of Federalism for the Regulation of Federal Government Lawyers" (2020) 43:1 Dal LJ 363; Andrew Flavelle Martin, "The Government Lawyer as Activist: A Legal Ethics Analysis" (2020) 41 Windsor Rev Leg & Soc Iss 28; John Mark Keyes, "Loyalty, Legality and Public Sector Lawyers" (2019) 97:1 Can Bar Rev 756; Andrew Flavelle Martin & Candice Telfer, "The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing" (2018) 41:2 Dal LJ 443; Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018); Andrew Flavelle Martin, "Legal Ethics and the Political Activity of Government Lawyers" (2018) 49:2 Ottawa L Rev 263; Adam Dodek, "The 'Unique Role' of Government Lawyers in Canada" (2016) 49:1 Israel LR 23; Kerry Wilkins, "Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada" (2016) 13 Indigenous LJ 27; Micah B Rankin, "The Trials, Tribulations and Troubling Revelations of Government Lawyers in Canada" (2014) 17:2 Leg Ethics 303; Michael H Morris & Sandra Nishikawa, "The Orphans of Legal Ethics: Why Government Lawyers Are Different—and How We Protect and Promote that Difference in Service of the Rule of Law and the Public Interest" (2013) 26 Can J Admin L & Prac 171; Patrick J Monahan, "'In the Public Interest': Understanding the Special Role of the Government Lawyer" (2013) 63 SCLR (2d) 43; Malliha Wilson, Taia Wong & Kevin Hille, "Professionalism and the Public Interest" (2011) 38:1 Adv Q 1; Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33:1 Dal LJ 1 [Dodek, "Intersection"]; John Mark Keyes, "The Professional Responsibilities of Legislative Counsel" (2009) 3 JPPL 453; Joshua Wilner, "Service to the Nation: A Living Legal Value for Justice Lawyers in Canada" (2009) 32:1 Dal LJ 177; Allan C Hutchinson, "'In the Public Interest': The Responsibilities and Rights of Government Lawyers" (2008) 46:1 Osgoode Hall LJ 105.

² Joshua Wilner, "To Be or Not to Be?: Some Legal Ethics for Judicial Law Clerks" (2011) 89:3 Can Bar Rev 611; Lorne Sossin, "The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada" (1996) 30:2 UBC L Rev 279; Mitchell McInnes, Janet Bolton & Natalie Derzko, "Clerking at the Supreme Court of Canada" (1994) 33:1 Alta L Rev 58; Michael John Herman, "Law Clerking at the Supreme Court of Canada" (1975) 13:2 Osgoode Hall LJ 279.

³ McInnes, Bolton & Derzko, *supra* note 2; Herman, *supra* note 2.

⁴ McInnes, Bolton & Derzko, *supra* note 2; Herman, *supra* note 2; Sossin, *supra* note 2.

⁵ Wilner, *supra* note 2. Wilner covers bench memos, confidentiality, impartiality, post-clerkship employment, and "assessment of prospective law clerk applications". I will address the middle three issues.

⁶ Wilner, *supra* note 2 ("[b]ecause a law clerk assists with a judge's performance of her public functions, the clerk's ethical duties are derivative of the judicial function" at 623). While Wilner, *supra* note 2

Wilner is vague and non-committal as to the precise nature of the clerk's status and role. Moreover, while the Canadian Judicial Council has jurisdiction over all federally appointed judges, it has no derivative jurisdiction over law clerks. Wilner's account thus implies that law clerks are accountable, if at all, only to their judges as superiors and to the government as the employer. These kinds of accountability are weak in their protection of the public interest, particularly insofar as most law clerks are future lawyers.

In this article, I propose a new doctrinal account or conceptual framework for the ethical duties of law clerks. I argue that law clerks practice law and thus share the professional duties applicable to all lawyers. However, the identity and nature of the court as an institutional client has important implications for those professional duties. Following and elaborating on my work elsewhere, I argue that the duty to encourage respect for the administration of justice transposes some of the ethical obligations of judges into professional obligations of their law clerks as lawyers.⁷ While the end result is somewhat similar as under Wilner's approach, insofar as the duties of law clerks are similar to or derived from the duties of judges, my framework has a clearer and sounder doctrinal and legal footing and has important regulatory implications.

This article is organized in four parts. In Part 1, I demonstrate that at least some of the major functions of law clerks constitute the practice of law—in particular, recommendations for dispositions of appeals and applications for leave to appeal and drafting and substantive editing of decisions. Then, in Part 2, I explain that the clerk-judge relationship is best understood as a lawyer-client relationship. While the formal client is the court as an institution, for practical purposes the client is the judge or judges to whom the clerk is assigned. In Part 3, I set out the special duties of law clerks. It is here I make my core argument: that the lawyer's duty to encourage respect for the administration of justice transposes at least some of the ethical obligations of the judge into professional obligations of the law clerk. I argue in Part 4 that purported law society jurisdiction over law clerks impedes to some extent judicial independence. While the role of law clerks constitutes the practice of law, courts are thus free to employ clerks other than lawyers or students-at-law. Finally, I conclude by reflecting on the implications of my analysis.

I begin with three key points. The first introductory point is a definitional one. I recognize that law clerks are often articulated students, and I include them within

sometimes uses the phrase "legal ethics", he does not appear to consider law clerks as lawyers and thus to consider law clerk's ethics as squarely legal ethics.

⁷ See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, last amended 19 October 2019, online (pdf): <flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf> [FLSC Model Code] ("[a] lawyer must encourage public respect for and try to improve the administration of justice", r 5.6-1.); Martin, *supra* note 1 ("[i]n effect, the rules and laws governing the political activity of judges and members of courts and tribunals are transposed into professional obligations of their counsel" at 291–92). See also Part 3 below, especially notes 60–68 and accompanying text.

my meaning of “lawyer”—as do the rules of professional conduct.⁸ For the purposes of this article, the professional duties of lawyers and articulated students are identical.

Second, if judicial law clerks among other things practice law (as I will argue in Part 1), and the clerk-judge relationship is among other things a lawyer-client one (as I will argue in Part 2), why are a law clerk’s professional duties as lawyers defining and dominant—as opposed, for example, to their duties as employees? The professional duties as lawyers are defining and dominant because they are the most immutable and definitive: lawyers cannot contract out of them and, with few exceptions, clients cannot relieve lawyers from them. They are also stringent. Moreover, the fact that lawyers provide legal advice alongside other services to the same client does not negate, and indeed may complicate, their professional duties as lawyers. My analysis is grounded in the functions performed by law clerks, not their status. I argue that the defining characteristic of law clerks’ ethical duties is that all law clerks practice law, even though not all law clerks are lawyers or articulated students. Thus, law clerks’ ethics are not severable from the definition of the practice of law.

The third introductory point is that my focus here is on the ethics of Canadian law clerks under Canadian law. While there is abundant literature on law clerks in other common law jurisdictions (particularly the US),⁹ like the Canadian literature, it focuses more on the roles and duties and selection of law clerks and their legitimacy,¹⁰

⁸ See *FLSC Model Code*, *supra* note 7 at r 1.1-1 (“‘lawyer’ means a member of the Society and includes a law student registered in the Society’s pre-call training program”).

⁹ But see e.g. Katharine G Young, “Open Chambers: High Court Associates and Supreme Court Clerks Compared” (2007) 31:2 *Melbourne UL Rev* 646; Abhinav Chandrachud, “From Hyderabad to Harvard: How US Law Schools Make It Worthwhile to Clerk on India’s Supreme Court” (2014) 21:1 *Intl J Leg Profession* 73.

