COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-11117

IMPOUNDED CASE

IN RE: A SUBPOENA

AMICUS CURIAE BRIEF OF THE MASSACHUSETTS BAR ASSOCIATION IN SUPPORT OF PETITIONER-APPELLANT

Thomas J. Carey Jr., BBO# 073680
COLLORA LLP
600 Atlantic Ave, 12th Floor
Boston, MA 02210
617-371-1000

Martin W. Healy, BBO# 553080
Chief Legal Counsel
MASSACHUSETTS BAR ASSOCIATION
20 West Street
Boston, MA 02111
617-988-4777

Davon Hudson MacWilliam
Boston College Law Student
On the Brief

March 30, 2012

TABLE OF CONTENTS

Table of Authorities ii

Statement of Interest of Amicus 1

Introduction 2

Adoption of the
Briefs Of Certain Other Amici 4

Risks To Judicial Independence Are
Uniquely Inherent In Disciplinary
Proceedings Based On Litigant
Allegations Of Failure To Follow The Law 5

No Need Exists To Intrude Into Judicial
Deliberations In Order To Adjudicate
Disciplinary Proceedings Of This Type 9

The Investigatory Methods
Embodied In The Subpoena Are
Destructive Of Judicial Independence 12

Conclusion 17

16 (k) certification

TABLE OF AUTHORITIES

Cases

Allard v. Estes,
292 Mass. 187 (1935) 5

Commonwealth v. O'Neal,
369 Mass. 242, 271 (1975) 5

Glenn v. Aiken,
409 Mass. 699, 703 (1991) 6

In re Benoit,
487 A.2d 1158 (Me. 1985) 16

In re Bonin,
375 Mass. 680, 711 (1978) 11

In re Brown,
427 Mass. 146, 149 (1998) 10

In re Crossen,
450 Mass. 533, 560 (2008) 6, 12

In re Markey,
427 Mass. 797, 804 (1998) 9

In re Scott,
377 Mass. 364, 367 (1979) 10

In re Troy,
364 Mass. 15, 41 (1973) 8, 10

Lafler v. Cooper,
No. 10-209 (U.S. Mar. 21, 2012) 7

Matter Of Duckman,
92 N.Y.2d 141, 160 (1998) 7

Missouri v. Frye,
No. 10-444 (U.S. Mar. 21, 2012) 7

United States v. Nixon,
418 U.S. 683 (1974) 12

Statutes

Mass. G.L., S.J.C. Rule 3:09,
Code of Jud. Conduct, Canon 2(A) 10

Other Authorities

Alfini et al.,
Judicial Conduct & Ethics, § 2.01 16

Benjamin N. Cardozo,
The Nature of the Judicial Process (1921) 13

Edward F. Hennessey,
The Hennessey Papers,
Massachusetts Continuing Legal Education, 2002 2

Frank I. Coffin,
On Appeal - Courts Lawyering & Judging,
W.W. Norton &Co., 1994, pp. 158-59 16

Henry M. Hart, Jr. and Albert M. Sacks,
The Legal Process: Basic Problems
in the Making and Application Of Law
(Foundation Press, 1994) 2

Henry T. Lummus,
The Trial Judge (1937) 2, 9

Irving R. Kaufman,
The Essence of Judicial Independence,
80 Colum. L. Rev. 671, 672 (1980) 7

James J. Alfini et al.,
Judicial Conduct & Ethics § 2.02
(Lexis-Nexis, 4th ed. 2007) 7

Justice Robert H. Jackson,
Tribute to Country Lawyers: A Review,
7 Tex. Bar J. 146, 163 (1944) 18

Philip Hamburger,
Law and Judicial Duty (2008) 7

Sambhav N. Sankard,
Disciplining the Professional Judge,
88 Cal. L. Rev. 1233, 1239, 1251 (2000) 6, 15

Stephanie Francis Ward,
*The Badgering State: Wis.
Battle over Worker's Rights and
Skirmishes in the Supreme Court*,
ABA Journal, Feb. 1, 2012 15

Statement of Interest of Amicus

The Massachusetts Bar Association ("MBA"), founded in 1910, is a non-profit organization that serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence and respect for the law. The MBA is the largest bar association in Massachusetts, with approximately 12,000 members state-wide. It is comprised of a House of Delegates that consists of a president, president-elect, two vice-presidents, treasurer, secretary, the two most immediate, living past presidents, 18 regional delegates, seven at-large delegates, chairs of the sixteen section councils and others. The MBA is governed by a set of bylaws, which were most recently approved by the members in August of 2010.

