

Maryland Judicial Ethics Committee

Opinion Request Number: 2019-14

Date of Issue: May 28, 2019

Published Opinion Unpublished Opinion Unpublished Letter of Advice

A judge may not permit an incoming law clerk to accept a salary advance from a law firm for which the law clerk will be working after the end of the clerkship.

Issue: Whether a judge may permit an incoming law clerk to accept a salary advance from a law firm for which the law clerk will be working after the end of the clerkship.¹

Answer: No.

Facts: The Requestor is a judge who seeks advice on whether the judge’s incoming law clerk may accept an advance from the law firm for which the law clerk will be working after the end of the clerkship. The law firm offers all of its incoming associates the opportunity to take a salary advance of up to \$10,000.00 at any time before their start dates. The incoming law clerk would like to take some or all of that advance before starting the clerkship with the judge, while studying for the bar exam and otherwise without income. The judge seeks an opinion on whether this scenario presents an ethical concern.

Discussion: Maryland Code of Judicial Conduct Rule 18-102.12 provides that “[a] judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.” A law clerk’s actions reflect sufficiently upon the court that ethical requirements must be applied to law clerks similar to those governing judicial conduct. But inasmuch as there is nothing specifically in the Maryland Code governing this issue, we have looked to the federal judiciary and other states for guidance.

A salary advance is a loan that an employer gives to an employee and the employee pays it back out of one paycheck or over an agreed time span. The federal judiciary addressed this issue in the Committee on Codes of Conduct Advisory Opinion No. 83: Payments to Law Clerks from Future Law Firm Employers (the Guide to Judiciary Policy, Vol 2B, Ch 2). The Opinion distinguishes between a payment that does not have to be repaid, from a salary advance that would have to be repaid. While the former is permitted, the latter is not:

¹ Consistent with our authority under Maryland Code of Judicial Conduct Rule 18-306(a)(1) to provide an opinion as to the proper interpretation of an ethics provision as it applies to judges, we have reframed the issue slightly.

Maryland Judicial Ethics Committee

Opinion Request Number: 2019-14

Date of Issue: May 28, 2019

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 2 of 5

[A] prospective law clerk is not prohibited from accepting a payment from a law firm before the beginning of the clerkship, provided that the law clerk is not legally obligated to repay the firm

* * * *

A judge should not permit a law clerk to accept a salary advance from a law firm, either before or during the clerkship. The Committee views a salary advance as a loan from the law firm to the law clerk, through which the law firm effectively provides a supplement to the law clerk’s salary during the clerkship. Acceptance of a salary advance could undermine public confidence in the integrity and independence of the court, and is contrary to Canon 4B and 4E of the Employee Code [of Conduct for Judicial Employees].²

A similar issue was presented to the Delaware Judicial Ethics Advisory Committee. In Opinion 2011-2, 2011 WL 7574996 (DE Jud. Eth. Adv. Comm.), a judge requested an opinion on the propriety of an incoming law clerk receiving a \$20,000.00 salary advance, to assist with moving and living expenses, from the firm for which the clerk would be working after the clerkship. The funds would be repaid by the clerk via deductions from the clerk’s paychecks once she began working at the firm.

The Committee based its opinion on the Delaware Law Clerk Conduct Code that provides that a law clerk may not accept a loan from anyone other than a lending institution in its regular course of business on the same terms generally available to persons who are not law clerks. The Law Clerk Conduct Code also specifically prohibits a law clerk from accepting the payment of any bonuses or moving expenses until the end of the clerkship and prohibits the law clerk from receiving any salary or any supplementation of salary from any source other than the State of Delaware.

² Canon 4B. Solicitation of Funds, in pertinent part provides:

(3) A judicial employee should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, except as an incident to a general fund-raising activity.

Canon 4E. Compensation and Reimbursement, in pertinent part provides:

[A] judicial employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States, provided, however, that court reporters are not prohibited from receiving compensation for reporting services to the extent permitted by statute and by the court.

Maryland Judicial Ethics Committee

Opinion Request Number: 2019-14

Date of Issue: May 28, 2019

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 3 of 5

The Delaware Judicial Ethics Advisory Committee concluded that the salary advance would essentially be an interest-free loan, which clerks are proscribed from taking. Further, since the advance would be used for moving and living expenses it was prohibited by the Delaware Code provision that prevents clerks from receiving any bonuses or moving expenses until the end of their clerkship.

