Judicial Clerks in the Job Market:
Opportunities and Challenges for Employers and Counselors

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In addition to the Code of Conduct for United States Judges and Code of Conduct for Judicial Employees, the federal judiciary offers guidance on ethics and professionalism in Published Advisory Opinions. These Opinions are issued from time to time in response to questions posed by judges. The Committee on Codes of Conduct, a committee of federal judges within the Judicial Conference of the United States, is responsible for the Codes of Conduct and the Published Advisory Opinions.

A number of Published Advisory Opinions concern judicial clerks and employment; for convenience, three of them are reproduced here:

No. 74:	Pending Cases Involving Law Clerk's Future Employer
No. 83:	Payments to Law Clerks from Future Law Firm Employers
No. 109:	Providing Conflict Lists to Departing Law Clerks

The full text of the Codes and the full collection of Published Advisory Opinions are available on the federal judiciary's website at:
http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct

(Note: The federal judiciary has revamped its website more than once in the past several years. If the link above stops working, you will be able to find the information by visiting www.uscourts.gov and looking for Rules & Policies.)

Committee on Codes of Conduct Advisory Opinion
No. 74: Pending Cases Involving Law Clerk's Future Employer

This opinion addresses the issue of appropriate procedures a judge should take when it is contemplated that a law clerk may accept employment with a lawyer or law firm that is participating in a pending case.

The Committee advises that such a circumstance does not in itself mandate disqualification of the judge. The law clerk, however, should have no involvement whatsoever in pending matters handled by the prospective employer. The Committee believes that the need to exclude the law clerk from pending matters handled by the prospective employer 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 formalities are not crucial.

The occasion for these precautionary measures does not arise merely because the law clerk has submitted an application for employment, but there may be situations in which, because of the nature of the litigation, or the likelihood that a future employment relationship with the clerk will develop, the judge feels it advisable to take these precautionary measures even at a preliminary stage of the employment discussions.

To deal appropriately with this issue, the judge should take reasonable steps to require that law clerks keep the judge informed of their future employment plans and prospects. *See*, *generally*, Canon 4C(4) of the Code of Conduct for Judicial Employees.

In appropriate circumstances, the judge may elect to inform counsel that the law clerk may have a prospective employment relation with counsel and that the procedures described here are being followed.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 83: Payments to Law Clerks from Future Law Firm Employers

This opinion discusses the ethical propriety of law clerks receiving payments, either before or during their clerkships, from the law firms for which they have agreed to work following their clerkships. The Committee considers payments from law firms in the form of bonuses, payments for deferring employment start dates, salary advances, benefits such as health insurance, or reimbursement for bar-related and relocation expenses. The guidance in this opinion would also apply to any other form of payments offered to clerks by their prospective law firm employers. For the purposes of discussion, the Committee assumes that the clerk will not participate in any judicial decisions that involve the clerk's future employer. *See* Advisory Opinion No. 74 ("Pending Cases Involving Law Clerk's Future Employer").

The Committee notes that the guidance in this opinion applies equally to law clerks who are paid for their work by the United States government and to individuals who work for judges in an unpaid capacity.[1] It does not matter what term is used for these individuals: "volunteer law clerk," "extern," "intern," etc. Like paid clerks, these volunteers are subject to the Code of Conduct for Judicial Employees ("Employees' Code"). Voluntary and uncompensated services to the court are governed by 28 U.S.C. § 604(a)(17)(A), wherein the Clerk of Court is delegated by the Director of the Administrative Office to accept such services. *See Guide to Judiciary Policy*, Vol. 12, §§ 550.20 and 550.80. As a matter of judicial policy, most volunteers are deemed judicial employees, albeit uncompensated ones. *Id*. The Employees' Code applies to all judicial employees (except those officials or employees who have governing codes of conduct from other sources), and the Committee has previously recognized that unpaid interns should follow the Employees' Code. Additionally, 5 U.S.C. § 7353, which provides that employees of the judicial branch are restricted in when they can receive or solicit gifts or other things of value from those seeking official action or doing business with the court, also applies to unpaid externs.

