

**ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OF COLUMBIA COURTS**

**ADVISORY OPINION No. 1
(December 18, 1991)**

**APPLICATION FOR AND ACCEPTANCE OF FUTURE EMPLOYMENT
BY JUDICIAL LAW CLERKS***

Law clerks for judges of the District of Columbia Court of Appeals (DCCA) and for judges and hearing commissioners of the Superior Court frequently apply for positions with prospective employers, including in particular the United States Attorney's Office and other institutional litigants who appear before the District of Columbia courts. The Joint Committee on Judicial Administration has asked our Committee to formulate guidelines addressing the circumstances under which a law clerk must be disqualified from working on a case in which his or her prospective employer is a party, counsel, or *amicus curiae*.

Canon 3(C)(1) of the Code of Judicial Conduct provides that a judge should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be

* For the purposes of this opinion, the term law clerk includes a law student who serves as an intern.

questioned. *See also Scott v. United States*, 559 A.2d 745, 748-51 (D.C. 1989) (en banc). The law clerk has been described as "the judge's right hand, [with] an important role in the decision-making process and in shaping [the judge's] ultimate decision." VIRGINIA STATE BAR, STANDING COMMITTEE ON LEGAL ETHICS, *Opinion #1334* (April 20, 1990) (quoting ABA Informal Opinion 1092). Moreover, there is a "public perception that judges discuss confidentially with their clerks the underlying rationale of [their decisions]." *Opinion #1334, supra*. In light of these considerations, judges have an obligation to exercise sensitivity and prudence in dealing with actual or apparent conflicts of interest on the part of their law clerks.

At the same time, compelling practical considerations counsel against excessive restrictions in this area, particularly where the law clerk's prospective employer is a high-volume litigator before the courts of this jurisdiction. In the District of Columbia, three such employers -- the United States Attorney, the Corporation Counsel, and the Public Defender Service -- cumulatively account for a very substantial percentage of the litigation before our courts. Each Superior Court judge has only one law clerk and, while each active judge of the DCCA has two, senior judges and hearing commissioners share law clerks

with their colleagues. Under these circumstances, the disqualification of a law clerk from so great a part of a judicial officer's caseload would be extremely burdensome.

Moreover, although there are some circumstances in which the criteria which are applied to judges in determining whether there is an appearance of impropriety may also be applied to law clerks, *see Kennedy v. Great Atlantic & Pacific Tea Co., Inc.*, 551 F.2d 593, 596 (5th Cir. 1977), there are obvious differences in the two positions which would make it unreasonable to treat them identically for all purposes. A law firm is not disqualified from a matter solely because a single attorney in the firm previously considered that matter in his or her capacity as a judicial law clerk; the firm would, of course, be disqualified if the lawyer had participated as a judge. *See* DISTRICT OF COLUMBIA COURT OF APPEALS RULES OF PROFESSIONAL CONDUCT, Rule 1.11 (b)(1991). In the final analysis, it is judges and not law clerks who decide cases, and disqualification should be avoided if more modest measures, *e.g.* rigorous supervision of the law clerk's work, will effectively avoid both impropriety and the appearance thereof.

Our Committee has surveyed available Advisory Opinions on this subject and has been in contact with our counterparts in several other jurisdictions. Surprisingly,

there appears to be comparatively little applicable precedent, although the Committee on Codes of Conduct of the Judicial Conference of the United States has twice addressed issues relevant to our inquiry.

In *Advisory Opinion No. 74* (Oct. 26, 1984), the federal Committee concluded that if an offer of employment has been extended to the law clerk and has been or may be accepted, then, in order to avoid the appearance of impropriety, the law clerk is to have "no involvement whatsoever in pending matters handled by the prospective employer." In *Advisory Opinion No. 81* (Sept. 14, 1987), the federal Committee applied essentially the same rule where the prospective employer was the United States Attorney. Observing that participation of the law clerk in a pending case "may reasonably create an appearance of impropriety and a cause for concern on the part of opposing counsel," the Committee stated that "[t]he judge should isolate the law clerk from cases in which the United States Attorney's Office appears."

This federal approach is not universally followed.¹

Our Committee was informally advised by a representative of

¹ Interestingly, the federal Committee expressed the view in *Advisory Opinion No. 38* (Aug. 1, 1974) that a judge whose son had accepted a position with the United States Attorney's Office was not disqualified from hearing cases in which that Office was representing the United States. The Committee emphasized that the United States Attorney's Office is not a

the Advisory Committee on Extra-Judicial Activities in an eastern State that, in contrast with federal *Advisory Opinion No. 81*, that State's judges treat a law clerk's prospective employment with the prosecutor or public defender differently from the clerk's potential association with a law firm. There is an absolute prohibition against assigning a law clerk to work on any matter handled by a firm from which the clerk has received and has accepted, or may accept, an offer of employment. That policy does not apply, however, to proffered employment by the prosecutor or the public defender. According to the State Committee, there has to be "a balancing of the damage to the judges' public image with the need to administer justice," and practical considerations have apparently prevailed.

In light of the considerations discussed above, our Committee has drafted guidelines which largely speak for themselves. Our Committee wishes to invite the reader's attention to three specific areas in which more than one alternative was considered, and to explain the reasons for our Committee's choice.

law firm, that it represents the public interest, and that under these circumstances it would be unreasonable to question the judge's impartiality.

