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Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations

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PROTECTING THE APPEARANCE OF JUDICIAL IMPARTIALITY IN THE FACE OF LAW CLERK EMPLOYMENT NEGOTIATIONS

> Without armies to carry out their judgments, courts are dependent on the consent of the governed . . . to make their pronouncements law. When the image of the judiciary is tarnished, the moral authority of the courts is critically undermined. The appearance of partiality . . . is the greatest threat that confronts our judges.[1]

Judicial clerkships[2] are considered plums to be picked by some of the best graduates of the top law schools.[3] Thus, judicial law clerks are usually bright and ambitious.[4] Many clerks view their employment with judges as a chance for an excellent post-graduate education and an opportunity to work with some of the best legal minds available.[5]

Most clerks also look forward to using the experience gained in their clerkships as a means to attaining prestigious legal positions.[6] Employers,[7] aware that judicial law clerks often represent the top graduates of the country's law schools, eagerly seek to hire such clerks.[8] Recruiting schedules dictate that clerks and employers negotiate for the clerks' employment while the clerkships are still underway.[9]

This employment negotiation presents a problem, since the clerk's potential employers often act as counsel before the judge for whom the clerk works. Employment negotiations between the clerk and counsel for one side can damage both the clerk's and the judge's appearance of impartiality due to the clerk's apparent conflict of interest. This damage to

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1. J. MacKenzie, The Appearance of Justice at x (1974).

2. Although this Comment refers specifically to law clerks in the federal courts, many of the state courts face the same requirements as federal courts regarding the appearance of impartiality. *See* Levy, *Judicial Recusals*, 2 Pace L. Rev. 35, 36 (1982). Therefore, much of this Comment applies to state courts as well. However, the nature of the law clerk position and its use by judges may vary significantly as one proceeds from the United States Supreme Court down to the state courts. *See* Baier, *The Law Clerks: Profile of an Institution*, 26 Vand. L. Rev. 1125, 1129 (1973) (invocation address at Law Clerk Institute, Louisiana State University Law Center, Aug. 30, 1972).

3. Baier, *supra* note 2, at 1138; Lauter, *Clerkships: Picking the Elite*, Nat'l L.J., Feb. 9, 1987, at 28, col. 1.

4. Judges want to hire talented law graduates to ensure the best assistance available. Lauter, *supra* note 3, at 28, col. 1.

5. *See* Baier, *supra* note 2, at 1161–62.

6. Lauter, *supra* note 3, at 1, col. 1.

7. As used in this Comment, "employers" will refer to entities such as law firms, government agencies, and others which provide employment to law clerks after their tenure with judges. This Comment will use the phrase "future employer" to refer to an employer from whom the clerk has accepted an offer, and "proffering employer" as one from which the clerk has received an offer.

8. Lauter, *supra* note 3, at 1, col. 1.

9. *Id.*

the appearance of impartiality could result in the judge's recusal or reversal of the case if recusal is later deemed to have been called for. This Comment examines the relationship among judges, law clerks, and the requirements placed on both to maintain the appearance of impartiality. It also addresses current standards applied to this problem and evaluates those standards based on the policies behind the cases and rules governing conflicts of interest. It analyzes what circumstances mandate removal of clerks from cases, as well as what circumstances mandate the removal of the clerks' respective judges. Finally, this Comment proposes a rule of professional responsibility for judges and clerks to follow when the clerks are involved in employment negotiations, and suggests the implementation of training and communication practices to avoid altogether many of the problems created when clerks negotiate for employment.

I. JUDGES, LAW CLERKS, AND THE APPEARANCE OF IMPARTIALITY

To understand the connection between law clerks' employment negotiations and the recusal of their respective judges, one must examine the requirements placed upon judges and law clerks to maintain the appearance of impartiality. Additionally, the relationship between judges and their clerks as well as the connections between the clerks' behavior and the judges' appearance must be examined.

A. Recusal: Judges and the Appearance of Impartiality

The courts rely upon the faith of the public for the enforceability of their decisions.[10] The public's willingness to accede to the courts' decisions is a fundamental assumption of the American system of government.[11] A lack of acceptance of judicial authority leaves the judiciary little power to implement its decisions.[12]

The public will not support judicial decisions unless the public believes the judiciary is impartial.[13] When a few judges are not impartial in the conduct of their duties, they can damage the public's belief in the impar-

10. *See* Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 746–47 (1973); J. MACKENZIE, *supra* note 1, at x.

11. *Potashnick*, 609 F.2d at 1111; Note, *supra* note 10, at 746–47; J. MACKENZIE, *supra* note 1, at x.

12. President Jackson is supposed to have said, after hearing of an unpopular decision by Chief Justice John Marshall, "Well, John Marshall has made his decision, now let him enforce it." Clark, *Internal Operation of the United States Supreme Court*, 43 J. AM. JUD. SOC'Y 45, 47 (1959).

13. Note, *supra* note 10, at 746–47.

tiality of the entire judicial system.[14] To many ordinary litigants, justice is synonymous with winning.[15] A loss is tolerable, however, if the losing party feels that the process, at least, is fair.[16] Thus, one of the principal objectives of those seeking to minimize judicial misconduct is to bolster public confidence in the neutrality of the courts.[17]

Actual lack of impartiality or actual impropriety is rarely a problem in the American court system.[18] The vast majority of judges behave in accordance with high ethical standards.[19] Sometimes, however, conduct which in fact is quite innocent can appear otherwise.[20] Most often only the judge knows what took place and whether any misconduct actually occurred. Onlookers, the general public and attorneys, must rely upon their perception of events. If the public believes that a judge has acted unethically, it is of little avail that there is no truth in the perception.[21] An appearance of a lack of impartiality will do as much or more damage to the public's confidence in the judicial system as any actual lack of impartiality.[22] Therefore, judges are called upon to avoid not only actual impropriety but the appearance of impropriety as well.[23]

In 1948 Congress enacted 28 U.S.C. § 455 ("Section 455")[24] to govern judicial recusal. In this section, Congress utilized a standard of actual

14. D. FRETZ, ETHICS FOR JUDGES 1 (2d ed. 1975); *see also Potashnick,* 609 F.2d at 1111.

15. Comment, *Meeting the Challenge: Rethinking Judicial Disqualification,* 69 CALIF. L. REV. 1445, 1480 (1981).

16. J. MACKENZIE, *supra* note 1, at 239-40.

17. *Potashnick,* 609 F.2d at 1111; *see also* Comment, *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and The Oregon Experience,* 48 OR. L. REV. 311, 313 (1969). Of course, such rules also seek to remove actual impartiality in the courts.

18. J. GOULDEN, THE BENCHWARMERS 292 (1974).

19. Goulden noted that, as of 1974, "[m]ore than 2,000 persons ha[d] served as federal judges; only eight ha[d] been impeached by the House of Representatives, and of those, only four were convicted by the Senate and thrown from office. By contrast, that many members of Congress have been convicted as felons in a single session." *Id.* at 292.

20. *See, e.g.,* Hall v. Small Business Admin., 695 F.2d 175, 178 (5th Cir. 1983). The magistrate whose recusal was sought in this case gave extensive reasons why his clerk had had no actual effect on his decision. Yet the court reviewing his failure to recuse himself found actual effects irrelevant. *Id.* at 179.

21. Of course, the appearance must have some reasonable basis to be credible, and not merely be an attack on a judge to avoid an unfavorable result. H.R. REP. NO. 1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6355 [hereinafter HOUSE REPORT].

22. Actual partiality may never be disclosed, and the public's confidence would not be damaged by something it never found out. The appearance of partiality, however, is known, since the behavior must appear partial *to someone. See* J. MACKENZIE, *supra* note 1, at ix.

23. American Bar Association (A.B.A.) CODE OF JUDICIAL CONDUCT Canon 2 (1972). "Judicial ethics . . . exact more than virtuous behavior; they command impeccable appearance." Hall v. Small Business Admin., 695 F.2d 175, 176 (5th Cir. 1983).

24. Act of June 25, 1948, ch. 21, 62 Stat. 908 (current version at 28 U.S.C. § 455 (1982)) [hereinafter Act of June 25, 1948]. For a history of recusal see Slovenko, *"Je Récuse!": The Disqualification of a Judge,* 19 LA. L. REV. 644 (1959).

impartiality, based on the judge's perception. Section 455 relied upon judges to recuse themselves when certain circumstances rendered it improper, "in the [their] opinion," for them to hear the case.[25] Cases interpreting Section 455 inferred a "duty to sit."[26] Judges presumed that they should normally hear cases unless it would be improper in fact for them to do so. In a situation where there were only doubts about their impartiality, judges would err on the side of hearing the case.[27] The actual partiality standard has been criticized as doing little to bolster public confidence since it is the public's perception of neutrality, not that of the judiciary, which governs the public's faith in the judicial system.[28]

In response to criticisms of the actual impartiality standard, the American Bar Association's Code of Judicial Conduct (C.J.C.)[29] introduced the appearance of impartiality standard in 1972. The C.J.C. provides that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . ."[30] The test requires an objective determination of only the *appearance* of impartiality, not actual impartiality. If a reasonable person, knowing all the circumstances, would be led to question the judge's impartiality, the judge should recuse him or herself.[31]

Finally, in 1974 the appearance of impartiality standard was codified in an amendment of Section 455.[32] Once a judge's impartiality is questioned,

25. Act of June 25, 1948, *supra* note 24. Section 455 read: "Any justice or judge of the United States shall disqualify himself in any case in which he . . . is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial . . . ."