The mission of the MBA is to provide professional support and education to members, and advocacy on behalf of lawyers, legal institutions and the public. The issues in this case so affect the public policy of the Commonwealth of Massachusetts that an amicus brief is warranted. The House of Delegates unanimously has approved its filing.

Introduction

Judges have the enormous responsibility of developing and applying the law to particular cases and for society as a whole. Among thoughtful observers, this legal process is recognized to be enormously subtle and complex.[1] The nature and function of law, the role of the Courts in the development of American common law, and the process of adjudication cannot be reduced to mere ministerial tasks whose performance can easily be measured.[2] The magnitude and difficulty of performing these critical judicial functions has long been understood, and the lessons of history demonstrate conclusively that special conditions are essential to the successful operation of the judiciary, conditions quite different in kind and effect from those applicable to the political branches.[3]

---

[1]*See, e.g.*, Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application Of Law* (Foundation Press, 1994), especially Chapters 1 & 3.

[2]*See generally* Edward F. Hennessey, *The Hennessey Papers*, Massachusetts Continuing Legal Education, 2002.

[3]*See* Henry T. Lummus, *The Trial Judge* (1937), Chapter 1.

Foremost among these essential conditions is the absolute assurance of judicial independence. And the most eloquent declaration of the need for judicial independence is the immortal language penned by John Adams in the Massachusetts Constitution of 1780, now engraved on the public entrance to the courtroom of the Supreme Judicial Court, and still the governing law of the Commonwealth more than two centuries later:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

So it is no small matter when for the first time in history this Court is asked to uphold a sweeping investigatory subpoena from the Commission On Judicial Conduct ("Commission") seeking to inquire into a judge's "thought processes, methodology, and conduct in adjudicating cases before him," and demanding production, not of court records, but of the judge's own "notes, notebooks, bench books, diaries, memoranda, recordation or other written recollections

of any of" some forty or so cases decided by the judge over more than a decade of his career.

Convinced that this unprecedented intrusion into the judicial process would result in incalculable damage to judicial independence, the Massachusetts Bar Association urges the Court to quash the subpoena.

Adoption of the Briefs Of Certain Other Amici

We endorse and adopt the views expressed in the amicus briefs filed by a special committee of retired judges and by the Massachusetts Association of Criminal Defense Lawyers. We believe, as do they, that analogous privileges for jury deliberations and governmental deliberations amply support the recognition of a similar judicial privilege. And we also believe, as do they, that such a deliberation privilege is essential for preservation of the judicial independence guaranteed by the Massachusetts Constitution. The current catchword "accountability" has its place, but it cannot displace the Constitution or infringe on the essential conditions necessary for proper exercise of the judicial function. *Commonwealth*

v. O'Neal, 369 Mass. 242, 271 (1975) ("Dependent or subservient courts render nugatory the fundamental constitutional protections which are the heart of our liberties.").

Risks To Judicial Independence Are Uniquely Inherent In Disciplinary Proceedings Based On Litigant Allegations Of Failure To Follow The Law.

