

Judge Clueless Hires a Law Clerk

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The ancient and arcane business of recruiting law clerks for judges has at last been deregulated. The judges themselves, through their cunning efforts to undermine the rules that used to stifle competition, have succeeded beyond their wildest dreams in creating a suitably unruly market in law clerks. Then, too, prospective clerks, liberated from crippling regulation, pursue innovative strategies of competition, such as the artful deployment of the telephone answering machine as an instrument of disinformation.

A couple of years ago, I wrote something for this journal entitled *The Sweet Reasonableness of Federal Judges*.¹ The subject was the annual game of musical chairs played by the federal judiciary to satisfy its insatiable appetite for purportedly brainy law students yearning to become law clerks. When the music starts to play, the queue of aspiring students begins to circle gingerly around the voracious pack of jurists drooling over the prospect of grabbing a promising specimen for their very own. When the music stops, the judges lunge forward, grabbing for the lapel or even the skin of a promising clerk-candidate. Since there is often a surplus of candidates, each one must preen him or herself in the hope of catching the eye of a passing judge, who will hopefully prove a source of wisdom and, of course, prestige (if not riches).

In my earlier comment on this annual rite, I dealt with the then-current situation of a rule that forbade interviewing law clerk candidates before March 1 of the year in which they were offering themselves for hire.² This was a rule of the Judicial Conference of the United States, no less, and was religiously adhered to by the candidates, law school faculty, and everyone else involved, with the exception, naturally, of the judges. The law schools, creatures as they are of legality, slavishly adhered to the rules to the point of withholding student recommendations until a few weeks before the March 1 deadline. Even some of the judges bowed to the letter of the law, though they brazenly manipulated the hours of the day and the days of the week to their own competitive advantage. They tried to make their phone calls to the candidates from easterly locations, like Bermuda, or even Siberia, where the accumulation of intervening time zones put them hours ahead of their rivals—and

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¹ 58 OHIO ST. L.J. 519 (1997).

² See generally *id.*

scheduled interviews for the wee hours on weekends, when their competitors lay dreaming of the law clerk that was to get away.

All this context has, however, changed. The business of hiring law clerks has been deregulated. The Judicial Conference of the United States has decided that everything, including the scheduling of interviews, should be left to the free market.³ Indefensible command and control approaches are to be abandoned to make way for the ultimate triumph of the marketplace. Thus, the judiciary, in whose hands the final defense of law, order, and regulation resides, has turned in desperation to the unregulated market for the efficient allocation of its most precious commodity—law clerks. For nothing has a higher value to the judiciary than a hundred-odd pounds of savory law clerk delivered in prime condition to the judicial workplace. It has finally become clear, even to as obtuse a group as judges, that law clerks are as much a commodity as bales of hay and ought to be similarly dealt with.

During the many years when an unending stream of regulatory nostrums had been adopted to somehow bring efficiency and equity to law clerk recruitment, an independent-minded band of jurists had done its best to steer the judiciary toward the wonders of the marketplace and away from burdensome regulation. Particularly after complex regulatory schemes had been adopted—like the failed effort of a few years ago to set a date for interviews, a subsequent date for offers, and then a short interval for acceptances—some stalwart judges had undertaken a principled refusal to cooperate. Solely to demonstrate that the free market was a better idea, they held interviews before the law students' first-semester exams had been graded and made their offers before the students went home for their Thanksgiving break. As a result, the judges discovered that they enjoyed a high rate of acceptance. Unfortunately, some of those who had accepted were forced to withdraw because they found out too late that they had flunked their first exams.

These early efforts to set up a free market in law clerks displayed entrepreneurial judges at their best. The behavior of these innovative jurists in dealing with their colleagues could follow one of two possible scenarios. Either, in a burst of competitive zeal, a judge could do his best to mislead other judges into thinking that he was slavishly following the rules—a course designed to lure credulous jurists into apathy, and therefore into a losing position in the race for law clerks. Or, with a contrasting strategy, the market-oriented judge could be brutally honest about his disregard of the rules, thereby panicking his compatriots into hiring the first warm body through the door and sometimes putting appallingly inept law graduates on the payroll.

In examining the first of these options, it is remarkable how effective a judicial campaign of disinformation could be. For example, when asked by their colleagues whether they intended to adhere to the current regulations of the Judicial Conference

³ JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 38 (1998).

on law clerk hiring, these shrewdly independent judges were quick to praise whatever rules were then in effect. They never hinted for a moment that they would dream of undermining judicial solidarity by ignoring the rules. Actually, of course, these freewheeling jurists regarded the current rules as an affront to their intelligence and deserving of being totally scrapped in favor of market competition. But, not wishing to give the impression that they were guilty of refusing to cooperate, these pseudo-conformists simply resorted to lying as a straightforward, though hardly innovative, tactic.