¹⁰ See e.g. Paul R Baier, “The Law Clerks: Profile of an Institution” (1973) 26:6 *Vand L Rev* 1125; Eugene A Wright, “Observations of an Appellate Judge: The Use of Law Clerks” (1973) 26:6 *Vand L Rev* 1179; Lynn K Rhinehart, “Is There Gender Bias in the Judicial Law Clerk Selection Process?” (1995) 83:2 *Geo LJ* 575; Christopher Avery et al, “The Market for Federal Judicial Law Clerks” (2001) 68:3 *U Chicago L Rev* 793; David R Stras, “The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process” (2006) 85 *Tex L Rev* 947, reviewing Todd C Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (Stanford: Stanford University Press, 2006) and Artemus Ward & David L Weiden, *Sorcerers’ Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York: New York University Press, 2006); Mark W Pletcher & Ludovic C Ghesquiere, “In Restraint of Trade: The Judicial Law Clerk Hiring Plan” (2007) 78:1 *U Colo L Rev* 147; Christopher Avery et al, “The New Market for Federal Judicial Law Clerks” (2007) 74:2 *U Chicago L Rev* 447; Todd C Peppers & Christopher Zorn, “Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment” (2008) 58:1 *DePaul L Rev* 51; Todd C Peppers, Michael W Giles & Bridget Tainer-Parkins, “Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks” (2008) 71:2 *Alb L Rev* 623; Carolyn Shapiro, “The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court” (2009) 37:1 *Fla St U L Rev* 101; William E Nelson et al, “The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?” (2009) 62:6 *Vand L Rev* 1747; Todd C Peppers, Michael W Giles & Bridget Tainer-Parkins, “Surgeons or Scribes?: The Role of United States Court of Appeals Law Clerks in Appellate Triage” (2014) 98:1 *Marq L Rev* 313; Timothy R Johnson, David R Stras & Ryan C Black, “Advice from the Bench (Memo): Clerk Influence on Supreme Court Oral Arguments” (2014) 98:1 *Marq L Rev* 21; Ryan C Black, Christina L Boyd & Amanda C Bryan, “Revisiting the Influence of Law Clerks on the U.S. Supreme Court’s Agenda-Setting Process” (2014) 98:1 *Marq L Rev* 75; Stephen L Wasby, “The World of Law Clerks: Tasks, Utilization, Reliance, and Influence” (2014) 98:1 *Marq L Rev*

especially at apex courts, than on their ethics.¹¹ Without denying the value of comparative work, this article uses a Canadian-centric approach.¹²

Part 1: The nature of clerks' duties: Judicial law clerks practice law

The existing Canadian legal literature on law clerks does not explicitly address the question of whether law clerks practice law, or the related question of whether the legal and professional obligations of lawyers apply to law clerks. In order to identify and understand the ethical obligations of law clerks, and indeed whether legal ethics—including the law of lawyering—applies to them, these questions must first be answered. I do so in this part. I start by considering definitions of the practice of law. I then identify how, based on existing accounts in the legal literature, at least some of the major work of law clerks constitutes the practice of law. Indeed, it is this functional characterization that grounds my doctrinal account. That is, I argue that the defining characteristic is that all law clerks practice law, even though not all law clerks are lawyers or articulated students.

There is some variation among the provinces and territories around the definition of the practice of law. Most statutes on the legal profession provide a definition, or examples, or both. The most concise definition comes from Nova Scotia:

The practice of law is *the application of legal principles and judgement with regard to the circumstances or objectives of a person that requires the knowledge and skill of a person trained in the law*, and includes any of the following conduct on behalf of another:

- (a) giving advice or counsel to persons about the persons legal rights or responsibilities *or to the legal rights or responsibilities of others*;
- (b) selecting, *drafting* or completing legal documents or agreements that affect the legal rights or responsibilities of a person;

111; Albert Yoon, “Law Clerks and the Institutional Design of the Federal Judiciary” (2014) 98 Marq L Rev 131; John J Szmer, Erin B Kaheny & Robert K Christensen, “Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrepancies in Clerk Selection” (2014) 98:1 Marq L Rev 261; Christopher D Kromphardt, “Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court” (2014) 98:1 Marq L Rev 289; Lawrence Baum, “Hiring Supreme Court Law Clerks: Probing the Ideological Linkage between Judges and Justices” (2014) 98:1 Marq L Rev 333; Tony Mauro, “Diversity and Supreme Court Law Clerks” (2014) 98:1 Marq L Rev 361; Adam Bonica et al, “The Political Ideologies of Law Clerks” (2017) 19:1 Am L & Econ Rev 96.

¹¹ But see e.g. John Paul Jones, “Some Ethical Considerations for Judicial Clerks” (1991) 4:4 Geo J Leg Ethics 771; David Lane, “*Bush v. Gore*, Vanity Fair, and a Supreme Court Law Clerk’s Duty of Confidentiality” (2005) 18:3 Geo J Leg Ethics 863; Charles W Sorenson, Jr, “Are Law Clerks Fair Game? Invading Judicial Confidentiality” (2008) 43:1 Val U L Rev 1; Chandrachud, *supra* note 9 at 80.

¹² See e.g. Adam Dodek, “Canadian Legal Ethics: Ready for the Twenty-First Century at Last” (2008) 46 Osgoode Hall LJ 1 (“Canadian legal ethics must also attempt to situate legal ethics within a distinctly Canadian context” at 7).

- (c) representing a person before an adjudicative body including, but not limited to, preparing or filing documents or conducting discovery;
- (d) negotiating legal rights or responsibilities on behalf of a person.¹³

Legislation in the other provinces and territories is to similar effect but tends to provide more examples.¹⁴

From what little has been written in the Canadian legal literature, the role and duties of a judicial law clerk are fairly clear, at least at the Supreme Court of Canada. Michael John Herman lists eight duties of Supreme Court of Canada law clerks: “[p]reparation of ‘bench memoranda’”, i.e. “a memorandum of fact and law... the Justice will carry it with him onto the bench for purposes of reference”;¹⁵ “[a]ttendance at the oral hearing”;¹⁶ “[p]articipating in the judicial decisions”;¹⁷ “[l]egal research”;¹⁸ “[p]reparing draft reasons”;¹⁹ and “[e]diting the draft judgment”.²⁰ Herman emphasizes that the last function, editing, “is perhaps the most valuable service that the clerk can perform.”²¹ He also includes a ninth potential duty: oral or written recommendations on applications for leave to appeal.²²

Similarly, Mitchell McInnes, Janet Bolton & Natalie Derzko observe that “[t]he primary duties [of law clerks] continue to include the preparation of leave memoranda and bench memoranda, and the provision of assistance in the drafting of reasons for judgment.”²³ In the same vein, Sossin writes that “[p]robably the most important role of law clerks at the Supreme Court—and the one least susceptible to

¹³ *Legal Profession Act*, SNS 2004, c 28, s 16(1) [emphasis added].

¹⁴ See e.g. *Law Society Act*, RSO 1990, c L.8 (“[f]or the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person”, s 1(5); s 1(6) gives examples that include “[g]ives a person advice with respect to the legal interests, rights or responsibilities of the person or of another person” and “[s]elects, drafts, completes or revises, on behalf of a person, ... a document that affects the legal interests, rights or responsibilities of a person”).

¹⁵ Herman, *supra* note 2 at 280–81. See also Wilner, *supra* note 2 (who refers to bench memos as “the main work product of law clerks” at 633).

¹⁶ Herman, *supra* note 2 at 281–82.

¹⁷ *Ibid* at 282–83.

¹⁸ *Ibid* at 283–84.

¹⁹ *Ibid* at 284–85.

²⁰ *Ibid* at 285–86.

²¹ *Ibid* at 285.

²² *Ibid* at 286.

²³ McInnes, Bolton & Derzko, *supra* note 2 at 61.

generalizations—is the drafting of bench memoranda”.²⁴ He also notes that, where the judge writes reasons in a given case, “the law clerk who prepared the bench memorandum will be asked to undertake some supplementary research on particularly complex issues, to edit a draft of an opinion prepared by the Justice or to work on a draft of the reasons in the case.”²⁵

In some respects, the work of law clerks clearly does not constitute the practice of law. To the extent that leave memos or bench memos are merely summaries of the materials filed, this clerical work, while requiring knowledge and skill, is not the practice of law. Likewise, to the extent that editing judgments is a matter of style and proofreading, it too is not the practice of law. Moreover, a bare statement of the law is arguably legal information and not legal advice, and thus pure legal research may not constitute the practice of law.