From time immemorial, disgruntled litigants have been prohibited from suing judges by the doctrine of absolute judicial immunity. *See, e.g.*, *Allard v. Estes*, 292 Mass. 187 (1935) ("It is a principle lying at the foundation of our jurisprudence, too well settled to require discussion, that every judge whether of a higher or lower court is exempt from liability to an action for any judgment or decision rendered in the exercise of jurisdiction vested in him by law."). The only recourse available was appellate review of the decision. *See id.* at 196 (discussing appellate procedure as an adequate remedy for legal error). A concomitant principle has long held that the decision cannot be impeached on appeal by collateral materials, not part of the record, as to what a judge really meant to do or had in mind in rendering the

decision. *In re Crossen*, 450 Mass. 533, 560 (2008); *Glenn v. Aiken*, 409 Mass. 699, 703 (1991). Appeals are the primary tool for enforcing legal norms, ensuring that legal decisions in the Commonwealth are accurate and consistent. Sambhav N. Sankard, *Disciplining the Professional Judge*, 88 Cal. L. Rev. 1233, 1239, 1251 (2000). In appellate proceedings, the court is not permitted to inquire into "the mental processes of a trial judge." *In re Crossen*, 450 Mass. at 560 (citing *Glenn*, 409 Mass. at 703). By prohibiting these inquiries, Massachusetts protects judges from harassment by litigants and enables judges to focus on making sound judgments for the cases on their docket. Thus, judicial privilege -- the prohibition against probing into a judge's deliberative process -- embodies judicial independence.

The same policies that support those decisions counsel that great care must be taken when litigants are permitted to have recourse to an administrative agency with power to impose discipline based on allegations of failure to follow the law. Disciplinary proceedings based on corruption, or on behavioral problems, or on health and senility concerns are understandably thought to pose little threat to

judicial independence. But discipline based on the content of a judge's decision strikes at the core of judicial independence. James J. Alfini et al., *Judicial Conduct & Ethics* § 2.02 (Lexis-Nexis, 4th ed. 2007) ("Imposing discipline upon a judge for an incorrect legal ruling is an extremely sensitive issue because of the potential impact on judicial independence.").[4]

These concerns are not adequately addressed by the blithe claim that a general rule permits the Commission to issue subpoenas and that the Commission is unaware of any established judicial privilege. Compare the depth of understanding of the delicate issues raised by such disciplinary proceedings

---

[4] The pressure on judicial independence is increased when the subpoena is issued by a legislatively created administrative agency, with some members appointed by the executive branch, at the request of a frequent executive branch litigator dissatisfied with the outcome of its cases. *Cf. Matter Of Duckman*, 92 N.Y.2d 141, 160 (1998) (Titone, J. dissenting). The Crown's influence over the courts was one of the reasons for creating an independent judiciary in the first place. Philip Hamburger, *Law and Judicial Duty* 512 (2008); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 Colum. L. Rev. 671, 672 (1980). And prosecutors already exercise enormous power in the field of criminal law. *See generally Lafler v. Cooper*, No. 10-209 (U.S. Mar. 21, 2012); *Missouri v. Frye*, No. 10-444 (U.S. Mar. 21, 2012)

exhibited by the Court's analysis in *In re Troy*, 364 Mass. 15,23-25,70-72(1973).

Disciplinary proceedings instituted by disgruntled litigants impose financial costs upon the judge, cast job security and reputation in doubt, detract from the ability to focus on pending cases, raise the spectre of forced recusal as a means of institutional judge-shopping, intrude on the role of appellate review, and otherwise threaten judicial independence. The ease with which such claims can be made[5] and the absence of any meaningful threshold for investigatory proceedings makes it all the more important that the filing of such complaints not trigger investigatory procedures that in and of themselves intrude on judicial independence as well as

---

[5] The number of a judge's reversals means nothing, standing alone or as a percentage of cases decided. There are too many variables involved. to take just one recent example, many trial justices took a hit on their reversal rates after the Melendez-Diaz case came down from the United States Supreme Court. Trial justices might justifiably point the finger of blame at the appellate courts in Massachusetts whose decisions they were following before the United States Supreme Court overturned them.

have a chilling effect on the ability of all judges to exercise their independence.[6]

No Need Exists To Intrude Into Judicial Deliberations In Order To Adjudicate Disciplinary Proceedings Of This Type

The Commission can fulfill its important role in disciplining judges without any need to inquire into a judge's deliberative process and methodology, even when allegations concern the judge's state of mind. The Commission is permitted to draw appropriate inferences from judicial conduct. *In re Markey*, 427 Mass. 797, 804 (1998) (concluding evidence justified inference that judge's ex parte communication was intended to "influence the outcome of a judicial proceeding"). Trial judges in particular operate in a

