

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

ADVISORY OPINION 91-03  
(May 24, 1991)

**Application of Canon Prohibiting the Practice  
Of Law to a Judge's Law Clerk**

**Issues**

1. Does Canon 5 of the Code of Judicial Conduct prohibiting a judge from practicing law prohibit a judge's law clerk from practicing law?

**Answer:** Yes.

2. May law clerks engage in *pro bono* legal activities? If so, with what constraints?

**Answer:** Yes, with constraints.

**Discussion**

**Issue 1**

Under Canon 5F, judges are proscribed from the practice of law. Their staff likewise must avoid entangling the judicial family. The law clerk's position carries with it an imprimatur of "character, credibility and reliability . . . automatically implied as coming from the court itself." *Kennedy v. The Great Atlantic & Pacific Tea Co., Inc.*, 551 F.2d 593, 596, reh. denied 554 F.2d 475 (5th Cir. 1977). Accordingly, the judicial office, albeit through the representations of a law clerk, could be used to promote the private interests of others in violation of Canon 2B of the Code of Judicial Conduct.

A judge should require his staff "to observe the standards of fidelity and diligence that apply to him." Canon 3B(2). Accordingly, both judge and staff must observe high standards of conduct upholding the integrity of the judiciary and must avoid conflicts of interest and even the appearance of impropriety. Adherence to this standard is measured not only by the intent of the actor, but also by the perception of the public.

Various federal courts have addressed the position a law clerk occupies. In *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983), and *Kennedy v. The Great Atlantic & Pacific Tea Co., supra*, the courts stated that the rules of conduct applicable to a judge are equally applicable to his clerk. In *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980), the court noted, quoting from *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir. 1974), that "[t]he protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system."

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In *Hall*, the court observed that:

Judicial ethics . . . exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct. These expectations extend to those who make up the contemporary judicial family, the judge's law clerks and secretaries. 695 F.2d at 176.

In *Miller Industries, Inc. v. Caterpillar Tractor Co.*, 516 F.Supp. 84 (S.D. Ala. 1980), the court found a clerk's duty to avoid the appearance of impropriety equivalent to that of the judge. In *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F. 2d 444, 447 (6th Cir. 1980), cert. denied, 454 U.S. 1099 (1981), the court expressed the opinion that a clerk is forbidden to do all that is prohibited to the judge. Justice Oliver Wendell Holmes, one of the first members of the bench to employ a law clerk, referred to law clerks as "puisne judges."

The positional conflict becomes obvious, for example, if a law clerk were permitted to represent a party in a matter that is appealed. The law clerk's judge would be required to take recusal as the case proceeded. The advocacy status of a court attache ethically bound to uphold its institutional integrity and impartiality is intolerable. The conflict is further underscored when viewed from the perspective of counsel opposing a cause advocated by law clerk counsel. That attorney would occupy the awkward position of contending with a law clerk advocate manifesting a fall-back position of insider influence with the appellate court. To that extent, the court's impartiality may be, or appear to be, compromised.

Advocates must stand on an equal footing in relation to the tribunal's neutrality. The public and every party is entitled to a clearly impartial judiciary. The public would be disserved and the administration of justice sorely undermined were an advocate to be, or appear to be, favorably positioned to unfairly influence the judicial process in either the matter at hand or vindictively in other matters.

Moreover, the law clerk's official time and expertise is a resource of the state to be employed for the benefit of the state. Accordingly, neither the law clerk nor the judge may donate the law clerk's official time and services to outside parties or agencies. The resources of the judicial office must not be permitted to advance the private interests of others. Canon 2B.

### **Issue 2**

The comment to ER 6.1, Voluntary Pro Bono Publico Service, Rule 42 of the Supreme Court, discusses the broad range of activities for improving the law that satisfy the Rule. These include "activities in law-related education, both to the public . . . ; law enforcement personnel . . . ; speaking appearances where the topic is educational and is about the law or the legal system; . . . service on certain boards, sections or committees of a state or county bar if the board, section or committee is engaged in work to improve the law and the legal system." Many of these areas of *pro bono* activities, for example, those directed toward educational activities and work to improve the law and the legal system, appear uncon-

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troversial and generally calculated to benefit the public good. Examples of recent activities in which we believe law clerks could have appropriately participated include drafting an immigration training manual for use by *pro bono* attorneys and assisting needy clients in finding an attorney when Legal Aid has a conflict. Other permitted activities are set forth in Canon 4 of the Code of Judicial Conduct. Any *pro bono* activities permitted by the judge must be circumspectly considered so as to avoid controversy that may reflect adversely upon the court or the judge's impartiality.

*Pro bono publico* service is commended in Rules of the Supreme Court, Rule 42, Arizona Rules of Professional Conduct, Public Service, 17A A.R.S., ER 6.1, Voluntary Pro Bono Publico Service. In view of the constraints upon law clerk's ability to perform carte blanche *pro bono* legal service because of their professionally sensitive position, it would seem that other public interest volunteer services or charitable activities on their part should be recognized as meeting their professional responsibilities for *pro bono publico* service.

### **Applicable Code Sections**

Arizona Code of Judicial Conduct, Canons 2B, 3B(2), 4 and 5F (1985).

### **Other References**

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

*Kennedy v. The Great Atlantic & Pacific Tea Co., Inc.*, 551 F.2d 593, reh. denied 554 F.2d 475 (5th Cir. 1977).

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

*Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir. 1980).

*Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444 (6th Cir. 1980), cert. denied, 454 U.S. 1099 (1981).

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Rules of the Supreme Court, Rule 42, Arizona Rules of Professional Conduct, Public Service, 17A A.R.S., ER 6.1, *Voluntary Pro Bono Publico Service*.