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Privilege Precludes Asking: What was the Judge Thinking

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By Judge Nancy Gertner

Case Focus

On August 9, 2012, the Supreme Judicial Court, for the first time, recognized the existence of a "judicial deliberative privilege." ***In re Enforcement of Subpoena, 463 Mass. 162 (2012)***. While the Court noted that holding judges accountable for violation of the Code of Judicial Conduct was critical, judicial disciplinary proceedings had to be conducted without doing violence to the independence and impartiality of the judiciary. A judicial deliberative privilege was essential to that end. The privilege they announced was absolute, covering a "judge's mental impressions and thought processes in reaching a judicial decision, whether harbored internally or memorialized in other non-public materials." It did not bar an inquiry into the judge's work, what was said in open court or related in decisions. It only banned an inquiry into what was in the judge's mind when she made her decision.

The case involved a complaint that had been filed by a district attorney with the Commission on Judicial Conduct, alleging that the petitioner, a judge, had exhibited bias in violation of the Code of Judicial Conduct, S.J.C. Rule 3:09, and citing to a number of examples over a twenty year career. The Commission appointed a special counsel to conduct a confidential investigation of the complaint. The special counsel sought to depose the judge, indicating his intent not only to cover the cases identified in the complaint, but also ones addressed in a series of Boston Globe articles, as well as thirty additional cases.

The subpoena, accompanying the deposition notice, was stunning in its breadth. It demanded "notes, notebooks, bench books, diaries, memoranda, recordation, or other written recollection of cases." It required the judge to engage in a post hoc reconstruction of his work – outside of the written or public record, reaching back into cases completed years before. Counsel for the petitioner objected, claiming, inter alia, that to the extent the subpoena sought such information it encroached on the judge's confidential, deliberative communications. The Court agreed.

A judge speaks through her decisions and in open court. Indeed, the ethical rules prohibit a judge from engaging in a public debate about what she intended to do or meant by her on-the-record statements or findings. A party, for example, is not permitted to subpoena a judge to reconstruct her thought processes after the fact. Judges are never permitted to impeach their own decisions outside of the public record. The reasons for these policies are straightforward: to enable an inquiry into a judge's thought processes would undermine the finality and the integrity of judicial decisions. Even more significant, protecting the judicial deliberative process from after-the-fact attack is essential to the independence and impartiality of the judiciary. The threat that a judge would have to reconstruct her thought processes, according to the Court, "could not help but serve as an 'external influence or pressure,' inconsistent with the value we have placed on conscientious, intelligent, and independent decision-making." Even the most "steadfast jurist," the Court added, would feel pressured to "pick his or her way through some of the decisions of the day by way of a route less likely to disturb the interests of those with the greatest ability to bring about such intrusive examination." That pressure, moreover, may well be more effectively exercised by certain litigants, like the complainant in this case, a district attorney involved in all criminal proceedings. In a footnote the Court took pains to note that danger. While "any disgruntled litigant" could bring a complaint – "the risk is greater in the case of the district attorney," a litigant who was in a unique position to "exert the pressure that would come from probing into deliberative materials."

Significantly, no such privilege had ever been announced in the Commonwealth until *In re Enforcement of Subpoena*. The issue had never before been raised because no special counsel had ever gone where this special counsel sought to go – a disciplinary proceeding not based on allegations of improper extraneous influences, conflicts of interest, or wrongful ex parte communications, but on the four corners of the judge's record. In challenging that record, the special counsel could not have been more explicit: his goal *was* to understand the judges' thought processes.

While the privilege had never been explicitly recognized before, it was fully consistent with the case law. The Court, for example, had held that communications between a judge and her law clerks were

confidential. See ***In re Crossen, 450 Mass. 533, 560 (2008)*** ("communications about deliberative processes that flow between judge and law clerk were confidential and an important aspect of the administration of justice"). If what a judge says to her law clerk is protected, it makes sense that what a judge says to herself or shares with other judges should be equally protected. Likewise, the Court's decision is consistent with judicial immunity from suit, which, according to the Court, was well settled in its prior case law.

Moreover, the judicial deliberative privilege was no different from the privilege accorded other decision makers whose thought processes must be insulated from public review, most notably, jurors. A juror's verdict cannot be impeached absent allegation of extraneous influences precisely to ensure that he or she will not feel pressured to decide the case in such a way as to avoid public pressure.

Notwithstanding special counsel's claim that a judicial deliberative privilege somehow undermined the Commission's ability to hold judges accountable for misconduct, the Court made clear that judicial disciplinary proceedings will continue in the future, as they have in the past, without subpoenas of this breadth. If there is proof of untoward external influences – a conflict of interest, ex parte communication, a financial interest in the proceeding, or improper public comments – the judicial disciplinary process is invoked. But in those instances the proceeding addresses the judge's *conduct,* not the judge's *beliefs* about her conduct, her thoughts about her conduct, or her notes about her conduct.

The goal here is an accountable judiciary, to be sure, but also a fully independent one, able to carry out its public duties without regard to political concerns, external pressures, and more generally, without fear of retribution. The value of these goals finds no better authority than John Adams, whose seminal writings prior to the adoption of the Massachusetts Constitution underscored the relationship between "judicial independence and impartial decision making. What Adams wrote then is just as compelling now: "[Judges'] minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law." *In re Enforcement of Subpoena*, 463 Mass. at 169 (citing Thoughts on Government (1776) in 4 Works of John Adams 198 (C.F. Adams ed. 1851)).

Judge Nancy Gertner, retired from the federal bench after serving from April of 1994 to August of 2011, to teach full time at the Harvard Law School. She was a signatory on an amicus brief on behalf of former Federal and State judges Margaret A. Burnham, Suzanne V. DelVecchio, Allan van Gestel, Mel L. Greenberg, Rudolf Kass, Patrick J. King, Charles B. Swartwood and J. Owen Todd.

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