

Why Judges And Schools Must Broaden Who They See As Clerks

By **Jack Karp**

Law360 (June 14, 2021, 1:53 PM EDT) -- Efforts to increase diversity among those clerking at the federal courts will have little impact unless judges and law schools expand their idea of who can be a federal judicial clerk, say experts — something several programs are trying to help those gatekeepers do.

Judges' insistence on hiring clerks from a few "elite" schools and those schools' practice of selecting students to groom for clerkships based on first-semester grades and professional interest are the main drivers behind the stubborn homogeneity among clerks in the federal courts, according to diversity advocates.

The result is a pool of judicial clerks that is largely uniform across demographics, law schools, socioeconomic status and professional interest, these experts say, with more than 79% of federal clerkships going to white applicants in 2019, according to data from the National Association for Law Placement.

That's unlikely to change until judges and law schools alter who they envision as a fit for judicial chambers, advocates say.

"There are a significant number of highly competitive Black, brown, Latina and Asian Americans who can serve as judicial law clerks," retired Judge Gerald Bruce Lee from the U.S. District Court for the Eastern District of Virginia told Law360 Pulse. "When judges tell me 'Well, I just can't find them,' the first thing I say is, 'Well, then you're not trying hard enough.'"

Focusing on 'Elite' Law Schools

Possibly the biggest reason for the continuing lack of diversity among judicial law clerks is that so many federal judges choose their clerks from a few top-tier law schools, according to advocates.

Yale, Stanford, Harvard and the University of Chicago usually top that list.

Harvard Law School placed 84 of its 2021 graduates in federal judicial clerkships, according to data from the American Bar Association. Yale Law School placed 52. University of Chicago Law School and Stanford Law School followed with 54 and 42 clerkships, respectively.

By comparison, historically Black Howard University School of Law placed one graduate in a federal clerkship, according to the ABA.

"Right now the federal clerkship pool is largely people from a handful of elite schools who are interested in having a career that focuses on corporate-interest work, and it's overrepresentative of people whose parents were lawyers," said Molly Coleman, co-founder and executive director of People's Parity Project.

Reaching only into those top schools to hire clerks is a problem because the student bodies at those schools tend to be less diverse than the general population, Coleman and others say. That lack of diversity then follows graduates into the judiciary.

Racial and gender diversity and diversity of law school are "intertwined," said Greg Washington, an attorney at Keeker Van Nest & Peters LLP who clerked at the Eleventh Circuit and the U.S. District Court for the District of Connecticut.

"The vast majority of the people that have been able to attain that kind of status at those institutions are the people generally that have strong economic backing or have somebody who's a lawyer in their family or have access to certain resources that other people might not," Washington said.

The result is what Judge Lee calls a "mirror-tocracy," in which judges who graduated from top schools hire other graduates from those schools "who look like them."

Increasing diversity means changing that mindset, experts insist.

"Because if you're talking about diversifying the law clerk pool, but you're still only talking about hiring law clerks from Harvard, Yale, maybe the T-14, maybe the very top state schools, you're going to have an unrepresentative clerkship group," Coleman said.

Investing in Select Students

The students who attend law schools like Harvard and Yale may be unrepresentative of the larger population, but even less diverse are the ones who excel at those schools in their first semester, and who are seen by their schools as most likely to benefit from clerkships, experts say.

That further limits the diversity of the federal clerkship pool since many top schools use first-semester grades and professional interest to select the students they will shepherd through the process of applying to be a federal judicial clerk. Affluent students tend to do better in their first semester of law school, experts say.

Schools then focus almost exclusively on investing in those students when it comes to clerkship applications and often don't even discuss clerkship opportunities with others, said Coleman, who added, "In that way we really limit the pool."

As a result, many minority students don't even know about clerkships or else believe they're only available to students at the top of their class.

"There are some law schools, particularly the elite law schools, who discourage students who were not number one in their class from competing for federal clerkships," according to Judge Lee. "And it's a mistake."

The fault doesn't lie solely with the schools, Judge Lee said. The "mystique" that cloaks federal judgeships causes some students to take themselves out of the applicant pool because they assume they're not who judges are looking for, he said.

The pandemic's disproportionate impact on communities of color has likely made the problem worse, Coleman said.

"People who had to be worrying about sick loved ones, loved ones who were laid off because of the pandemic, housing insecurity, those students were not set up to succeed like their wealthy, privileged counterparts," she said.

So law schools should broaden the scope of students they choose to invest in, according to experts. That involves partnering with minority student organizations and reaching out to minority students to talk about the value of clerkships.

"It starts with broadening the perspective of who can be a law clerk," Washington said. "That's the first step."

Diversifying the Pool

Several initiatives are hoping to broaden the pool of judicial clerks by changing the way judges and law schools think about what kind of students would be a good fit for those positions.

The Summer Judicial Internship Diversity Project, a joint effort by pipeline organization Just the Beginning and the Judicial Resources Committee of the U.S. Judicial Conference, places a broad array of law students in summer internships with federal judges. The program exposes judges to the possibility of hiring more diverse candidates and diverse students as judicial clerks.

This past year, the program signed on about 250 judges to host summer interns, and JTB then recruited applicants for those posts from local law schools near those judges' chambers, according to Cristina Figueroa, JTB's program director.

JTB also trains the students in legal writing and prepares them for interviews, according to Judge Lee, who is involved with the program and has had many interns. The retired judge says he always made sure his interns came from diverse backgrounds and were recruited from local as well as national law schools.

Since 2011, the program has placed over 600 students of different backgrounds in internships, Judge Lee said, and approximately 50 have gone on to become judicial law clerks.

"And that's what's changing the trajectory," he said.

Meanwhile, the Federal Bar Association's recently launched Federal Judicial Law Clerk Committee is creating a database of every former law clerk in the country, according to Constantine Economides and Trevor Jones, the committee's co-chairs.

Students will be able to reach out to former clerks for mentorship and advice through the database, which Jones hopes will "help connect students that may not otherwise have easy access to chambers or easy access to former law clerks."

Advocates hope initiatives like these help improve diversity among federal law clerks by encouraging judges to broaden the criteria by which they choose their clerks and by providing more support to traditionally underrepresented students who might otherwise not have the knowledge or resources to apply for federal clerkships.

And that diversity is vital, these activists say, not just to expand opportunities for a larger group of potential clerks, but also to ensure the legal system is fair and just for all.

"If you don't have a diverse set of law clerks, the thinking within the chambers becomes monolithic, and then the thinking within that district or that circuit also becomes monolithic," Washington said.

"When you have a lack of diversity, you have a lack of diversity in terms of what the law means, what the repercussions are, and ultimately where the law is on a subject," he added.

--Editing by Orlando Lorenzo.