Canon 4 of the Employees' Code provides guidance on whether law clerks may receive payments from prospective law firm employers during their clerkships. Canon 4C states that "a judicial employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States." Canon 4B(3) instructs that judicial employees "should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court." Additionally, 5 U.S.C. § 7353(a) provides that:

> no . . . employee of the executive, legislative, or judicial branch shall solicit or accept anything of value from a person –
>
> > (1) seeking official action from [or] doing business with . . . the individual's employing entity; or

(2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties.

Law clerks are offered payments by prospective law firm employers for a variety of reasons. Sometimes firms provide a "clerkship bonus" that is paid solely on the basis that the individual served as a law clerk for a judge. In other instances firms provide a bonus uniformly to all new associates of the firm, such as a "signing bonus" paid when the offer of employment is accepted. Some firms have developed programs through which associates will defer the start date to their firm employment in return for specified payments. Firms also often provide reimbursement for expenses related to relocation and taking the bar exam. Some firms offer salary advances that must be repaid when the law clerk begins working at the firm. Some of these assorted payments are scheduled for acceptance before the clerkship, some during, and some after. Based on the ethical considerations raised, we will discuss acceptance of payments according to when the payments would be accepted.

Acceptance of Payments Before the Clerkship: The Code of Conduct for Judicial Employees applies only to "employees of the Judicial Branch," not to prospective employees. Similarly, 5 U.S.C. § 7353 applies only to "employees" of the judicial branch. Accordingly, a prospective law clerk is not prohibited from accepting a payment from a law firm before the beginning of the clerkship, provided that the law clerk is not legally obligated to repay the firm. However, judges are advised against appointing volunteer externs who are provided payments by law firms before, during or after the externship that are dependent on the individual serving as a judicial extern, for instance through a starting date deferral program that included such a restriction. This restriction would not preclude appointing, subject to other ethical restrictions, an extern who would receive a deferral payment before or following (though not during) an externship that was not tied to serving as a judicial extern.

A judge should not permit a law clerk to accept a salary advance from a law firm, either before or during the clerkship. The Committee views a salary advance as a loan from the law firm to the law clerk, through which the law firm effectively provides a supplement to the law clerk's salary during the clerkship. Acceptance of a salary advance could undermine public confidence in the integrity and independence of the court, and is contrary to Canon 4B and 4E of the Employee Code.

Acceptance of Payments During the Clerkship: A law clerk may not, during his or her service as a law clerk, accept *any* payment or salary advance from a law firm, except as noted below regarding reimbursement. Accepting any payments during the clerkship would violate Canon 4B(3) and 4C, as well as the prohibitions of 5 U.S.C. § 7353. In addition, benefits paid for by a law firm may not be accepted during the period of service to the courts; for example, a volunteer extern may not accept health insurance benefits from a law firm during the term of the externship.

The Committee has also advised that a law clerk may not accept, during a clerkship, travel and other expenses associated with attending a "retreat" with a law firm that is the law clerk's future employer. Accepting such payments would be contrary to Canon 2 (avoiding the appearance of impropriety) and Canon 4C(2) of the Employee Code (prohibiting the acceptance of a gift from anyone seeking official action from or doing business with the court or whose interests might be substantially affected by the performance or nonperformance of an employee's official duties). *See also, Judicial Conference Gift Regulations § 3* (*Guide to Judiciary Policy,* Vol. 2C, § 620.35(a)).

Acceptance of Payments Following the Clerkship: As with prospective clerks, the Code and § 7353 do not apply to former clerks, and so would not prohibit acceptance by former clerks of payments such as clerkship bonuses. The Committee includes this category, however, to caution judges against appointing volunteer externs who may receive payments following their externships that are tied specifically to serving as a judicial extern.

Reimbursement for Bar-Related and Relocation Expenses: The Committee observes no problem with law clerks accepting reimbursement for relocation or bar-related expenses from a future employer, whenever that reimbursement is received. Prospective judicial employees are not covered by the Code, so the acceptance of reimbursement before the clerk begins work for the judge would not be prohibited. With regard to accepting such reimbursement payments during the clerkship, the Judicial Conference Gift Regulations, § 5(b)(6), specifically permits a judicial employee "who has obtained employment to commence after judicial employment ends" to accept "reimbursement of relocation and bar-related expenses customarily paid by the employer, so long as conflicts of interest are avoided." Judicial Conference Gift Regulations § 5(b)(6) (*Guide to Judiciary Policy,* Vol. 2C, § 620.35(b)(6)).