However, without explicitly stating that law clerks practice law, the Canadian literature on law clerks reveals that they typically exceed this clerical work. For example, in his discussion of leave memos, Sossin generalizes that “[t]he memo concludes by recommending whether or not the case should be granted leave.”²⁶ As Sossin also explains, the test for leave is set out in the *Supreme Court Act*.²⁷ In applying subsection 40(1) to the facts of the leave application, and expressing a conclusion (recommendation or not) as to whether the legal test is met, the law clerk is providing legal advice and thus practicing law. Sossin is correct that this test is “extremely vague and largely subjective” and that “[f]ew clerks have enough experience, or are given enough guidance, to credibly and consistently apply a standard of ‘national importance’.”²⁸ It is nonetheless a legal test and the law clerk is providing a legal conclusion. In the words of the Nova Scotia legislation, the law clerk is applying “legal principles and judgement with regard to the circumstances or objectives of a person that requires the knowledge and skill of a person trained in the law” and more

²⁴ Sossin, *supra* note 2 at 292.

²⁵ *Ibid* at 296.

²⁶ *Ibid* at 289. See also McInnes, Bolton & Derzko, *supra* note 2 (“the clerks pre-screen the applications and provide recommendations as to dispositions.... The most important, and typically longest, part of the memo examines whether or not the application should be granted [emphasis added]” at 71–72).

²⁷ See *Supreme Court Act*, RSC 1985, c S-26, s 40(1):

[T]he Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.

See also e.g. for the Court of Appeal for Ontario, *Courts of Justice Act*, RSO 1990, c 43 (“[a]n appeal lies to the Court of Appeal from ... an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court”, s 6(1)(a)).

²⁸ Sossin, *supra* note 2 at 289, 291.

specifically “giving advice or counsel to persons about the persons legal rights or responsibilities or to the legal rights or responsibilities of others”.²⁹

Likewise, in his discussion of bench memos, Sossin explains that bench memos not only “summarize the relevant arguments” but also “offer recommendations based on a thorough review of the applicable law.”³⁰ While the former is clerical work, the latter is the development and expression of a legal opinion and thus the practice of law.

There is a similar dichotomy in law clerks’ drafting and editing of judgments. Where editing is simply proofreading, it is clerical work. However, where editing involves confirming that the statements of law are correct, including that the cases relied on are still good law, that editing is arguably the practice of law. Sossin asserts that law clerks often go beyond editing and actually draft reasons.³¹ He elaborates that clerks’ work goes beyond a statement of the law to provide an “opinion”, which using the criteria above I would characterize as a legal opinion about the legal rights and responsibilities of a person:

First, clerks are expected to give accurate statements of the law in a particular area or with respect to particular circumstances. Second, clerks are expected to give an opinion as to whose view of the proper law—the appellant’s, the respondent’s or an intervenor’s—should carry the day. In other words, clerks are asked to both express an opinion of their own and to summarize objectively the opinions of others.³²

A court’s decision is a legal document and is, at least in the Canadian common law jurisdictions, law as much as a statute is law. Thus, drafting a decision likewise involves the application of the law to the facts and the giving of a legal conclusion. Even where the conclusion has been specified by the judge, the clerk in providing the draft is implicitly stating that the analysis supports the conclusion.

Based on this application of the definition of the practice of law to the existing descriptions of law clerks’ duties, at least some of the major duties of law clerks constitute the practice of law. For the reasons I discussed in the introduction, legal ethics should thus predominate in law clerks’ ethics.

²⁹ *Legal Profession Act*, *supra* note 13, s 16(1).

³⁰ Sossin, *supra* note 2 at 292 [emphasis added]. See also Wilner, *supra* note 2 (“[i]t is commonly recognized that when clerks prepare bench memos for their judges they are giving them legal ‘advice’” at 622). See also McInnes, Bolton & Derzko, *supra* note 2 (a bench memo “assists a judge in determining the more difficult question of how an appeal should be decided” at 74). See also Wilner, *supra* note 2 (“the purpose of a bench memo is not to convince the judge as how to decide the case but instead to lay a foundation for a decision, to facilitate a decision” at 633).

³¹ Sossin, *supra* note 2 at 296.

³² *Ibid* at 302.

How, then, can this conclusion be reconciled with the fact that at least some courts do not require judicial law clerks to be articulated students or lawyers?³³ I certainly do not suggest that these courts are condoning the unlawful unlicensed practice of law. There are two possible answers. The more conservative answer is that such law clerks, i.e. those who are not articulated students or lawyers, are implicitly acting under the supervision of a lawyer at the court, for example the executive legal officer or a staff lawyer.³⁴ The *FLSC Model Code* recognizes that lawyers may delegate functions to non-lawyers other than articulated students, though the lawyer maintains “complete professional responsibility” and “must directly supervise” those non-lawyers.³⁵ This answer is problematic insofar as non-lawyers cannot, among other things, “give legal advice”, “act finally without reference to the lawyer in matters involving professional legal judgment”, or “sign correspondence containing a legal opinion”.³⁶ Moreover, as a factual matter, the actual extent of this implicit supervision is unclear.

A bolder and better answer is that legislation on the legal profession, and the codes adopted by law societies under that legislation, do not apply to courts, including their law clerks in the performance of their duties, because such application is at least largely inconsistent with judicial independence. I will return to this argument below in Part 4.

Admittedly, if the legislatures were convinced that a judicial clerkship is a sufficiently special public role, they would be free to amend legislation on the legal profession to add an exception to the definition of the practice of law.³⁷ (Indeed, for the purpose of law society regulation, the practice of law is whatever the legislature defines it as.) For example, legislation in some provinces explicitly provides that politicians may advocate on behalf of their constituents without practicing law.³⁸ However, given the long history of judicial clerkships in Canada, one can infer that

³³ See e.g. the Supreme Court of Canada, the Federal Court, and the Ontario Court of Appeal.

³⁴ While the duties of these lawyers also warrant further study, they are beyond the scope of this article.

³⁵ *FLSC Model Code*, *supra* note 7, r 6.1-1. See also *ibid* (“[in] this rule, a non-lawyer does not include a student-at-law”, r 6.1-2); *Black v Law Society (Alberta)*, [1989] 1 SCR 591, 58 DLR (4th) 317, La Forest J (“[i]t must be remembered that the member lawyer takes full responsibility for the work of a non-member, whether that non-member be a student, a paralegal, or a lawyer from another jurisdiction, and to fulfill his or her obligations to the law society the member lawyer must adequately supervise all work done in his or her name” at 628–29 of SCR).

³⁶ *FLSC Model Code*, *supra* note 7, r 6.1-3(b), (d), (k).

³⁷ In some jurisdictions this could be done by regulation. See e.g. *Legal Profession Act*, *supra* note 13 (“this Act does not prohibit ... (l) any other person or class of persons permitted by the regulations made by the Council and approved by the Governor in Council to carry on one or more of the activities referred to in subsection (1)”, s 16(4)).

³⁸ See e.g. *ibid* (“[the *Legal Profession Act*] does not prohibit ... (j) a member of (i) the House of Commons of Canada, (ii) the House of Assembly, or (iii) a council of a municipality, from acting as an advocate or representative of a person in the member’s capacity as an elected representative; (k) a member of the Senate of Canada from acting as an advocate or representative of a person in that member’s capacity as a Senator”, ss 16(4)(j), (k)).

the legislatures have declined the opportunity to do so. If, however, the implications of my analysis are undesirable, then such an amendment would be appropriate.

Part 2: The nature of the clerk-judge relationship: A lawyer-client relationship

The clerk-judge relationship is amorphous in the existing Canadian literature. However, given my conclusion that law clerks practice law, I argue that it is correctly understood as a lawyer-client relationship.

I start by considering the legal or technical nature of the clerk-judge relationship. Wilner notes that “[t]he [judge-clerk] relationship has several facets, including employer-employee, teacher-student, client-lawyer, and lawyer-lawyer.... The relationship between judges and clerks is an odd, paradoxical mix of partnership and subservience, collaboration and subordination.”³⁹ However, understanding the ethics and professionalism obligations of law clerks requires precision about the dominant characteristic of their relationship with judges. The court may resemble a firm—with the judges as partners and the clerks as associates—or, potentially, a collection of firms sharing space, with each firm consisting of a judge and her clerks. Judges, however, are not lawyers. As the clerk is providing, among other things, legal advice, there must be a lawyer-client relationship and thus a client. Therefore, the situation is best understood as the law clerks being in-house counsel either to the court as an institutional client or to the individual judge.

