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Judicial Ethics, Law Clerks and Politics

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By Gerald Lebovits

Judicial Ethics, Law Clerks and Politics

A STRONG CASE can be made that New York State judicial law clerks — called court attorneys in most courts and formerly called law assistants and law secretaries — should never engage in partisan politics. But that is not the law in New York.

Law clerks, judges and politicians should know what clerks may and may not do. Learning the ethical limits of a law clerk's permissible politicking is not simple; the rules are obscure, untested and often honored in the breach. This article tries to clarify the extent to which law clerks may be political.

Some political activity is forbidden and subjects the clerk to discipline and even criminal prosecution. Forbidden activity is covered by the Career Service Rules of the Chief Judge (RCJ) (22 NYCRR 25.39) and includes political activity conducted in a courthouse or during court time, or which interferes with court duties, suggests that a judge or the court is involved, interferes with work or uses court resources.

Law clerks are not subject to discipline for engaging in prohibited politics. Rather, the Commission on Judicial Conduct may discipline a judge whose law clerk is a personal appointee and member of the judge's personal staff if the clerk engages in impermissible political activity and if the judge can but does not prohibit that activity. Prohibited activity is covered by the Chief Administrator of the Courts' Rules Governing Judicial Conduct (RGJC) (22 NYCRR 100.5[C]), amended effective Jan. 1, 1996.

The distinction between "forbidden" and "prohibited" politics arises because the RCJ forbids "employees of the Unified Court System," including law clerks, from engaging in specified political activity, whereas RGJC §100.6(A) governs only judges and

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judge-candidates for elective judicial office.

Other than court attorney-referees, whom the RGJC advises never to engage in partisan politics, law clerks are neither bound nor explicitly guided by the CJC or the RGJC.

RGJC §100.5(C) directs judges to "prohibit members of the judge's staff who are the judge's personal appointees from engaging in [prohibited] political activity." A question thus arises who is a personal appointee. Only elected Supreme Court justices may make personal appointments not subject to review. (See, e.g., *Matter of Blyn v. Bartlett*, 39 NY2d 349, 359-60 [1976]; *Matter of Gilligan v. Procaccino*, 27 NY2d 162, 166-67 [1970]).

Only those who clerk for elected Supreme Court justices, in fact, are "law clerks" (a term this article uses generically); other clerks are called "court attorneys" because they are not appointed by the judges but by the court.

However, even if only an elected Supreme Court justice need not obtain pro forma approval from an appointing authority to hire a law clerk, the law would likely not permit judges to allow their clerks to engage in impermissible activities.

Non-Supreme Court law clerks who work for individual judges are as close to their judges and the decision-making process as personal appointees. Accordingly, all law clerks selected by a judge personally are probably subject to the RGJC's requirement that a judge prohibit impermissible political activity.

Law clerks who work in Law Department pools or as court staff do not seem to be personal appointees who are members of a judge's personal staff. Perhaps, then, pool law clerks may engage in political activity prohibited by the RGJC but not forbidden by the RCJ. If so, pool law clerks would be treated like court clerks, over whom a "judge has no control . . . outside of court." (Advisory Committee on Judicial Ethics Opinions [which are current only through 1994] 91-80, 92-56, 92-105, 93-100, 94-35).

However, pool law clerks may be "analogous to a personal appointee" (Ethics Opinion 91-77); their responsibilities are similar to law clerks who work for individual judges, and they serve at the pleasure of their appointing judge. Prudence suggests that pool law clerks consider themselves subject to their appointing judge's prohibition under the RGJC.

Beyond the Rules

Even though the RGJC authorizes discipline for judges who fail to prohibit their law clerks from engaging in prohibited politics, judges often prohibit their clerks from engaging in permissible politics. A judge may want the clerk to be above politics; or she may oppose the candidate or the cause. Either way, the law clerk likely has no recourse against a judge's decision to forbid her from engaging in permitted partisan politics. Here is why.

Law clerks, as members of the career civil service classified-confidential-noncompetitive class (true law clerks — those who clerk for elected Supreme Court justices — are exempt, not noncompetitive, because of their personally appointive status), are unprotected by Civil Service Law §75. Instead, they are disciplined for misconduct under RCJ §25.29 or a collective-bargaining agreement.

