

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 00-02
(Reissued March 8, 2001)

**Participation in Educational Programs Funded by Businesses,
Foundations and Other Non-governmental Entities**

Issues

May judges participate in seminars or educational programs funded by businesses, foundations or other non-governmental entities whose interests may come before the judiciary?

Answer: Yes, with qualifications.

Facts

Judges are often asked to attend seminars or university-based legal education programs funded by corporations or special interest groups that pay all or most of the tuition, travel and lodging costs of the participants. For example, in recent years law-related educational opportunities have been offered by:

- The University of Kansas Law and Organizational Economics Center conducts economics institutes for state court judges that are funded by corporations and foundations, including a foundation run by Koch Industries, a frequent litigant in various courts.
- The Foundation for Research on Economics and the Environment conducts seminars for judges that are funded by foundations run by companies with significant interests in property rights and environmental law issues.
- Harvard Law School's Berkman Center on Law and Technology runs the Daubert Project, a series of seminars for judges on the Supreme Court's decision on the gate keeping role of judges concerning the admissibility of contested scientific evidence. The program is funded by a tort reform lobby created by corporate general counsel.
- The National Judicial College has offered a program for state judges dealing with land use issues based on grant money provided by a non-profit trade association whose membership includes home builders and contractors in the housing industry.

Discussion

A number of judicial canons are implicated by this request. The overriding concern, of course, is that a judge act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 2A. Of particular concern in this request is

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whether participation in an educational program sponsored by a business or non-governmental entity “conveys or permits others to convey the impression that they are in a special position to influence the judge.” Canon 2B.

On the other hand, the canons require a judge to participate actively in judicial education programs and complete mandatory judicial education requirements. Canon 3B(12). And the canons explicitly allow a judge to accept a gift incident to an invitation to the judge and spouse to attend an activity devoted to the improvement of the law, legal system or the administration of justice. Canon 4D(5)(a). The restriction is tighter, however, if the invitation comes from “a party or other person who has come or . . . whose interests . . . are likely to come . . . before the judge” Canon 4D(5)(h).

Canon 4H(1) allows a judge to receive compensation and reimbursement of expenses for extra-judicial activities permitted by the code, if the source of the payment does not give the appearance of influencing the judge’s performance of judicial duties or otherwise give the appearance of impropriety. Compensation cannot exceed a reasonable amount and it cannot exceed what a non-judge would receive for the same activity. Expense reimbursement is limited to actual costs of travel, food and lodging reasonably incurred.

The final canon implicated by this request is disqualification. A judge must disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, and should disclose information relevant to the issue of disqualification even if the judge believes there is no real basis for disqualification. Canon 3E.

Although this committee has not addressed these issues before, advisory opinions from several other jurisdictions have. In New York, the advisory committee concluded it was ethically permissible for judges to attend a land use judicial education program conducted by the National Judicial College and funded by grant money from non-profit trade associations whose members included builders and contractors. The New York advisory committee stated that the “grant by the trade association to the college may be likened to a grant to an educational institution which retains full discretion to choose faculty and determine the content of the course of study. Here, the intended program is under the discretion and control of the National Judicial College, not the entity that is providing the funding.” N.Y. Op. 96-106 (Sept. 5, 1996). Moreover, given the insulation from the judiciary of the source of the funding, the committee concluded there was no danger of an appearance of impropriety.

In South Carolina, a magistrate inquired whether he could attend a three-day conference hosted and financed by a local housing authority, which also offered to pay expenses. The housing authority appears as a party in eviction cases before the magistrate. The advisory committee concluded that the magistrate could attend the event, but should pay his or her own expenses, and not accept any gift or remuneration. The committee relied upon the commentary to Canon 4D(5)(h) as prohibiting judges “from accepting gifts, favors, bequests or loans from lawyers or their firms if they have come or are likely to come before the judge.” S.C. Op. 9-1998 (March 12, 1998).

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Again in South Carolina, the advisory committee addressed whether a judge or magistrate could attend a “lunch and learn” session sponsored by a children’s center to inform the judges about the center’s mission and current issues in children’s law. Inasmuch as the sponsoring organization had a specific purpose which comes before the judiciary, the advisory committee concluded that the contents of the presentation had to be reviewed to ensure that the contents do not unduly influence the judiciary to a particular viewpoint. The committee was concerned that a relationship with a special interest group may create a perception of bias against anyone at odds with the special interest group. Accordingly, judges “must be cautious not to attend functions where only one side of legal issues are or may be presented, by an interested group, so as to avoid the appearance of impropriety. The canons, however, do not forbid attendance of forums intended for the public at large. In addition, if functions are accredited and endorsed by the Committee on Judicial Continuing Legal Education, attendance would certainly be proper.” S. C. Op. 22-1998 (June 8, 1998).

In Oregon, the judicial conduct committee addressed whether a judge could attend seminars, at reduced or waived tuition, sponsored by organizations representing a particular interest group with the Bar, such as a prosecutor or criminal defense attorneys organization, or a plaintiff’s personal injury association, or organizations which represented the Bar as a whole, such as the State Bar of Oregon. The committee concluded that judges could attend those types of conferences.

The committee unanimously opined that a judge could attend, at no cost or reduced tuition, a seminar sponsored by a “neutral” organization. A majority of the committee also agreed that a judge may attend seminars sponsored by “interested” organizations. The majority concluded that attendance at an “interested” groups seminar would not diminish a judge’s impartiality, and that judges are fully capable of filtering biases imparted at any seminar. The minority of the committee believed that attendance at an “interested” group seminar might well cast doubt upon the judge’s impartiality. Or. Op. 81-1 (1981).

