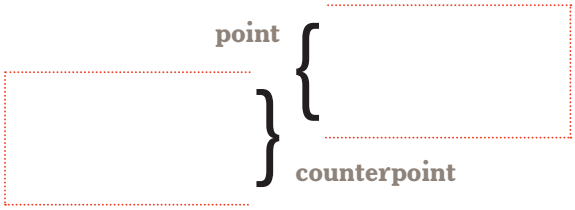
VOLUME 102 NUMBER 2 SUMMER 2018
JUDICATURE
Published by the Bolch Judicial Institute of Duke Law. Reprinted with permission. judicialstudies.duke.edu/judicature



A(nother) new plan for clerkship hiring

On February 28, 2018, an unofficial ad-hoc committee of federal judges announced a new version of a law clerk hiring plan, a revision of an earlier system that was tried but discontinued in 2014. Under the new plan, students who entered law school in 2017 or later will not begin the application and hiring process for federal clerkships until after the completion of their second year of law school. In its announcement of the plan, the ad-hoc committee calls it "a two-year pilot plan that participating judges will reconsider after June 2020."

To support the plan, the OSCAR Working Group – a group of judges and law school administrators – voted to adjust the date on which clerkship applications are made available to judges. (OSCAR is the Online System for Clerkship Application and Review operated by the Administrative Office of the Courts to facilitate the hiring process for federal clerkships and staff attorney positions.) According to the OSCAR website, "Judges will not seek or accept formal or informal clerkship applications, seek or accept formal or informal recommendations, conduct formal or informal interviews, or make formal or informal offers before June 17, 2019" – the date that the OSCAR system will make clerkship applications available to judges. The application date for the entering class of 2018 is June 15, 2020.

The plan responds in part to a September 2017 letter signed by 111 law school deans who said they "strongly support a proposal under which judges would not accept clerkship applications until after the completion of students' second year." The letter noted that waiting until the second year will provide judges with more information about students and give students more time to focus on their studies before turning to the often-stressful clerkship hiring process.

Similar federal clerkship hiring plans have been adopted in the past. All eventually fell apart. To provide perspective on the new plan and its chances for success, we posed questions to the **HONORABLE DIANE WOOD**, chief judge of the U.S. Court of Appeals for the Seventh Circuit, a senior lecturer at the University of Chicago, and a member of the ad-hoc committee that developed the plan; and to **PROFESSOR AARON NIELSON**, who teaches administrative law at Brigham Young University, has written about clerkship hiring, and is a former clerk to Supreme Court Justice Samuel A. Alito, Jr., Judge Janice Rogers Brown of the U.S. Court of Appeals for the D.C. Circuit, and Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit.

Do federal courts need a coordinated hiring plan for clerks? Why, or why not?

WOOD: The federal courts have a great deal of experience, both with coordinated hiring plans and without such plans. During the periods when the plans have been in effect and have been followed by a substantial majority of the judges, the hiring process has operated better both for clerkship applicants and for judges. Particularly for applicants who are still in law school and who hope to obtain a clerkship immediately upon graduation, the plans have assured that the student is able to develop a full academic record, get to know professors and other recommenders well enough for a personal and helpful letter of recommendation, and come to an informed opinion about whether a clerkship fits into the student's career plans. Hiring law students who have barely completed their first year is unambiguously bad for all concerned. In contrast, if a judge has two full years of grades, she gets a much better picture of the student's ability. Suppose, for example, that the first-semester grades are average, but the second half of the first year and the full second year are excellent. The judge would make a mistake in overlooking that candidate, if she or he were limited to first-year grades only; that mistake would be avoided under the plan. The opposite could also happen: A student might start out with a fine performance but slack off as time goes on and the competition becomes more intense. Letters of recommendation are also much more helpful when the writer actually knows the person and can speak specifically to the judge's hiring criteria.

Experience shows that during the periods when no plan has been effect, competition among the judges has pushed the dates of interviews back into the end of the first year of law school. This means that both the judge and the student are making plans for two years or more into the future. That, too, can be risky, even though it normally works out. Worse, the student is relegated to discussing a semester (or quarter) or so in law school, undergraduate experience, and any relevant work experience. Neither party is well served with such limitations. That timetable creates terrible pressure for the first-year students who are just feeling their way. It has a particularly deleterious effect on students who do not come from a background where graduate work, or law school, was the norm, including minority students and those from disadvantaged backgrounds.

NIELSON: This may sound pedantic, but no, federal courts don't *need* a hiring plan. The courts didn't fall apart between 2013 and 2017 when there was no plan. The better question is whether federal courts should want a hiring plan. But to answer that question, we need to answer two other questions. What is the benefit of a hiring plan? And how much does it cost?

