Law clerk hiring system under fire, including in 9th Circuit
DC Circuit refuses to make judges and students delay contact

By John Roemer

The frenzied, stressed system by which federal judges choose law clerks took a turn further into chaos this week when the U.S. Court of Appeals for the District of Columbia Circuit announced that the rules for hiring clerks are dysfunctional and judges there will no longer follow them.

The rules - known as the federal law clerk hiring plan - seek to level the field by requiring judges and third year law school candidates for clerkships to hold off on contacting one another until specific dates in late summer.

Problem is, the plan is voluntary and not every judge - including prominent members of the 9th U.S. Circuit Court of Appeals - and law student follows it.

Scoring choice clerkships with a distinguished federal judge has long been a fraught endeavor for law students. A clerkship in a top jurist's chambers can make a career. Many are tempted to game the system by sending packets, including grades and cover letters, to desirable judges as early as the end of their first year of law school.

Likewise, judges avid for prize clerks schmooze and network with law professors and senior partners who have spotted outstanding summer associates. Then the judges grab star students as soon as they can.

Chief Judge Alex Kozinski of the 9th Circuit has been the outspoken voice of the rule breakers.

When judges in the late 1980s first proposed a plan to organize clerk selection, some predicted it would work only if "a few bad apples" didn't screw things up. Kozinski volunteered in a piece titled, "Confessions of a Bad Apple" that he would be "the self-appointed spokesperson for this bushel of spoilsports" who believe that "efforts at reform cannot, will not and should not succeed" because an open market works best.

In 2011, he told a New York Times reporter that he began to recruit clerks "at birth." This week, he wrote in an email, "There were never any rules. It was a voluntary plan that judges were free to join, which I never did. The D.C. Circuit merely acknowledged the reality that the joint hiring plan never really worked."

In 2008, Kozinski clashed with Deborah L. Rhode, a Stanford Law School ethicist, over Kozinski's effort to interview students there as prospective clerks earlier than the plan envisioned.

"We had a meaningful exchange of views," Rhode told the Daily Journal. "He appears to have a sense of entitlement and to feel an insularity from accountability."

This week, Rhode denounced the D.C. Circuit's announcement. "What a appalling example to young clerks the D.C. judges are setting, that because others don't follow the rules, they don't have to either," she said. "This will simply make it more difficult for law schools and students to know where they stand."
David B. Sentelle, the D.C. Circuit’s chief judge, declined to speak with a reporter. The circuit’s deputy clerk, Marilyn Sargeant, declined to comment further, saying the announcement speaks for itself.

As the D.C. Circuit’s announcement put it, "During the past few years, a significant and increasing number of circuit judges around the country have hired in advance of the plan’s interview and offer dates, and it is likely that they will continue to do so.”

Laurie L. Levenson, a professor and the law clerk adviser at Loyola Law School, said that judges have been hiring on their own schedules for years. "This is the worst-kept secret in the country," she added. "The judges who follow the rules are the exception."

She explained that the resulting anarchy has been particularly hard on law schools like hers that don’t rank with Harvard, Yale and Stanford. "There's a two-tier system, and we don't have a shot," she said, pointing out that Loyola follows the hiring rules. "Judges will cherry-pick clerks from the schools they like most, and everyone else is in the position of competing for slots likely already filled."

Another disadvantage, Levenson and others said, is that judges who grab the first clerk they like will never get to see the wide range of candidates available.

Senior Circuit Judge Stephen S. Trott of Boise, Idaho, said he never thought the clerk hiring plan would work and has not participated in it. "It's an East Coast premise that there are far fewer good candidates than jobs," he said. "In fact, there are thousands of very fine law students who make excellent clerks. I get mine from the University of Idaho College of Law, and they serve us as well as those from any other good school."

The competition appears fiercest over jobs in circuit chambers known to feed clerks to the U.S. Supreme Court. Kozinski said he has sent close to 50 "upstairs," as judges put it. Circuit Judge Diarmuid F. O'Scannlain, another nationally prominent 9th Circuit jurist, said he has sent about 20 on to the high court.

O'Scannlain said he has tried to follow the rules but, "When people with strong credentials get contacted by other chambers, I arrange a telephone interview. I hear recommendations from law professors and lawyers who see students doing summer associate work. Some come over the transom, people who apply with stellar grades. If other [judges] are jumping the gun, I'm not going to let myself be prejudiced."

Erwin Chemerinsky, the founding dean of UC Irvine School of Law, said the D.C. Circuit's announcement "will further speed the collapse of the hiring plan. It is unfortunate, because it makes it harder for students to know when to apply to individual judges."

"Probably five or six percent of federal judges care about this," he said. "Most judges hire those they want when they want without all the hassle. The D.C. Circuit, the 2nd Circuit, the 7th Circuit and the 9th Circuit seem to have the judges who get excited about this hot little competitive world. True, a clerkship in Alex Kozinski's or Richard Posner's chambers can lead to a Supreme Court clerkship and make a career. But mostly, it's like a lot of little kids playing in an important sandbox."

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By Jasmine Singh

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