In Alaska, the Commission on Judicial Conduct concluded that a judge may not accept free conference travel to attend a conference sponsored by the Roscoe Pound Foundation, a not for profit arm of the Association of Trial Lawyers of America. Inasmuch as the Association is a plaintiffs’ bar association, which judges could not join, the commission concluded that a gift of travel would give the appearance of a gift by the plaintiffs bar to judges. Alaska Op. 99-5 (Dec. 14, 1999.)

The U.S. Judicial Conference Committee on Codes of Conduct has issued several opinions on attendance at educational seminars. The major opinion, Advisory Opinion No. 67, “Attendance at Educational Seminars,” stated that the payment of expenses to non-governmentally sponsored seminars were a gift under the Judicial Code of Conduct; but a gift the judges can accept so long as it is awarded on the same terms to all other applicants. The committee stated:

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The education of judges in various academic disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to weigh them.

It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of the litigation

Judges who accept invitations to participate in such seminars, having been satisfied that no impropriety or appearance thereof is present, must report the reimbursement of expenses and the value of the gift on their financial disclosure reports.

In general, then, attendance by federal judges at non-government sponsored seminars where tuition and expenses are paid, although considered a gift, is permitted by the canons. It is permissible to attend such seminars, but it is improper to participate if the sponsor or source of funding is involved or likely to be involved in litigation and the topics of the seminar are related to the subject matter of the litigation. A judge should take some actions as may be necessary to assure there is no impropriety.

No advisory opinion can replace common sense. A judicial officer needs to be sensitive to the issues presented by an invitation to attend a conference at a reduced expense or expense free. An advisory opinion cannot anticipate all the varying circumstances that can be presented. Based upon the canons and reported decisions from other jurisdictions, the committee concludes that there is no general ethical impropriety in attending expenses-paid educational programs sponsored by non-governmental organizations. Circumstances may be present, however, that would cause a judge not to attend. The following guidelines should be used in making this determination:

1. Attendance at educational programs put on directly by businesses or entities should be carefully evaluated. If the business or entity is actually in litigation before the court, the judge should not attend. If the business or entity is likely to appear in court, then the judge attending the event should pay his or her expenses and not accept any reimbursement. Even then, the content of the program may be inappropriate and should be reviewed. If the content is appropriate, then the judge may attend at a reduced or free tuition provided that the business or entity sponsoring the program treats everyone who attends on an equal basis. If, in the future, the business or entity appears in court, the judge should consider whether recusal is necessary under the facts and circumstances or, if not, whether to disclose information relevant to the issue of disqualification to the parties even if the judge believes there is no real basis for disqualification.

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2. Attendance at educational programs funded by corporations or foundations but hosted by universities or judicial colleges that independently determine course content are permissible with reduced or free tuition. Here, given the insulation of the judiciary from the source of the funding and the independent determination of course content, the committee believes there is little chance of an appearance of impropriety. Nonetheless, the judge should inquire into the names of businesses and foundations sponsoring the law-related educational programs. If the sponsoring business or foundation is in litigation before the court, the judge should not attend. If the sponsoring business or foundation is likely to be in litigation before the court, the judge should not attend unless the judge pays his or her own expenses. If, in the future, a sponsoring organization appears before the judge, the judge should consider whether recusal is necessary under the facts and circumstances or, if not, disclosing information relevant to the issue of disqualification to the parties even if the judge believes there is no real basis for disqualification.

3. Attendance at educational programs sponsored by neutral or interested bar associations is permissible. As to neutral bar associations, such as the state bar or the county bar, the committee believes that a judge can attend educational programs at reduced or no tuition, whether offered to other bar members or not. As to an interested bar association, the committee believes that a judge should pay his or her own expenses and decline to accept reimbursement for tuition, lodging or meals or travel for these types of events. As with businesses, a judge should review the content of an interested bar association's program for acceptability. A judge may accept reimbursement, however, if the judge is on faculty and the reimbursement is for faculty participation.

4. Where compensation is permissible, compensation for expense reimbursement cannot exceed the actual cost of travel, food and lodging reasonably incurred.

5. If a judge receives expenses, tuition, lodging and meals from an institution conducting a seminar and the funding comes from non-governmental organizations, the judge should report the amount as a gift on the annual Arizona financial disclosure statement in accordance with the applicable requirements.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 2A, 2B, 3B(12), 3E, 4D(5)(a), 4D(5)(h), 4E(1) and 4H(1) (1993).

Other References

Alaska Commission on Judicial Conduct, Opinion 99-5 (Dec. 14, 1999).

New York Advisory Committee, Opinion 96-106 (Sept. 5, 1996).

Oregon Judicial Conduct Committee, Ethics Opinion 81-1 (1981).

South Carolina Advisory Committee, Opinions 9-1998 (March 12, 1998); 22-1998 (June 8, 1998).

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U.S. Judicial Conference Committee on Codes of Conduct, Advisory Opinions 3 (Jan. 21, 1970, revised July 10, 1998); 17 (Jan. 21, 1970, revised July 10, 1998); 67 (Aug. 25, 1980, revised July 10, 1998).

H. Butler, "The Manne Programs in Economics for Federal Judges," 50 Case Western Reserve Law Review 351, 362-367 (Winter 1999).

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