26. HOUSE REPORT, *supra* note 21, at 6355.

27. *See* Levy, *supra* note 2, at 46.

28. Comment, *supra* note 15, at 1481-82; Note, *supra* note 10, at 764; *see also supra* notes 18–22 and accompanying text.

29. A.B.A. CODE OF JUDICIAL CONDUCT (1972); *see also* E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 49 (1973); Note, *supra* note 10, at 745. The A.B.A. Code of Judicial Conduct was approved by the Judicial Conference of the United States in 1973, and was adopted by that body as the Code of Judicial Conduct for United States Judges. 69 F.R.D. 273 (1976) [hereinafter C.J.C.]. The language of the A.B.A. Code of Judicial Conduct was "largely retained." *Id.* The A.B.A. Code of Judicial Conduct was, as are all A.B.A. codes, non-binding, but the C.J.C. was made binding on all federal judges. *Id.*

30. C.J.C., *supra* note 29, Canon 3(C)(1).

31. Recusal is a means whereby judges remove themselves from a case upon their own or the parties' motion. *See* Kilgarlin & Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L. J. 599 (1986) (discussion of differences in the terms "disqualification" and "recusal").

32. The amendment incorporated much of Canon 3 of the C.J.C. (with a few changes). *Compare* 28 U.S.C. § 455 (1982) *with* C.J.C., *supra* note 29, Canon 3(C). Sub-section (a) of the amended Section 455 reads: "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The adoption of the C.J.C.'s language shifted the basis for recusal from an actual partiality standard to an appearance of partiality standard. Smith v. Pepsico, Inc., 434 F. Supp. 524, 525 (S.D. Fla. 1977); *see also* E. THODE, *supra* note 29, at 60–61.

the judge decides only whether there is a reasonable basis for the question. The new, objective standard focuses on the point of view of the reasonable person.[33] The new Section 455 also repudiates the duty to sit, and requires that judges decide doubtful cases on the side of caution and recusal.[34]

B. Law Clerks and the Appearance of Impartiality

The introduction of the position of law clerk[35] in 1882 by Justice Gray[36] was not an historical accident, but a direct result of the burgeoning docket which was then beginning to build at the Supreme Court.[37] By assigning some of the research and other work to law clerks, the Justices were better able to handle the administrative and judicial load presented by the increasing number of cases in the late nineteenth century.[38] The practice of hiring law clerks grew in the twentieth century,[39] and eventually spread to the federal circuit and district courts.[40] The use of law clerks has become so

33. *See* Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980), *cert. denied,* 449 U.S. 820. In a change from the language used in the C.J.C., and in the older version of the statute, recusal was made mandatory whenever the judge's impartiality might reasonably be questioned. The word "should" in the older version of Section 455 was changed to "shall" in the amended version. *Compare* C.J.C., *supra* note 29, Canon 3(C) *and* Act of June 25, 1948, *supra* note 24, *with* 28 U.S.C. § 455 (1982). This change was intended to support further the public's confidence in the impartiality of the judiciary. HOUSE REPORT, *supra* note 21, at 6354–55. *See generally* Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251, 256–57 (5th Cir.), *cert. denied,* 439 U.S. 859 (1978); 8 FED. PROC., L. ED. § 20:39 (1982). Now if there is a question about judges' impartiality, and they find that the basis for the doubt is reasonable, they must recuse themselves. *Fredonia,* 569 F.2d at 256–57.

34. Congress explicitly removed the duty to sit with the adoption of the new version of Section 455. HOUSE REPORT, *supra* note 21, at 6355; *see also* 8 FED. PROC., L. ED. § 20:39 (1982). Now, a judge should seek to "err on the side of caution and [recuse] himself in a questionable case." *Potashnick,* 609 F.2d at 1112. Some cases still seem to rely upon the duty to sit doctrine. *See* Annotation, *Recusal—Law Clerk's Conduct,* 65 A.L.R. FED. 775, 782 n.16 (1983).

Although it is important that judges be sensitive to the appearance of partiality, Congress did not intend for parties to use Section 455 as a means for picking their own judges. HOUSE REPORT, *supra* note 21, at 6355. While there is no duty to sit on cases in which there is a reasonable basis for questioning a judge's impartiality, judges need not and should not recuse themselves when the moving party merely fears an unfavorable result. "Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice." *Id.*

35. The term "law clerk" was first used in a statute in 1919. Act of July 19, 1919, ch. 24, 41 Stat. 209. This Comment uses the term to mean a judicial law clerk, not the clerk of the court, docket clerk, or deputy clerk. For a discussion of the origin and development of the term "law clerk," see Baier, *supra* note 2, at 1130–31 & 1130 n.22.

36. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks,* 40 OR. L. REV. 299, 301 (1961).

37. Baier, *supra* note 2, at 1133; *see also* Newland, *supra* note 36, at 301.

38. Baier, *supra* note 2, at 1132.

39. Id. at 1132–33; Newland, *supra* note 36, at 301–305.

40. *See* 28 U.S.C. § 712 (1982) (providing clerks for circuit court judges); 28 U.S.C. § 752 (1982) (providing clerks for district court judges). Use of law clerks is also widespread among state courts,

commonplace that the position of law clerk has been referred to as "an institution."[41]

Law clerks play a visible and important role in the judicial system. Judges depend upon clerks to perform many routine tasks.[42] Law clerks have no statutorily defined duties; tasks are generally assigned at an individual judge's discretion.[43] Some duties, however, are common. A clerk generally does intensive research, often providing the precedent upon which the judge's opinion will rest.[44] The clerk may write memoranda setting out the issues and applicable law in cases before the court,[45] or the clerk may summarize the arguments of the parties.[46] Many judges use their clerks as sounding boards for ideas and theories about the cases before the court.[47] Some judges even direct their law clerks to write drafts of opinions.[48] At the appellate level, a number of courts permit law clerks to select cases for disposition without oral argument.[49] The clerks write memoranda and propose specific dispositions of those cases. Often the judges adopt such recommendations. Many of the federal circuits have permitted hundreds of such abbreviated dispositions.[50] In addition to serving as professional aides, clerks, because of the close working relationship, may become confidants of their respective judges.[51]

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especially the state appellate and supreme courts. P. BARNETT, LAW CLERKS IN THE UNITED STATES COURTS AND STATE APPELLATE COURTS 1 (1973) (an American Judicature Society research study).

41. Baier, *supra* note 2, at 1125. *See generally Judicial Clerkships: A Symposium on the Institution*, 26 VAND. L. REV. 1123 (1973). There are an estimated 1100 law clerks working in federal courts today. Lauter, *supra* note 3, at 1 col. 1.

42. Some typical law clerk duties include performing legal research, drafting, editing, cite checking, serving as courtroom crier, and running errands. *See* A. DILEO & A. RUBIN, LAW CLERK HANDBOOK § 1.1 (1977) [hereinafter LAW CLERK HANDBOOK].

43. "The tasks of . . . clerks are . . . very much the product of the whims of their Justices." J. FRANK, MARBLE PALACE 116 (1958) (referring to United States Supreme Court law clerks); *see also* P. BARNETT, *supra* note 40, at 3; Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1234 (1981).

44. Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983); *see also* Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251, 255–56 (5th Cir. 1978), *cert. denied*, 439 U.S. 859; Edwards, *The Avoidance of Appellate Delay*, Panel Discussion before the Section on Judicial Administration, Appellate Judges Conference, Proceedings of the A.B.A. 93rd Annual Meeting, Aug. 8, 1970, 52 F.R.D. 61, 68 (1971) [hereinafter Panel Discussion].

45. Dorsen, *Law Clerks in Appellate Courts in the United States*, 26 MOD. L. REV. 265, 268 (1963); Baier, *supra* note 2, at 1149.

46. Dorsen, *supra* note 45, at 268; J. FRANK, *supra* note 43, at 116.

47. *Hall*, 695 F.2d at 179; *see also Fredonia*, 569 F.2d at 255–56; Baier, *supra* note 2, at 1145.

48. Smith, *A Primer of Opinion Writing for Law Clerks*, 26 VAND. L. REV. 1203 (1973). Not all judges have clerks draft opinions, but mounting case loads may prompt an increase in the practice. *Id.*; *see also* Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179, 1191 (1973).

49. Baier, *supra* note 2, at 1160.

50. Wright, *supra* note 48, at 1185–86 n.31.

51. Comment, *supra* note 43, at 1232. When the position of law clerk was established, and for many years thereafter, judges and their clerks were often quite close personally. Some clerks paid their

Due to the close professional and personal relationship between law clerks and judges, a few observers fear that clerks are able to exert too much influence on decisions.[52] Some have alleged that clerks have sought to further their own political agenda, for example, by influencing the trend of decisions.[53] Even if clerks do nothing but conduct research and prepare memoranda, they might influence judges by a subtle manipulation of the facts.[54] The most common charge, though, is that law clerks who draft opinions exert too much influence on the course of those decisions.[55]

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judges' bills, or lived in their judges' homes. Newland, *supra* note 36, at 311; *see also* McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 717–18 (1946).