Under RCJ §25.29 and the collective-bargaining agreements, law clerks may be terminated at will. Indeed, law clerks are not entitled to a pretermination hearing before dismissal for misconduct. (See, RCJ §25.29[a][3]; *Matter of Conigland v. Rosenblatt*, 171 AD2d 864, 864-65 [1st Dept. 1991])

A law clerk terminated for engaging in permitted political activity, or for not engaging in prohibited political activity, may sue for damages and injunctive and declaratory relief to vindicate First Amendment freedoms.

It is doubtful, ultimately, that a court would fault a judge's decision to fire at will a clerk for engaging in partisan politics — even, if notice is given, for engaging in activity the RGJC does not prohibit and even if, as a non-personal appointee, the clerk is not contemplated by the RGJC.

The U.S Supreme Court has held that a state may bar all "partisan political activity" by a civil servant. (*Broadrick v. Oklahoma*, 413 US 601, 606, 616 [1973]).

Many state courts exercise their authority to prohibit court-employee partisan politics. The Pennsylvania Supreme Court has twice stricken legislative enactments that contradict Pennsylvania court rules that prohibit court staff from being partisan. (*Matter of Prohibited Political Activity by Court-Appointed Employees [Petition of Dobson]*, 534 A2d 460, 464 [Pa 1987] [per curiam]; *Snyder v. Unemployment Comp. Bd. of Review*, 502 A2d 1232, 1234 [Pa 1985]; see also *Matter of Prohibition of Political Activities by Court-Appointed Employees [Petition of Silvestri]*, 373 A2d 1257, 1259-60 [Pa 1977].)

Several New York neighbors forbid law-clerk partisanship, with New Jersey and Vermont forbidding even issue politics. (See, *Matter of Randolph*, 502 A2d 533 [NJ 1986] [per curium]; *Aranoff v. Bryan*, 569 A2d 466, 467, 469 [Vt 1989]).

Notably, the American Judicature Society believes that non-law-clerk court employees may be partisan outside the courthouse but that "law clerks should be held to a higher standard of conduct ...." AJS Model Code of Conduct for Nonjudicial Court Employees, 73 Judicature 138, 139-40 [1989].

Forbidden Activity

The RCJ (22 NYCRR 25.39) forbids UCS employees, including law clerks, from engaging in certain political activity. By virtue of RCJ §25.1, RCJ §25.39 does not apply to judges directly. However, RGJC §100.5(C)(4) requires judges to prohibit conduct forbidden by RCJ §25.39. Judges are bound not to violate RCJ §25.39, and RGJC §100.5(A) forbids judges from engaging in partisanship enumerated in RCJ §25.39. This analysis is important because of the relationship between judges and their law clerks. The following are forbidden:

- §25.39(a) — No UCS employee may recommend anyone for a job based on political opinions or affiliations; question an employee about political opinions or affiliations; appoint, hire or fire based on political opinions or affiliations; prejudice a court employee for not making a political contribution or rendering political assistance or advance any UCS employee's career for making a political contribution; or use official authority or influence to coerce anyone into engaging in political action or to interfere with an election.

Note: "Political opinions" would likely mean only partisan political opinions. Additionally, §25.39(a) forbids anyone in a supervisory capacity from using influence to coerce a law clerk into engaging in political action.

- §25.39(b)(1) — No UCS employee may mention any employee's or dependant's political affiliations as fitness to work for the UCS.

Note: This subdivision expands and limits RCJ §25.39(a). Violating §25.39(b)(1) is a misdemeanor. "Employee" likely refers to everyone who works for the UCS, including interns and volunteers. This subdivision relates to law clerks who aid in hiring other pool law clerks and to any UCS employee who recommends anyone for a UCS position.

- §25.39(b)(2) — No UCS employee may inquire about an applicant's political affiliations or discriminate for or against any applicant because of political opinions or affiliations.

Note: Section 25.39(b)(2), like one provision of RCJ §25.39(a), forbids judges (through RGJC §100.5[C][4]) from favoring in their hiring decisions members of political clubs. Moreover, a judge may not consider the clerk's political affiliations in deciding to retain that clerk.

- §25.39(c) — No UCS employee may use authority or official influence to compel another court employee to pay a political assessment, subscription or contribution; no one may enter or remain in any government office to demand or collect a political assessment; and no one may ask any UCS employee for a political contribution or assist in requesting or receiving money from a UCS employee for a political purpose.

Note: Standing alone, the final provision of this subdivision may unconstitutionally infringe on free speech. In any event, the cases that apply Civil Service Law §107(3), to which §25.39(c) refers, require that the request be coercive. (See, e.g., *Matter of Hempstead Democratic Club v. Incorporated Village of Hempstead*, 112 AD2d 428, 430 [2d Dept. 1985].)

