

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

FORMAL ADVISORY ETHICS OPINIION 16-04
(December 20, 2016)

JUDGES OFFERED TRAINING BY AN ADVOCACY GROUP THE MEMBERS OF WHICH
REPRESENT ONE SIDE IN CONTESTED CASES BEFORE THOSE JUDGES

Question and Overview

The Judicial Ethics Advisory Committee (JEAC) was asked whether the Arizona Code of Judicial Conduct prohibits a judge from attending a training seminar specifically limited to landlord/tenant law and issues that is sponsored and taught by attorneys who almost exclusively represent landlords in eviction cases. Called “Case Studies”, the training is designed for an audience of judges who predominately hear these cases on a consistent basis—the Justice of the Peace bench. The training is free of charge. It is usually held at a local restaurant and judges pay for their lunch. The invitation is from the “Association of Landlord-Tenant Attorneys”, which is apparently operated by a specific law firm. The firm represents landlords in eviction cases. Attorneys representing tenants are not on the faculty for the seminar. The law firm hosting the training has numerous cases pending in the justice courts of the county at any given time.

Answer

A judge’s attendance at such a training seminar raises the likelihood that his or her impartiality would reasonably be questioned in future landlord/tenant cases (Rules 2.2 and 2.4(C)), and would lead to the need for a judge to recuse in future cases (Rules 2.11 and 3.1(B)). Attendance at such a training seminar would be contrary to Rule 3.1(C) as it would reasonably call into question the judge’s impartiality in landlord/tenant cases. Public confidence in the independence and impartiality of the judiciary is of utmost importance and any benefit obtained as a result of attending such a training seminar is inconsequential in comparison. (Rule 3.1(B)).

Applicable Rules

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.2 Impartiality and Fairness

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Comment 1 to Rule 2.2 states: “To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.”

Rule 2.4 External Influences on Judicial Conduct

- (A) A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.
- (B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.
- (C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

The Comment to Rule 2.4 states in part: “Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.”

Rule 2.11 Disqualification

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer....

Comment 1 to Rule 2.11 states: “Under this rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply.”

Rule 3.1 Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law or this code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge’s judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;
- (C) participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality or demean the judicial office.

Rule 3.14 Reimbursement of Expenses and Waivers of Fees or Charges

- (A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law, a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge’s employing entity, if the expenses or charges are associated with the judge’s participation in extrajudicial activities permitted by this code.

Comment 2 to Rule 3.14 states in part: “A judge’s decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all of the circumstances. The judge

must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this code.”

Comment 3 to Rule 3.14 sets forth numerous factors that a judge should consider when deciding whether to accept reimbursement of expenses or a fee waiver for attendance at a particular activity. Some of the factors listed include:

- (a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;
- (b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;
- (c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;
- (f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge’s court, thus possibly requiring disqualification of the judge under Rule 2.11;
- (g) whether differing viewpoints are presented; and
- (h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

Discussion

We recognized in Formal Advisory Ethics Opinion 00-02 (Revised and reissued on March 8, 2001), that while judges are encouraged to keep up to date on the law and seek out training opportunities, they must also carefully scrutinize programs to ensure that they are balanced presentations not intended to improperly indoctrinate judges as to a particular viewpoint which “might well cast doubt upon the judge’s impartiality.” *Id.* p. 3, citing Oregon Op. 81-1 (1981).

Formal Advisory Ethics Opinion 00-02 addressed the question of whether judges can participate in educational programs funded by businesses, foundations and other non-governmental entities. The Committee answered the question in the affirmative, but with qualifications. While recognizing that, in general, federal judges who attend non-government sponsored seminars where tuition and expenses were paid did not violate the canons, so long as they claimed these as a gift, more specific criteria must be considered by Arizona judges when facing a similar decision. Although noting it may be permissible to attend such seminars in certain circumstances, the Committee cautioned that “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.” *Id.* p. 4. To assist judges in deciding whether they should attend a specific program, the Committee listed “guidelines” for judges to use in evaluating seminars or training to ensure that they do not violate their ethical obligations. These guidelines are similar to those listed in the comments to Rule 3.14, *infra.* (Op. 00-02, pp. 4-5).

Judges must evaluate seminars and programs so that their attendance does not create a situation where they may have to disqualify themselves in a proceeding in which their impartiality might

reasonably be questioned. Rule 3.1(B), (C). “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.” Id. p. 1 citing former Canon 2.

The education of judges by university, corporate or other group sponsors has been a topic of concern, scrutiny and criticism over at least the last two decades.¹ “Of particular concern in this request is 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.’” Id. pp. 1-2, citing former Canon 2B. Judges are encouraged to review the proposed materials for the seminar or training, and determine if the sponsor is a group affiliated with a particular agenda, and whether it is likely that the group or attorneys representing the group may be now or in the future, litigating the very issues in the court of a judge who wishes to attend the training. *See* Rule 3.14, Comment 3, *supra*.

