

Law Clerk Ethics In New York State

BY JEREMY R. FEINBERG

Readers of the recent two-part “Judicial Ethics in New York State” articles (NYPRR, August, September 2007) may be curious what ethics rules govern the conduct of judges’ law clerks in New York State. The answer is not simple –depending on the role and duties of the law clerk, several different sets of ethics rules could conceivably apply. Ethics opinions, rules, and even commentators sometimes interchangeably use the terms “law secretary,” “court attorney,” “elbow clerk,” or “law clerk” to describe an attorney or recent law graduate who works directly with, and serves at the pleasure of, an individual judge. This article will focus on the subset of law clerks who are full-time employees of the New York State Unified Court System, who have worked (or plan to work) for an individual judge for a number of years or as a career, and who do not have any quasi-judicial responsibilities (as a court-attorney referee does).

After an overview of the potentially applicable rules, this article will touch on a number of commonly occurring issues for law clerks that emerge in their day-to-day interactions with practicing attorneys: what obligations the law clerk (and judge) have when the law clerk interviews for a job after a clerkship; what political activity a law clerk may engage in while working for the court system; and the prohibition against gifts to law clerk from those who come before the courts.

Different Rules Applicable to Law Clerks

As a starting point, all law clerks are subject to the rules Governing Conduct of Nonjudicial Court employees. These rules, promulgated by the Chief Judge, can be found at 22 NYCRR Part 50. They cover a variety of ethics issues for court employees, ranging from (1) the need to avoid the appearance of impropriety (22 NYCRR 50.1(I)); (2) the limited circumstances under which court employees can practice law (22 NYCRR 50.6); to (3) how and when court employees can accept outside employment (22 NYCRR 50.1(III)(A)) or obtain dual employment with another division of the government (22 NYCRR 50.3).

Law clerks, as personal appointees of judges, are also subject to certain sections of the rules governing Judicial Conduct (22 NYCRR Part 100). For example, law clerks, like their judges, may not comment on matters pending or impending before any court in the United States or its territories (22 NYCRR 100.3(B)(8)). Readers should bear this in mind if they ask a law clerk to serve on a CLE program panel, or if they serve with a law clerk on a bar association committee.

Finally, most law clerks are attorneys admitted to practice in New York State. As such, they are also subject to the New York Code of Professional Responsibility. Although some rules contained in the Code, such as those in Canon 2 concerning lawyer advertising, or Canon 5 concerning conflicts of interest in client representation, are highly unlikely to come up in the course of a law clerk’s day-to-day work. others, such as DR 1-103’s reporting requirement might well present issues for a clerk; and still others, like DR 9-101, (discussed briefly below), are specifically addressed to individuals, like law clerks, who switch between public and private employment.

When Law Clerks Seek and Obtain Employment Outside The Court System

For many lawyers and law firms, the first face-to-face interaction they have with a law clerk may come when the law clerk is seeking employment at the end of the clerkship. Law clerks are often desirable hires – through working with a judge, they develop excellent research and writing skills, as well as a strong sense of what arguments and lawyering approaches may be persuasive to a court. The interviewing and hiring process, however, raises special ethics issues of which the law clerk, the judge, and even the law firm should be aware.

One important practical question is how the law clerk's duties should change when he or she starts to interview for jobs outside the court system. Whether, and to what extent, the law clerk can continue to work on matters in which specific firms (or other potential employers) are involved may create logistical difficulties for the judge and the law clerk – to say nothing of an appearance of impropriety. These concerns arise from the very same reasons that make a law clerk an attractive hire for a law firm: as a judicial appointee, the law clerk works very closely with the judge, and sometimes collaborates with the judge in the judicial decision-making process – conducting research, briefing the judge on cases before her and on the law, and helping the judge in drafting decisions.

In a recent joint opinion – combining answers to two separate judicial inquiries – the Advisory Committee on Judicial ethics (“ACJE” or “Committee”) set forth the responsibilities that a judge and a law clerk have when the law clerk is in the midst of a job search. The Committee initially emphasized the importance of the law clerk's keeping the judge informed: “we believe it is important for all law clerks to a judge to keep the judge apprised of any contacts they may have with any law firm with which they are seeking post-clerkship employment following submission of an application or resume.” NY Jud. Adv. Ops. 07-87 and 07-95.

The ACJE then explained why it was important for the judge to know what firms the law clerk was contacting. According to the ACJE, when a law clerk interviews for post-clerkship employment, his judge has an ethical obligation to insulate the clerk from any cases involving a firm or organization that has contacted the clerk for an interview. The judge is also required to disclose the insulation to the parties, and may, but is not required to, recuse upon request. *Id.* The judge should continue to insulate the law clerk from matters involving the firm for the duration of the law clerk's employment discussions with that organization. The insulation will continue to the end of the law clerk's employment with the judge, if the law clerk receives and accepts an offer. *Id.* If the law clerk does not receive (or accept) an offer, the insulation may also end. *Id.*

This ACJE opinion dovetails with DR9-101(B)(3), which prohibits a lawyer who is a government employee, such as a law clerk, from seeking private employment “with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.” DR 9-101(B)(3). Both the ACJE and the Code of Professional responsibility thus call for the same result –insulation of the clerk during the interviewing process – but from different sides of the judge/law clerk relationship.

