



## Advisory Committee on the Code of Judicial Conduct

Hon. Frank H. Allen, Jr. Chairman  
Hon. Thomas A. Donnelly  
Prof. William T. MacPhearson, Jr.

August 30, 1994

The Honorable

Re: Judicial Advisory Opinion No.94-06

Dear

Judicial Advisory Committee is in receipt of your letter of August 15, 1994. You have requested that we indicate whether a judge should permit his or her law clerk to work on a case where one of the parties in the case is represented by a law firm with which the clerk has accepted future employment.

Two Canons of the Code of Judicial Conduct are pertinent to this inquiry. SCRA 1986, 21-200(A) (Repl. 1994), provides that "[a] judge shall respect and comply with the law and shall conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." SCRA 1986, 21-300(B)(2) (Repl. 1994), instructs that a judge must require the employees subject to his direct control to "observe the standards of confidentiality, fidelity and diligence that apply to the judge."

In Judicial Advisory Opinion 93-3, we stated that "[t]he focus of Canon 21-200(A) is to avoid situations which may evoke a perception of unfairness...." That opinion also relied upon an earlier advisory opinion interpreting Canon 21-200(A) in recognizing that "'[i]n assessing situations in which the appearance of [partiality] may occur, a judge is required to consider the public perception which may arise' and that '[u]nder Canon 21-200(A), the question is not what a judge actually does or does not do, but what others may reasonably believe he or she has done or may do.'" Id.

Although neither the Code of Judicial Conduct nor prior judicial advisory opinions of this committee have directly addressed the precise question presented by your inquiry, our research indicates the question presented has been previously considered in a number of reported decisions. The cases on point appear unanimous in their conclusion that it would be improper for a law clerk to work on a case in which the clerk's future employer is serving as counsel.

See Milgard Tempering, Inc. v. Selas Corp., 902 F.2d 703, 714 (9<sup>th</sup> Cir. 1990) (law clerk should not work on case involving clerk's future employer); Hunt v. American Bank & Trust Co., 783 F.2d 1011, 1015 (11<sup>th</sup> Cir. 1986) ("It is true that a reasonable person might wonder about a law clerk's impartiality in cases in which his future employer is serving as counsel. Clerks should not work on such cases..."); Hall v. Small Business Admin., 695 F.2d 175, 179 (5<sup>th</sup> Cir. 1983) ("Whether or not the law clerk actually affected the [judge's] decision, her continuing participation with the [judge] in a case in which her future employers were counsel gave rise to an appearance of partiality."); Cheeves v. Southern Clays, Inc., 726 F. Supp. 1579, 1581-82 (M.D. Ga. 1990) (policy of not permitting clerks to work on cases involving their future employers recognized as policy of the court); Miller Indus., Inc. v. Caterpillar Tractor Co., 516 F. Supp. 84, 88-90 (S.D. Ala. 1980) (law clerk's involvement in case involving clerk's future employer created an appearance of impropriety); Pope v. State, 345 S.E.2d 831, 847 (Ga. 1986) (judge should excuse clerk from participation in case involving clerk's future employer, unless there is adequate disclosure and waiver); see also Alvin B. Rubin & Laura B. Bartell, Law Clerk Handbook, Ch. 2, § 2, at 23 (Federal Judicial Center rev. ed. 1989) (law clerk should not be involved with case in which clerk's future employer has an interest.)

In Pope, the Georgia Supreme Court recognized part of the rationale behind not allowing law clerks to participate in cases in which their future employer is involved.

"Law clerks are...sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the law suit nor his most intimate family members may be...

"Whether or not the law clerk actually affected the [trial judge's] decision[s], her continuing participation with the [judge] in a case in which her future employers were counsel gave rise to an appearance of partiality. See [cits.] (judge not disqualified when law clerk immediately taken off all work...in cases being tried...by his prospective employers.)...See also A. DiLeo and A. Rubin, Law Clerk Handbook § 2250 (1977) (when clerk accepts position with firm, must cease involvement in cases in which future employers have interest)."

Pope, 345 S.E.2d at 847 (quoting Hall v. Small Business Admin., 695 F.2d 175, 179 (5<sup>th</sup> Cir. 1983)).

The Law Clerk Handbook, published by the Federal Judicial Center and cited in Pope, observes that law clerks should not participate in cases in which their future employers are involved: "When a clerk has accepted a position with an attorney or with a firm, that clerk should cease further involvement in those cases in which the future employer has an interest.

With the judge's permission, the clerk should transfer those cases to another clerk and receive others in exchange." Id., Ch. 2, § 2, at 23.

In light of the Canons of the Code of Judicial Conduct and authorities listed above, we believe that a law clerk should not participate in a case involving a law firm with which he has accepted future employment because his or her participating would reasonably tend to give rise to a perception of unfairness. See SCRA 21-200(A); see also SCRA 21-300(B)(2).

In such situation, however, the judge for which the clerk works is not required to end his involvement with the case. See Hunt, 783 F.2d at 1016 ("If a clerk has a possible conflict of interest, it is the clerk, not the judge, who must be disqualified."); see also Miller Indus., 516 F.Supp. at 89. In Milgard Tempering the court noted that "when the judge promptly removes the clerk from the case, and avoids further communication with that clerk about the litigation, the appearance of judicial propriety is preserved." Id., 902 F.2d at 714. The court in Pope also noted that an alternative to limiting a law clerk's involvement or participation in a case involving a future employer is to make full disclosure of the situation to all interested parties and determine whether the parties are willing to waive any objection. See Pope, 345 S.E.2d at 847.

Yours very truly,

A handwritten signature in cursive script, reading "Frank H. Allen, Jr.", is written over a horizontal line.

Frank H. Allen, Jr.,

Chairman, Judicial Advisory  
Committee