Some judges have not been on close terms—or necessarily even cordial terms—with their law clerks. Justice McReynolds, it is said, had difficulty locating and retaining clerks, perhaps because "in his earlier years he insisted that his clerks remain single and refrain from the use of tobacco." Newland, *supra* note 36, at 306; *see also* B. WOODWARD & S. ARMSTRONG, THE BRETHREN 240–43 (1979) (discussing Justice Douglas' sometimes stormy relationships with his clerks).

52. "Th[e] idea of the law clerk's [inordinate] influence gave rise to a lawyer's waggish statement that the Senate no longer need bother about confirmation of [Supreme Court] justices but ought to confirm the appointment of law clerks." Clark, *supra* note 12, at 48.

53. Allegations were raised in the late 1950's and early 1960's that "liberal" law graduates from the Ivy League law schools were "quietly and insidiously responsible for the [Supreme Court's] 'leftward' trend." J. WILKINSON, SERVING JUSTICE 56 (1974). Several articles appeared in news magazines debating the extent of law clerk influence in the United States Supreme Court. *See, e.g.*, Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74; Rogers, *Do Law Clerks Wield Power in Supreme Court Cases?*, U.S. NEWS & WORLD REP., Feb. 21, 1958, at 114; Rehnquist, *Another View: Clerks Might "Influence" Some Actions*, U.S. NEWS & WORLD REP., Feb. 21, 1958, at 116; Bickel, *The Court: An Indictment Analyzed*, N.Y. Times, Apr. 27, 1958, § 6 (Magazine), at 16; N.Y. Times, May 18, 1958, § 6 (Magazine), at 4 (letter to the editor from Judge Samuel H. Hofstadter).

54. The judge's selection, stress and arrangement of "the facts" can make the most peculiar case look like routine . . . . Manipulation—nay, perception—of "the facts" is all-important; judges, like witnesses *observe* differently according to temperament and circumstances. . . . "[T]he facts" take shape in court in the light of the result to be achieved.

Llewellyn, *Legal Illusion, Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82, 83 (1931) (Symposium on J. FRANK, LAW AND THE MODERN MIND (1930)) (emphasis in original). In this manipulation of facts, law clerks could also exert some change in the perceptions of those who read their memoranda.

55. There are judges who do not permit any of their clerk's writing to appear in an opinion. *See, e.g.*, P. BARNETT, supra note 40, at 3; Medina, *Some Reflections on the Judicial Function at the Appellate Level*, 1961 WASH. U.L.Q. 148, 153; Edwards, *supra* note 44, at 69; Baier, *supra* note 2, at 1153. Some judges incorporate some of their clerk's words and phrases when writing opinions. *Id.* at 1146. Some allow their clerks only to write the first draft of an opinion. *Id.* at 1146–47; Newland, *supra* note 36, at 312. Others seem to allow more substantial contributions by their law clerks. "The most notorious rumors concern Chief Justice Vinson, who is said to have done all his 'writing' with his hands in his pockets, outlining to his clerks generally what he wanted, and then criticizing this bit or that in a clerk's draft and making suggestions for revision." J. FRANK, *supra* note 43, at 117–18.

Regardless of whether clerks draft opinions for judges or not, some say that clerks simply could not influence the decisions. No matter how much influence a clerk might have, they say, not even a judge may disregard precedent. Newland, *supra* note 36, at 314. Also, the process itself, especially at the appellate level, guarantees that other judges will look over the opinion before it is handed down. Wright, *supra* note 48, at 1189. Any attempt by clerks improperly to influence their judge would most likely be caught by that judge and dismissed. *Cf.* J. WILKINSON, *supra* note 53, at 58–59. If it is not, the judge's

Even if clerks do not actually affect the ultimate resolutions of cases, commentators note that clerks' opinions may have an effect in the margins of a decision.[56] In areas of the law with which judges are unfamiliar, the way their clerks state the facts or present the issues may lead the judges to a conclusion on those particular issues.[57] Some judges have admitted that their clerks affect their decisions, if only in the way that the decisions are reached.[58]

Regardless of actual influence, the perception of law clerks' influence on judges is present, even among lawyers.[59] Perhaps because law clerks are perceived as influencing decisions, cases and commentators suggest that they should adhere to the same appearance of impartiality standard as their judges.[60] The C.J.C. requires that judges hold their staff to the same standards of fidelity and diligence that apply to the judges themselves.[61] Decisions in three federal circuits endorse this position.[62]

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fellow panelists would notice any aberrations. *Id.* Some critics have characterized reports of law clerk influence to the clerks' own exaggeration of their importance. Judge Medina was quoted as saying that law clerks "say, 'See that opinion of mine that came down yesterday.' Why, to listen to that going around the courts you wouldn't think the judges had anything to do with an opinion except maybe to take a quick glance and say, 'Okay, boy. Good work. Good work.'" M. SCHICK, LEARNED HAND'S COURT 107 (1970). Judge Medina had stated nine years earlier, however, that clerks are hired to help influence the process. For this reason, he urged that, "[a]t all events, let us rule out the humbug and the honey and look the facts full in the face." Medina, *supra,* at 155–56.

56. Medina, *supra* note 55, at 154–55; Newland, *supra* note 36, at 314–15; *see also supra* note 53. Dean Acheson noted that "his" justice "wrote the opinion; I wrote the [Everest of] footnotes." Acheson, *Recollections of Service,* 18 ALA. LAW. 355, 364 (1957). But one could recall the persistent influence of some footnotes, for example, the well-known "Footnote 4" from the *Carolene Products* case. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). For reference to the influence of "Footnote 4," see G. GUNTHER, CONSTITUTIONAL LAW 473–74 (11th ed. 1985).

57. Dobson v. Camden, 502 F. Supp. 679, 680 (S.D. Tex. 1980).

58. Medina, *supra* note 55, at 155–56. This is understandable, since judges hire clerks to affect the process, if no more than by reducing the burden of the docket. *Id; see supra* notes 37–41 and accompanying text.

59. Justice Tom C. Clark wrote that "during my 10 years on the [United States Supreme] Court I have been asked by prominent lawyers, who should know better, to please speak to my law clerks about their petitions." Clark, *supra* note 12, at 48.

60. *See, e.g.,* Miller Indus., Inc. v. Caterpillar Tractor Co., 516 F. Supp. 84, 88–89 (S.D. Ala. 1980); LAW CLERK HANDBOOK, *supra* note 42, § 2.110; Aronson & Martin, The Trial Court Clerk and Professional Responsibility: A Suggestion for Training 1, 2 (1985) (unpublished manuscript) (on file with *Washington Law Review*) [hereinafter Aronson & Martin].

61. C.J.C., *supra* note 29, Canon 3(B)(2).

62. The Fifth Circuit held a law clerk to the same standards as his judge in determining whether the law clerk's action was improper. Kennedy v. Great Atl. & Pac. Tea Co., 551 F.2d 593, 596 (5th Cir. 1977) (judge should have recused himself where his clerk visited scene of the incident at issue and reported back to judge); *see also* Price Bros. Co. v. Philadelphia Gear Corp., 629 F.2d 444, 447 (6th Cir. 1980) ("a judge may not direct his law clerk to do that which is prohibited to the judge."); Miller Indus., Inc. v. Caterpillar Tractor Co., 516 F. Supp. 84 (S.D. Ala. 1980) (concurring decision in federal district court now in Eleventh Ciruit). No circuits seem to contradict this idea.

Much of the language of the Code of Judicial Conduct was incorporated in the Judicial Conference of the United States' Code of Conduct for Law Clerks.[63] Canon 2 of the Code of Conduct for Law Clerks remonstrates with clerks to avoid impropriety and the appearance of impropriety;[64] Canon 2 of the Code of Judicial Conduct requires the same of judges.[65]

C. *The Relationship Between the Law Clerk's Employment Negotiations and the Judge's Appearance of Impartiality*

Law clerks often begin interviewing for new positions during their clerkships.[66] Some employers considering clerks for employment may have cases pending before the judges of the respective clerks. If the clerks are negotiating for employment with these employers, the impartiality of the clerks may be doubted. Observers, especially the opposing parties, may suspect that the clerks are biased towards their proffering employers.[67] Further, these suspicions may attach to their judges.[68]

Three recent cases focus on the imputation of doubts about impartiality from law clerks to judges. *Miller Industries, Inc. v. Caterpillar Tractor Co.*,[69] presented a typical fact pattern. After an adverse judgment in the bench trial, the defendant moved on several grounds, including the employment negotiations of the judge's law clerk, that the judge reverse his decision and recuse himself. The clerk had accepted a position with plaintiff's firm during the course of trial yet continued to work on that case until he left the judge's employ.[70] The district court judge assigned to decide the recusal issue found the law clerk's employment negotiations to

63. *Compare,* CODE OF CONDUCT FOR LAW CLERKS Canons 2 & 3 (1981), *reprinted in* Guide to Judiciary Policies and Procedures (Vol. 1-C), Chapter X, Personnel Policies and Procedures, Subchapter 1735.7, Code of Conduct for Law Clerks, Section A, Canons, *excerpted in* Law Clerks Orientation Program, Sept. 10–11, 1984 (9th Cir.) (unpublished) (on file with *Washington Law Review*) [hereinafter CODE OF CONDUCT FOR LAW CLERKS] *with* C.J.C., *supra* note 29, Canons 2 & 3.