Any violation of §25.39(c) is a class "A" misdemeanor. If soliciting a UCS employee were criminal absent coercion, court employees would receive vastly less junk mail.

Thus, the RCJ likely forbids only coercive solicitations, such as soliciting a subordinate. Supporting this view is *Stretton v. Disciplinary Bd.* (944 F2d 137, 145 [3d Cir 1991]) and *(People v. Haff*, 47 NY2d 645, 700 [1979]).

§25.39(d) — No public officer or someone seeking to become one may promise a favor in return for political support or threaten anyone for not giving political support.

Note: Although the question is fraught with ambiguity, most if not all law clerks probably are public officers under Public Officers Law §2. This subdivision makes it misdemeanor bribery through Civil Service Law §107(4) to promise, even indirectly, a job as a law clerk in return for political support. Election Law §17-158 makes this a felony.

§25.39(e) — No UCS employee may hold elective office in a political organization except as a delegate to a judicial nominating convention or as a

non-executive member of a county committee.

Note: First, being "appointed" rather than "elected" to club positions is of questionable propriety. No law clerk should accept an appointment to a position traditionally filled by election. This includes ex officio membership. (Ethics Opinion 90-105). Second, law clerks may serve on judicial nominating conventions. Third, although this subdivision forbids election to most party offices, RCJ §25.37 forbids law clerks, absent the Chief Administrator's consent, from holding any other elective or appointive state government position.

According to Ethics Opinions 89-101, 90-102, 93-36, 93-100, no law clerk may politic in the courthouse or use court resources (stationary, copying machines, etc.) for partisan activity. A violation subjects the law clerk, a public servant, to punishment for official misconduct under Penal Law §195.00. (Compare *People v. Haywood*, 201 AD2d 871, 871 [4th Dept. 1994] with *People v. La Carruba*, 46 NY2d 658, 665 [1979].)

Additionally, political activity may not take place on court time. (Ethics Opinions 93-36, 93-100). One advisory opinion provides that "court time" covers a law clerk's "normal working hours." (Ethics Opinion 90-102). This would forbid political activity during an excused leave, such as vacation time, if that activity occurs from 9:30 a.m. to 5:00 p.m. on non-holiday weekdays, when court is in regular session. The reasoning is that someone who sees a clerk politicking while court is in session might believe that the court endorses the clerk's partisan politics. A contrary argument is that "court time" covers only periods while the law clerk is on duty because a law clerk's lawful activities during that clerk's own time is not the court's business. Until this issue is resolved, clerks should refrain from political activity while court is session.

Finally, law clerks may not politic in a manner that suggests the involvement of the court or a judge not running for election or re-election. (Ethics Opinions 90-102, 93-100). Judges are forbidden from engaging in political activity except during a defined window period and, even then, only for their own campaigns. Law clerks "must make it reasonably clear" that no judge is involved in their political activity.

Prohibited Activity

Although law clerks are not bound by the RGJC, they should not place in jeopardy their judges' reputations or the integrity and the independence of the court. As a practical matter, a judge would be justified in terminating a law clerk who engages in forbidden or prohibited political activity — or even in permitted partisanship. Moreover, the non-lawyer public would not appreciate the distinction between "forbidden" and "prohibited" politics.

Prohibited political activities are enumerated in the RGJC at 22 NYCRR 100.5(C), entitled "Judge's Staff."

- §100.5(C)(1) — A judge shall prohibit her staff from holding elective office in a political organization, except as a delegate to a judicial convention or a non-executive member of a county committee. (Ethics Opinion 90-105).

Note: This subdivision is identical to RCJ §25.39(e).

- §100.5(C)(2) — The judge shall prohibit her staff from contributing consideration exceeding $500 a year for political campaigns (other than for the staff member's own campaign) or other partisan activity, including buying tickets to political functions.

Note: Some law clerks who contribute in excess of $500 a year claim they do so for their own future campaigns. This is improper and thus subject to a judge's prohibition. According to RGJC §100.0(A), a person becomes a "candidate" only on publicly announcing candidacy for a specific vacancy or by authorizing a responsible committee to solicit or accept contributions, which requires a filing with the Board of Elections.

Five policies justify RGJC §100.5(C)(2): to prevent law clerks from buying judgeships; to limit to a reasonable time, place and manner the contacts law clerks have with politicians; to prevent politicians from extorting money from gullible law clerks in return for promises of future political support; to reduce internecine courthouse personality wars over who supports whom; and to provide court employees with job security based on merit and free from electoral politics.

