

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

OF THE

DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION NO.7

(January 24, 1997)

RULES GOVERNING JUDICIAL CLERK'S RECEIPT FROM
PROSPECTIVE PRIVATE EMPLOYER OF (1) TRAVEL,
MEAL, AND LODGING EXPENSES TO COVER RECRUITING
VISITS, (2) PRE-EMPLOYMENT PAYMENTS TO COVER
MOVING, HOUSING, AND BAR REVIEW EXPENSES, AND
(3) PRE-EMPLOYMENT HIRING BONUSES AS REWARDS FOR
COMMITMENT TO FUTURE EMPLOYMENT OR AS ADVANCES
ON FIRST YEAR SALARY

We are presented with questions whether, and if so when during the clerkship year, a judicial clerk may receive -- while on the government payroll -- payments from a prospective employer for (1) expenses such as travel, meals, and temporary lodging while seeking employment, (2) coverage, either by gift or loan, of anticipated expenses incident to permanent employment, such as relocation costs, bar review course fees, and downpayment money for housing, and (3) a pre-employment hiring bonus or loan to induce and reward acceptance of an employment offer, or as an advance on the first year's salary.

In contrast with the federal court system,¹ we have no code of conduct expressly applicable to law clerks.

¹ See Judicial Conference of the United States, Code of Conduct for Law Clerks (1981).

Nonetheless, these questions arise because a judge's clerk is close enough to being a judicial officer, and the clerk's actions thus reflect enough upon the court, that ethical norms should be applied to clerks similar to those governing judicial conduct. We therefore address the questions presented (as we have on an earlier occasion) by reference to the Code of Judicial Conduct of the District of Columbia Courts (1995) and relevant ethics opinions, in order to discern apt principles to govern law clerk activities.²

I.

We are only minimally concerned here about a clerk's acceptance of travel, meal, and temporary lodging expenses paid for by a prospective employer when the clerk visits the employer for an interview -- provided, of course, that such payments are reasonable in amount for the types of expenses covered (including those of an accompanying spouse or companion). There is not an appearance of impropriety, let alone any actual impropriety, in acceptance of such expenses because everyone knows the typical clerkship is limited to a period of one or two years and the clerk

² See Advisory Committee on Judicial Conduct of the District of Columbia Courts, Advisory opinion No. 1 (Dec. 18, 1991) (Application for and Acceptance of Future Employment by Judicial Law Clerks).

necessarily will have to pursue future employment, sometimes in a community far from the District of Columbia, while still serving the judge. *See* Judicial Conference of the United States, Code of Conduct for Law Clerks (1981), Canon 5C(1) ("During the clerkship the clerk may seek and obtain employment to commence after completion of the clerkship"); Judicial Conference of the United States, Committee on Codes of Conduct Advisory Opinion No. 83 (citing Law Clerk Canon 5C(1)); *see also* federal Code of Conduct for Law Clerks, Canon 6B.³

II.

A more serious question presented here is attributable to a common law firm practice -- in the hope of enticing recent law school graduates, and especially judicial law clerks -- of giving recruits substantial payments, in amounts that can total as much as \$5,000 to \$10,000 or even more, to cover major moving, housing, and bar review expenses months before they report for work. Even without such payments, any clerk would have to be recused from

³ Federal Canon 6B provides:

Expense Reimbursement. Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by a law clerk and, where appropriate to the occasion, by the law clerk's spouse. Any payment in excess of such an amount is compensation.

participating in any case that involved the private employer. *See* Advisory Opinion No.1, *supra* note 1. But that is not the only problem. There is an arguable unseemliness in a judicial clerk's accepting what appears to be private-employer compensation while still serving as a public employee, irrespective of any particular case before the court. A public employee, conducting judicial functions, should serve the public with undivided loyalty and attention, without undue attachment to private interests that might be seen as coloring or even influencing that employee's views and allegiances. Thus, acceptance of an early payment -- call it payroll money -- from a private employer during the clerkship term creates at least an appearance of divided attention, if not of divided loyalty, that requires a clear statement from this committee about the propriety of such practices. Judicial clerks and prospective private employers alike need to understand what limits, if any, there are.