1. The event precipitating precautionary measures.

In *Advisory Opinion No. 74, supra*, as we have noted, the federal Committee concluded that the need for disqualification arises "whenever an offer of employment has been extended to the law clerk and either has been, or may be, accepted by the law clerk." The federal Committee was of the opinion that "the occasion for these precautionary measures does not arise merely because the law clerk has submitted an application for employment," but recognized that in some cases "the judge may feel it advisable to take these precautionary measures even at a preliminary stage of the employment discussions."

Any incentive on the part of the law clerk to attempt to act favorably towards the prospective employer might reasonably be viewed as being at least as strong during active negotiations for employment as it would be after an offer has been made and accepted. Accordingly, our Committee determined that the precipitating event should be an offer of an employment interview or an offer of employment, whichever comes first.

2. Treatment of high-volume litigators.

As noted in the preceding discussion, the federal Committee treats the United States Attorney's Office (and

presumably other high-volume litigators) as indistinguishable from a prospective private employer for purposes of law clerk disqualification. The eastern State as to which we received information, on the other hand, follows a less exacting approach. There is also some recognition in the case law that, for purposes of judicial disqualification, the United States Attorney's Office is not a conventional law firm. *United States v. Zagari*, 419 F. Supp. 494, 505 (N.D. Cal. 1976); *Scott, supra*, 559 A.2d. at 764 n.7 (concurring opinion); *see also Advisory Opinion No. 38, cited supra* note 1.

Because the federal policy would impose a very heavy burden on the District's judicial officers, and because less drastic measures will in our view achieve both impartiality in fact and the appearance thereof, our Committee has proposed that we adhere to the more moderate approach which is utilized in the eastern State. We emphasize, however, that if this policy is adopted, each judge will have the obligation to become and remain apprised of his or her law clerk's job search activities, and to remove the law clerk from any case in which there is reason to believe that the clerk's impartiality, in any measure, has been or may be compromised or impaired.

3. Selection of litigators eligible for the "high volume" exception.

Our Committee considered including in the exception for high volume litigators other public or quasi-public agencies (*e.g.* the Legal Aid Society, Neighborhood Legal Services, other federal or District of Columbia agencies, Bar Counsel, etc.), as well as private law firms which engage in a high volume of litigation before the District of Columbia courts. We determined to exclude, all but the identified institutional litigants, concluding that application of the basic disqualification rule to all other prospective employers would not sufficiently impair the work of the District of Columbia courts to warrant any further exception. The proposal to exempt the United States Attorney, the Corporation Counsel, and the Public Defender Service was in substantial part based on a virtual "rule of necessity" which is simply not applicable to other agencies or employers, public or private.

GUIDELINES*

(December 18, 1991)

A. General Considerations

1. During the clerkship, a judicial law clerk may seek and obtain employment to commence after the completion of the clerkship, provided that the clerk and the judge abide by the restrictions set forth below. The purpose of these restrictions is to maintain the impartiality of the court and to avoid any appearance of impropriety.

2. A law clerk has an obligation to apprise the judge that he or she is seeking future employment and to inform the judge of the identities of prospective employers, as further described in section (B) (1) of this policy.

3. A judge has an obligation to ensure that the law clerk's interactions with prospective employers do not affect the impartiality of the court and do not create an appearance of impropriety. The judge is required to become and remain informed regarding the clerk's job search, to supervise the work of the law clerk and, if necessary, to exclude the clerk from matters involving prospective employers, as described in sections (B), (C), and (D) of this Policy.

* These guidelines apply to law clerks for judges of the District of Columbia Court of Appeals, for judges of the Superior Court of the District of Columbia, and for Hearing Commissioners.

B. When Policy Applies

1. No obligation to notify the judge or to take other precautionary measures arises merely because the law clerk has submitted an application for employment, or because a prospective employer has requested additional written information from the clerk. The clerk's obligation to inform the judge of the identity of a prospective employer arises when that prospective employer notifies the clerk that the clerk has been invited to an employment interview, or has been offered a position without an interview being required, provided, however, that no obligation to inform the judge or to take other precautionary measures arises if the clerk has declined the interview or rejected the offer. The clerk is required to inform the judge of the identity of a prospective employer only if that prospective employer has or may have a matter pending before the judge.

2. The judge's responsibilities pursuant to these guidelines arise when the judge knows or should know that the clerk has been invited to an interview by a prospective employer and has not declined the invitation, or that the clerk has received an offer of employment which the clerk has not rejected.

C. General Disqualification

Except as provided in Part D, when a law clerk has been invited to an employment interview, or has been offered future employment by a prospective employer and the clerk has not declined the interview or rejected the offer of employment, the law clerk shall be excluded from working on any matters pending before the judge in which the prospective employer is a party, counsel, or *amicus curiae*.

D. Exception for High Volume Litigators

The general disqualification in Part C shall not apply where the law clerk has applied for or secured employment with the United States Attorney for the District of Columbia, the Corporation Counsel, or the Public Defender Service. Where employment has been sought or secured with any of these three agencies, the law clerk may, in the judge's discretion, continue to work on cases in which this prospective employer is a party, counsel or *amicus curiae*, provided, however, that the judge shall closely supervise the clerk and scrutinize the clerk's work product to ensure that no conscious or unconscious bias on the part of the clerk has affected or may impair the impartiality of the court.