---

[6] "Independence means freedom from every form of compulsion or pressure.... [T]he conclusive reason why judicial independence is necessary, is that without it there can be, properly speaking, no judgment and no judge. The moment a decision is controlled or affected by the opinions of others or by any form of external influence or pressure, that moment the judge ceases to exist. One who pronounces a decision arrived at even in part by other minds is not a judge, though he bear the title and wear the robe. The courts are not above criticism. But they must be above intimidation, control or influence, or they cease to be courts." Henry T. Lummus, *The Trial Judge*, 9-10 (1937).

virtual fishbowl and their fidelity to the law can be judged on the records of their cases. In the past, the Commission and the Supreme Judicial Court have successfully disciplined judges for misconduct in failing to follow the law. In *In re Scott*, the Court inferred that courtroom conduct demonstrated "a pattern of disregard of, or indifference to, fact or law" that resulted in "individual injustices." 377 Mass. 364, 367 (1979). And in *In re Troy*, the Court had ample evidence based on the record of proceedings to conclude that Judge Troy engaged in conduct prejudicial to the administration of justice. 364 Mass. 15, 41 (1973).

In addition to using inference to determine a judge's discipline-worthy state of mind, judges can be disciplined based on appearance of bias or unfairness as a violation of Canon 2(A). Judges are required to "respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Mass. G.L., S.J.C. Rule 3:09, Code of Jud. Conduct, Canon 2(A). In *In re Brown*, the Court disciplined the judge for violating Canon 2(A) when he exhibited outward signs of unfairness and partiality by

expressing what "appear[ed] to be a strong animus against" a party and its leadership. 427 Mass. 146, 149 (1998). Similarly, the Court in *In re Bonin*disciplined the Chief Justice of the Superior Court for conduct because it "was improper and created the appearance of impropriety, bias, and special influence." 375 Mass. 680, 711 (1978). Beyond the Commission, the political branches of government have the ultimate power to remove a judge through impeachment or a bill of address.

Compelling judges to testify about or open their private books and papers regarding their deliberative process is unnecessary because Massachusetts has long implemented effective means to enforce fidelity to the rule of law and norms of professional conduct. Inquiries into judicial deliberations are not only unnecessary, but are actually destructive of the judicial independence to which the public has a constitutional right. It is the backbone and integrity of the judges on which we must in the end rely, and if we subject them to investigatory procedures that strip away the privacy of the deliberative process, we will destroy the very independence that protects us.

The Investigatory Methods Embodied In The Subpoena Are Destructive Of Judicial Independence

As the Supreme Judicial Court recognized in *In re Crossen*, "communications about deliberative processes that flow between judge and law clerks [are] confidential and an important aspect of the administration of justice." 450 Mass. 533, 599 (2008). Although*Crossen* did not address the question of privilege specifically, the opinion outlined sound reasons to do so. By enabling judges "'to explore alternatives in the process of ... making decisions and to do so in a way many would be unwilling to express except privately,'" protecting confidentiality in communications between judges and staff promotes sound decision making. *Id.* at 599 (quoting *United States v. Nixon,* 418 U.S. 683 (1974)). The privilege for staff communications derives from the need to insure freedom of thought and deliberation by the judge. It makes no sense to respect confidentiality in communications between judges and staff but not protect the judge's internal thoughts, personal

writings, and mental processes -- the Crown jewels of the deliberative process that are the very essence of what we seek to protect in the first place.[7]

The Amicus judges have graphically described the chilling effect on judicial independence that would flow from rummaging through the materials developed by a judge as part of the deliberative process. Every judge brings his or her own philosophy to making decisions.[8] The factors to be taken into account are complex.[9] Many such factors may point in different

---

[7] The Commission professes not to be seeking law clerk memoranda, but the subpoena is certainly broad enough to include them, and would obviously include any notations the judge had made on them.