64. CODE OF CONDUCT FOR LAW CLERKS, *supra* note 63, Canon 2 ("A Law Clerk Should Avoid Impropriety and the Appearance of Impropriety in All His Activities").

65. C.J.C., *supra* note 29, Canon 2. Unfortunately, these codes serve only as general guidelines with limited practical application.

66. Waiting to interview until their clerkships are over may mean at best a three-to six-month period of unemployment, at worst a paucity of jobs at the larger firms (which may have chosen all their associates by that time).

67. *See, e.g.*, Hunt v. American Bank & Trust Co., 783 F.2d 1011, 1015 (11th Cir. 1986); Hall v. Small Business Admin., 695 F.2d 175, 178 (5th Cir. 1983).

68. *Hall*, 695 F.2d at 179.

69. 516 F. Supp. 84 (S.D. Ala. 1980).

70. *Id.* at 88. The court reviewing this problem relied heavily on Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251 (5th Cir. 1978), *cert. denied*, 439 U.S. 859. Even though *Fredonia* was factually different the *Miller Industries* court found the principles established in *Fredonia* applicable. *Miller Indus.*, 516 F. Supp. at 88.

be "the most troublesome aspect of the situation."[71] The court concluded that one party might have improper advantage due to the connection of the judge's law clerk with a firm involved in the case.[72] The *Miller Industries* court concluded that such a connection presented an appearance of improper advantage,[73] and held that the judge should have recused himself.[74]

In *Hall v. Small Business Administration*[75] the Small Business Administration (SBA) had lost a class action sex discrimination suit filed against it. Later, the SBA discovered that the magistrate's law clerk had accepted a job with the plaintiff's firm during the case's pendancy before the magistrate.[76] The clerk had been actively involved in the case, taking notes in court and preparing bench memoranda.[77] In fact, the last thing that the clerk had worked on before she left for private practice was that case.[78] The SBA moved for reversal of the decision and recusal of the magistrate. Despite the SBA's allegation that the law clerk's conduct damaged the magistrate's appearance of impartiality, the magistrate declined to recuse himself or to vacate the judgment.[79] According to the magistrate, the clerk had performed little more than secretarial duties on the case.[80] He implied that, since the law clerk had had no actual effect on his decision, he was not required to recuse himself.[81]

On appeal in 1983 the Fifth Circuit disagreed. Regardless of the clerk's actual effect upon the magistrate's decision, the court concluded, the clerk's continued participation in a case in which her future employers were counsel gave rise to an impermissible appearance of partiality on the part of the magistrate.[82] The court declined to look into the actual work the clerk

71. *Miller Indus.*, 516 F. Supp. at 88.

72. *Id.*

73. "When the law clerk has accepted employment with a law firm, there is the possibility that continuing to work on a case before the trial judge in which the law firm is counsel might present an unfair advantage to the party represented by that law firm." *Id.* at 88.

74. *Id.* at 90.

75. 695 F.2d 175 (5th Cir. 1983).

76. *Id.* at 178.

77. *Id.*

78. *Id.* The clerk was also a former employee of the SBA and a one-time member of the class of plaintiffs involved in the suit; she had removed herself from the class at the magistrate's request. *Id.* at 177.

79. *Id.* at 178.

80. The magistrate stated that the clerk was "'little more than an amanuensis in th[e] case.' He stated, 'I don't think that any female law clerk is going to give me a lot of input on how to decide a case.'" *Id.*

81. *Id.*

82. *Id.* at 179. The court ordered the magistrate to recuse himself, remanded the case and vacated the judgment, holding that the clerk's continued participation after she had accepted an offer from plaintiff's firm gave rise to an impermissible appearance of partiality on the part of the magistrate, and that he should therefore have recused himself. *Id.* at 179-80.

performed after she had accepted the law firm's employment offer.[83] The court interpreted the amended Section 455 to require a judge to recuse himself "if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality."[84] The court concluded that "knowing" included only objectively ascertainable facts. To look beyond, into the judge's chambers, would incorrectly interpret Section 455 as a test of actual lack of bias, not a test of an appearance of impartiality.[85] Thus, actual bias or lack thereof was irrelevant.[86] In this case, the objectively ascertainable facts, including the close relationship between clerks and judges,[87] created an impermissible appearance of partiality. According to the court, judges should seek to err on the side of recusal if they have any questions about the propriety of sitting on a case.[88]

Three years after *Hall* the Eleventh Circuit, in *Hunt v. American Bank & Trust Co.*,[89] looked for actual bias on the part of the judge.[90] In the original suit in district court, the receiver of a bankrupt life insurance company had brought various charges against the defendant.[91] One of the parties brought a recusal motion questioning the judge's appearance of impartiality.[92] Two of the district court judge's law clerks had accepted jobs with counsel for the defendants while the case was pending before the court.[93] One of the clerks worked on the case before accepting the job offer, but the judge depicted the clerk's work on the case as "'ministerial only,'"[94] and removed the clerk from the case once the clerk had accepted defendants' job offer. The other clerk apparently had no contact with the case in question.[95] The district court judge dismissed the motion to recuse.[96]

On appeal, the Eleventh Circuit did not link questions about the law clerk's appearance of impartiality to the judge. The court stated, "If a clerk has a possible conflict of interest, it is the clerk, not the judge, who must be

83. *Id.* at 179.

84. *Id.* at 179 (citing Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251 (5th Cir. 1978), *cert. denied*, 439 U.S. 859); *see supra* note 32.

85. *Hall*, 695 F.2d at 179.

86. *Id.*

87. *Id.*

88. *Id.* at 178–79 (citing Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1112 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980)).

89. 783 F.2d 1011 (11th Cir. 1986).

90. "Absent actual bias, disqualification is necessary *only if* a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality." *Id.* at 1015 (emphasis added).

91. *Id.* at 1012.

92. *Id.* at 1015–16

93. *Id.* at 1015.

94. *Id.* at 1016.

95. *Id.*

96. *Id.*

disqualified."[97] The court averred that it agreed with the holdings in *Miller Industries* and *Hall:* if clerks are removed from cases as soon as they accept employment offers, no recusal of judges is necessary.[98] Despite this purported agreement, the court focused on the judge's characterization of the actual events, not on the appearances.[99] Regardless of a possible attachment of doubts about the clerk's appearance of impartiality to his judge, the court would apply disqualification as the exception, not the rule, if no actual bias existed.[100]

Both the *Miller Industries* and *Hall* courts imply that screening of the law clerks in those cases could have prevented the judge's recusal.[101] Screening means the isolation of the law clerk from all contact with the particular case. The clerk does not read or prepare any of the memoranda or other documents associated with the case, nor is the clerk allowed to participate in any discussions regarding the case.

Screening has been used in different conflict of interest situations to prevent the imputation of conflicts of interest. For instance, government lawyers often leave their agencies to join private employers. Their new private employers may seek to represent a client against the former government lawyer's previous agency. Rationally the same disqualification and imputed disqualification rules which apply to other former client conflicts should apply to such situations involving former government lawyers.[102]

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97. *Id.*

98. The court found that a reasonable person could wonder about a law clerk's impartiality in cases in which his future employer is serving as counsel. Nevertheless the court did not impute these doubts to the judge. "Clerks should not work on such cases, just as a judge should not hear cases in which his business associates are involved." *Id.* at 1015.

99. The court's focus on actual partiality—rather than on the appearance of partiality to the "person in the street"—can be seen in its reliance on the *judge's* characterization of the nature of the law clerk's involvement in the case. *Id.* at 1016.

100. *Id.* at 1016. The facts in Dobson v. Camden, 502 F. Supp. 679 (S.D. Tex. 1980), did not involve law clerks' employment negotiations, but the court's decision is illustrative of extreme sensitivity to appearances of judicial partiality created by law clerks' conflicts of interest. The court stressed that it wished to avoid "even the suggestion of an appearance of partiality," even if it meant "'bend[ing] over backwards . . . .'" *Id.* at 681.

101. Miller Indus., Inc. v. Caterpillar Tractor Co., 516 F. Supp. 84, 88 (S.D. Ala. 1980) ("*continuing to work on a case* before the trial judge in which the law firm is counsel might present an unfair advantage to the party represented by that firm") (emphasis added); Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983) (the law clerk's "*continuing participation* with the magistrate in a case in which her future employers were counsel gave rise to an appearance of partiality" on the part of the magistrate) (emphasis added).

Hunt does not seem to draw such a bright line of requiring that the clerk be removed from all work. The *Hunt* court did not find the clerk's "ministerial" work on the case after receiving his offer important. 783 F.2d at 1016.

For a broader discussion of screening (of attorneys), see Comment, *Federal Courts and Attorney Disqualification: A Realistic Approach to Conflicts of Interest,* 62 WASH. L. REV. 863 (1987).