The deceptions practiced by this brand of market-oriented judges were inspiring and heartwarming. Having secretly signed up law clerks for five years in advance, they whined to their brethren that all the star prospects were being picked up early by the D.C. Circuit. These judges also set up the judicial equivalent of a Potemkin's Village⁴ by appearing to interview large numbers of young men and women at the authorized time. Actually, the young people showing up at the chambers of the self-deregulated judges were not law students at all but Junior Achievement members on a tour of the courts. The sight of such a horde sent rivals into a panic.

The alternative strategy followed by judges of a libertarian bent was to pursue an *in terrorem* strategy designed to demonstrate the potential of ruthless competitors to leave the conformists in the dust. These rugged individualists made it clear to all who would listen to them that efforts to introduce order into the law clerk hiring process were the work of impractical dreamers. If not of dreamers, they were products of an unholy alliance between "elite" judges (defined as some professor's good friend) and academics bent on landing their prize students with friendly judges who would cherish their clerks and acclaim their clerks' professors.

These openly nonconformist judges typically saw themselves as disadvantaged. They were judges who thought they *deserved* to be everyone's first choice but apparently were not for any number of reasons over which they had no control. Perhaps, they labored in some obscure backwater, many miles from a seacoast and not noted for cosmopolitan charm or cultural sophistication. Perhaps, they had graduated from an anonymous law school, practiced with a small and unheralded law firm, and were yet to publish their first novel or even a practice manual. They were quick to believe that in normal course all the prime law clerk candidates would land with a court much closer to a seacoast than they, with a judge who graduated

⁴ The handsome Prince Grigori A. Potemkin was a governor general and "close friend" of the late Tsarina Catherine the Great of Russia (1762–1796). Prince Potemkin cleverly arranged for attractive façades of nonexistent villages to be erected on the banks of the Volga, so that Catherine, when she passed in the royal barge, would be impressed with her favorite's efforts in bringing prosperity to the steppe and would yearn to reward him appropriately. Thus, a Potemkin's Village is "an imposing or pretentious façade or display designed to obscure or shield an unimposing or undesirable fact or condition." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1775 (3d ed. 1986).

from Harvard or Stanford or with one who spent his recesses on tour touting his most recent book.

These self-pitying judges might not seem like rugged individualists, but they were. They scorned a system erected by effete Easterners and designed to keep top candidates from crossing the mountains into the great breadbasket of America. These jurists trumpeted their contempt of any rules at all and gloried in having candidates report for interviews before Christmas. And they were careful to allow their clerks to discreetly whisper the word that their judge had almost completed his hiring only a week or two after New Year's.

These carefully leaked rumors spread panic among a law-abiding but essentially craven segment of the judiciary. This group was stubbornly determined to hold the line, come what may, until they got wind that their colleague down the hall was interviewing and there was still a month to go before "The Day." Then the forces of competition proved their power to shred the carefully woven fabric of regulation just as the (black) market undermines any serious effort at price control. Could there be any more glorious vindication of deregulation than the disorderly rout of the rule-bound jurists by the free spirits creatively following their own lights?

In order to bring this all into focus, let us examine a few weeks in the life of Judge Clueless as he goes about the business of hiring law clerks for the fall term still eighteen months in the future. Remember, it is now the age of deregulation with no set time for beginning interviews, but Judge Clueless is hopeful as usual of bagging an editor in chief or two. This year with the advent of deregulation the number of law clerk applications that he has received has leaped upward. Last year he was gratified when the number of applications had risen modestly from the fifteen or twenty to which he had been accustomed to a new record of thirty. But now, in the first year of deregulation, he counted a huge tenfold increase totaling almost three hundred applications. Not only were there more applications, there were applications from previously undreamed of applicants: the Editors in Chief of Harvard and Yale were tucked in beside the Poetry Editor of the Okefenokee Bar Record (the nation's only legal publication with a Poetry Editor). Judge Clueless was ecstatic. What he did not know was that, with the advent of deregulation, the numbers of law clerk applications nationwide had skyrocketed. Now that there was no set date for interviewing, judges could interview year-round. Hence, even the choicest candidates sent applications not only to the "elite" judges that they clearly yearned to serve but to almost every judge, on the theory that if, through some mischance, they missed out with the elite, they would have a second chance with what were popularly called "safety" judges.