[8] Justice Benjamin Cardozo observed that "[a]ll their lives, forces which [judges] do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions;...We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own." Benjamin N. Cardozo, *The Nature of the Judicial Process* 12-13 (1921).

[9] Most cases can be decided by the application of legal reasoning. According to Justice Hennessy's quotation of Professor Paul Freund, this reasoning includes the force of precedent, the close applicability of statute law, the separation of powers, legal presumptions, statutes of limitation, analogy, inductive and deductive reasoning, the balancing of interests and values, and above all the pragmatic assessment of facts that may point to one result.

directions.[10] The intellectual independence required to fulfill these responsibilities would be stifled if tentative ruminations could be scrutinized for use or misuse in disciplinary proceedings.

Different judges take myriad sorts of bench notes, sometimes varying their note taking at different times in their career. Judge Lummus in the later stages of his career took none, preferring to concentrate on grasping the case. Judge Coffin reported that he took scanty notes of post-argument conferences with his colleagues, while others wrote up extremely detailed notes. This is an individualistic process as an aid to further analysis, not something

---

[10] In Justice Hennessy's view, "the judge's personal values (I assume that they are honorable and admirable values) may be invoked in a multitude of cases where the facts are not a good fit with established law. With some hyperbole, but not too much, Lord Macmillan stated that "in almost every case except the very plainest, it would be possible to decide the issue either way with reasonable legal justification." In this uncharted area, the trial judge's function parallels that of the appellate judge in applying value judgments to extend or modify the law. On appeal, the result and reasoning of the trial judge may be memorialized. The excellent judge never abandons intellectual curiosity, especially about the law; he or she continues to learn with a willingness to question time-honored dogma."

that should be used to impeach the considered judgment later entered.

Moreover, these issues about the protection of deliberations are not limited to trial courts. In California, disciplinary proceedings were begun against an intermediate appeals court judge for writing a dissent in which he argued that a controlling decision of California's highest court was wrongly decided and ought not to be followed. Sankard, *Disciplining the Professional Judge*, *supra*, at 1234-35. Are the judge's notes from the *semble* or conferences among the panel of judges subject to subpoena? What about those of the other judges? Are they at risk if they fail to report an improper comment made during deliberations?[11] Is every casual, intemperate, or regrettable comment or improvident idea that occurs in deciding cases going to be used

[11]As contrasted, of course, with physically throttling a colleague during debate. Stephanie Francis Ward, *The Badgering State: Wis. Battle over Worker's Rights and Skirmishes in the Supreme Court*, ABA Journal, Feb. 1, 2012, *available* at http://www.abajournal.com/magazine/article/the_badgering_state_wis._battles_over_workers_rights_and_skirmishes/.

against judges in subsequent disciplinary proceedings?[12]

In the last analysis, a judge's conduct must be determined by an objective evaluation of his judgment based on the record of his decisions. In *In re Benoit*, 487 A. 2d 1158 (Me. 1985), the Supreme Judicial Court of Maine adopted a reasonable judge standard for the purpose of applying Canon 3A(1) of the 1972 Model Code (which imposes a duty on a judge to "be faithful to the law and maintain professional competence in it"; judicial conduct would be a violation "if a reasonably prudent and competent judge would consider that conduct obviously and seriously wrong in all circumstances."). Alfini et al., *Judicial Conduct & Ethics*, *supra*, § 2.01. No fishing expeditions into the deliberative process are needed

---

[12] "Judges being human, the 'value-added' component of judicial balancing sometimes exceeds professional bounds. Once in a while a judge will give vent to spleen.... In its very utterance, the remark generally seals its own doom. It is not unusual that a judge who has 'sounded off' in unjudicial irritation will join or even write an opinion running contrary to her initial comments." Former First Circuit Chief Judge Frank I. Coffin, *On Appeal - Courts Lawyering & Judging*, W.W. Norton &Co., 1994, pp. 158-59.

or justified in evaluating a judge's fidelity to the law.

