

SUBJECT: Rules regarding future employment of and benefits to law clerks

COMMITTEE: Judicial Affairs — committee substitute recommended

VOTE: 7 ayes — Thompson, Capelo, Deshotel, Garcia, Hinojosa, Solis, Uresti
1 nay — Hartnett
1 absent — Talton

SENATE VOTE: On final passage, April 10 — 29-0

WITNESSES: (*On companion bill, HB 2889:*)
For — Suzy Woodford, Common Cause Texas; Tom “Smitty” Smith, Public Citizen; Cris Feldman, Texans for Public Justice; *Registered but did not testify:* Dan Lambe, Texas Watch.

Against — Ernest H. Young, University of Texas Law School; Steven Goode, University of Texas Law School; Justice Martin Richter, Fifth District Court of Appeals.

On — Chief Justice Tom Phillips, Supreme Court of Texas.

BACKGROUND: Many courts employ recent law school graduates for a one- or two-year term as a briefing attorney or law clerk to help the judges with research and in drafting opinions. Many of these young lawyers worked for law firms in the summers during law school and receive future offers for permanent positions with those firms after they finish their service with the court. Many law firms give new attorneys who have worked as law clerks or briefing attorneys a “clerkship bonus” both as a way to attract lawyers with this credential as well as a way of compensating them for having experience that is valuable to the firm.

Penal Code, ch. 36 prohibits certain bribery and corrupt influence of public officials by making it class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) for a public servant employed by a tribunal to solicit, accept, or agree to accept a benefit from someone that the public

servant knows is interested or likely to become interested in a matter before the tribunal. The Texas Ethics Commission has interpreted “public servant” to mean someone who has accepted but not begun employment with the state.

Penal Code, sec. 36.02(a) also makes it a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000) intentionally or knowingly to offer someone, or accept or agree to accept from someone, a benefit as consideration for a public servant’s recommendation or exercise of discretion. Under this section, it does not matter that the benefit is offered or accepted after the recommendation or exercise of discretion has occurred.

A Texas Ethics Commission Opinion (No. 425) has held that Penal Code, ch. 36 would prohibit as bribery a law firm’s severance payment to an attorney who was leaving to work for the Attorney General’s Office for several years. The opinion argued that because the money would be contingent on the attorney’s limiting his or her tenure with the state, it would be a benefit in exchange for an exercise of the person’s discretion as a public servant.

DIGEST:

CSSB 1210 would amend the Government Code to prohibit law clerks, other than during the last 90 days of their employment with the court, from negotiating for or accepting employment with a law firm or other private employer during their employment with a court. It also would bar a law clerk from accepting a benefit in connection with future employment if the offer or acceptance of the benefit would violate Penal Code, ch. 36.

The bill would require law clerks to make written disclosures of their agreements for future employment as well as disclosure of any benefits they had accepted. The courts also could require by rule that law clerks disclose other information. The disclosures would become public records and available to anyone on request.

The bill would require law clerks who had accepted employment with or a benefit from a private entity prior to being employed by the court not to participate in any way (*i.e.*, recuse themselves) concerning any case before that court involving that private entity. Nor would the law clerk be able to participate in any manner before that court on behalf of their new employer

for two years following their service with the court. Recusal would have to be made by order to the court.

Any violation of the provisions of this bill would subject the attorney to sanctions by the State Bar.

CSSB 1210 would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2001.

**SUPPORTERS
SAY:**

CSSB 1210 would help ensure that the courts maintained high ethical standards and that the relationships between clerks and law firms would not involve any appearance of impropriety or that some firms had special access to the courts. Moreover, the bill would help guarantee the impartiality of law clerks who could exercise influence over the judges for whom they work.

By preventing clerks from interviewing with or receiving bonuses from private employers during their tenure with the court, the bill would eliminate the situations with the biggest potential for conflicts of interest and the most egregious appearances of impropriety. A bonus paid during the clerk's tenure appears tainted even if the clerk is recused from any cases involving the payer of the bonus.