There's an important footnote to this – the New York State Bar Association's Committee on Standards and Conduct (COSAC) is proposing a new rule in New York that would lead to a different result. Under proposed rule 1.12(b), the law clerk would, after notice to her judge, be permitted to engage in

negotiations for employment with a party that is appearing before the law clerk's judge, even if the law clerk is participating "personally and substantially" in the matter. Under the new rule, then, the law clerk would still be allowed to seek employment with law firms or companies having matters on which the law clerk was working. It is an open (and interesting) question whether the ACJE might reach a different conclusion if COSAC's recommendation is adopted. Stay tuned.

Once the law clerk leaves the judge's employ, there are still ethics issues for both to consider. Former law clerks may be given the opportunity by their new employer to appear before the judge on the theory that this might give the law firm an "edge" or an "inside track." The ethics rules recognize this and address it by requiring judges to take certain steps, at least for a period of time after the law clerk has left the chambers. In ACJE Opinion 07-04, the Committee held that a judge is required to disclose the relationship between judge and former law clerk for one year after the law clerk's employment ends whenever the law clerk appears before the judge as an attorney, and that, if a party requests it, the judge should recuse. NY Jud. Adv. Op. 07-04. In reaching this conclusion, the Committee again cited the close relationship that a judge shares with a law clerk, and the appearance of impropriety which may arise if the judge does not disclose the relationship to the parties involved in the case, so soon after the end of the clerk's employment. *Id.*; 22 NYCRR 100.2(C). The Committee was careful to distinguish that close relationship, however, with the more tenuous bonds a judge forms with a student intern who might clerk for the judge for a summer, or serve with the judge during a semester in law school as a "research clerk." For each of these more transient members of a judge's staff, the Committee reaffirmed its prior conclusions that no disclosure or recusal was required, should the former intern later appear before the judge as an attorney. NY Jud. Adv. Ops. 07-04; 95-58; 88-157.

Law Clerks And Political Activity

Can law clerks run for public office, or get involved in the political campaigns of others? Generally speaking, a law clerk is allowed to participate in any kind of political activity which is not specifically prohibited by the rules governing Judicial Conduct or Part 50.2(C) of the rules of the Chief Judge, as long as the law clerk does not implicate her judge in politics. This means that while the law clerk is prohibited from conducting any political activity in the courthouse or chambers during work hours, the law clerk is free to circulate petitions for persons running for judicial and non-judicial office; review and draft such petitions (NY Jud. Adv. Op. 03-111), although not in the capacity of counsel; accept a volunteer position in a political campaign (NY Jud. Adv. Op. 93-36); act as a political party committee member; and solicit signatures on nominating petitions for political candidates. NY Jud. Adv. Op. 90-85. (Readers should be aware, however, that law clerks who have quasi-judicial roles, such as court attorney-referees, face even stricter rules on political activity that I will not address here).

Although law clerks are specifically prohibited by the rules governing Judicial Conduct from holding any elective office in a political organization (22 NYCRR 100.5(C)(1)), they are free to hold an appointive office in a political organization. The ACJE has specifically approved the following appointive positions for law clerks: member of the public policy committee of a local political party (NY Jud. Adv. Op. 97-141); member of a local commission or committee that is drafting town council district lines; co-zone leader of a local political party (NY Jud. Adv. Op. 01-08); and non-executive member of the county committee of a political party. (NY Jud. Adv. Op. 99-95.)

The rules governing Judicial Conduct prohibit law clerks from "contributing, directly or indirectly, money or other valuable consideration in amounts exceeding \$500 in the aggregate during any calendar

year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions” and from “soliciting funds in connection with a partisan political purpose, including personally selling tickets to or promoting a fund-raising activity of a political candidate, political party, or partisan political club.” 22 NYCRR 100.5(A)(2), (3). This rule constrains even indirect solicitation of funds or political contributions by law clerks. For instance, a law clerk is not permitted to serve as the treasurer of any political campaign, even the re-election campaign of his own judge. NY Jud. Adv. Ops. 07-11; 03-48; 00-04. A law clerk also may not donate office space to a political party. NY Jud. Adv. Op. 97-103.