102. In such cases, the same issues arise if the government lawyer is now in private practice and seeks to represent a client against her previous employer (for example, an agency) as would arise for

The government lawyers and their firms would be prohibited from representing new clients against the previous agency employer. The American Bar Association's Model Rules of Professional Conduct (M.R.P.C.), however, provide an entirely separate rule for government lawyers, and do not call for an entire firm to be disqualified as long as the former government lawyers are screened.[103]

The M.R.P.C. seek to avoid deterring good lawyers from working in government service by foregoing imputation of disqualification. Policy reasons dictate that society needs good lawyers in government.[104] If the imputed disqualification rule were applied to government lawyers, no firm in their field would want to hire them after they left the government.[105] Facing such a bleak professional future after government service, many good lawyers who might otherwise choose differently, would choose not to work for the government. Therefore, even though former government lawyers do have a conflict of interest which could be imputed to their entire firm, for policy reasons the rules accommodate the appearance by providing screening.[106]

II. PROTECTING JUDGES AND LAW CLERKS FROM THE APPEARANCE OF PARTIALITY

Professional rules of conduct, both for judges and for their clerks, could be established to provide that clerks must be screened whenever they have received offers from employers with cases before the clerks' respective judges. Policy bases for allowing judges to continue to sit even when their clerks have received offers could be clearly set forth.

Training and better communication between clerks and judges could obviate the need for further court decisions on imputing doubts about appearances of impartiality from law clerks to judges. This Comment suggests that all judges should provide as much training as possible regarding potential ethical problems of their clerk's employment negotiations. Such training could include written procedures, as well as directives to clerks to keep their judges informed of all employment negotiations contemplated or underway.

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private attorneys and their firms in representing clients with conflicting interests. *See infra* notes 152–56 and accompanying text.

103. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1983) [hereinafter M.R.P.C.].

104. *Id.*, Rule 1.11 comment.

105. Government lawyers will have the most expertise and the best employment opportunities in cases involving their former agencies. If strict conflict of interest principles regarding imputed disqualification were applied, the former government lawyer would be a sort of "Typhoid Mary," disqualifying any firm at which the lawyer worked from acting as counsel in many cases involving the lawyer's former agency.

106. *Id.*

A. *The Lack of Clarity and Policy Bases in Current Standards*

The principal cases and rules dealing with law clerks' employment negotiations and judges' appearance of impartiality do not indicate with sufficient specificity when clerks should be screened, nor do they provide adequate rules for or policies supporting screening. The cases do not agree whether it is possible for doubts about a clerk's impartiality to attach to the clerk's judge. *Miller Industries* and *Hall* both linked doubts about the clerks' appearance of impartiality to their respective judges; *Hunt* found that no doubts about the judge's impartiality had been created by the clerk's apparent conflict of interest.

The cases' contradictory reasoning makes determination of appropriate behavior based on their holdings difficult to define. All three cases purportedly evaluated their facts on the appearance of impartiality standard. *Miller Industries* and *Hall* agree that screening is necessary when law clerks have accepted employment offers giving rise to reasonable doubts about the clerks' appearance of impartiality.[107] *Hunt,* however, seems to approach from the other side, looking first to whether there is a problem with actual impartiality on the judge's part,[108] and leaning away from requiring recusal in the presence of actual impartiality regardless of appearances.[109] The *Hunt* court's focus on actual impartiality ignores the importance of the *appearance of impartiality,* which is vital to the effectiveness of the judiciary.[110]

Not only do the cases focus on different standards, but the reasoning in *Miller Industries, Hall,* and *Hunt* is simplistic and conclusory, weakening the legitimacy of using screening to prevent doubts about the clerks' impartiality from attaching to their respective judges.[111] The cases indicate that doubts about clerks' impartiality are only reasonable when clerks have accepted offers, not when they have received offers.[112] Thus, the cases do not distinguish between the offers made and offers accepted in determining when screening is necessary. Analysis of offers made and offers accepted indicates that screening should be employed in both situations. The cases

107. Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983); Miller Indus., Inc. v. Caterpillar Tractor Co., 516 F. Supp. 84, 89 (S.D. Ala. 1980).

108. *See supra* note 99 and accompanying text.

109. Hunt v. American Bank & Trust Co., 783 F.2d 1011, 1015–16 (11th Cir. 1986).

110. *See supra* notes 13–17 and accompanying text.

111. *Miller Industries* and *Hall* support screening, holding that unless clerks are screened, the clerks' conflict of interest will be imputed to their respective judges and the judges must recuse themselves. *Hall,* 695 F.2d at 179; *Miller Indus.,* 516 F. Supp. at 89. *Hunt* seems to indicate that screening *prevents* doubts about the clerk's impartiality from attaching to the judge. 783 F.2d at 1016. Such a proposition is contrary to traditional conflict of interest principles. *See infra* notes 152–58 and accompanying text.

112. *Hunt,* 783 F.2d at 1016; *Hall,* 695 F.2d at 179; *Miller Indus.,* 516 F. Supp. at 89.

also do not provide policy bases justifying screening as preventing the imputation to judges of doubts about their law clerks' appearance of impartiality. Screening does not remove the logical bases for imputing conflicts of interest. Instead, screening is used to forgo imputation of conflicts of interest for policy reasons.[113] For example, in order to avoid deterring good lawyers from going into government service, former government lawyers' conflicts of interest are not imputed to their private employers if the former government lawyers are screened.[114]

A lack of policy bases for standards may also result in standards that are too lax or too strict. Standards which are too lax may allow law clerks' conflicts of interest to create doubts about their judges' appearance of impartiality, and damage may be done to public confidence in the neutrality of the judiciary. If standards are too strict, however, clerks may be disadvantaged in seeking employment to follow their clerkships, which are almost always temporary and of short duration. Judges might have difficulty persuading talented law graduates to become clerks,[115] and thus may be deprived of their vital assistance. Therefore, standards should be established which go as far as possible towards maintaining the appearance of judicial impartiality in order to prevent a loss of public credibility; but the standards must be limited so that they do not deter law graduates from becoming clerks.

Inconsistency and lack of logical clarity regarding imputing law clerk conflict of interest in employment negotiations to judges is not confined to case law. Those professional rules which apply do not address the problem directly, or provide only general, laudatory guidelines. The C.J.C., the M.R.P.C., and the American Bar Association's Model Code of Professional Responsibility (M.C.P.R.) do not provide for screening of law clerks in any situations, nor do they address the imputation of law clerk conflicts of interest to judges.[116] Different courts have different personnel procedures and rules.[117] Some procedures and rules are specific and detailed, prohibiting or recommending specific activities.[118] Others fall short of or

113. *See supra* notes 104–06 and accompanying text.

114. *See supra* notes 102–03 and accompanying text.

115. *See supra* note 66 and accompanying text.

116. *See, e.g.*, C.J.C., *supra* note 29; M.R.P.C., *supra* note 103; MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) [hereinafter M.C.P.R.].

117. LAW CLERK HANDBOOK, *supra* note 42, § 2.250.

118. *See, e.g.*, Wright, Office Manual for Law Clerks (Revised Sept. 1985) (unpublished office procedures manual of Ninth Circuit judge) (on file with *Washington Law Review*) [hereinafter Wright, Office Manual]. This manual states:

> A law clerk should be insulated from participation or knowledge of cases in which a prospective employer is a party or counsel. A prospective employer includes an entity with which active and serious employment discussions are being conducted, or an entity which has extended an offer of employment to a clerk, unless the offer has been rejected. Keep the Judge apprised of future

do not improve upon the C.J.C., M.R.P.C., or M.C.P.R., but are largely too general or laudatory.[119] Current professional rules do not provide the guidance or demand the adherence to screening which is needed to protect public confidence in judicial neutrality. If current professional rules allow only a few judges to continue to sit on cases in which, due to their clerks' employment negotiations, they do not appear impartial, belief in the judicial system as a whole can be diminished.[120]

B. Defining When a Reasonable Doubt Exists About the Law Clerk's Possible Impartiality

Law clerks should be screened from cases in which their proffering employers have an interest. Such screening would protect judges from the imputation of doubts about their clerks' appearance of impartiality when conflict of interest principles are applied to the stages of the employment negotiation: the interview and the offer (made and accepted) stages.

1. The Interview Stage

Law clerks should not be screened at the interview stage. Interviewing does not present reasonable doubts about their appearance of impartiality. Arguably, questions about their appearance of impartiality based on law clerks' interviewing might be created by the perception that the clerks would be partial toward the interviewing employers,[121] and attempt to exert some influence in the court to impress those employers.[122] For instance, if employer *A* has interviewed a clerk and also has a case before the clerk's judge, *A's* opponent in the case may suspect that the clerk will attempt to influence the judge in *A's* favor. The opponent could note that judges' chambers are small, intimate offices, where working relationships are often

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employment plans and prospects so that he may help you identify potential conflicts of interest. *Id.* at 6. For a discussion of the "serious employment negotiations" standard, see *infra* text accompanying notes 136–37.

119. *See, e.g.*, CODE OF CONDUCT FOR LAW CLERKS, *supra* note 63, Canon 5(c)(1), which states:

> During his clerkship, a law clerk may seek and obtain employment to commence after the completion of his clerkship; if any [employer] appears in any matter pending before the appointing judge, the law clerk should promptly bring this fact to the attention of the appointing judge, and the extent of the law clerk's performance of duties in connection with such matter should be determined by the appointing judge.