Judge Clueless was a safety judge *par excellence*. His opinions had the aroma of law clerk drafts and might have been created just by reformatting his bench memos. Judge Clueless had no reputation as someone who could turn a phrase. In fact, his work was reminiscent of the rolling cadences of *Corpus Juris Secundum*.

He began his clerk selection process in an undeniably orthodox way. He turned to his current clerks to sift and winnow his applications to identify candidates worthy of an interview. Since his present clerks were all products of the Okefenokee Law School, they naturally gravitated to the Poetry Editor from that venue. That candidate had additional credentials as an “interesting” applicant. As a matter of fact, the Poetry Editor had the distinction of having served terms in both federal and state prison and would no doubt add diversity of viewpoint to the chambers.

But Judge Clueless had bigger things in mind, and he immediately set out to recruit the editors in chief of the leading law reviews. He instructed his secretary to place telephone calls to these applicants and set up interviews for a couple of weeks hence. But then he began to learn the awful truth. Each of the candidates that his secretary attempted to contact had telephones where only an answering machine responded. The answering machine hinted that the candidate was traveling on law clerk interviews and suggested ever so subtly that he might be in Washington seeing judges of the D.C. Circuit. Judge Clueless’ secretary left messages that the applicant should call Judge Clueless immediately. Of course, none of these calls were to be returned until the recipient had exhausted far more promising opportunities than a place with Judge Clueless. Judge Clueless was not likely to get a call-back until the candidate had reached a much higher level of job anxiety. The Judge learned that the new and superbly qualified candidates were not serious applicants at all. They had applied only to toy with his affections, but with no real expectation of receiving and accepting a bona fide offer.

The strategy of these law clerk applicants was abundantly clear. They employed the answering machine as a prime weapon of competitive battle in the era of deregulation. The answering machine strategy was to lure the “Cluelesses” of the judiciary into continuing to call to set up interviews while allowing the potential clerk to avoid making any commitment to come for an interview. The message on the machine was designed to whet the appetite of the Cluelesses while building their desperation that the applicant was lost to a more elite jurist. Thus, the message could say that the law student, Ms. Resumé, would be on the road for a few days but could be reached at a 202 or a 212 area code number. This strongly suggested interviews in the D.C. Circuit or the Second Circuit and sent Judge Clueless into fits of anxiety. The student could even go to the extreme of leaving the actual office phone number of a judge with whom she intended to interview. This stratagem would serve the dual purpose of warning Judge Clueless that Ms. Resumé was about to be signed away by another and more elite jurist, and alerting the judge being visited that Ms. Resumé may already have received an offer from Judge Clueless. Thus, Ms. Resumé, by astute manipulation of her answering machine, has set up a rivalry for her services out of thin air between Judge Clueless and an elite judge on the East Coast.

This sort of strategy can be employed throughout the month of January by sophisticated applicants. But, by the time February rolls around, it may be assumed

that the truly elite judges have hired their full quota of law clerks, and Ms. Resumé's answering machine, to be credible, should now communicate generalities like, "she is traveling in the Southwest or the Upper Midwest," giving area codes in the Arizona desert or northern Wisconsin. That way, Judge Clueless can be left with the painful thought that Ms. Resumé is still actively in the market and might even be hired by a judge as obscure as Judge Clueless. That would be the ultimate humiliation. However, in any event, Judge Clueless has still not succeeded in getting beyond the answering machine.

To supplement the answering machine, Ms. Resumé may enlist a canny and discreet roommate in her cause. The roommate can dispense imaginative misinformation to Judge Clueless' secretary suggesting that Ms. Resumé is roaming the country, visiting with a flock of interested judges, receiving numerous offers, which she is carrying around with her as she looks for the best possible terms. This helpful roommate must be just indiscreet enough to give away tidbits of information that will whet Judge Clueless' appetite while being forgetful enough never to remind Ms. Resumé to call the Judge back.

Finally, when March arrives, Ms. Resumé may be sufficiently desperate for a law clerk position to consider even an offer from Judge Clueless. By then, of course, Judge Clueless may have given up trying to get Ms. Resumé to call *him*. The shoe is now on the other foot, and it is the applicant's turn to wheedle an interview out of Judge Clueless. One time-honored tactic for law students is to call Judge Clueless' secretary and report (falsely) that she is scheduled to be interviewed by Judge Cluemore, whose chambers are down the hall from Judge Clueless. Therefore, wouldn't Judge Clueless want to see her on the same day? Judge Clueless, of course, doesn't want to be in the position of turning down Ms. Resumé without even seeing her when she is so close and it would be so convenient. Hence, he responds generously, "Oh, yes, if you are nearby, by all means come in to see me."