The Committee recognizes, of course, that some judges may prohibit their future or present law clerks from accepting bonuses or other payments that are permissible under this opinion. Accordingly, the present or future law clerk should consult with his or her judge before accepting any payment or reimbursement from the clerk's future law firm.

Note for Advisory Opinion No. 83

[1] This guidance may not apply to certain types of volunteers who are not considered to be judicial employees. *See, e.g., Guide to Judiciary Policy, Volume 12, § 550.60 (College Work-Study Programs); § 550.70 (Cooperative Education and Fellowship Programs); and § 550.80 (Volunteers).*

August 2011

Committee on Codes of Conduct Advisory Opinion
No. 109: Providing Conflict Lists to Departing Law Clerks

Judges sometimes receive requests from law firms for which their law clerks will work after the clerkships end. These firms ask, for the purpose of screening for conflicts of interest, the clerk or judge to identify the matters that the clerk worked on or that passed through chambers during the clerkship period. This opinion addresses whether a judge should provide law firms and clerks with a list of matters the clerk worked on while in chambers, as well as whether a judge should provide a list of all matters that were pending before the judge or the court during the clerk's tenure.

A. Matters the Clerk Worked on While in Chambers

Judges and clerks should generally decline to provide law firms with lists of matters the clerks worked on while in chambers. Granting such requests may result in the disclosure of confidential information. The assignment of a law clerk to a particular case is rarely revealed by any court, whether appellate, district, or bankruptcy. Moreover, assignment of particular appellate judges to an appeal may remain confidential until shortly before oral argument. *See, e.g.*, Practitioners' Guide to the U.S. Court of Appeals for the Fifth Circuit at 69 (Nov. 2011) ("About 30 days before the beginning of oral argument sessions, we post the case names and numbers, and the locations of the arguments on our internet site. The week before argument we post the names of the judges who will hear the cases."), available at www.ca5.uscourts.gov/clerk/docs/pracguide.pdf. Also, the involvement of particular judges in some internal appellate proceedings, such as certain aspects of en banc activity, inquiry to other panels, holding mandates, etc., is not publicly disclosed.

Canon 3D of the Code of Conduct for Judicial Employees mandates that a judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties. This provision binds clerks even after their clerkships end. Canon 3D states, "[a] former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority." Employees' Code, Canon 3D. This provision is intended to protect the ability of judges to confer privately with their law clerks without fear that those interactions will later be revealed, thus chilling the ability of judges to receive assistance from their clerks. Canon 3D also insures that present and former law clerks will not later use their privileged access to the judiciary for personal gain.

As a general matter, the Employees' Code respects the confidentiality owed by incoming law clerks to former employers or organizations by not requiring law clerks to provide a list of the cases they previously worked on or other confidential client information. Rather, the Employees' Code puts the onus on the law clerks to self-identify cases as to which they have disqualifying information due to personal relations,

financial investments, or former employment at the outset of their clerkships without requiring any case list. Under Canon 3F,

> When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such matter so as to avoid a conflict or the appearance of a conflict of interest. A judicial employee should observe any restrictions imposed by his or her appointing authority in this regard.

Employees' Code, Canon 3F(3). Just as law clerks identify conflicts to their judges instead of being required to submit a list of their former employer's matters or cases that may include confidential information, former clerks who are employed by law firms should be trusted to recognize those cases whose very pendency is confidential but from which they should be isolated due to clerkship-related conflicts. This process can occur without resorting to a case list divulging confidential information in violation of the continuing confidentiality obligation under Canon 3D.

We assume that a former clerk must refrain from working on all cases in which he or she participated during the clerkship, and may be required by the judge, by court rule, or by attorney ethical rules to refrain from work on cases pending before the judge even if the law clerk had no personal involvement in them. *See, e.g.*, 9th Cir. R. 46-5 (2011) ("No former employee of the Court shall participate or assist, by way of representation, consultation, or otherwise, in any case that was pending in the Court during the employee's period of employment. It shall be the responsibility of any former employee, as well as the persons employing or associating with a former employee in the practice of law before this Court, to ensure compliance with this rule. . . . An attorney who is a former employee may apply to the Court for an exemption."); *accord* Fed. Cir. R. 50 (2011) ("No former employee of the court may participate or assist, by representation, consultation, or otherwise, in any case that was pending in the court during the period of employment."); Federal Judicial Center, Maintaining the Public Trust—Ethics for Federal Judicial Law Clerks at p. 25 (3d ed. 2012) ("You may not participate in any matter that was pending before your judge during your clerkship."); Advisory Opinion No. 81 ("United States Attorney as Law Clerk's Future Employer"); Advisory Opinion No. 74 ("Pending Cases Involving Law Clerk's Future Employer").