Law clerks are permitted to run for political office, including judicial office, while working for the court system, and in certain cases they may be permitted to hold an elective office while simultaneously serving as law clerk. NY Jud. Adv. Ops. 07-11; 04-104; 99-10; 98-19. The key question is whether the second position causes conflicts with the law clerk’s primary role within the court system. If not, the law clerk may be able to obtain permission from the appropriate administrative authorities to do both jobs, pursuant to section 50.3 of the Chief Judge’s Rules. 22 NYCRR 50.3. In the past, law clerks in New York State have gotten permission to serve on County Legislatures, Town Councils, and Public School Boards. NY Jud. Adv. Ops. 05-38; 04-130; 99-10.

If the law clerk is running for political office, notwithstanding the limitations on political expenditures described above, the law clerk may contribute more than \$500 to her own campaign for office, or, through a campaign committee, engage in the solicitation of funds for her own campaign for non-judicial office. This exception includes purchasing tickets for political functions, in connection with the law clerk’s own campaign. NY Jud. Adv. Op. 98-19. It may be necessary however, for the law clerk to take a leave of absence to conduct a campaign – an issue that the clerk, her judge, and appropriate administrative authorities within the court system should assess.

Gifts for Law Clerks

Suppose you’ve just had your first trial before a notoriously tough judge. Even though your client won, it was a very difficult experience, and was only made bearable because of the hard work of the judge’s law clerk who made it easier on both sets of litigants and their lawyers. Your client, a retailer, asks if, now that the trial is over, you can forward a gift certificate to the law clerk as a thank you for her efforts to make the trial experience more pleasant for everyone. Can you? Would it make a difference if it were a pair of tickets to a concert that would otherwise go to waste? Could the law clerk accept a hand-made baby blanket for her recently-born child?

The answer here is a clear “no” – both from the lawyer’s point of view and the law clerk’s. For the law clerk, there is a specific rule contained in Part 50, stating that “[c]ourt employees shall not solicit, accept or agree to accept any gifts or gratuities from attorneys or other persons having or likely to have any official transaction with the court system.” 22 NYCRR 50.1(C). That means that no matter how well intentioned, law clerks should not permit themselves to be offered – nor can they accept – gift certificates, tickets to concerts, baby blankets or even boxes of candy, as a “thank you” for what they did (or might someday do) within the court system. The no-gift rule helps protect both the perception and the reality that all cases to come before the courts will be decided by a neutral decision-maker.

From the lawyer’s point of view, there is a separate Disciplinary Rule, DR 7-110, that also precludes a lawyer from giving or lending “anything of value to a judge, official or employee of a tribunal” except as

permitted by the judicial ethics rules or through appropriate contributions to a judge's election campaign. DR 7-110 has not been frequently invoked by the disciplinary authorities, but when it has, it is in the context of a lawyer's seeking to influence the outcome (or timing of the outcome) of a matter sub judice. See, e.g., *Matter of Lefkowitz*, 105 A.D.2d 161 (1st Dep't 1985); *Matter of Goffen*, 103 A.D.2d 197 (1st Dep't 1984). In each instance, the Appellate Division upheld serious sanctions against the lawyers for providing gifts, in violation of DR 7-110, to court employees.

What does this mean for the law clerk's friends and family? Can a close friend from law school, who has given gifts to the law clerk on his birthday for years, no longer do so once the law clerk takes a job within the court system? Can distant family members no longer provide gifts at the law clerk's wedding, if they happen to have matters before the law clerk's court? In my view, the ethics rules should not, and do not, trump these pre-existing relationships. But the law clerk, and the relevant friend or family member should still think through the time, place, and manner of any such gift-giving. Although a gift from a lawyer-friend who is celebrating a milestone in the law clerk's life might well be appropriate under normal circumstances, the same gift when the lawyer has a case pending before the law clerk's judge sends an entirely different message.

Going back to the hypothetical question at the beginning of this section – is there anything the satisfied lawyer and his client can do to acknowledge the difference the law clerk made in providing good customer service? Yes, there is – and this would be true of any court employee. It is always appropriate to write a letter to the employee's supervisor (or judge) expressing that the employee did a good job and even explaining what it is that the employee did (or did not do) to make you want to write the letter. If you are not certain whom to send such a letter to, the Chief Clerk of the court where the law clerk works is a good source of information.

Conclusion

There are many ethics issues that law clerks need to be aware of in their day-to-day work within the court system. Law clerks are not alone in having to stay on top of these matters - they do have two key in house resources available to them to interpret and resolve these issues. Of course, there is always the law clerk's judge. There is also an ethics "helpline" for all non-judicial state court employees. That helpline, which has handled hundreds of court employee inquiries (including many from law clerks) in its almost three years of operation, provides quick, convenient, and knowledgeable advice about these issues. To the extent an ethics issue affects both law clerk and judge, the Advisory Committee on Judicial ethics is also available to assist the two in finding the right answer.

Hopefully, as a result of this piece, you now have a better understanding about why law clerks and judges have to approach certain issues the way that they do.

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