There are many examples from other jurisdictions that provide relevant guidance. As noted in Formal Advisory Ethics Opinion 00-02, a New York judicial ethics advisory committee concluded that 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. Id. p. 2. South Carolina’s judicial ethics advisory committee concluded that a judicial officer could attend a three-day conference hosted and financed by a local housing authority [which also offered to pay expenses], even though the housing authority appeared as a party in eviction cases before the judicial officer, so long as the participant paid his or her own expenses, and did not accept gifts. Id. In reaching this conclusion, South Carolina’s committee advised its judicial officers to carefully review the contents of a “lunch and learn” session sponsored by a children’s center to inform participants about the center’s mission and current issues in children’s law. Id. p. 3. The advisory committee concluded that “Inasmuch as the sponsoring organization had a specific purpose which comes before the judiciary ... 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.*” Id. p. 3, citing South Carolina Advisory Committee on Standards of Judicial Conduct Opinion Op. 22-1998 (June 8, 1998) (emphasis added).

¹ Bruce A. Green, *Ethics of Judicial Education: An Analysis of Private Charitable Gifts for Judicial Learning*, (October 15, 1999)(on file with the Fordham Urban Law Journal)(on-line citation: www.thefreelibrary.com). This work contains numerous examples of public media scrutiny of “junkets for judges”, including a 20/20 television program segment by Barbara Walters (ABC television broadcast, April 6, 2001), newspaper articles (Id. at footnotes 7, 8 and 18), and federal legislation that was proposed by Senators John Kerry and Russell Finegold, *The Judicial Education Reform Act of 2000*, S. 2990, 106th Cong. (Kerry-Finegold).

The lesson from these examples is that 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.” Id.²

In the federal judiciary, this same issue is addressed in Advisory Opinion No. 67 (*Attendance at Independent Educational Seminars*), Volume 2B, Guide to Judiciary Policy, Ch. 2, pp. 93-96, Committee on Codes of Conduct (June 2009). The committee begins by stating the general proposition that judges are not barred from attending a program just because “a lecture or seminar may emphasize a particular viewpoint or school of thought.” Id. p. 93. The rationale is that judges are continually exposed to competing views and arguments and are trained to consider and analyze them. The committee went on, however, to caution that judges, consistent with their duty under Canon 3 to recuse from any proceeding in which their impartiality might reasonably be questioned, should “conduct themselves in a manner that minimizes the occasion for recusal.” Id. pp. 93-94. To do so, judges must consider and determine in advance whether attending and accepting benefits associated with a particular seminar may jeopardize their independence and require them to later recuse on specific matters that are likely to come before them. The committee offers several specific criteria for judges to use in evaluating seminars or programs which mirror those set forth in Rule 3.14, Comment 3, *supra*. By way of example, the committee discussed a hypothetical encompassing the criteria of Comment 3, subsections (c) and (f), *supra*, and commented, “it would be improper for a judge to attend a seminar if the sponsor or source of substantial funding for the seminar is a litigant before the judge and the topics covered in the seminar are directly related to the subject matter of the litigation.” Id. p. 95. The committee summarized its recommendation as follows: “A judge’s determination whether to attend the seminar should be made considering the totality of the circumstances. If, in light of all of the relevant factors, the judge concludes that there is a reasonable question concerning the propriety of attendance, the judge should not attend the seminar.” Id.

² For additional guidance, see Arizona Supreme Court Judicial Ethics Advisory Committee Formal Advisory Opinions 03-08 (December 17, 2003)(judges’ participation in law enforcement programs and criminal law seminars) and 09-02 (September 18, 2009)(judges and judicial employees training on equipment used by law enforcement); Nebraska Judicial Ethics Opinion 06-4 (June 7, 2006)(opining that judges should not participate in a seminar about defense of driving under the influence (DUI) cases when the sponsor is a statewide organization of criminal defense attorneys that are active in influencing legislation in this area); Washington State Judicial Ethics Advisory Committee Opinion 03-06 (May 15, 2003) (judges can attend training in specialized areas of the law sponsored by the superior court put on by attorneys who specialize in those particular areas provided that judges who attend disclose to parties in a litigation the fact of their attendance and that one of the attorneys appearing on the case was a presenter). For a contrary view, see, e.g., Green, *Ethics of Judicial Education*, *supra*, footnote 157; Kansas Judicial Ethics Advisory Panel, Opinion JE 168 (August 5, 2009)(the appearance of a judge at a presentation by the DUI Victims Center of Kansas (an advocacy group) would violate Rule 2.4(C) of the Kansas Code of Judicial Conduct).

Advice

In the context of the facts in the question posed, and considering all of the ethical rules identified above and the factors or criteria set forth in the comments to the rules, it is the conclusion of the Committee that judges should not attend a training seminar that is sponsored by a single entity, that presents one side of a particular legal issue, and that is presented by attorneys who regularly appear before the attendees consistently representing the same side in the same types of cases that are the subject matter of the training.³ The fact that the training is free to those who attend is of no consequence in this scenario. A judge's attendance at such a training seminar raises the likelihood that his or her impartiality would reasonably be questioned in future landlord/tenant cases (Rules 2.2 and 2.4(C)), and would lead to the need for a judge to recuse in future cases (Rules 2.11 and 3.1(B)). Attendance at such a training seminar would be contrary to Rule 3.1(C) as it would reasonably call into question the judge's impartiality in landlord/tenant cases. Public confidence in the independence and impartiality of the judiciary is of utmost importance and any benefit obtained as a result of attending such a training is inconsequential in comparison. (Rule 3.1(B)).

³ This opinion does not address reimbursement of expenses for judges' participation in training seminars or other educational programs.