While the clerk-judge relationship may be an unusual or even non-traditional lawyer-client relationship, that does not mean it cannot be a lawyer-client relationship. Wilner argues that the relationship is not a typical lawyer-client one because “clients are not normally more experienced in the law than their lawyer is” (which is true, but does not preclude the judge being a client) and that “it is inaccurate to describe a judge as a client, at least a traditional kind of client.... [A] clerk assigned to a particular judge is employed to assist the judge in performing a public function, rather than to represent the judge’s personal interests.”⁴⁰ Interestingly, Wilner concludes that “the clerk’s professional role seems more akin to that of a government lawyer than to that of a lawyer representing a private client.”⁴¹ (He goes on to imagine that the client may be “even perhaps ‘the law’ itself”,⁴² a characterization that is so abstract as to be unhelpful.) I note that despite the differences between private practice and government practice, a government lawyer is a lawyer, and the client of a government lawyer is a client—i.e., to say that a law clerk is like a government lawyer is to say that she practices law in a lawyer-client relationship. The law clerk has a specific client, and

³⁹ Wilner, *supra* note 2 at 620.

⁴⁰ *Ibid* at 622.

⁴¹ *Ibid*.

⁴² *Ibid*.

that client remains free to provide instructions to the law clerk and accept or reject the law clerk's advice.

As Wilner notes, however, there is “an ambiguity as to whether a law clerk's ‘client’ is his particular judge or rather the court as an institutional whole.”⁴³ The nature of, and parties to, the relationship have implications for the ethical duties of law clerks, such as the law clerk's duty of confidentiality.⁴⁴ As Wilner notes, confidentiality is essential to the role of the law clerk.⁴⁵ If each law clerk is counsel to the individual judge, then lawyer-client confidentiality applies as among the law clerks and as among the judges, with the possibility of a joint retainer where a law clerk works on a single matter for more than one judge.⁴⁶ On the other hand, if each law clerk is counsel to the court as a whole, there is no confidentiality as among the law clerks and as among the judges, with the possibility of different lawyers within the same “firm” representing both sides to a matter.⁴⁷ (Of course, even if the court is a collective, individual judges can impose additional obligations of confidentiality on their law clerks as a matter of contract or undertakings.⁴⁸) For example, Herman notes that “[t]he Judges promote the clerks' practice of discussing cases amongst themselves.... But the employers' thoughts are disclosed only to aid the fuller discussion of the case and the better formulation of a legal solution. This limited sharing of the judicial confidence is ordinarily permissible.”⁴⁹ Similarly, Sossin notes that “[p]erhaps as influential as the discussions between clerks and their Justices are the discussions among the law clerks themselves.”⁵⁰ Wilner, however, observes that “[s]ome judges encourage this, while others do not permit it.”⁵¹

Here a comparison to government lawyers is helpful. The government lawyer represents an institutional client, the Crown. However, on a day-to-day basis, the government lawyer receives instructions from, and provides legal advice and services to, a particular ministry or department, and confidentiality typically applies as against

⁴³ *Ibid.*

⁴⁴ *Ibid* addresses confidentiality at 637–39. Ironically, the law clerk has an explicit obligation of confidentiality, but the judge does not. See Stephen GA Pitel & Liam Ledgerwood, “Judicial Confidentiality in Canada” (2017) 43:1 *Queen's LJ* 123.

⁴⁵ Wilner, *supra* note 2 at 637.

⁴⁶ See *FLSC Model Code*, *supra* note 7, r 3.4-5.

⁴⁷ See *ibid* (“[w]here there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that...”, r 3.4-4).

⁴⁸ See also Wilner, *supra* note 2 (“the law clerk's duty of confidentiality may be in principle be rooted in a number of sources, including moral obligation, professional responsibility, fiduciary or contractual obligation, and court rule or statute” at 637).

⁴⁹ Herman, *supra* note 2 at 279.

⁵⁰ Sossin, *supra* note 2 at 294.

⁵¹ Wilner, *supra* note 2 at 638.

other ministries or departments. Likewise, though the client of the law clerk is the court as an institutional whole, he or she is assigned to provide services to a particular judge or judges who are the *de facto* clients. As the formal client is the court itself, it is ultimately up to the court to determine how confidentiality and other considerations will apply when clerks are assigned to specific judges.

Part 3: The ethical duties of law clerks

Having established that law clerks practice law, and noted that the clerk-judge relationship is a lawyer-client one, I can now explain how and why the ethical duties of law clerks are professional duties of lawyers. At first glance, this may seem like a hybrid set of duties, combining the professional duties of a lawyer and the ethical duties of a judge. However, law clerks are not judges.⁵² The law clerk practices law in a lawyer-client relationship and thus shares the professional duties applicable to all lawyers. But the identity and nature of the client (whether the court, formally, or the individual judge, in practice) has important implications for those professional duties or imposes additional professional duties: at least some of the duties applicable to judges are transposed onto their lawyers via the duty to encourage respect for the administration of justice.

This approach has some overlap with Wilner's approach, under which the positions and functions of the lawyer are "*derivative*" of those of the judge,⁵³ and so the duties of the law clerk are likewise "*derivative*" of the duties of the judge:

The nature of their [clerks'] participation is derivative of their professional relationship with their judge and their judge's duties. Clerks' functions are completely dependent upon their judges' functions. That clerks are judicial agents explains the similarities between legal ethics for law clerks and judicial ethics.⁵⁴

He later notes that "[i]t is this aspect of the relationship—the fact that law clerks are 'personal extensions' of the judge—which explains the link between judicial ethics and law clerks' ethics... Clerks are the trusted agents of 'their' judge, and as such clerks may be bound by the judicial standards binding their principal."⁵⁵ Wilner argues

⁵² See e.g. *ibid* at 612, 621, 622.

⁵³ See e.g. *ibid* at 612:

That law clerks' ethics tracks some of the basic concerns in judicial ethics reflects a fundamental tension inherent in the clerkship institution, namely, that clerks are not judges even though their functions overlap with those of judges. That tension arises not because clerks are "parajudges," but because their functions are derivative of the judicial function, arising out of and dependent upon the judicial office held by the judge they serve [citation omitted].

⁵⁴ *Ibid* at 616. See also *ibid* ("[t]he derivative character of the law clerk's responsibilities, being dependant on the judicial function, explains the interrelated and overlapping nature of law clerk ethics and judicial ethics. The agent must adopt and live up to the ethical standards of his principal" at 641).

⁵⁵ *Ibid* at 621.

that “clerks themselves have public duties flowing from the judicial office held by the judge whom they serve.”⁵⁶ Indeed, he is explicit that “[t]he agent must adopt and live up to the ethical standards of his principal”.⁵⁷ He argues that “[t]he law clerk’s duty is derivative of the judge’s duty, and the judge is tasked with enforcing it”⁵⁸ and refers to “ethical obligations” and “public obligations” interchangeably.⁵⁹

I argue instead that it is the duty to encourage respect for the administration of justice that does the deriving or extending of judges’ duties into lawyer’s duties, within a relationship that is not solely agent-principal but more specifically lawyer-client.⁶⁰ In general, duties of the client do not always, or even often, automatically become duties of the lawyer.⁶¹ The lawyer’s duty to encourage respect for administration of justice is the mechanism by which ethical duties of the judge become professional duties of the law clerk.

The *Model Code* of the Federation of Law Societies of Canada provides that “[a] lawyer must encourage public respect for and try to improve the administration of justice.”⁶² While this duty is not often the subject of disciplinary proceedings, they typically involve “unsupported allegations of bias or wrongdoing against judges or courts.”⁶³ In contrast, law clerks by their actions may discourage public respect for the administration of justice not because they allege wrongdoing but because clerks and their functions are closely connected to their courts and judges and unavoidably reflect on them in the perception of the legal profession and the public. Thus, “[i]n effect, the rules and laws governing ... judges and members of courts and tribunals are transposed into professional obligations of their counsel.”⁶⁴

In order to determine the content of these additional professional duties, the relevant question is whether the absence or breach of such duties would discourage respect for the administration of justice in the mind of a reasonably informed member of the public, given the substantive nature of the work done by law clerks and their close working relationships with their judges. As Wilner puts it, “[e]verything a clerk

⁵⁶ *Ibid* at 623.