The Committee is mindful not only of attorneys' ethical obligations regarding conflicts but also the desire of firms to avoid disqualification, disgorgement of fees, or other consequences resulting from a failure to screen lawyers who have ethical conflicts. Although the Committee is not authorized to interpret the ABA Model Rules of Professional Conduct, we are not aware of any provision in these rules that would require the disclosure of broad lists of all matters that a former clerk worked on. Indeed, law firms themselves have recognized the pitfalls and barriers in obtaining confidential

information from lateral hires who are presumably subject to the ABA Model Rules or similar derivative rules. *See, e.g.*, Susan P. Shapiro, Tangled Loyalties: Conflict of Interest in Legal Practice 330 (U. of Mich. Press 2002) (quoting a Chicago law firm hiring partner about how he might screen for conflicts: "See, I can't ask an associate, 'What clients have you worked on?' That would be a breach of ethics for them to disclose it to me."); *see also* Paul R. Remblay, Migrating Lawyers and the Ethics of Conflict Checking, 19 Geo. J. Legal Ethics 489, 491-93 (Spring 2006) (noting that, because the ABA Model Rules lack specific guidance about the scope of permissible conflict checks, law firms tend to ask proposed lateral hires about "the work that they did at their old firms, and about their former and existing clients" while observing the rule not to reveal presumptively confidential client information).

In light of these considerations, judges and clerks should generally decline law firms' requests for lists of all matters the clerks participated in, because such requests may call for the disclosure of confidential information, especially for clerks currently employed by the court. The concerns underlying the requests can be effectively addressed through less intrusive means. First, judges may suggest to clerks that they maintain a list of cases in which they have participated in order to facilitate the identification of conflicts of interest during their future employment (keeping in mind that such lists are not to be disclosed to anyone). Second, law firms can also provide to the former clerk who joins the firm a list of cases whose pendency before a specific judge or court is a matter of public record, and ask the clerk to identify those cases where there is a conflict (without identifying to anyone the cases the clerk worked on). Third, at the start of the former clerk's employment and for whatever time period deemed appropriate, firms can isolate former clerks from all cases pending before a particular judge or court (as identified from the public docket).

B. Matters Pending Before the Judge or the Court During the Clerk's Tenure

Some law firms have requested that judges and clerks provide a list of all matters pending before the particular court—or the particular district, bankruptcy, or magistrate judge—during the clerk's tenure, not simply those on which the clerk worked. Although these requests present fewer problems because they do not associate a clerk with work on a particular case, they can still create confidentiality concerns, as well as practical problems.

On one hand, it is possible a clerk will not have knowledge of all cases pending before his or her judge during the clerkship. One way to avoid future conflicts would be for the court to provide to the clerk upon departure a list disclosing only publicly available information about pending cases. Such a list would not run afoul of Canon 3D's prohibition on disclosing confidential information. On the other hand, depending on the caseload of the particular court, it could create an administrative burden for the Clerk's Office to generate such lists for each departing clerk. Further, the lists may not be comprehensive, as judges on the same court sometimes confer with one another on a given case even when not assigned to that case. In the appellate context, such a list

should include cases considered by the court rather than by an individual judge, because the panel assigned to a case is often not publicly revealed until shortly before oral argument, and because non-panel judges may be involved in the resolution of cases, for instance in en banc considerations.

For the foregoing reasons, judges may decide on an individual basis to provide such lists to clerks of all cases assigned to the judge's court during the relevant time, or in the case of district, bankruptcy, or magistrate judges, all cases assigned to that judge. The Code does not preclude this. However, judges are under no obligation to provide such lists. The onus remains on the law clerks to identify cases as to which they have a disqualifying connection. Judges deciding to provide such lists should not provide them to law firms directly but instead to the individual clerk.

July 2012