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ALM

Stop Judges Tripping on Corporate Dollar

BY TIMOTHY J. DOWLING

A modest proposal: Federal judges should be subject to the same ethics rules as federal prosecutors and other executive branch lawyers when it comes to accepting gifts.

Currently, federal judges play by their own rules. And too many of them see nothing wrong with taking large gifts in the form of all-expenses-paid trips to judicial seminars at resort locations—offerings that every federal attorney would be prohibited from personally accepting.

These privately funded trips are hosted by groups seeking to advance a particular jurisprudential perspective. For example, the Foundation for Research on Economics and the Environment routinely offers federal judges free trips to a dude ranch in Montana to attend seminars on what the foundation calls "free-market environmentalism."

The value of these gifts—which typically include free travel, lodging, meals, and the seminar—often runs into the four figures. Funding for the FREE seminars comes from foundations that also provide monetary support to libertarian groups challenging environmental laws in federal court. FREE also receives general financial aid from corporations, which then send representatives to the seminars to provide judges a "corporate perspective" on environmental law.

The FREE seminars for judges are *not* open to the public or attorneys generally. Rather, these travel gifts are offered to federal judges precisely because of their official positions as judges.

RULES FOR PUBLIC SERVANTS

The Standards of Ethical Conduct that apply to every executive branch employee (5 CFR §2635.202) prohibit the acceptance of gifts offered because of the employee's official position, even when the giver has no official business before the employee's agency. The Office of Government Ethics adopted this prophylactic rule because such gifts create the appearance that the employee is using his public office for private gain.

The rule reflects the simple notion that one should enter public service to serve the public, not to profit personally from gifts or other perquisites. If someone offers a federal prosecutor or any other executive branch employee a free travel voucher or other valuable item because of the employee's official position, the employee must decline it, regardless of whether there is any intent to influence a government decision.

The executive branch gift rules contain reasonable exceptions, such as refreshments of nominal value at professional and social events. They also allow for a gift of free admission to a widely attended gathering, such as a press dinner, as long as the gift is valued at $285 or less. And, of course, they permit an employee to accept benefits offered to the general public, such as commercial discounts or rewards.

These rules also allow for appropriate continuing education for federal attorneys, even when an outside source pays for the travel expenses and lodging. But there are important built-in safeguards that apply to everyone, from career staff attorneys to high-ranking political appointees. In these situations, the payment is made not to the attorney personally but to the agency, and an agency supervisor must affirmatively determine, on a case-by-case basis, that the travel is in the government's interest.

In deciding whether to authorize agency acceptance of this gift, the supervisor must consider all relevant factors, including the identity of the source, other expected participants, potential conflicts with pending matters, and the monetary value of the travel benefits. This approval process ensures that federal attorneys are able to attend professional conferences and other appropriate continuing-education seminars that promote the public interest, while insulating them from the untoward

appearance that they are exploiting public service to, say, travel to Maui or Montana.

HOW DOES IT LOOK?

Having served as an ethics adviser for six years in the Environment and Natural Resources Division of the U.S. Department of Justice, I seriously doubt that DOJ supervisors would conclude that having its attorneys attend privately funded, results-oriented seminars comparable to FREE's would be in the public's interest.

One FREE board member described the seminars as part of a "long-term strategy" of judicial education that parallels efforts to challenge environmental laws in the courts. As noted, there is common funding for FREE's seminars and these litigation campaigns. Such funding conflicts are exactly the kind of concern that would prompt DOJ supervisors to look elsewhere for educational opportunities for their attorneys, especially given the many conferences offered by the government, bar association groups, and law schools that raise no ethical concerns.

The appearance-of-undue-influence issue is even more problematic in the context of specific cases. For example, in *American Trucking Associations v. Environmental Protection Agency* (1999), industry groups challenged landmark clean-air standards for smog and soot, arguing that the U.S. Court of Appeals for the D.C. Circuit should adopt a rigorous cost-benefit test and resurrect the long-discarded doctrine of unconstitutional delegations of congressional authority to invalidate the regulations. Edward Warren, a partner at Kirkland & Ellis, argued the case and prevailed in an opinion joined by Chief Judge Douglas Ginsburg, which was later repudiated by a unanimous Supreme Court.

While this case was pending in the D.C. Circuit, FREE added Warren to its board and invited him to deliver a lecture called "Applying More Harm Than Good: Principles in Environmental Decisionmaking" at two FREE seminars in mid-1998. The title of the lecture tracks that of a 1993 law review article Warren co-authored that sets out his cost-benefit and non-delegation arguments in more detail. The lectures occurred shortly after briefing concluded in the American Trucking Associations case and just months before the oral argument. Dozens of federal judges attended those FREE seminars, including D.C. Circuit Judge David Sentelle, who later voted to deny a rehearing in the case. Chief Judge Ginsburg also sat on FREE's board with Warren during this time.

It would be implausible to think that Warren's lecture changed any vote or that he intended for it to do so. By all accounts, he is a distinguished practitioner of high integrity.

But should a judge even attend an all-expenses-paid seminar at which a lawyer delivers an analytical preview of his oral argument in a pending case? And should another judge in that case sit on the board of the seminar host along with that lawyer? Even in the absence of any direct evidence of intent to influence—and let me emphasize there is none here—the appearance issues seem overwhelmingly disqualifying. Similar appearance issues caused by FREE's seminars in other cases have left litigants feeling "outraged," in the words of the plaintiffs lawyer in the 2nd Circuit case of *Aguinda v. Texaco* (2001).

LIKE PROSECUTORS

Community Rights Counsel, where I serve as chief counsel, presented information about the FREE seminars to the federal judiciary in a series of ethics petitions filed under 28 U.S.C. §351, requesting that federal judges be prohibited from serving on FREE's board. We did not allege any actual misconduct by any judge but argued instead that the appearance issues created by the seminars made service on FREE's board inconsistent with the effective administration of justice.

In a May 23 order, Chief Judge James Loken of the 8th Circuit denied the request, accusing the CRC of "character assassination" for even raising the appearance issues.

Oddly, after excoriating the CRC for suggesting that service on FREE's board is inappropriate, Loken "expressed no view as to whether Congress or the Judicial Conference should continue to permit federal judges to attend privately funded judicial seminars." In other words, the order leaves unaddressed whether judges should be allowed to attend FREE seminars, but concludes there is no concern when a judge lends the authority of the judicial office to FREE by serving on its board.

Legislation was introduced in 2003, with the CRC's support, to address the concerns raised by privately funded judicial seminars. (While it didn't pass, we hope a similar bill will be introduced in this Congress.)

The bill would have removed the taint of private funding by providing taxpayer funding for judicial education. It would have established an ethics regime for judges similar to the one for prosecutors by requiring the Federal Judicial Center to independently approve judicial seminars to ensure that judges' trips are in the public interest. If so, the judges could go on the taxpayers' dime.

Some contend that proposed restrictions on these trips would impair judges' First Amendment rights, but the First Amendment does not establish any right for public servants to accept privately funded gifts. And judges, just like Justice Department attorneys, are fundamentally public servants.

The next time the federal judiciary considers its existing practices, perhaps it can answer a simple question: Why should federal judges be allowed to accept travel gifts without any independent review when the federal lawyers who litigate before them cannot?

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