⁵⁷ *Ibid* at 641.

⁵⁸ *Ibid* at 621.

⁵⁹ *Ibid* at 623.

⁶⁰ Martin, *supra* note 1 at 292.

⁶¹ See e.g. Deborah MacNair, “In the Service of the Crown: Are Ethical Obligations Different for Government Counsel?” (2005) 84:3 Can Bar Rev 501 (“[i]t is easy to confuse the ethical obligations of government counsel with the legal obligations of clients” at 530), quoted in Andrew Flavelle Martin & Candice Telfer, “The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing” (2018) 41:2 Dal LJ 443 at 457.

⁶² *FLSC Model Code*, *supra* note 7, r 5.6-1.

⁶³ Martin, *supra* note 1 at 291. See also the list of cases with descriptions (*ibid*, n 106).

⁶⁴ *Ibid* at 292.

does reflect back on his or her judge.”⁶⁵ For example, Wilner notes that “[t]he justification for the requirement that law clerks be impartial... would seem to be rooted entirely in the detrimental manner in which a biased clerk would reflect on the perception of the judge’s role in administering justice.”⁶⁶

The archetype here is political activity. Judges are restricted from engaging in political activity in order to promote their impartiality and public confidence in that impartiality.⁶⁷ Political activity by law clerks would appear, to a reasonably informed member of the public, to detract from the impartiality or the appearance of impartiality of the judges who those lawyers serve.⁶⁸ Thus, under the analysis set out above, judges’ ethical duty to refrain from political activity is transposed into a professional duty of the their law clerks to likewise refrain.

Before proceeding further, I note that one rule of professional conduct has particular importance given the nature of the clerk’s function. Because not all of a clerk’s duties constitute the practice of law or giving legal advice, clerks should be particularly careful to distinguish their legal advice from their non-legal advice.⁶⁹

I acknowledge that many of the professional duties of law clerks are the same as those of all lawyers. However, some of these duties have special implications for law clerks. Some of these special duties apply to the conduct of law clerks after they have left the court. But one of the most important—a bar on political activity and constraints on other civic and charitable activity—applies only during their service to the judiciary.

3A. The ethical duties of law clerks: Impartiality and outside interests

Like political activity, other outside interests raise problems for law clerks in the same way that they raise problems for judges.⁷⁰ Law clerks share their judges’ obligations

⁶⁵ Wilner, *supra* note 2 at 621.

⁶⁶ *Ibid* at 623.

⁶⁷ Canadian Judicial Council, *Ethical Principles for Judges*, Ottawa: CJC, 2004, at 28, principle d(1), online (pdf): <cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>.

⁶⁸ Martin, *supra* note 1 at 271.

⁶⁹ See *FLSC Model Code*, *supra* note 7, r 3.1-2, commentary 10:

In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer’s experience will be such that the lawyer’s views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

⁷⁰ Wilner, *supra* note 2 addresses impartiality at 639–40.

of impartiality—they “must not only be impartial but also be seen to be.”⁷¹ Partiality or partisanship by law clerks calls into question the impartiality of their judges.

An important example of these problems is fundraising. Fundraising by judges raises several concerns, primarily about buying influence with, or preferential access to, the judges involved.⁷² As Pitel & Malecki put it: “[a] common concern... is that donors (which may include lawyers and potential litigants appearing before a judge) may contribute with the expectation that they will receive future favours from the soliciting judge in return for their generosity.”⁷³ There is a further concern that judges will become “publicly identifie[d] ... with the objectives of the organization for whom the solicitations were made.... this heightens the risk that the public could question the judge’s neutrality.”⁷⁴ Similarly there is concern that solicitation by a judge “may cause people to feel intimidated or coerced into donating.”⁷⁵ Thus, the Canadian Judicial Council’s *Ethical Principles for Judges* provides that “[j]udges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes) or lend the prestige of judicial office to such solicitations.”⁷⁶ Fundraising by their law clerks raises similar concerns. Here law clerks should also be guided by the rules of professional conduct on outside interests: “[a] lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer’s independent judgment on behalf of a client.”⁷⁷

Wilner’s conclusion is that law clerks “must be prudent in any civic, charitable, and political activities in which they take part.”⁷⁸ I have observed elsewhere that in the context of political activity, however,⁷⁹ mere prudence seems insufficient for law clerks, and they are better advised to refrain completely. It is worth emphasizing here that *Ethical Principles for Judges* treats political activity, and particularly partisan political activity, differently than other civic and charitable activities. Such civic and charitable activities may be permissible for judges, and so for those activities prudence is an appropriate and sufficient approach for law clerks.

⁷¹ *Ibid* at 639.

⁷² See e.g. Stephen GA Pitel & Michal Malecki, “Judicial Fundraising in Canada” (2015) 52 *Alta L Rev* 519.

⁷³ *Ibid* at 531. See also *Ethical Principles*, *supra* note 67 at 36, commentary c(6).

⁷⁴ Pitel & Malecki, *supra* note 72 at 531. See also *Ethical Principles*, *supra* note 67 at 36, commentary c(6).

⁷⁵ Pitel & Malecki, *supra* note 72 at 533.

⁷⁶ *Ethical Principles*, *supra* note 67 at ch 6(c)(1)(b).

⁷⁷ *FLSC Model Code*, *supra* note 7, r 7.3-2.

⁷⁸ Wilner, *supra* note 2 at 640.

⁷⁹ Martin, *supra* note 1 (“I would argue that no political activity is prudent for a law clerk” at 292, n 109).

3B. The ethical duties of law clerks: Post-service restrictions

Judges face restrictions on their return to the practice of law.⁸⁰ Although there is variation among the provinces and territories, the *FLSC Model Code* provides that a former judge cannot, in the three years following her departure from a court, appear before that court or any court or tribunal over which that court has jurisdiction.⁸¹ Should their law clerks also face restrictions when they leave a court?

Of course, the general rule on appearing in front of judges with whom a lawyer has a close relationship will apply to former law clerks:

When acting as an advocate, a lawyer must not: ... appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice[.]⁸²

The application of this rule turns on the nature of the relationship between the judge and the law clerk. Wilner notes that some judges impose a “cooling-off period” during which they will not allow their former clerks to appear before them.⁸³ But what about other judges of the same court, or judges of inferior courts?

On one level, law clerks are differently situated than judges. Unlike the long-term career that comes from a judicial appointment, service as a law clerk is transient, even fleeting.⁸⁴ Law clerks are near the beginning of their legal careers.⁸⁵ In contrast, retired judges receive considerable pensions.⁸⁶ Restrictions on post-service court appearances would be a considerable deterrent from taking a clerkship, particularly for potential clerks whose career plans contemplate litigation.

At the same time, some of the reasons to be wary of judges returning to practice do also apply to their law clerks. Parties and their counsel might be at a perceived or actual disadvantage when facing opposing counsel who recently served the Court in which they are appearing. As Pitel & Bortolin put it, “[o]ne concern

⁸⁰ *FLSC Model Code*, *supra* note 7, r 7.7-1; Stephen GA Pitel & Will Bortolin, “Revising Canada’s Ethical Rules for Judges Returning to Practice” (2011) 34:2 Dal LJ 483.

⁸¹ *FLSC Model Code*, *supra* note 7, r 7.7-1. There is an exception where the law society “approves on the basis of exceptional circumstances”. For an example of “exceptional circumstances”, see *LaForme v Law Society of Ontario*, 2020 ONLSTH 112.

⁸² *Ibid*, r 5.1-2(c). Pitel & Bortolin, *supra* note 80 at 488–90 refer to these kinds of rules as “situation-specific restrictions” and emphasize that they “focus on the relationship between the former judge and the judge before whom he or she is appearing... not... on conflict of interest or confidentiality concerns.”

⁸³ Wilner, *supra* note 2 at 640.

⁸⁴ *Ibid*.

⁸⁵ *Ibid*; McInnes, Bolton & Derzko, *supra* note 2 at 61, 77.

