Arizona Supreme Court
Judicial Ethics Advisory Committee

ADVISORY OPINION 01-02
(December 31, 2001)

Ethical Issues in Cases Involving Prospective Employers of Law Clerks

Issues

1. Must judges be informed of their law clerks' law-related job applications, interviews, and offers?

   Answer: Yes.

2. Is a judge required to screen a law clerk from cases involving a law firm, public agency, or other entity with whom the clerk obtains future employment?

   Answer: Yes, once the clerk accepts a job offer and, depending on the circumstances, perhaps even earlier in the process.

3. When a law clerk receives and accepts a job offer from a law firm, public agency, or other entity with matters pending before the judge, must the judge disqualify himself from such cases?

   Answer: Yes, with qualifications.

Facts

A law clerk employed by a superior court judge applied for a position with the local county attorney's office. He ultimately received a job offer and accepted a position with that office. Before his interviews, the clerk worked on a post-conviction relief petition that was pending before the judge. He performed legal research and wrote a partial draft minute entry. After the interview process began, the clerk edited his work in non-substantive ways but did not change his recommendations in the proposed minute entry. After the clerk resigned and began his new job, the judge prepared a final order denying relief to the petitioner. The judge relied on the clerk's work in preparing the order.

Discussion

Judges typically employ law school graduates as clerks for relatively brief periods of time. During their tenure with the court, clerks often apply for and negotiate employment with law firms or public agencies. This practice can raise questions about the judge's impartiality when prospective employers of the clerk have matters pending before the court in question. Judges routinely rely on law clerks' legal research and writing in making decisions, and there is a general consensus that "[r]egardless of actual influence, the perception of law clerks' influence on judges is present, even among lawyers." "Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotia-

tions," 62 Wash. L. Rev. 813, 820 (1987). Recognizing that the pending inquiry is relatively narrow and fact-specific, this opinion will nevertheless address broader issues implicated by the job-seeking activities of law clerks.

Issue 1

Canon 3E(1) requires disqualification "in a proceeding in which the judge's impartiality might reasonably be questioned." Although the standard is an objective one, it is the appearance of partiality, more than the reality, that is at issue. *See Matter of Haddad*, 128 Ariz. 490, 627 P.2d 221 (1981) (judge is required not only to *be* impartial, but to *be seen* as impartial). *See also* Opinion 95-11 (test under Canon 3E(1) is "whether a person of ordinary prudence in the judge's position knowing all the facts known to the judge could find that there is a reasonable basis for questioning the judge's impartiality"). A judge who himself is negotiating for employment must recuse from any matters in which the prospective employer appears, absent full disclosure to the parties and counsel and waiver of any conflict. *See* Canon 3E(1), commentary.

Law clerks must comply with the Code of Conduct for Judicial Employees. Among other things, the code requires judicial staff to: (1) manage personal and business matters so as to avoid an appearance of conflict; (2) inform the appropriate supervisor of any potential conflict; and (3) withdraw from participation in any proceeding in which they have an interest that may appear to influence the outcome. Canon 4C.

The committee concludes that law clerks must advise their employing judges of all law-related job applications, interviews, and offers. They should take special care to inform (and remind) judges on a timely basis when a prospective employer has a matter pending before the court.

Issue 2

The next question is whether clerks must be screened from cases involving a prospective employer. Requiring automatic screening of cases based on any job application or interview could be problematic—especially for judges assigned to a criminal calendar—where the number of prospective employers (particularly on the prosecution side) is limited. An excellent discussion of the legal and policy considerations relating to screening of clerks can be found in the comment cited above, "Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations."

The comment advocates screening of clerks once a job offer is extended, but not before. It correctly notes that law clerks often apply with numerous prospective employers. At such a preliminary stage, any appearance of partiality by the judge is relatively attenuated and would not meet the "reasonably questioned" standard of Canon 3E(1). Moreover, mandating screening based merely on job applications, interviews, and even job offers would likely lead to significant restrictions on clerks' job-seeking activities and a corresponding difficulty in attracting talented, qualified law graduates. It also would unduly impede the swift and orderly disposition of cases in trial and appellate courts.

As the employment process progresses through the interview and into the negotiation and job offer phases, however, the appearance of conflict becomes more pronounced. Incentive for a clerk to consciously or unconsciously affect the outcome of a pending matter is enhanced. The committee concludes that once a clerk accepts a job offer, he or she should be screened from all cases involving the clerk's future employer. After that point, the clerk may not continue working on such matters, even if he or she has work in progress that started before the job offer was made and accepted.