A hiring plan could provide real benefits — if it worked. Judges could hire with more information (a good thing); students could get a better feel for the law before applying (also a good thing); and hiring might be more orderly (arguably a good thing).

Unfortunately, a plan that works would be very costly. Coordination is difficult when breaking from the group provides a benefit, there are many players, there isn't much transparency, and there is no meaningful enforcement mechanism — all of which describes clerkship hiring pretty well. To create a working plan, the federal courts would need a powerful enforcement mechanism to prevent "early" hiring. But would that be cost-justified? Almost certainly not. We could, for instance, imprison law students who apply early; in the cartel context, the prospect of prison presumably discourages some coordination. But jail obviously would be disproportionate in the clerkship context. The courts could also try to set up a "medical match" system that controls all hiring. But that is expensive and, alas, isn't foolproof either. Or Congress could pass a law ordering judges not to hire early. But that could not possibly be the best use of Congress's time. Stigma also may sometimes serve as an informal enforcement mechanism. Yet as far as I can tell, there is no stigma. In fact, some judges who think it is virtuous to hire outside the plan say they do so because they believe the plan is unfair to students.

And so we come to the crux of the dispute: What is better — a plan that doesn't work or no plan at all? My sense is the latter. I applied for clerkships while the old plan was collapsing. It was unfair. Some students at schools with less robust clerkship cultures presumably trusted the plan because it looked authoritative; they missed out. Many better-informed students knew that some judges hired early but did not know who those judges were, and students in the know weren't always keen on sharing that information. That also wasn't fair. Likewise, some but not all professors were willing to send letters before the deadline, which in effect treated similarly-situated students dissimilarly. And some judges may have penalized students for applying early by discounting their applications, even though students were simply trying to navigate a difficult situation with imperfect information. Finally, when a plan is formally in place but is widely ignored, folks learn that only gullible people trust rules. That's a very bad lesson to teach law students.

Will a coordinated plan affect all judges equally? For example, will it advantage or disadvantage judges on certain courts or in certain geographic areas? Should Supreme Court justices adhere to the plan?

WOOD: The new plan is as evenhanded among judges as it is possible to be: It uses only one date (in the first year, June 17, 2019) for the time when applications can be transmitted to judges, whether electronically using the OSCAR system or in any other way accepted by the judge in question. From that point, it is up to the judge to decide how to proceed. In order to address geographic issues and to be sensitive to student budgets, some judges have started to use video interviews; other judges prefer in-person interviews.

Several justices on the Supreme Court have publicly expressed their support for the plan, including Justice Elena Kagan and Justice Ruth Bader Ginsburg. Justice Kagan indicated that she would take compliance with the plan into account when she conducts her own hiring. But the Supreme Court justices do not hire people directly out of law school, so certain features of the plan do not apply to them.

NIELSON: Many students are on the East Coast, and it is easier and cheaper for those students to interview with judges who are near them than to fly to, say, San Antonio, St. Paul, or Salt Lake City. Proximity isn't as significant in a world without a plan because hiring isn't as compressed; there is more time for students to travel and tickets can be purchased more cheaply. In a world with a plan, however, students, at least at the margins, rationally prefer to interview where lots of judges are reachable quickly and cheaply. The same math presumably applies for students in California, to the Ninth Circuit's benefit.

This isn't just my opinion. I reached out to a number of circuit judges. This is what one of them said: "The plan hurts judges in 'fly-over country.' The top students will be tempted to go only to New York and D.C. to interview because they can do those cities quickly and compactly and they are the places with more potential feeder judges." Another made the same point: "Any plan hugely advantages judges in the I-95 corridor from Boston to Richmond."

HIRING LAW STUDENTS WHO HAVE BARELY COMPLETED THEIR FIRST YEAR IS UNAMBIGUOUSLY BAD FOR ALL CONCERNED.

At the same time, the plan creates incentives for "exploding" offers, which are disgraceful. When hiring is compressed, the opportunity cost of delay increases. The current iteration of the plan purports to prohibit exploding offers by giving students 48 hours to travel. But will that solve the problem? Again, quoting a circuit judge: "The 48-hour period for exploding offers is a joke. It's not realistic that an applicant can schedule numerous interviews, receive offer(s), consult with advisors and family, and come to a reasonable conclusion in that short period."

I agree with Chief Judge Wood that Supreme Court involvement is interesting. In theory, the justices could act as enforcement mechanisms — if a circuit judge hires early, her clerks won't be considered for a Supreme Court clerkship. And because students know this, they know not to apply early. In practice, however, I'm not so sure. First, non-"feeder" judges hire early, too. That presumably will not change much no matter what the Supreme Court does. Second, although a number of the justices have suggested that they will take into account the plan, others haven't even gone that far, and, I believe, no justice has said that he or she will categorically reject applicants on this ground. This matters because, objectively, no one has a good shot at clerking at the Supreme Court; there is a lot of luck involved. So if a student's odds of being hired at First Street drop from, say, 2 percent to 1 percent, is that really enough to dissuade an early application to a circuit judge? And third, how will the justices police such a rule? A circuit judge may say something like, "Obviously, I can't hire now, but I sure hope you are available when I can; I'll keep my eyes out for your application." The effect can be essentially the same as an offer.