120. *See supra* notes 21–22 and accompanying text.

121. *Cf.* Miller Indus., Inc. v. Caterpillar Tractor Co., 516 F. Supp. 84, 88 (S.D. Ala. 1980).

122. Of course, the vast majority of law clerks would never presume to attempt such improper action as to try to influence a judge's decision for personal gain. No such actual impropriety was alleged in any of the cases cited. The principal issue addressed by this Comment is the *appearance* of impropriety or partiality.

quite close.[123] In such offices clerks can become judges' confidantes.[124] Judges utilize law clerks for such functions as performing research to support the judge's opinions, writing bench memoranda, and providing feedback for the judge's ideas.[125] The opponent might suspect an attempt by the clerk to slant a bench memorandum in *A's* favor, for example, or give confidential information to the interviewing employer, using the clerk's close association with the judge to implement the bias the clerk apparently had.[126]

Law clerks, however, would face practical difficulties and insufficient incentives for attempting to influence their judges for the benefit of interviewing employers. Clerks may interview with many different employers, perhaps even more than ten. Attempting to impress them all through an exertion of influence would be difficult. For instance, in the example above, the clerk would have to attempt to slant perhaps more than ten bench memoranda, and influence the judge on each case to favor the interviewing employer involved. Moreover, for the clerk's influence to impress interviewing employers, the clerk would have to inform the employers of his or her efforts. The incentive for the clerk to attempt all this, however, is small. The object of interviews is merely to obtain offers. The object of exerting influence would be to improve the clerk's chance of receiving offers. But the amount of influence the clerk could exert in so many cases would likely be small and would fail to achieve the goal of impressing the interviewing employer, if the effort were noticed at all. To obtain this tenuous benefit, the clerk would risk the relationship with the judge, and possibly risk dismissal from the clerkship. Thus, there is a very limited reasonable basis to question law clerks' appearance of impartiality based on their interviewing.[127]

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123. *See supra* note 51 and accompanying text.

124. *Id.*

125. *See supra* notes 42–51 and accompanying text.

126. The ability to remain neutral in the face of conflicting interests has historically been subject to doubt. *See, e.g., Luke* 16:13 (King James Version) ("No servant can serve two masters: . . . Ye cannot serve God and mammon."); THE FEDERALIST No. 79 (A. Hamilton), *reprinted in* SELECTED READINGS, JUDICIAL DISCIPLINE AND REMOVAL 1 (G. Winters ed. 1973) ("In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*") (emphasis in original). *But see supra* note 122.

127. In Hotel Corp. of South v. Rampart 920, Inc., 46 B.R. 758 (E.D. La. 1985), *aff'd*, 781 F.2d 901 (5th Cir. 1986), the court implied that mere interviews do not create an appearance of partiality. *Id.* at 761. The judge noted that neither of her two clerks had received any offer and, *for that reason*, she denied the motion to recuse herself. *Id. But see* Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985) (accidental contact by judge's "headhunters" with firms with cases before judge mandated judge's recusal). Judges and law clerks are held to the same ethical standards, *see supra* notes 60–65 and accompanying text, so the prohibition against judges working on cases in which they have even discussed employment with firms involved in the case could be applied to clerks as well.

Even if interviewing actually did create reasonable doubts about law clerks' impartiality, balancing the need for law clerks in the judicial system against the minimal conflict of interest presented by interviewing indicates that interviewing could be allowed. Screening clerks at the interview stage could effectively deprive a judge of clerks' important assistance in many cases,[128] since among all of a judge's clerks, many of the employers who will come before the judge will most likely be interviewing.

Some judges might ban interviewing altogether to avoid losing their clerks' assistance.[129] Those clerks would be forced to wait until their clerkship was over to begin seeking a job.[130] Students would be deterred from becoming clerks, because it would disadvantage them in seeking the best jobs. Given the importance of clerks to the judicial system,[131] public policy should encourage talented law students to become clerks, or at least not deter them. Balancing the importance of clerks to the judicial system against the marginal conflict of interest which would be prevented by screening at the interview stage indicates that screening should be imposed only after the interview stage.

2. *The Offer (Made and Accepted) Stage*

a. *Offers Made—Proffering Employers*

Clerks should be screened as soon as they have received offers; doubts about the clerks' impartiality increase and the balance of policy considerations shifts when the offer stage is entered. The new professional rules could require screening of clerks from any contact with cases involving proffering employers.[132]

When employers with cases before the clerk's judge have made the clerk job offers, the doubts created about the clerk's impartiality are greater than when the clerk had simply been interviewed. Attempting to influence the judge to impress employers is less difficult than during the interview stage, while the incentives are increased. Just as in the interview stage, employer *A's* opponent in a case before the clerk's judge would suspect that the clerk would try to influence the judge in favor of proffering employer *A*. Everything about the clerk-judge relationship that had led *A's* opponent to doubt

128. *See supra* notes 42–51 and accompanying text.

129. Perhaps in recognition of this problem, the M.R.P.C. allow interviewing by law clerks, but only after the the clerk has notified the judge of the negotiations. M.R.P.C., *supra* note 103, Rule 1.12(b). Of course, just communicating with the judge could not remove any appearance of partiality, and thus could not replace the need for screening.

130. *See supra* note 66.

131. *See supra* notes 42–51 and accompanying text.

132. For definitions of the terms "proffering employer" and "future employer" see *supra* note 7.

the clerk's impartiality would be the same as in the interview stage.[133] Unlike the interview stage, though, the pool of proffering employers is likely to be smaller.[134] The opponent would see far fewer practical limitations to the clerk's attempt to assist proffering employer *A* than could be seen with interviewing employers. In the offers made stage the clerk would only have to track a few bench memoranda and cases to be influenced, for example. Furthermore, the opponent's fears about the clerk's ability to manage the situation in favor of *A* would be more reasonable, since the opponent is likely to know that an offer was made and that the clerk's affinity with employer *A* is stronger than at the interview stage. Contrary to the interviewing employer, the proffering employer has indicated an acceptance of the clerk by extending an offer. The clerk, if truly interested in the employer, will want to nurture that acceptance. Whether the clerk actually intends or even desires to help the proffering employer in a case before the clerk's judge is no longer relevant at this stage. The employer's opponent will perceive that a different relationship—perhaps a closer relationship—exists between the employer and the clerk than between opposing counsel and the clerk. The uncertainty of neutrality is precisely the doubt that screening at the offer stage could preempt.

Employer *A's* opponent could also note that the object of any attempted influence during the offers made stage would be far more important to the clerk than merely obtaining offers. Those employers the clerk would be seeking to impress would be more important to the clerk, since one of them would certainly become the clerk's employer. In addition, the clerk would be seeking to improve career factors, such as pay, prestige, and type of work. Such goals would be much more important to the clerk than obtaining offers.

The balance of policy considerations[135] also shifts when the offers made stage is entered. The factors which would inhibit law graduates from becoming clerks are not as influential, since clerks would be allowed at least to interview. Law clerks who were permitted to interview but screened from cases involving proffering employers would not face the difficulties in competing for the best jobs which screening at the interview stage and the resultant ban on interviewing could create. The law clerks will merely have to select from among their offers more quickly, and not be involved in cases

133. *See supra* notes 121–26 and accompanying text.

134. Law clerks could conceivably receive offers from every employer with which they interview. At that point, the reasons for screening clerks from their proffering employers become operative, and the clerks should be screened. The policies in favor of foregoing screening of clerks from their interviewing employers' cases disappear. Clerks at this point must choose more quickly, but are not entirely precluded from choosing among the best employers.

135. *See supra* notes 128–31 and accompanying text.

in which their proffering employers were involved. This should not discourage ambitious law students from becoming law clerks, nor deprive judges of their law clerks' assistance.

Talented law students might also be discouraged from becoming clerks if courts applied a case-by-case approach; but a bright line rule will better protect the appearance of judicial impartiality. It is conceivable to establish a looser rule which, for example, could require screening whenever "serious employment negotiations"[136] are entered into. A bright line rule, though, emphasizes the appearance of impartiality from the point of view of the person in the street. A looser standard, which would require the judge to define "serious" employment negotiations, would place the emphasis on the judge's perceptions. Most judges would probably feel confident of their own decisions to maintain their neutrality, but it is the public's perception of judges' neutrality that must be promoted. The ease with which the appearance of impartiality can be improperly measured by the lack of actual partiality can be seen in the *Hunt* court's reliance on the absence of any allegations of actual bias on the part of the judge.[137]

Rules which are less specific could be difficult to apply—for the judge and the law clerk—when the clerk is actually in the midst of employment negotiations. Either party's objectivity might be lessened by their own involvement in the negotiations and the threatened case; a "flexible" rule might be less apt to be seen as requiring screening. Only later, if someone questioned the judge's impartiality for allowing the clerk to remain on the case, would both the judge and the clerk realize that they had drawn their own line at the wrong point. Once questions had been raised about the judge's impartiality, it would be too late to go back and screen the law clerk. Even if only a few judges made the wrong choice, one judge's appearance of a lack of impartiality damages public confidence in the judiciary as a whole. A more specific rule would avoid these problems by defining when the clerk must be screened.

b. Offers Accepted—Future Employers

A bright line rule which requires screening at the offers made stage rationally requires screening at the offers accepted stage as well. The rationale behind the government lawyer rule applies with equal force to prohibiting law clerk participation in cases involving employers whose offers have been accepted. Certainly an opposing party would have a reasonable basis for seeing little difference between the clerk having received offers and having accepted one offer. The analysis used to infer the

136. *See supra* note 118.