Then, Ms. Resumé telephones Judge Cluemore's chambers to indicate that Judge Clueless is going to see her and to ask whether Judge Cluemore would not want to take advantage of her proximity to interview her as well. Judge Cluemore goes through the same mental process as Judge Clueless did earlier and invites Ms. Resumé to drop by. Thus, Ms. Resumé has manufactured two interviews where there were none before.

But what about the possibility that Judge Cluemore would tell Judge Clueless that Ms. Resumé in fact had no prior appointment with him, thus exposing her efforts to arrange interviews as a mammoth hoax? This would be a most unlikely development because judges abhor talking to one another about *anything* substantive (instead they send each other memoranda). They particularly abhor talking about a law clerk candidate that might have to choose between them for a position. Each judge would like to think that he would never make an offer to a candidate who would reject him in favor of one of his colleagues on his own court.

This would be a painful blow to his sensitive judicial ego and explains fully why judges rarely mention candidates that would be in a position to spurn them.

However, even if Judge Cluemore should disclose Ms. Resumé's misrepresentation to Judge Clueless, the applicant could easily explain the suspicious circumstances as an innocent error by her roommate, who confused Judge Cluemore with Judge Moreclue, a senior judge in Alaska. The entire mix-up resulted from a real appointment with Judge Moreclue, which the roommate transformed into a date with Judge Cluemore.

There are other ways of enticing Judge Clueless into granting an interview to Ms. Resumé. For example, Ms. Resumé might whisper romantic suggestions over the phone to Judge Clueless' male law clerk, who would then stop at nothing to get her invited to the Clueless chambers, where he could pursue the romance. A cruder approach might involve expensive gifts for the Judge's secretary, including bouquets of orchids, intoxicating perfumes, or cases of Miller Lite. But the setting up of a phony rivalry for Ms. Resumé's services between two judges with fragile egos is a sure-fire method that rarely fails.

Let us now assume that an interview has been arranged. The fate of the applicant now rides upon the success of that interview. But the interviewing of law students by judges is a complex subject that will have to be saved for another essay and another day. For present purposes, let us assume that the judge is overwhelmed by the applicant's promising record in junior high school, her notable accomplishments in baby-sitting, and her uncanny talent for cracking her knuckles. Hence, he quickly consults the ultimate authority in these matters—his present clerks—one of whom, as we have noted, already has a warm regard for Ms. Resumé, so to speak. With his clerks' blessing, Judge Clueless pops the question.

Ms. Resumé, of course, would not think of accepting an offer on the spot, even though it might be the first such offer she has received in three months of interviewing. Instead, she asks for a week to think about it, inferring (falsely) that she has to go back and check with all the judges who told her to get back to them if she received a subsequent offer. Judge Clueless is, of course, annoyed at the prospect of waiting a week for an answer but is also flattered by the thought that Ms. Resumé may be so sought-after that it takes her a week to make up her mind. Judge Clueless is so spineless that he would seriously consider waiting a week for an answer, but he wants to project an image of being in control so he boldly cuts the proposed week down to six days. That is the way the two of them leave it as the applicant disappears into the night—perhaps never to be seen again. But Ms. Resumé, having shown to her own satisfaction that she could wring a six day concession out of the hapless Judge Clueless, decides that there is no point in taking further risks. She telephones her acceptance to Judge Clueless from a pay station on the ground floor on her way out of the courthouse. The Judge, however, remains secure in the misapprehension that he has landed a prize specimen in great demand throughout the judiciary. Ms. Resumé, never one to rest on her oars, snoozes fitfully

on the flight home while entertaining vivid dreams of *Justice* Clueless.

All these impressive events would be unlikely, if not impossible, without the deregulatory effort that left the recruitment of law clerks a totally unregulated matter and completely open to the mysterious market forces that in their wondrous way are guaranteed to bring just the right law clerk into just the right judicial chambers. Command and control efforts could only obstruct the work of the Invisible Hand in performing this Miracle of the Market. The free market will bring Ms. Resumé unerringly to rest in the custody of the otherwise hapless Judge Clueless. According to the unconstrained market, these two deserve each other, and there is no doubt that they do.