How does the requirement that students have grades for two years of law school before applying benefit or adversely impact individual law students, including post-graduates and current students?

WOOD: The requirement benefits current students and is irrelevant to anyone who has already completed more than two years of law school at the time of his or her application. Nothing in this plan

addresses applications from post-graduates. For judges who prefer hiring lawyers with some experience, the plan does not require any change in their practice. For other judges who prefer hiring directly from law school, however, the plan will allow the student to put his or her best foot forward in the ways described above. It is our experience, and our expectation, that the professed fear that graduates will crowd out current law students is not realistic. Judges who prefer hiring directly from law school will simply do so with a better information base.

NIELSON: My position is the middle one — I would be sympathetic to a plan if I thought it would work at a reasonable cost and without unintended consequences. Students at schools like BYU, where I teach, presumably do worse in a world without a working plan; the same is true for students at all schools who, for whatever reason, need a bit more time to adjust to law school. When judges make decisions with less information, they have to rely more heavily on proxies for legal ability. For instance, a circuit judge told me that all else being equal, if all the information that he has is the law school, hiring a clerk from Stanford is generally safer than hiring a clerk from BYU because students who attend Stanford, on average, have higher entering credentials. But after students have had time to demonstrate their ability, Stanford's initial advantage often disappears. Thus, at least at the margins, if there is a working plan, we should expect students at schools like BYU to do better than they would in a world without a plan, while students at the most selective schools should do worse. And we should also expect students who need more time to adjust to law school to do better. As someone who teaches at BYU, that doesn't bother me!

Unfortunately, I don't think the plan will work. In a world with a broken plan, students at the most selective schools who did best as 1Ls should be expected to do better because they have greater access to secret information. Today, no one knows the full universe of judges who aren't following the plan. Yet by next year, the students on the *Yale Law Journal* will have a pretty good idea, even though almost all other students still won't.

Similarly, we should expect post-graduate applicants to do better in a world with a plan because they aren't regulated. Hiring during a compressed period can be stressful. Some judges prefer to hire a clerk or two outside of that process just to deescalate things. Hiring post-graduates is not always a problem; some judges like having real-world experience in chambers. But it is a problem if a judge feels compelled to hire a post-graduate, not because he or she is the best candidate, but because of the plan's incentives. Likewise, as one of my colleagues stresses, to the extent that the plan encourages hiring post-graduates, it makes it more difficult for less "traditional" students to clerk, especially students who are married or who have young children. After all, they have to find a job, then leave that job and move someplace else for a clerkship, and then probably move again. Such upheaval often isn't realistic.

> ***TODAY, NO ONE KNOWS THE FULL UNIVERSE OF JUDGES WHO AREN'T FOLLOWING THE PLAN. YET BY NEXT YEAR, THE STUDENTS ON THE YALE LAW JOURNAL WILL HAVE A PRETTY GOOD IDEA . . .***

Should the judiciary as an institution have any concerns about potential administrative challenges law schools may face in implementing any hiring plan?

WOOD: The law schools have overwhelmingly supported the Federal Law Clerk Hiring Plan of March 2018. They have not communicated any concerns about administrative challenges that cannot be addressed. The small number of schools on the quarter system wanted to ensure that the starting date was late enough to accommodate their calendars, which is why the plan uses June 17, 2019, and June 15, 2020, for the next year. In addition, even if a quarter-system student were missing one or two grades by June 17 of the 2L year, that student would still have one more set of grades than any semester-system student. Importantly, the plan is flexible: In the event that there are unexpected administrative challenges for law schools, students, or judges, it will be revised to accommodate those challenges. That flexibility is reflected in the fact that this is a two-year pilot plan, not something that has been etched in stone.

NIELSON: If by "administrative challenges" we mean, "preventing faculty members from sending recommendation letters too soon," then yes, the judiciary should be concerned. Otherwise, I agree with Chief Judge Wood that the administrative challenges should not be significant.

At bottom, law schools are not designed to prevent judges from hiring their students. No doubt many law schools see the advantage of a plan and want it to succeed. But what happens when a specific judge wants letters of recommendation sent early? A law school may decide that it will not send letters before the deadline, no matter what. But that school has to worry that other schools will not be so unyielding. This is not an imaginary concern. In 2012, Georgetown Law circulated a memo to its students, letting them know that "some of our peer schools are submitting students' applications for judicial clerkships in advance of deadlines established by the federal law clerk hiring plan." Predictably, Georgetown also started sending letters.