⁸⁶ Pitel & Bortolin, *supra* note 80 at 522.

associated with former judges is that their arguments before a court will be more persuasive than they ought to be.”⁸⁷ While Pitel & Bortolin argue that such special influence is unlikely in reality, they note that the public might perceive it, and so the restriction is necessary to protect the appearance of impartiality.⁸⁸ The same concern, although lesser in degree, would seem to apply to law clerks appearing in front of the court they served. Lawyers who have recently acted as the court’s trusted advisors conceivably have more credibility and persuasiveness than other lawyers.

On the other hand, there is little reason to think that this concern would apply to judges of courts inferior to or superior to the court in which a law clerk served. These judges have had no interaction with, and no relationship with, the former law clerk.

Given the short-term nature of law clerks’ service, and the danger of deterring applicants from such service, a cooling-off period would be preferable to a permanent prohibition. Pitel & Bortolin argue that such periods for former judges are an arbitrary and absurd compromise between a permanent prohibition and no prohibition.⁸⁹ However, for former law clerks, such an arbitrary period, perhaps of one year, has an important symbolic value and promotes public confidence in the administration of justice. For example, the Supreme Court of Canada’s *Confidentiality and Conflict of Interest Declaration* provides that “[f]ormer law clerks shall not, within a period of two years after terminating their clerkship, without consent of a judge, appear as counsel in any proceeding before the Supreme Court of Canada.”⁹⁰ Such a period would be more important for clerks at lower courts, given the rarity of a recently-called lawyer appearing at the Supreme Court of Canada.

In contrast, prohibitions on soliciting post-service practice opportunities are equally warranted—though not equally feasible—for law clerks as they are for judges.⁹¹ As Pitel & Bortolin note, there is nothing specific in *Ethical Principles for Judges* that “would prohibit judges from negotiating employment with parties to a dispute or their lawyers... [a]lthough this is already an obvious violation of judicial ethics principles”.⁹² As Wilner notes, law clerks doing the same creates “possible conflicts of interests and the appearance of impropriety”.⁹³ While Wilner does not advocate an absolute prohibition, he suggests that “[w]hen in doubt, during their

⁸⁷ *Ibid* at 512.

⁸⁸ *Ibid* at 513.

⁸⁹ *Ibid*. But see also *ibid* (“[a] time-limited restriction on appearances would make more sense if it was limited to the same court in which the former judge had served” at 514).

⁹⁰ Email from Samson Rémi, Senior Legal Officer, Supreme Court of Canada (13 March 2019) [on file with author].

⁹¹ Wilner, *supra* note 2 addresses “post-clerkship employment” at 640–41.

⁹² Pitel & Bortolin, *supra* note 80 at 520.

⁹³ Wilner, *supra* note 2 at 640.

employment it would be prudent for clerks to inform their judges about any potential conflicts of interest raised by their job hunting.”⁹⁴ Here too a cooling-off period would promote public confidence in the administration of justice. But in the age of the mega-firm, a law clerk serving for a single year would be *de facto* prevented from seeking employment. While I appreciate the concurrence by Cory J in *MacDonald v Martin Estate* that “[n]either the merger of law firms nor the mobility of lawyers can be permitted to affect adversely the public’s confidence in the judicial system.”⁹⁵ I acknowledge that such a cooling-off period for law clerks would be impractical in practice and destructive to the institution of clerking.

Law clerks also face restrictions on public comment following their service. During their service, law clerks have a clear duty to avoid public comment because of their duties of loyalty and confidentiality.⁹⁶ But what about after their departure from the court?

It is generally understood that judgments speak for themselves and judges should not comment on their previous cases: “The rule that judges should speak, or explain themselves, only once, through their judgments, is a wise and salutary one, based on the long experience of the common law.... They are expected to speak only through their Reasons for Judgment, and thereafter never to explain their judgments.”⁹⁷ Indeed, this is one of the dangers considered by Pitel & Bortolin for judges returning to court and potentially arguing against one of their previous decisions.⁹⁸ A similar concern appears to apply to former law clerks who become litigators or academics, which are two very common careers for former law clerks.⁹⁹ Can a litigator, or an academic, argue or write about decisions that they worked on? What about decisions by the same judge during the law clerk’s service? What about decisions by other judges of the same court? This situation invokes both the duty of confidentiality and the broader duty of loyalty to clients, both present and former.¹⁰⁰

⁹⁴ *Ibid.*

⁹⁵ *MacDonald Estate v Martin*, [1990] 3 SCR 1235 at 1265, 77 DLR (4th) 249.

⁹⁶ See e.g. Wilner, *supra* note 2 at 638–39. As I have explained, under my approach these duties of confidentiality and loyalty are a lawyer’s duties.

⁹⁷ *Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia* (Ottawa: CJC, 27 August 1990) (Allan McEachern CJ, Chairman), at 23–25, online (pdf): *Canadian Judicial Council* <cjc-ccm.gc.ca/cmslib/general/conduct_inq_HartJonesMacdonald_ReportIC_199008_en.pdf> [CJC 1990 Report].

⁹⁸ Pitel & Bortolin, *supra* note 80 at 518.

⁹⁹ See e.g. McInnes, Bolton & Derzko, *supra* note 2 at 69; Sossin, *supra* note 2 (“many former clerks have gone on to academic careers” at 286).

¹⁰⁰ See *FLSC Model Code*, *supra* note 7 (“[a] lawyer must not use or disclose a client’s or former client’s confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client”, r 3.3-2).

The identity of the judges who wrote a decision forms part of the reasons and is readily apparent on its face in a way that the identity of the law clerks who worked on a decision is not. However, the identity of a judge's clerk and their dates of service are readily available. While technically the identity of a client and the nature of the services provided are privileged and confidential,¹⁰¹ many law clerks are open with the names of the judge(s) for whom they worked, both during and after their service.

Here an analogy can be drawn to the duty of a lawyer not to comment on the strength of a client's case.¹⁰² The former law clerk has, or may be perceived as having, inside knowledge about the intended meaning and interpretation of a decision on which she worked as well as its potential weaknesses. Attacking the credibility or applicability of such a decision undoes the work for which the lawyer was responsible.¹⁰³

On the other hand, a litigator is not free to simply ignore such decisions or pretend that they do not exist; indeed, such an approach would violate the duty of competence to the current client.¹⁰⁴

The best course for the former law clerk, in any situation where a decision issued by the court during their service is relevant, is to choose their words carefully, avoid speculating as to the judge's intended meaning, and avoid insofar as possible commenting on the merits of the decision. This is most important when the decision is one in which the law clerk was involved, but is also advisable for any decision of the judge(s), and even the court, for which the law clerk worked during that service.

3C. The ethical duties of law clerks: The duty to report fellow lawyers to the law society

I have argued above that law clerks have some special professional duties, flowing from their professional duty to encourage respect for the administration of justice.

¹⁰¹ *Ibid* (“[g]enerally, unless the nature of the matter requires such disclosure, a lawyer should not disclose having been: (a) retained by a person about a particular matter; or (b) consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them”, r 3.3-1, commentary 5).

¹⁰² *Ibid* (“[a] lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal”, r 5.1-1, commentary 5).

¹⁰³ See e.g. *Stewart v Canadian Broadcasting Corp* (1997), 150 DLR (4th) 24, 32 OTC 321 (Gen Div) (“Mr. Greenspan not only revisited the future benefits and protections he had worked to provide to Mr. Stewart as his counsel, he undermined them.... He re-visited and undermined the future benefits and protections which he had provided to Mr. Stewart as his counsel” at paras 278, 280 of DLR).

¹⁰⁴ See *FLSC Model Code*, *supra* note 7, r 3.1-1(a):

‘Competent lawyer’ means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement, including: (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises.

Before moving on, it is important to emphasize that, and how, another of the professional duties of all lawyers applies to law clerks: the duty to report fellow lawyers to the law society. This is an example of how the duties of law clerks diverge from, rather than converge with, the duties of their judges. Put another way, the duties of judges may supplement, but cannot negate, the professional duties of law clerks. (Another example is that while judges lack an express duty of confidentiality,¹⁰⁵ law clerks are doubtlessly bound by the lawyer's duty of confidentiality.)