Conclusion

Without questioning the good faith or sincerity of the complainant, it is indisputable that disciplinary complaints from litigants are fraught with risks to judicial independence. Human nature being what it is, some lawyers and clients have difficulty accepting an adverse judgment. It is dismayingly alluring for some to ascribe the loss to incompetence, malfeasance, misconduct, or worse. There is an understandable temptation to cry "He's [or She's] a plaintiff's judge, or a defendant's judge, or a wife's judge, or a husband's judge, or a landlord's judge, or a tenant's judge, and so on *ad infinitum*.

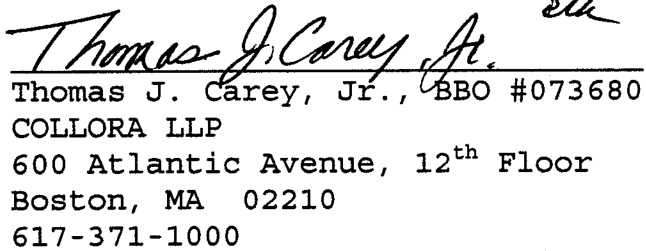
Mr. Justice Robert H. Jackson, a superb advocate and staunch defender of judicial independence, once described the traditional end to litigation. After fighting vigorously with every weapon available, including motions for new trials and appeals, the "country lawyer" "if he lost out in the end, joined the client at the tavern in damning the judge -- which is the last rite in closing an unsuccessful case, and I have officiated at many." Justice Robert

H. Jackson, *Tribute to Country Lawyers: A Review*, 7 Tex. Bar J. 146, 163 (1944).

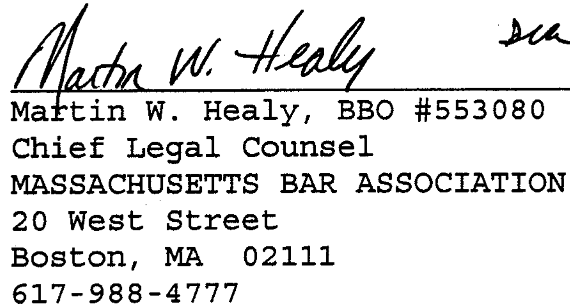
Recent history and proceedings such as the *Crossen* case strongly suggest that disgruntled litigants may today prefer to retaliate with disciplinary complaints rather than grumble at a bar. And somewhat like the mutually assured destruction of the cold war, if one group of institutional litigants attacks the poster judge of its regular adversaries, retaliation against its own poster judge is sure to follow. If such disciplinary complaints routinely trigger a searching inquiry into all of a judge's records and deliberations, judges will inevitably approach what they do with constant concern over the risk of being caught in the fray and trepidation over how their deliberations might look to a disciplinary board. That erosion of judicial independence would be a fatel blow to the justice system and an enormous loss to the citizens of this Commonwealth.

The Massachusetts Bar Association urges the Court to quash the subpoena. It will be time enough to decide whether there may ever be sufficient reason to supersede the privilege if and when such a highly unlikely case should ever arise.

Respectfully submitted,
Amicus Curiae,
MASSACHUSETTS BAR ASSOCIATION
By its attorneys:



Thomas J. Carey, Jr., BBO #073680
COLLORA LLP
600 Atlantic Avenue, 12th Floor
Boston, MA 02210
617-371-1000



Martin W. Healy, BBO #553080
Chief Legal Counsel
MASSACHUSETTS BAR ASSOCIATION
20 West Street
Boston, MA 02111
617-988-4777

Devon Hudson MacWilliam
Boston College Law Student
On the Brief

MASS. R. A. P. 16(k) CERTIFICATION

The undersigned certify that this brief complies with the Massachusetts Rules of Appellate Procedure pertaining to filing of briefs including, but not limited to, the Rules noted in Mass. R. A. P. 16(k).

Respectfully Submitted,
Amicus Curiae,
MASSACHUSETTS BAR ASSOCIATION
By its attorneys:

Date: 3/30/2012 Thomas J. Carey, Jr.

Thomas J. Carey, Jr., BBO# 073680
COLLORA LLP
600 Atlantic Ave, 12th Floor
Boston, MA 02210
617-371-1000