Even before a law clerk actually accepts a job offer, the judge should take a close look at any pending matters that the clerk is working on and that involve a prospective employer that has interviewed or extended a job offer to the clerk. Depending on the nature and extent of any further work the clerk may need to do, the judge, in his or her discretion, may choose to screen the clerk from any further involvement in such matters. The judge probably should err on the side of caution in those situations, particularly in light of law clerks' obligation under Canon 4C(3) of the employee code to "withdraw from participating in a court proceeding" in which they have a personal or business interest "that may actually or appear to influence the outcome."

In addition, although the committee has established a law clerk's acceptance of a job offer as the point at which the clerk must be screened from any cases involving the future employer, courts may choose to adopt a more restrictive or stringent standard. *See* Arizona Code of Conduct for Judicial Employees, Preamble ("The minimum standards contained in this code do not preclude the adoption of more rigorous standards by law, court order or local rule."). For example, section 3D(4)(c) of the "Law Clerk Code of Conduct," adopted by the Arizona Supreme Court in 1984, does not require a law clerk's recusal from participation in a case involving a law firm to which an application for employment is pending. That same section, however, provides that "if serious or active negotiations are underway, the law clerk should so inform the judge, and volunteer to withdraw from the case."

Many courts have approved screening of clerks as an alternative to disqualification of judges. *See Hunt v. American Bank & Trust Co.,* 783 F.2d 1011 (11th Cir. 1986); *Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486 (2nd Cir. 1986); *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703 (9th Cir. 1990); *In re Cooke*, 160 B.R. 701 (D. Conn. 1993). While the Arizona courts have not specifically addressed the issue, in an analogous context, our Rules of Professional Conduct allow screening of government lawyers who transfer to the private sector. *See* Rule 42, Ariz.R.S.Ct., ER 1.11. *See also State v. Superior Court*, 184 Ariz. 223, 708 P.2d 37 (App. 1995). Similar policy considerations support screening of law clerks versus *per se* disqualification of judges.

If prompt screening of a clerk does not occur once the law clerk has accepted a job offer, the judge must recuse himself unless the parties and counsel waive any conflict after full disclosure. *See, e.g., Miller Industries, Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84 (S.D. Ala. 1980) (disqualification required when clerk accepted job with plaintiff's firm during trial but continued to work on case); *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983) (impermissible appearance of partiality where clerk accepted job with plaintiff's firm during class action litigation).

Issue 3

Based on the foregoing principles, after a law clerk accepts a job offer from a law firm, public agency, or other entity with matters pending or impending before the judge, disqualification is required unless the clerk is screened from any substantive work and discussion in such matters, or unless the parties and counsel waive the apparent conflict pursuant to Canon 3F. A party would likely question the judge's impartiality upon learning of the clerk's continued work on a case after having accepted a job offer from an adverse party or its legal representative. Even if a reasonable person would not necessarily question the judge's impartiality in such circumstances, the judge should disqualify himself or herself in the absence of the screening or waiver discussed above.

Conclusion

Applying the foregoing analysis to the pending inquiry, the judge was not ethically required to disqualify from the case after the law clerk applied for and ultimately accepted a position with the county attorney's office. Nor was the judge ethically prohibited from using the law clerk's prior work product in preparing the final order. After interviewing with the county attorney's office, the clerk here performed only minor, editorial work on his existing draft and did not alter his prior recommended disposition of the pending matter. Under these circumstances, one cannot reasonably question the judge's impartiality in continuing on and disposing of the case after the clerk had resigned and begun his new job.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 3C and 3D (1993).

Arizona Code of Conduct for Judicial Employees, Preamble and Canon 4 (1997).

Other References

Arizona Judicial Ethics Advisory Committee, Opinion 95-11 (June 16, 1995).

Arizona Rules of Professional Conduct, ER 1.11.

Arizona Supreme Court, Law Clerk Code of Conduct, Canon 3D(4)(c) (1984).

Bartel Dental Books Co., Inc. v. Schultz, 786 F.2d 486 (2nd Cir. 1986).

Hunt v. American Bank & Trust Co., 783 F.2d 1011 (11th Cir. 1986).

Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983).

Matter of Haddad, 128 Ariz. 490, 627 P.2d 221 (1981).

In re Cooke, 160 B.R. 701 (D. Conn. 1993).

Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703 (9th Cir. 1990).

Miller Industries, Inc. v. Caterpillar Tractor Co., 516 F. Supp. 84 (S.D. Ala. 1980).

State v. Superior Court, 184 Ariz. 223, 708 P.2d 37 (App. 1995).

"Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations," 62 Wash. L. Rev. 813 (1987).