The fact that some courts have rules forbidding law clerks from accepting bonuses during their tenure with the court and informally prohibiting law clerks from being involved in cases that their future employers have before the court is not enough. There is no public disclosure of these relationships or any public recusal for the clerk, so no one outside the court has any way to know if those within the court are respecting the recusal. Further, these internal rules and procedures do not eliminate the appearance of impropriety that arises with these relationships.

By requiring disclosure of relationships between law clerks and private entities and public recusal of clerks, the bill would insure that someone besides the court itself could monitor the recusals and provide accountability. It also would make members of the different courts aware of which clerks serving other members of their court had potential conflicts and with whom.

By barring former clerks from appearing before the court for which they worked, for a reasonable period, the bill would bring the judiciary into line with the “revolving door” provisions to which other agencies and their employees must adhere. Such rules ensure that public servants who are connected closely to an agency do not parlay their experience and connections with the state in ways that jeopardize the integrity of state agencies in the eyes of the public.

OPPONENTS
SAY:

Many of this bill’s provisions would make it more difficult for the courts to attract high-caliber clerks. By making the courts less competitive for the legal staff they need to do their work, this bill would make the courts less effective and reduce the quality of their work product.

CSSB 1210 unfairly would penalize law clerks for their service by forbidding them from appearing before the court for which they worked for two years. Not only would this make it much more difficult for the law clerk to find a job, it also would discourage young lawyers from working for the courts.

If a law clerk could not receive a bonus for having been a state court clerk even after having left the court’s service, it would be nearly impossible for the courts to attract top candidates. Federal courts pay higher salaries and have no such rules against bonuses, which can be many thousands of dollars, provided they are paid after the clerkship. The Texas Supreme Court already bans by rule bonuses received during a clerkship; a further statutory ban is unnecessary.

The limitation on when a law clerk could seek later employment would impose an undue burden on many law clerks. Such a wholesale recusal of the clerk would not serve any legitimate purpose. While it would make sense to bar a former law clerk from appearing before the court on a case on which the clerk had advised the court, this provision would be a very blunt instrument for achieving that result.

Because the interview and hiring season for law firms occurs mostly in the fall, while clerkships tend to begin the August after graduation, this bill would prevent law clerks from interviewing in the fall immediately after they began work and thus from having a job lined up for after their clerkship.

Though the clerkship would end at the beginning of the interview season, the law clerk probably still would have to wait several months for an offer, and few recent law graduates can afford to go so long without a pay check.

This bill would do nothing to address the uncertainties about the relationships between law clerks and their future private employers under the Penal Code. Currently, it is unclear whether the Penal Code prohibits law clerks from accepting bonuses after their clerkship if the bonus were given because the person worked for a court. However, the bill would not clarify this uncertainty, but simply would incorporate it by reference into the Government Code section it would enact.

OTHER
OPPONENTS
SAY:

While CSSB 1210 would prohibit a clerk from accepting an offer during the clerkship period, a law clerk could accept a job before the clerkship and have the same relationship throughout that would exist if an offer were accepted during clerkship. If the concern would be that the relationship looked bad or that recusal would be ineffective, that concern would apply to both clerkships, not just the ones prohibited by the bill.

NOTES:

The committee substitute is largely identical to the companion bill, HB 2889 by Dunnam, which was left pending in the House Judicial Affairs committee.

The substitute deleted from the Senate version an amendment to the Penal Code that added an exception for law clerks to the other types of gifts/benefits that are excepted. The substitute also incorporated reference to the Penal Code, while the Senate version would have prohibited benefits only if the law clerk knew or should have known that the benefit was intended to influence the law clerk in the performance of the clerk's duties for the court. The substitute deleted the provision that would have allowed the Supreme Court to make rules governing when and how law clerks could interview for and accept future jobs during their tenure working for a court and added the substitute's provision that would permit a law clerk to look for a future job during the last 90 days of the position with the court. Finally, the substitute replaced a Senate provision that would have forbidden a law clerk from representing his or her new employer before the court on any case that had

been pending before the court while the law clerk worked for the court, with the two-year blanket recusal from appearing before the court.