

JUDICIAL ETHICS COMMITTEE

Advisory Opinion - 92-JE-3

Issued: January 5, 1993

Re: Maine Bar Foundation Judicial Education Project

The following opinion is adopted as the formal response of a majority of the Judicial Ethics Committee present and voting on December 29, 1992.

Question presented: Whether under the Code of Judicial Conduct the Judicial Department should participate in educational programs to be funded by the Maine Bar Foundation?

Answer: A majority of the Judicial Ethics Committee determines that participation in the Judicial Education Project is not prohibited by the Code of Judicial Conduct (CJC). On the contrary, judges have an obligation to engage in activities designed to improve the law, the legal system and the administration of justice. Canon 4, CJC. Such activity necessarily includes an obligation to remain current as to changes in the law and to take advantage of programs designed for the training and continuing education of judges.

Contributions by the Maine Bar Foundation (MBF) for judicial education programs are made for the benefit of a body of judges and not to them as individuals. Any benefit flowing to judges is in their professional, and not personal, capacity and in turn benefits the public and parties before the court.

The distinction between professional and personal benefit is crucial because a professional benefit that goes to the judiciary as a whole from an independent organization poses little problem of judicial prejudice. Further, because the program relates solely to professional education, judges will likewise not feel personally indebted to contributors.

This financial aid for judicial education is derived from a neutral organization with a diverse membership which will solicit funds from a wide variety of sources to be disbursed to the courts as a whole. Specific gifts to individual judges from named attorneys might be inappropriate, but such gifts are not contemplated by the MBF Judicial Education Project.¹

Canon 4 specifically permits the type of activity contemplated by the Judicial Education Project. It states as follows:

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

* * *

C. He may serve as a member, officer, or director of an organization devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

¹The program is designed to prevent judges from learning the identity of donors as a measure to protect judicial impartiality. While this is a helpful precaution, the confidentiality of donors' identities cannot be guaranteed, and this opinion does not depend upon confidentiality.

The above rule suggests rather explicitly that judges may properly be involved in activities such as the Judicial Education Project so long as no direct fund raising activities are carried out by them. Contributions by judges to the project would likewise seem to create no conflict, and involvement by judges as administrators or advisors also seems to be contemplated by the rule.

Additionally, Canon 5 permits judges to accept certain gifts, including participation in bar-related functions or activities, of a character which are unlikely to influence any judicial decision specifically where the gift or benefit is " an invitation ... to attend a bar-related function or activity devoted to the improvement of the law, the legal system or the administration of justice." Canon 5(C)(4)(a).²

Equally important is the code's lack of prohibition of such activities as the Judicial Education Project. Awards from local bar associations to individual judges have been upheld, ABA Informal Opinion 86-1516

² Code of Judicial Conduct: Canon 5(C)

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(4) Neither a judge nor a spouse or dependent child of a judge should accept a gift, bequest, favor, or loan from anyone **except** as follows: (emphasis added)

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

* * *

(1/23/86), in ABA/BNA Lawyers' Manual on Professional Conduct 901:301-303. Such awards are more likely than the Judicial Education Project to raise questions of ethics problems because they represent recognition for specific behavior (arguably including particular kinds of rulings), whereas the Judicial Education Project simply represents a contribution to the court system not because it has done a particular thing, but to enable it better to perform its primary function.

We are aware of the opinion issued by the Professional Ethics Commission of the Board of Overseers of the Bar with respect to this same program. Opinion No. 129, issued December 31, 1992. That opinion concluded that lawyers are prohibited from contributing to the Bar Foundation Judicial Education Fund by Bar Rule 3.7(h)(1). It did so, however, because the language of the Bar Rule in question is generally based on ABA Disciplinary Rule 7-110(A) but does not contain an explicit exception that is contained in the ABA rule. Specifically, ABA DR-7-110(A) permits lawyers to make gifts to judges if such gifts "are permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct." However, Maine Bar Rule 3.7(h)(1) includes no such exception. The Professional Ethics Commission noted in a footnote that this omission may lead to a result that the Illinois Supreme Court found to be unreasonable in In re Corboy, 528 N.E.2d 694, 699 (Ill. 1988) -- viz., that a judge is permitted under the Code of Judicial Conduct to accept something from a lawyer that the lawyer is not permitted to give under the Bar Rules. Opinion No. 129 at 8, n.5. However,

the Professional Ethics Commission noted that, unlike the Illinois Supreme Court, it was not empowered to amend the Bar Rule.

Since the function of the Judicial Ethics Committee is limited to interpretation of the Code of Judicial Conduct, Professional Ethics Commission Opinion No. 129 does not alter our thinking that the Bar Foundation's Judicial Education Program is permissible under the Code of Judicial Conduct, Canon 5(C)(4). We agree, however, with the Illinois Supreme Court in Corboy that this leads to an anomalous situation.

Finally, the Committee feels it appropriate to note that funds from the Judicial Education Project be accepted to supplement rather than supplant the State's general obligation to provide for the continuing education and training of judges. It is more desirable for the Judicial Department to be fully funded from public sources.

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Hon. Susan W. Calkins