- §100.5(C)(3) — The judge shall prohibit her staff from soliciting for a

partisan purpose and from selling tickets to or promoting political fundraising.

Note: As explained below, a law clerk may participate fully in fundraising activities, despite §100.5(C)(3)'s apparent prohibition against promoting fundraising, subject to certain exceptions, such as activity that involves personal solicitation or is coercive.

§100.5(C)(4) — The judge shall prohibit her staff from engaging in political conduct prohibited by RCJ §25.39.

Note: As discussed above, this subdivision is contained in the RCJ to discipline actual violators and in the RGJC to discipline judges who fail to enforce the RCJ.

§100.5(A)(4)(b) — The candidate-judge shall prohibit staff and employees subject to her direction from doing what she may not do.

Note: The candidate-judge must discourage court employees from committing acts that affect the judiciary or impair elections.

Permissible Activity

Law clerks may engage in countless forms of political activity. The judge for whom the law clerk is a personal appointee need not prohibit these activities and, indeed, under some interpretations may not even forbid them, lest the judge violate the law clerk's First Amendment free-speech or associational rights or Fourteenth Amendment Equal Protection Clause rights.

Nonetheless, it would be judicious for the law clerk to advise her judge of her political activities, thus allowing the judge to prohibit impermissible activities.

For the political law clerk whose judge does not want to be apprised of the law clerk's activities, special care must be taken to follow the rules.

Law clerk political activity is permitted if it takes place outside the courthouse and chambers, not on court time, without court resources, and neither implies that a judge or the court is involved nor affects the law clerk's judicial work. (Ethics Opinions 90-27, 92-102, 93-36, 93-100).

Furthermore, a law clerk who agrees to assist the judge-candidate must not, according to RGJC §100.5(4)(b), do for the judge what the judge may not do, including soliciting or accepting campaign contributions, committing to issues likely to come before the court, and making false statements about the judge's opponent. (See, 22 NYCRR 100.5[4][d]).

With these caveats, a law clerk may engage in "any [political] activity not specifically prohibited by the rules." (Ethics Opinion 90-102).

Thus, a law clerk may: solicit and coordinate volunteers (Ethics Opinion 93-36); canvass for signatures on nominating petitions and supervise such efforts (90-85, 93-36); conduct and supervise telephone polls (93-36); appear with a candidate at public gatherings and rallies (91-77); attend campaign strategy meetings (91-77); speak at engagements (91-77); secure endorsements for candidates (91-77); assist and attend campaign fundraising efforts (89-101, 91-77), other than through personal solicitations. A law clerk may not, however, be a campaign treasurer, for that position requires personal solicitations (91-77).

A clerk also may be on the board of directors of a citizens group that fundraises (90-85, 90-27); be active in a political organization or club (92-56, 93-100), except by holding most elective party office, as explained above; prepare, mail and personally distribute campaign literature (91-77), place campaign stickers on their cars (93-100), and post campaign signs on their property (93-100); permit family members to engage in political activity, including activities in which the law clerk may not engage, such as being a campaign manager who solicits funds personally. (Cf. Ethics Opinion 94-60).

The law clerk also may run for public office and, without even taking a leave of absence, resign from the position of law clerk only when inducted into public office. New York, unlike many states and the Federal Government under the Hatch Act, has no resign-to-run statute. The State Hatch Act prevents state employees in a federally supported agency from engaging in electoral politics. (5 USC §1502 [1994]). However, the Hatch Act does not cover law clerks, who are not members of New York's executive branch of government. (See, 5 USC §1501[2] [1994]).

Conclusion

Unless their judge directs otherwise, law clerks may engage in political activity that does not suggest that the court endorses partisan politics. To the law clerk in doubt about what is ethical, here are three suggestions.

First, seek guidance from the judge, assuming that the judge wishes to discuss the matter. The judge, who may be disciplined for failing to prohibit impermissible political activity, should have the opportunity to prevent a violation.

Second, ask the judge to obtain an ethics opinion from the Advisory Committee on Judicial Ethics, c/o the Office of Court Administration, 270 Broadway, Room 1401, New York, NY 10007, (212) 417-2000, pursuant to 22 NYCRR 101.3(a).

Third, and most important, always err on the side of caution and scrupulously avoid close ethical calls. The court's appearance of impartiality depends on it.