Acceptance of salary advances by Maryland law clerks

Maryland does not have a code of conduct that applies specifically to law clerks as the federal judiciary and some other states do. *See e.g.*, Arizona Code of Conduct for Judicial Employees; Arizona Supreme Court Law Clerk Code of Conduct; New Hampshire Court Rule 46, Law Clerk Code of Conduct; Palm Beach County Code of Conduct for Trial Court Law Clerks (Florida Fifteenth Judicial Circuit Administrative Rule 11.604-9/08). In Maryland, law clerks are provided an information sheet that details their benefits, conditions, and salaries. The information sheet specifically prohibits outside employment with limited exceptions:

No outside employment, public or private, during the appointment term, except that, **with the permission of the judge**, the law clerk may engage in such outside activities, with compensation, that are allowed for judges under the Maryland Code of Judicial Conduct (see Maryland Rule 18-103.12). (emphasis in original)

The prohibition in the information sheet is similar to the federal prohibition in the Employee Code of Conduct for Judicial Employees and the prohibition in the Delaware Law Clerk Conduct Code that preclude law clerks from receiving a salary or supplementation of salary from any outside source.

Moreover, the Maryland Code of Judicial Conduct provides limitations on the loans that a judge may accept:

Rule 18-103.13. Acceptance of Gifts, Loans, Bequests, Benefits, or Other Things of Value.

(a) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

(b) Unless otherwise prohibited by law, or by section (a) of this Rule, a judge may accept the following:

(1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;

Maryland Judicial Ethics Committee

Opinion Request Number: 2019-14

Date of Issue: May 28, 2019

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Page 4 of 5

(2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including attorneys, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification of the judge under Rule 18-102.11;

(3) ordinary social hospitality;

(4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;

* * * *

As stated previously, law clerks must act in a manner consistent with the judge’s obligations under the Maryland Code of Judicial Conduct. A salary advance from a law firm would not fit within one of the exceptions outlined above, *i.e.*, a loan from a friend or relative or from a lending institution. Therefore, we look to whether the salary advance is a loan that “would appear to a reasonable person to undermine the law clerk’s independence, integrity, or impartiality.” We find that a salary advance is such a loan.

In reaching our decision, we rely on the analysis provided in both the federal and Delaware opinions discussed herein with respect to salary advances. A salary advance would conflict with the intent of the Maryland prohibition of outside employment of law clerks because it could be seen as a supplement to the clerk’s salary from an outside source. Moreover, the salary advance is essentially a no-interest loan to the clerk that would require repayment. By placing the law clerk in a position of indebtedness to the firm during his or her clerkship, the Committee believes that such an advance would undermine public confidence in the integrity and independence of the court. Accordingly, we conclude that a judge may not permit an incoming law clerk to accept a salary advance from a law firm, either before or during the clerkship.

Given the foregoing analysis, we do not believe a law clerk should accept the salary advance even if the judge opts to recuse in cases involving the clerk’s future employer. Under Maryland Rule 18-102.11 “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” If a judge believes that recusal in cases involving the law firm is required on the basis that the judge’s law clerk will be working for the firm the following year, or for some other reason, then Rule 18-102.11 obliges the judge to recuse. We stress, however, that recusal notwithstanding, the judge may not permit the incoming law clerk to accept a salary advance that we have concluded is prohibited.

Maryland Judicial Ethics Committee

Opinion Request Number: 2019-14

Date of Issue: May 28, 2019

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 5 of 5

Acceptance by incoming law clerks of other payments

We agree with the distinction made in the federal opinion between salary advances, which must be repaid, and other types of payments made to law clerks pre-clerkship that do not require repayment. With no obligation to repay, the concerns expressed in this opinion regarding law clerks receiving compensation from future employers while working for the State of Maryland would not apply. Neither would concerns about no-interest loans apply. We conclude, therefore, that a judge may permit an incoming law clerk to accept a payment that is made before the beginning of the clerkship, such as a signing bonus, as long as such payment is not contingent on the recipient being a law clerk, i.e., the payment is provided to all incoming associates, and as long as the law clerk does not solicit the payment.³ Although that issue was not presented to us by the requesting judge, we find that it occurs enough to warrant addressing it in this Opinion.

Application: The Judicial Ethics Committee cautions that this Opinion is applicable only prospectively and only to the conduct of the Requestor described herein, to the extent of the Requestor's compliance with this opinion. Omission or misstatement of a material fact in the written request for opinion negates reliance on this Opinion. Additionally, this Opinion should not be considered to be binding indefinitely.

The passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If the request for advice involves a continuing course of conduct, the Requestor should keep abreast of developments in the area of judicial ethics and, in the event of a change in that area or a change in facts, submit an updated request to the Committee.

³ The judge will also have to decide whether recusal in such cases is appropriate under Maryland Rule 18-102.11.