Rule 7.1-3 of the *FLSC Model Code* requires lawyers to report other lawyers to the law society in a range of circumstances:

Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

- (a) the misappropriation or misapplication of trust monies;
- (b) the abandonment of a law practice;
- (c) participation in criminal activity related to a lawyer's practice;
- (d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer;
- (e) conduct that raises a substantial question about the lawyer's capacity to provide professional services; and
- (f) any situation in which a lawyer's clients are likely to be materially prejudiced.¹⁰⁶

This duty applies to all lawyers individually. Thus, for example, an articled student or junior lawyer has the duty to report regardless of whether the senior lawyer for whom they work, or the firm's managing partner, agrees that a report is necessary or appropriate.

Judges do not have the same duty to report lawyers to the law society—if in fact they have such a duty at all. *Ethical Principles for Judges* provides the following guidance:

It is a delicate question whether and in what circumstances a judge should report, or cause to be reported, a lawyer to the lawyer's professional governing body.... [G]enerally a judge should take, or cause to be taken, appropriate action where the judge has clear and reliable evidence of serious misconduct or gross incompetence by a lawyer.¹⁰⁷

¹⁰⁵ See above note 44.

¹⁰⁶ *FLSC Model Code*, *supra* note 7, r 7.1-3. For a discussion see John Chapman, "Am I My Partner's Keeper? The Duty to Report a Colleague" (2013) 92:3 Can Bar Rev 611.

¹⁰⁷ *Ethical Principles*, *supra* note 67 at 22, commentary 14. The commentary also deals with when such a report should be made, i.e. during a proceeding versus after the proceeding has concluded.

Judges may witness firsthand “conduct that raises a substantial question as to another lawyer’s honesty, trustworthiness, or competency as a lawyer” or “conduct that raises a substantial question about the lawyer’s capacity to provide professional services”. They also may learn of such conduct secondhand from the record before them, be that conduct that is the subject matter of the litigation, for example in a malicious prosecution matter, or conduct by counsel below, for example in an appeal based on inadequate assistance by counsel. But reporting is only triggered when it reaches the threshold specified in *Ethical Principles*. Moreover, *Ethical Principles* itself is explicitly not a binding code,¹⁰⁸ and thus it is inaccurate to refer to this as a reporting duty.

In contrast, law clerks—who may become aware of the same conduct when their judge does, or before or after—do have a duty to report it to the law society, with a lower threshold than judges’ reporting. Lawyers are required to report not only “serious misconduct” or “gross incompetence”, but also “conduct raising a substantial question as to” integrity or capacity. In the same way that a senior partner cannot decide that his juniors will not make a report, a judge has no ability to absolve a law clerk of this duty. Even if the judge does not want to make a report, indeed even where the judge determines that the conduct would not merit a report under *FLSC Model Code* rule 7.1-3, the law clerk has a duty to use her own judgement and make a report if she determines that one is required. The only exception to this duty is where the information for the report is privileged.¹⁰⁹

Part 4: Law Society jurisdiction and judicial independence

In this part I argue that, while law clerks practice law and law clerks’ ethics are legal ethics, the law societies’ regulatory and disciplinary jurisdiction over law clerks is at least largely incompatible with judicial independence. More specifically, the requirement that law clerks be articulated students or lawyers under the jurisdiction of, and in good standing with, the law societies impedes the constitutionally protected administrative independence of the judiciary. This is because each law society is external to the judiciary and exercises power, albeit independently, delegated through legislation.¹¹⁰

¹⁰⁸ *Ibid* at 3, principles 1–2:

The Statements, Principles and Commentaries describe the very high standards toward which all judges strive.... The Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.

¹⁰⁹ *FLSC Model Code*, *supra* note 7 (“[u]nless to do so would be unlawful or would involve a breach of solicitor-client privilege...”, r 7.1-3).

¹¹⁰ See e.g. *Legal Profession Act*, *supra* note 13.

In the *PEI Judges Reference*, Lamer CJ identified the three core characteristics of judicial independence as “[s]ecurity of tenure, financial security, and administrative independence”, and the two dimensions of those characteristics as individual and institutional.¹¹¹ Chief Justice Lamer quoted approvingly from *Valente v The Queen* on the meaning of administrative independence: “the administrative decisions that bear directly and immediately on the exercise of the judicial function.... assignment of judges, sittings of the court, and court lists—as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions”.¹¹² He also specified that “administrative independence... only attaches to the court as an institution (although sometimes it may be exercised on behalf of a court by its chief judge or justice.)”, and thus has only an institutional and not individual dimension.¹¹³

While the principle of judicial independence does not preclude legislative and executive power over the justice system, it does constrain the exercise of that power. For example, “[l]egislatures have the constitutional power over the creation, transformation and abolition of judicial offices. However, legislatures must exercise this power in a way that complies with the constitutional principle of judicial independence.”¹¹⁴ This constraint applies specifically to protect administrative independence:

The legislative powers exercised by the province under s. 92 [of the *Constitution Act, 1867*] are subject to constitutional requirements and, in particular, are limited by the principles of judicial independence. Accordingly, the provincial Legislature's authority over the administration of justice in Ontario, and the Attorney General's statutory duties regarding the administration of justice, must be exercised consistently with the principles of judicial administrative independence.¹¹⁵

Thus, both legislative and executive power are constrained by the administrative independence of the judiciary.

The question thus becomes whether the “direction of the administrative staff engaged in carrying out these functions”, noted by Lamer CJ as a facet of

¹¹¹ *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at paras 119–20, 150 DLR (4th) 577 [*PEI Judges Reference*]. See also *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice)*; *Ontario Judges' Assn v Ontario (Management Board)*; *Bodner v Alberta*; *Conférence des juges du Québec v Québec (AG)*; *Minc v Québec (AG)*, 2005 SCC 44 at paras 5–7.

¹¹² *PEI Judges Reference*, *supra* note 111 at para 117, quoting from *Valente v The Queen*, [1985] 2 SCR 673 at 709, 712, 24 DLR (4th) 161.

¹¹³ *Ibid* at para 120.

¹¹⁴ *Conférence des juges de paix magistrats du Québec v Québec (AG)*, 2016 SCC 39 at para 1 [*Conférence des juges*].

¹¹⁵ *Ontario (Ministry of the AG) v Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172 (Div Ct) at para 33.

administrative independence, encompasses the power to select law clerks and the exclusive power to discipline them. If it does, the specific interference with judicial independence is the ability of the executive, acting through the self-regulating law society, to restrict the judiciary's choice of law clerks through the law society's regulatory and disciplinary powers. That is, legislation on the legal profession may purport to provide that the judiciary may only employ clerks who are lawyers admitted to the bar (or articulated students admitted to the licensing process), and the law society can discipline these lawyers and articulated students for conduct in the course of their judicial service. In other words, the court can only *direct* law clerks who are in good standing with the law society and so long as they remain in good standing with the law society.

Despite the extensive and obvious differences between law clerks and prosecutors, at a constitutional level there are similarities between prosecutorial independence, as discussed in *Krieger v Law Society of Alberta*, and judicial independence as it relates to law clerks.¹¹⁶ The court in *Krieger* recognized that the constitutional principle of prosecutorial independence restricted, but not eliminated, the ability of both courts and law societies to interfere with the conduct of Crown prosecutors:

It is a constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions. So long as they are made honestly and in good faith, prosecutorial decisions related to this authority are protected by the doctrine of prosecutorial discretion.¹¹⁷

It followed from this principle that the law societies could not, and the courts would not, interfere with conduct of Crown prosecutors acting within prosecutorial discretion.¹¹⁸ Likewise, judicial independence is a constitutional principle that, I argue, restricts law society disciplinary and regulatory jurisdiction.¹¹⁹

Krieger, however, was fundamentally about the relationship between the law society and the Attorney General. Unlike prosecutors, the question for law clerks is about the respective roles of the law society and the judiciary. In *Krieger*, the

¹¹⁶ *Krieger v Law Society of Alberta*, 2002 SCC 65 [*Krieger*].

¹¹⁷ *Ibid* at para 3.

¹¹⁸ *Ibid* at paras 3–4.