137. *See supra* notes 90, 99 and accompanying text.

possibility of improper advantage to the clerk's proffering employers could be applied to require screening from cases involving future employers as well. The incentives for attempting to exert influence are even greater once an offer has been accepted, because the clerk now would have just one employer to impress. The clerk could favor employer *A* with confidence that *A* would be in a position to reward the clerk's efforts.

In addition to the existence of more incentives for the clerk at the offers accepted stage, doubts about the appearance of impartiality are even greater than at the offers made stage. For instance, an attorney facing a judge whose clerk is employed by opposing counsel is not likely to distinguish between a newly hired clerk and a newly hired associate in the opposing firm. The attorney would no more find it fair for opposing counsel's newly hired associate to be helping the judge than for the newly hired clerk to be helping the judge. The newly hired associate and the clerk are each susceptible to the desire to help a fellow employee. Regardless of whether the desire is acted upon, the appearance of unfairness is sufficient to warrant screening at this stage.

The principal cases of *Miller Industries, Hall,* and *Hunt* imply that only after law clerks have accepted an offer from an employer does it create doubts about the appearance of impartiality for the clerks to participate in any cases involving that employer.[138] In *Hall,* for example, the court specifically relies upon the fact that the clerk had accepted an offer of employment and had continued to work on the case in holding that recusal was mandated.[139] All three courts reach their conclusions without explication of their underlying reasoning for their conclusion that screening is necessary only after offers have been accepted, as opposed to after offers have been made.[140] This Comment concludes that reasonable doubts about clerks' impartiality are created when they are involved with their proffering employers' cases, though, because of the relationship between clerks and judges and the incentives to attempt to exert influence for proffering employers.[141]

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138. *See* Hunt v. American Bank & Trust Co., 783 F.2d 1011, 1015–16 (11th Cir. 1986); Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983); Miller Indus., Inc. v. Caterpillar Tractor Co., 516 F. Supp. 84, 88, 89 (S.D. Ala. 1980).

139. *Hall,* 695 F.2d at 176–77.

140. In addition, without providing the rationale supporting their conclusions regarding appearances of partiality among law clerks seeking employment, these courts leave room for misinterpretation in future cases. Law firms, judges, and law clerks are left with rules whose bases are not revealed, making conformance with those rules a matter of faith, not understanding agreement.

Admittedly, courts may only speak out on issues which come before them. In light of the fact that maintaining the appearance of judicial impartiality is a very important issue, perhaps the courts could have spoken of the rationale used to arrive at their decisions, in order to provide more details or guidance for judges, law clerks, and lawyers.

141. *See supra* notes 132–35 and accompanying text.

C. *Imputing Doubts About the Law Clerk's Appearance of Impartiality to the Judge*

The new professional rules could require that judges recuse themselves if their law clerks are not screened from cases involving their proffering employers. Once the law clerks have received offers, their appearance of impartiality is reasonably called into doubt. Case law and traditional conflict of interest principles indicate that doubts about clerks' impartiality attach to their respective judges. Analogy to rules providing for screening of former government lawyers helps to justify using screening to prevent this attachment. If clerks are not screened from those cases involving their proffering employers, the clerks' respective judges must recuse themselves to protect the perception of the judiciary's neutrality.[142]

1. *Case Law*

Two principal cases, *Hall* and *Miller Industries*, clearly indicate that law clerks' conflicts of interest damage the clerks' appearance of impartiality, and that this damage can attach to their respective judges.[143] In *Hall*, for instance, the court found the presence or absence of the clerk's actual effect on the magistrate's decision irrelevant.[144] The court insisted that the clerk's continuing participation in the case gave rise to an appearance of partiality.[145] Noting clerks' important duties, such as acting as sounding boards for tentative legal opinions and as researchers assigned to find the pertinent legal authorities,[146] the court further implied that clerks could be suspected of misusing their close relationship to judges by performing those duties in such a way as to influence their judges' decisions in favor of future employers.[147] Thus, the court linked doubts about the *clerk's* appearance of impartiality to the *magistrate*[148] and required the magistrate's

142. If the clerk had been working on a case and then received an offer from an employer with an interest in that case, at that point the clerk would be required to be screened. Up until that point, the clerk's position falls under the analysis applied to interviews. *See supra* notes 121–31 and accompanying text.

If a clerk received offers from employers *A*, *B*, and *C*, and then accepted *A's* offer, the clerk obviously could resume work on cases involving *B* and *C*. Any reasonable inference of the clerk's temptation improperly to assist *B* or *C*, which temptation would have been founded upon impressing a future employer, disappears when those employers' offers are no longer available to the clerk.

143. *See supra* notes 67–88 and accompanying text.

144. Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983).

145. *Id.*

146. *Id.*

147. *Id.*

148. *See, e.g., id.; see also supra* notes 123–26 and accompanying text.

recusal.[149] When the "scales tip [even] slightly in favor of avoiding any blemish on the impartiality of the federal bench,"[150] recusal is mandated.[151]

2. *Traditional Conflict of Interest Principles*

Traditional conflict of interest principles, such as those used to impute individual lawyers' conflicts of interest to their firms, indicate that clerks' conflicts of interest due to employment offers should be imputed to their judges in every case, regardless of screening.[152] Normally, for instance, Lawyer *L*, who seeks to represent new client *B* in the same or a substantially related matter in which *L* represented *B's* adversary, former client *A*, will not be allowed to undertake the representation of new client *B*. Lawyer *L's* representation of *B* would create a serious conflict of interest for Lawyer *L*. The lawyer's loyalty to a new or former client may not be as strong as it should be, due to the conflict between the clients' interests. Lawyer *L* probably also has confidential information about past client *A* which *L* may be moved to disclose to client *B*. These conflicts make it impermissible for the lawyer to represent *B*.[153]

The relationship between lawyers and their firms requires that the disqualification of one be imputed to the entire firm. A firm, just like a single lawyer, must be loyal to a client.[154] Every lawyer in the firm is also vicariously bound by the obligation of loyalty owed by the other lawyers in

149. Hall, 695 F.2d at 176–77.

150. Dobson v. Camden, 502 F. Supp. 679, 681 (S.D. Tex. 1980).

151. The *Miller Industries* court found that the law clerk's continuing participation in a case in which his future employers were counsel mandated the judge's recusal due to a reasonable doubt about the judge's appearance of impartiality. Miller Indus., Inc. v. Caterpillar Tractor Co., 516 F. Supp. 84, 88–89 (S.D. Ala. 1980). The court in *Hall* agreed. The opinion in *Hall* uses almost identical language to that in *Miller Industries* in imputing the clerk's appearance of partiality to the judge. *Compare Hall*, 695 F.2d at 179, *with Miller Indus.*, 516 F. Supp. at 89. The *Hunt* court did not find that the judge was required to recuse himself, largely because the clerk had been removed from all work on the case once the clerk had accepted the offer. Hunt v. American Bank & Trust Co., 783 F.2d 1011, 1016 (11th Cir. 1986). The reasoning used to arrive at the decision in *Hunt*, though, misses the point of recusal: preventing the appearance of partiality. The *Hunt* court misread *Hall* by looking into the judge's chambers to examine the law clerk's actual work on the case, which had been characterized by the judge as "ministerial only, . . ." *Id.* at 1016; *see supra* notes 90, 99 and accompanying text. The question should focus on appearances. The court noted, "Hunt [the party moving for recusal] does not contend [that there was more substantial, actual involvement by the law clerk], nor does [Hunt] allege any actual bias on the part of the district judge." *Hunt*, 783 F.2d at 1016. The degree of the clerk's involvement relates to actual partiality, however, not the appearance of partiality.

152. M.R.P.C., *supra* note 103, Rule 1.10; *accord* M.C.P.R., *supra* note 116, DR 5-105(D).

153. M.R.P.C., *supra* note 103, Rule 1.9 & comment.

154. M.R.P.C., *supra* note 103, Rule 1.10 comment.

the firm.[155] Therefore, none of the lawyers in Lawyer *L's* firm may represent client *B;* the disqualification of Lawyer *L* is imputed to the entire firm.[156]

In the case of a law clerk and a judge, imputing disqualification could make even more sense than it does in the case of lawyers and their firm. The relationship of clerk and judge is often far closer than that among lawyers in a firm.[157] Also, there are far fewer people working in most judges' offices than in many law firms.[158] Thus, the probability that cases will be discussed or opinions overheard is far greater in a judge's office than in a law firm, and the reasons for imputing disqualification are equally as great or greater.