In identifying the problem, we do not examine all situations that reasonably can be anticipated. We must say, however, that the need of the judicial system -- and thus of the public -- to attract superior judicial clerks, coupled with the realities inherent in legitimately pursuing private employment for the period immediately

after the clerkship, cut in favor of reasonable accommodation of the clerk's personal needs for a smooth transition without financial hardship. These transitional needs, most commonly moving and housing deposit or downpayment expenses, are as significant for the young lawyer, once new employment has been secured, as the earlier needs for transportation, meals, and lodging during the recruiting period.

All things considered, we conclude that a judicial clerk may receive from the new employer reasonable sums offered as pre-employment payments to cover relocation, housing, and bar review expenses. *See* Federal Advisory Opinion No. 83. These amounts must be limited to reasonable expenses actually incurred or anticipated for the post-clerkship period; any such payment may not instead represent a standard, lump sum amount the employer has allocated for such a purpose to each incoming lawyer having the clerk's status, without regard to an actual expense.⁴

⁴ Because the reimbursable expenses we address here relate to the post-clerkship period, we assume that such payments ordinarily will not be received until sometime during the last three months of the clerk's service with the judge. We impose no such particular time limitation, however, recognizing the possibility that a judicial clerk who accepts post-clerkship employment on the west coast, for example, may need to make housing arrangements during a vacation period (*e.g.*, December-January) that would require employer advances earlier in the clerkship year.

III.

There is a final concern. Some private employers provide new recruits with hiring bonuses, unrelated to particular anticipated relocation, housing, or bar review expenses, simply "as a reward for commitment to future employment at the firm or as an advance on his or her first year salary." Federal Advisory Opinion No. 83. The majority of the federal court committee, our counterpart, concluded that "such bonuses, if received during the clerkship, violate the letter as well as the spirit of [federal law clerk] Canon 5C(2)," to wit:

[A] law clerk ... should [not] accept a gift, bequest, favor, or loan from any person whose interests have come or are likely to come before the court in which the law clerk serves

Federal Advisory Opinion No. 83. The committee reached that conclusion despite the fact that the clerk would be recused from participating in any case in which the prospective employer appeared before the court or otherwise had an interest in such litigation. Any other outcome, according to the committee majority, would "undermine confidence in the integrity of the *court* itself," since a loan or salary supplement would reflect a "direct and personal relationship between an officer of the court and a member of the judge's chambers." *Id.*

For purposes of this opinion we rely on federal Law Clerk Canon 5C(2), as well as on the reasoning of Advisory Opinion No. 83 and the concerns expressed at the outset of Part II. above, to conclude that a judicial clerk should not accept from a prospective employer, during the term of the clerkship, any payment not earmarked to cover particular relocation, housing, and bar-related expenses after the clerkship. Like the federal committee, we are concerned that such pre-employment bonuses, unrelated to actual payment of customary employment transition expenses, would appear to be a private-sector subsidy of a judicial employee intended to compensate for low clerkship salaries -- an arrangement that could suggest the subsidizer had some kind of relationship with the court, helping to pay the court's way, that reflected an improper, if not unlawful, purchase of the justice system for private ends.

We recognize that some employers have a uniform, "lump sum" policy to deal with prospective employee transition expenses and hiring bonuses, payable before commencement of the employment relationship. These employers choose not to address the individual needs of new lawyers -- reflecting major differences in moving expenses and housing preferences -- that could lead to time - consuming haggling over what is fair individually and overall. These

employers prefer to pay a single sum large enough to cover expenses in all circumstances plus a reasonable incentive to accept the offer of employment. The rules announced herein should not affect such a policy; an employer with a uniform, "lump sum" expense/bonus approach can simply defer payment to a judicial clerk until after the former clerk arrives at work, except for payment of actual expenses incurred or anticipated for the period after the clerkship.

We stress again that the payments considered in all parts of this opinion include loans as well as compensation; the relationship with a prospective employer is no less when the employer lends, rather than gives, the recruit money.