All the while, a similar dynamic is playing out with faculty members. We know that some judges hire before the deadline and that some professors send letters to those judges. So what should a professor do when a talented student asks for a recommendation? Some may stand firm and say, "No way, no how." But is that fair to the student? Around the same time as the Georgetown memo, Harvard similarly announced that "[f]aculty approached by students who are applying on their own to non-complying judges may exercise discretion in deciding how to support such students." That is a sensible compromise — but it also largely gives up the game. Recommendation letters will be sent.

Previous plans did not last because many judges did not abide by the guidelines, for a variety of reasons. Do you believe this plan is more likely to succeed? Why?

WOOD: No plan lasts forever, as all of the judges who worked to develop this plan know well. But this plan has a better chance than many, because it has been built on the experience we have gained over the years. Critically, it is a very simple plan centered on one pivotal date. No one needs to monitor the date when an application was sent, the date when it was received, the date of first interview, the date of offer, and the date of acceptance. There is no "starting gun" for interviews that applicants must observe. The plan leaves as much as possible to individual circumstances, including, importantly, the fact that interviews can take place over the summer before the third year, when the applicant may well be working in a city near the judge to whom he or she has applied. This timing means that interviews need not come at the cost of missing class.

THIS PLAN HAS A BETTER CHANCE THAN MANY, BECAUSE IT HAS BEEN BUILT ON THE EXPERIENCE WE HAVE GAINED OVER THE YEARS.

NIELSON: Answering this question is difficult because there is a "Heisenberg problem" — if those of us who worry about the plan state publicly that it probably won't work because judges aren't following it, it may lead to even more judges not following it. Even so, the truth is that some judges are not following the plan. And students deserve that information.

For instance, Judge Jerry Smith (for whom I clerked a decade ago) sent a letter to law schools to say he will not follow the plan. Another circuit judge reports that on a recent trip to Boston, she told students that the plan is a mistake and that "they should apply early to judges in [her] circuit." A third judge told me in no uncertain terms that he is not going to follow the plan. In fact, I've heard whispers that perhaps the majority of judges in at least one circuit will not do so. Even the Ninth Circuit, which issued a statement in favor of the plan, admits that not all of its judges are on board. The same is true for the First Circuit which acknowledges that only a "majority" of its judges are on board; the Third Circuit's announcement is ambiguous.

Put all of this together and it is pretty obvious that a lot of clerkship hiring is going to happen outside of the plan. So what are other judges going to do in response? Perhaps a critical mass will decide to abide by the plan, even if it means missing out on many good clerks. But is that critical mass likely to hold together over the long run? I fear we will be in for a repeat of the demise the old plan. At first a handful of judges will refuse to comply, some openly and some not. And then a few more. And then a lot more. And then the plan will collapse. That said, I agree with Chief Judge Wood that this plan is better than the old plan; it is simpler and the summer is a better time for hiring.

Concluding thoughts?

WOOD: Through the adoption of this plan, participating judges around the country will improve the clerkship hiring experience both for their applicants and for themselves. While it is not essential that every judge in the country follow the plan, for the plan to succeed,

we are hopeful that most judges will find it in everyone's best interest to adopt it. Suggestions for improvement are also welcome. They may be addressed to any member of the Ad Hoc Committee that formulated the plan: Chief Judge Merrick Garland (D.C. Circuit); Chief Judge Robert Katzmann (2d Circuit); Chief Judge Sidney Thomas (9th Circuit); or Chief Judge Diane Wood (7th Circuit).

> ***THE TRUTH IS THAT SOME JUDGES ARE NOT FOLLOWING THE PLAN. AND STUDENTS DESERVE THAT INFORMATION.***

NIELSON: I understand why a plan is attractive and I appreciate the efforts of Chief Judge Wood and the Ad Hoc Committee to try to build a system that works best for everyone. Our disagreement is about means, not ends. If there was a cost-effective way to push hiring back that would work, not encourage exploding offers, not make the process more expensive for students, and not benefit some judges more than others, I'd support it.

But I just don't see it. The new plan is already leaky — and it would be very difficult to plug those leaks. At the same time, a plan creates problems of its own. And if a plan doesn't work (which is likely), the process becomes really unfair. Likewise, the ills of a world without a plan should not be overstated; it may not be ideal to hire clerks with just one year of grades, but some judges are good at it, and if they aren't, then there is an opportunity for other judges to wait for passed-over superstars.

So if a plan isn't realistic, what's the best option? *Transparency*. Everyone should know and play by the same rules. No one should have to care about rumors. And no one should be an "insider." Unfortunately, although it's imperfect, I fear that means no plan.