3. Justifying Screening

Policy reasons mitigate against a wholesale recusal of judges whenever their clerks have conflicts of interest. Screening is acceptable in light of policy considerations which allow screening of former government lawyers to prevent the imputation of conflict of interest to their private employers. In the interest of not deterring good lawyers from entering government service, the M.R.P.C. allow screening to prevent the imputation of conflict of interest from former government lawyers to their firms.[159] Just as society needs talented lawyers to work for the government, society also needs talented law graduates to become law clerks. Many courts would find it incredibly difficult, if not impossible, to operate without law clerks to provide the research, writing, and other functions judges have come to rely upon.[160] Requiring recusal of judges whenever there were doubts about their clerks' impartiality would mean that once a law clerk has been made offers by an employer, the judge would not hear any cases in which that employer had an interest. This could cause judges to prohibit any employment negotiations by their clerks. Such a prohibition would deter law graduates from becoming clerks in the same way that requiring imputation of former government lawyers' conflicts of interest to their private employers would deter lawyers from entering government service. For the same policy reasons that persuade society to accommodate former government lawyers and not to require that their conflicts of interest be imputed to their firms, the law clerks' conflict of interest problem can be accommodated.

155. *Id.*

156. M.R.P.C., *supra* note 103, Rule 1.10.

157. *See supra* note 51 and accompanying text.

158. Most judges employ only a few clerks, *see, e.g.,* Baier, *supra* note 2, at 1133–35, while many law firms are much larger. *Cf.,* Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251, 256 (5th Cir. 1978), *cert. denied,* 439 U.S. 859 (stressing the "nature of the judge-law clerk relationship" as a basis for imputation of an appearance of partiality from law clerk to judge).

159. *See supra* notes 103–06 and accompanying text.

160. *See supra* notes 42–51 and accompanying text.

With screening, doubts about the law clerks' appearance of impartiality need not be imputed to their respective judges, and the judges need not recuse themselves.[161]

D. Proposed Rule for Judges and Law Clerks

A rule of professional conduct for both judges and law clerks regarding law clerk employment negotiations could be adopted to protect judges' appearance of impartiality. Screening of law clerks could be required to isolate them from any contact with cases in which their proffering employers have an interest.[162] Thus, if a judge's law clerk received offers of employment from Firms *A*, *B*, and *C*, the rule would require that the clerk be screened from all cases in which Firms *A*, *B*, and *C* act as counsel or are parties. This rule could also require that, if clerks who have received offers are not screened from cases involving their proffering employers, their respective judges must recuse themselves. If the judge did not screen the clerk after Firm *A* made its offer to the clerk, the judge must be recused to prevent the clerk's apparent conflict of interest, which has attached to the judge, from tainting the rest of the bench.

A commentary to the rule should also be adopted, explaining the policy bases and rationale behind screening of the clerk at the offer received stage.[163] This would provide both judges and clerks with a better understanding of why the rule was instituted, and why it is logical to require screening at the point described. The policies served include promoting public confidence in the neutrality of the judiciary while encouraging talented law graduates to become law clerks.

E. Using Training, Written Guidelines, and Communication To Prevent Imputation of Law Clerks' Conflict of Interest to Their Judges

As a further measure to protect the appearance of judicial impartiality, judges could seek to provide extensive training to reduce conflicts of interest among law clerks seeking employment. Although it would be

161. However, if effective screening cannot be established, that is, if the judge has only one law clerk, then the judge must be required to recuse herself, or the doubt about the law clerk's appearance of impartiality will attach to the judge. The decision in Dobson v. Camden implicitly accepts this rationale. 502 F. Supp. 679, 681 n."*" (S.D. Tex. 1980).

162. *See* Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 825, 830 (1986) (suggesting that judges should also be required to obtain the parties' consent).

163. The M.R.P.C. provide good examples of such commentary. *See, e.g.*, M.R.P.C., *supra* note 103, Rule 1.11 comment (explaining policy allowing screening of former government lawyers to prevent imputation of those lawyers' conflicts of interest to their private firms).

idealistic to suggest that conflicts could be completely prevented, some measures could reduce the occurrence of law clerk conflicts of interest created by employment negotiations. One method is to train law clerks to recognize and avoid conflicts of interest which may arise during their clerkships.[164] Specific training, pointing out the ethical pitfalls which may be encountered in the clerkship,[165] given by the clerks' respective judges would remove misconceptions clerks may have about their professional and ethical duties.[166] Training that is focused on the particular conflict of interest problems facing law clerks seeking employment could accomplish much toward preventing conflicts problems for law clerks and their judges. Unfortunately, although some judges do provide training,[167] others simply expect their clerks to learn the ropes as they go along.[168]

Training could consist of a half-day meeting early on in the clerkship, in which the judge would discuss with the clerk important topics regarding judicial ethics and appearances. The judge would discuss the necessity that the judiciary maintain its appearance of neutrality in order to uphold the public's confidence in the judiciary and its willingness to abide by judicial decisions. The judge would also take great care to alert the clerk to considerations associated with employment negotiations, such as protecting confidentiality and not allowing the creation of any appearance of bias.

Written materials would provide the best source of information for new law clerks. The clerks could refer to the manuals whenever they had a question. In addition, there would be much less doubt about what the judge's requirements were than might exist as memories of an initial oral orientation faded during the clerk's tenure.[169] The written guidelines

164. In order to graduate from law school, students must have taken and passed a course in professional responsibility. Aronson & Martin, *supra* note 60, at 13. Law clerks, who have graduated from law school, should (in theory) know from their professional responsibility courses about conflict of interest issues before beginning their clerkships. Some may note that therefore it is not the courts' place to provide such training. The facts of cases such as *Hall* and *Hunt* suggest that although all clerks should perhaps know better, some apparently do not.

Externs—students still in law school working for a judge during part of a school year—may not have had a professional responsibility course before their externships, and may not know about appearance of impartiality problems, conflict of interest, etc. Training is therefore especially important for externs, and the judge has even greater responsibility and motivation to provide instruction in ethics.

165. This Comment attempts to provide some insight into the pitfalls associated with law clerks' employment negotiations. There are, or course, many other potential problems of which clerks and judges must be aware. *See, e.g.*, Comment, *supra* note 43.

166. Aronson & Martin, *supra* note 60, at 18. Clerks may not understand or be familiar with the potential ethical problems, requirements, and consequences which may arise during their tenure. Training could point out these issues and allow clerks and their judges simply to avoid many such problems.

167. *See, e.g.*, Wright, Office Manual, *supra* note 118.

168. Baier, *supra* note 2, at 1128.

169. A statistical study on training for confidentiality issues could well apply to training methods for other ethics subjects, such as conflict of interest. Comment, *supra* note 43, at 1265 (ninety-four

should be specific and thorough. They could require that clerks keep their judges informed before and during any negotiations, and they could let the clerks know that the clerks will be screened from any cases involving proffering employers. The reasons underlying these standards should be clearly set forth.

One Ninth Circuit judge's Office Manual for Law Clerks provides a good example of such a manual. It is detailed and covers many areas of potential problems clerks might encounter during their tenure.[170] The judge's manual also requires that law clerks communicate with the judge about future employment plans so that the judge may help the clerk recognize potential conflicts of interest.[171] This kind of communication is also critical to preventing law clerk conflicts of interest which could taint the judge.[172] Law clerks could be admonished to inform judges as soon as they have begun interviewing, so that judges will be ready to screen the clerks once employment offers are made. Clerks should be encouraged to ask judges any questions about matters which might reflect upon the judges' professional reputations.

The new professional rules could establish an affirmative duty for law firms, requiring them to inform a judge when one of the judge's clerks is being interviewed by that firm. This affirmative duty would act as double protection, since law clerks may have an interest in not informing judges to avoid being removed from the case. This redundant system would insure that judges would know of the potential problem, and be ready to take appropriate action should a law clerk's appearance of impartiality come into question.

III. CONCLUSION

Law clerks will negotiate for employment during their clerkships. This practice should be allowed and endorsed. Rules which prohibit or restrict such negotiations could deter talented students from becoming law clerks and inhibit the clerks' important contributions to the judicial system. Employment negotiations, however, create potential conflicts of interest which can be imputed to the judges employing the clerks.

Professional rules of conduct, consistent throughout all jurisdictions, could be established to provide specifically for screening law clerks from cases in which their proffering employers have an interest. Careful analysis

percent of judges responding to survey used oral instructions to law clerks regarding confidentiality; only fifty percent used guidelines in a written manual).

170. Wright, Office Manual, *supra* note 118, at 6.

171. *Id.*; Aronson & Martin, *supra* note 60, at 9.

172. Aronson & Martin, *supra* note 60, at 9.

of conflict of interest rules in other areas indicates specific standards for law clerks seeking employment. Although reasonable doubts about the clerks' appearances of impartiality attach to their respective judges if the clerks are involved with cases in which their proffering employers have an interest, for policy reasons judges may avoid recusal by screening their clerks from such cases. If judges fail to screen their clerks in such cases, the rules should mandate recusal.

Law clerk conflicts of interest could be avoided in many cases if the clerks were provided with adequate training about the dangers inherent in negotiating for employment during their clerkships. Written guidelines reinforcing this training are essential. As an integral part of their training, clerks could be encouraged to communicate openly with their respective judges about all employment negotiations they undertake during their clerkships. Judges themselves are in the best position to forestall future difficulties with a few simple instructions and quick action where necessary.

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