¹¹⁹ See *PEI Judges Reference*, *supra* note 111 at para 83:

Notwithstanding the presence of s 11(d) of the *Charter*, and ss 96–100 of the *Constitution Act, 1867*, I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts. The existence of that principle, whose origins can be traced to the *Act of Settlement of 1701*, is recognized and affirmed by the preamble to the *Constitution Act, 1867*.

See more recently *Conférence des juges*, *supra* note 114 at para 31.

unsuccessful argument was that the Attorney General should have sole control over the regulation of Crown prosecutors.¹²⁰ However, the law society's regulatory role was narrowed to conduct outside prosecutorial independence, including dishonesty and bad faith of a Crown prosecutor.¹²¹

An argument parallel to that in *Krieger* would be stronger in the context of judicial independence than in the context of prosecutorial independence.¹²² Law societies' regulatory and disciplinary jurisdiction over law clerks, in the performance of their professional duties, is to some extent contrary to judicial independence. However, like in *Krieger*, that jurisdiction is narrowed but not necessarily eliminated by the relevant constitutional principle. In a similar way as law societies maintain jurisdiction over Crown prosecutors outside prosecutorial discretion, law societies may maintain jurisdiction over law clerks outside the course of their duties. For example, a law clerk's extraprofessional misconduct could arguably be subject to law society regulation, as could bad-faith conduct, if he or she happened to be an articulated student or a lawyer.

It would also follow from my analysis that law clerks, during their clerkships, are exempt from any regulatory or disciplinary consequences for not complying with basic regulatory requirements for good standing that apply to all lawyers, such as mandatory continuing professional development.

I acknowledge here that my analysis may appear to undercut itself. I have argued that law clerks practice law and are subject to the professional obligations of lawyers, but I have also argued that law clerks, in the course of their practice, are beyond law society jurisdiction. I have two responses. The narrower response is that law society jurisdiction over law clerks may merely be restricted, not eliminated. The broader response is that an exclusive focus on enforcement and discipline reflects a thin conception of legal ethics.

I have argued that it is the lawyer role in the lawyer-client relationship, as opposed for example to the employee role in the employer-employee relationship, that is determinative of law clerks' ethics. Nonetheless, as in *Krieger*, the relevant constitutional principle may mean that no professional or regulatory consequences, only employment consequences, are available for misconduct within the scope of the constitutional principle. In *Krieger*, prosecutorial independence in effect meant that the only possible consequences for the good-faith exercise of prosecutorial discretion were internal employment consequences. For law clerks, judicial independence in

¹²⁰ *Krieger*, *supra* note 116 at paras 2, 50.

¹²¹ *Ibid* at para 55.

¹²² I note that insofar as law clerks are hired as public servants, legislation and policies on hiring also constrain judicial independence. See e.g. Wilner, *supra* note 2 (“clerks are normally hired as public servants who are paid with public funds [citation omitted]” at 622; “[c]lerks may also be accountable to a public service manager” at 623). If the law society's jurisdiction over law clerks violates this independence, then presumably this human resources power does as well.

effect means that the only possible consequences for the good-faith exercise of law clerks' duties rest with the employer. In this respect, law society requirements may be largely unenforceable by the law society—but that does not mean they are hollow or merely aspirational. Law clerks should strive to meet the spirit and letter of these obligations, and judges and courts should expect them to do so. Indeed, it is public confidence in the judiciary that may suffer consequences, if not the clerk himself or herself, for a breach of these rules. Moreover, for those law clerks who are articulated students and those who wish to become lawyers, it would be open to law societies to consider any such breaches as evidence against good character when it comes time for the former law clerk to apply for admission to the bar.

A major exception here is post-service restrictions. Just as post-service restrictions on former judges are a matter for the law society and not the Canadian Judicial Council, and do not impede judicial independence, so too are post-service restrictions for former judicial law clerks a legitimate matter for the law society that does not impede judicial independence.

Of course, it is open to the courts to impose law society membership, as a lawyer or a student-at-law, and compliance as a condition of employment (although, as mentioned above, many courts do not do so¹²³). By doing so, they would in effect be accepting any implications for judicial independence. Moreover, there may indeed be reasons that law clerks may wish to be articulated students or lawyers, despite the fact that judicial independence provides that such status cannot be required of them. The most obvious reason is to complete articling requirements, and thus to become licensed as a lawyer, sooner rather than later—or, for lawyers, to accrue a year of seniority at the bar.

Reflections and conclusion

In this article, I have offered a new doctrinal account of the ethical duties of law clerks. This account is rooted in the fact that law clerks practice law, and thus in the lawyer-client relationship between the law clerk and the judge, the professional duties of lawyers, and specifically the duty to encourage respect for the administration of justice. These ethical duties are professional duties, i.e. duties as lawyers that are enforceable by the law society. However, I have also argued that law society jurisdiction over law clerks is restricted though not necessarily eliminated by the constitutional principle of judicial independence.

Under my account, law clerks are practicing lawyers and so share the professional duties of all practicing lawyers, but because of the identity and the nature of the client, the duty to encourage respect for the administration of justice incorporates at least some duties of the judge. I have focused on impartiality and outside interests. In this respect, the duties of lawyer are the same as the duties of the

¹²³ See *supra* note 33 and accompanying text.

judge. I have also focused on post-service restrictions. In this respect, the animating principles are the same as those animating restrictions on judges returning to practice, but their application is different. However, the duties of the judge supplement, but do not detract from, the professional duties of the law clerk. I have focused here on the duty to report a fellow lawyer to the law society. Another example is that while judges lack an express duty of confidentiality,¹²⁴ law clerks are doubtlessly bound by the lawyer's duty of confidentiality.

My analysis has focused primarily on judicial law clerks at the Supreme Court of Canada, as these are the only group specifically described in the existing literature. My conclusions should be applicable to all judicial law clerks. But further empirical research is needed on the role and duties of law clerks at other courts. Further research is also warranted on other lawyers to the judiciary, such as staff lawyers and executive legal officers.

Given my analysis, how should law clerks be situated among public sector lawyers? Law clerks, if indeed they are properly understood as lawyers, are not properly considered *government* lawyers under typical definitions. Government lawyers are generally understood to be lawyers for the executive branch of government.¹²⁵ Law clerks are unique in that they may be employees of the executive, but their client is the judiciary.¹²⁶ However, there are some similarities between the two. Sanderson explains government lawyers as having three layers of duties, as lawyers, as delegates of the Attorney General, and as public servants: "The first set of professional duties comes with their membership in provincial and territorial law societies. The second set of public law duties comes with their responsibilities to the Minister of Justice and *ex officio*, Attorney General. The third set comes with their employment in the public service."¹²⁷ Law clerks share two of these layers. They are lawyers (or articulated students) practicing law and are thus subject to the professional duties of all lawyers. They are also public servants.¹²⁸ But they are not delegates of the Attorney General—indeed, as the government is the most common litigant, this would be untenable.

Under Sanderson's analysis, these layers of duties have conceptual and practical implications because each layer is imposed, and therefore adjudicated, by a

¹²⁴ See *supra* note 44 and accompanying text.

¹²⁵ See Sanderson, *supra* note 1 at xxiii; Martin, *supra* note 1 at 271.

¹²⁶ Martin, *supra* note 1 at 271.

¹²⁷ Sanderson, *supra* note 1 at 48.

¹²⁸ See e.g. Wilner, *supra* note 2 ("clerks are normally hired as public servants who are paid with public funds [citation omitted]" at 622). Their status as public servants is in itself problematic: law clerks present a microcosm in the tension between judicial independence and executive control over court resources. Law clerks provide services to the judiciary, with the executive controlling their pay and benefits.

separate authority. In particular, the law societies only have jurisdiction over the professional layer of duties, not the others.¹²⁹

Law clerks unquestionably have special duties because of the nature of their work and the nature of their client. These duties might appear to be a third layer—perhaps a “public interest” lawyer or “public duties” layer,¹³⁰ like that of government lawyers as delegates of the Attorney General. I argue, however, that these special duties are best understood as part of the professional duties layer and are derived from the duty to encourage respect for the administration of justice. Thus, they are enforceable by the law society subject to the considerable limits imposed by judicial independence.

¹²⁹ Sanderson, *supra* note 1 at 3.

¹³⁰ See e.g. Wilner, *supra* note 2 at 622:

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