

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 1st day of October, 2019.

On July 29, 2019, came the Judicial Ethics Advisory Committee and presented to the Court Opinion 19-3 pursuant to its authority established in this Court's order of April 18, 2019. Upon consideration whereof, the Court approves the opinion as modified and set out below.

Judicial Ethics Advisory Committee Opinion 19-3

A judge may participate in a continuing legal education seminar presented by a local bar association, where attendees are charged a fee for admission and which may result in a profit for the bar association, subject to restrictions imposed by the Canons of Judicial Conduct.

ISSUE:

Is it a violation of the Canons of Judicial Conduct for a judge to participate in a continuing legal education (CLE) seminar presented by a local bar association, where attendees are charged a fee for admission which may result in a profit for the bar association?

Answer: No. Participating in a CLE seminar presented by a local bar association where attendees are charged a fee for admission and which may result in a profit for the bar association does not, in and of itself, violate the Canons of Judicial Conduct for the Commonwealth of Virginia (the "Canons") under the facts presented. The judge's participation is, however, subject to restrictions imposed by the Canons.

FACTS:

A local bar association is presenting a CLE seminar, the topic of which includes trial practice. The judge requesting this opinion has been invited to speak as a panelist. The bar association is charging attendees a fee for admission. The CLE seminar is not advertised as a fundraising event though the bar association will likely realize income due to low costs associated with producing the seminar. The requesting judge has asked whether participating as a panelist for this CLE seminar violates the Canons, in particular, Canon 4D(3)(b)(v), which prohibits speaking at a fundraising event, unless the event is raising funds for improving access to the legal system for indigent or low income individuals.

DISCUSSION:

The role and life of a judge is not confined to service in the courtroom. The Canons recognize that "[c]omplete separation of a judge from extra judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives."

Canon 4A, Commentary. Canon 4 provides this guidance: “[a] judge may engage in extra-judicial activities designed to improve the law, the legal system, and the administration of justice, and shall conduct any such extra-judicial activities in a manner that minimizes the risk of conflict with judicial obligations.”

Judges must be particularly careful when participating in charitable activities and events, especially where fundraising may be concerned. “Judges are encouraged to be involved in community activities so long as the judge does not participate in the solicitation of funds and the prestige of the office is not used for fund raising.” Canon 4D(3)(b), Commentary.

Although the bar association may make incidental income from admission fees charged, the facts as presented do not indicate that this CLE seminar is a fundraising event subject to the prohibitions of Canon 4D(3)(b)(v). Based on the facts presented to the Committee with the current inquiry, it is not a violation of the Canons for the judge to participate as a panelist in the CLE seminar.

1. Applicable Canons

Canon 1 provides that a judge shall uphold the integrity and independence of the judiciary.

Canon 2 provides that a judge shall avoid impropriety and the appearance of impropriety. A judge “shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 2A. “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.” Canon 2B.

Canon 3 provides that “[a] judge shall perform the duties of judicial office impartially and diligently.” If the judge’s impartiality might be reasonably questioned, disqualification may be required. Canon 3E(1). Furthermore, Canon 3B(9) requires a judge to abstain from making public comments about a pending or impending proceeding in any court, which includes during any appellate process and until final disposition. *See* Canon 3B(9) and Canon 3B(9), Commentary.

Canon 4 governs a judge’s extra-judicial activities. Canon 4A provides that:

A judge shall conduct all of the judge’s extra judicial activities so that they do not:

- (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

Avocational activities are addressed in Canon 4B: “[a] judge may speak, write, lecture, teach and participate in other extra judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of these Canons.” Such activities are not just permitted, but encouraged:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law.

Canon 4B, Commentary.

With respect to participating in civic or charitable events, concerns often arise about a judge soliciting funds or memberships, either by a judge's personal participation or by using or permitting others to use the prestige of judicial office. *See* Canon 4D(3)(b). Furthermore, a judge "shall not be a speaker or guest of honor at an organization's fund raising events, unless the events concern raising funds for improving access to the legal system for indigent or low income individuals, but may attend such events." Canon 4D(3)(b)(v).

2. Analysis

The Committee has not previously considered the propriety of a judge participating in a CLE seminar sponsored by a bar association. A prior opinion of the Committee concluded that a judge could lecture at a police training academy:

provided that the lecturing or teaching is done under circumstances which are clearly educational and give no appearance of the judge acting as an agent of the police department or the sponsoring agency or which might reasonably cause the judge to appear to be biased in favor of the police in the courtroom.

Va. JEAC Op. 01-4 (2001).

Generally, Canon 4B is permissive and encourages a judge to contribute to the improvement of the law, the legal system and administration of justice through a variety of activities such as speaking, writing, lecturing and teaching, with the caveat that such extra-judicial activities are still subject to the rest of the Canons' requirements. The Committee finds that presenting at a CLE seminar sponsored by a bar association is included in those encouraged activities. In and of itself, participating in a CLE seminar does not violate the Canons and, in fact, is entirely consistent with the notion that judges are in a good position to educate members of the legal community on the law. However, prior to accepting an invitation, a judge must ensure that participation will comply with all the Canons based on the particular circumstances of the event. Additionally, the content of the judge's comments, remarks, or presentation should always necessarily be restricted to that which is permissible under the Canons. Finally, a judge must also be mindful of any change in circumstances during planning or presentation of the event which may implicate the Canons and the judge should act accordingly.

Based on the facts presented, including the bar association sponsorship, the subject matter of the seminar, and the prospective audience, the judge's role in the CLE seminar does not appear to interfere with the judge's independence, integrity, or impartiality such that Canons 1, 3, 4, or 4A would be violated. The judge's participation would not be improper or create the appearance

of impropriety, nor would serving as a panelist impermissibly lend the prestige of the judicial office to advance the judge's interests or interests of others in violation of Canons 2, 2A or 2B.

The judge must be mindful of the circumstances and ensure that none of the comments or remarks made during the CLE seminar could reasonably call the judge's impartiality into question regarding pending matters, requiring recusal in accordance with Canon 3E(1). The judge must also take care to abstain from making public comments about any pending or impending proceedings in any court, in accordance with Canon 3B(9).

The judge has raised the issue of the admission fee charged by the bar association and any profit that may be realized as a result. In particular, Canon 4D(3)(b)(v) states that a judge "shall not be a speaker or guest of honor at an organization's fund raising events, unless the events concern raising funds for improving access to the legal system for indigent or low income individuals, but may attend such events."

While Canon 4D(3)(b)(v) cites permissible types of fundraising events in which judges may speak, the Canons do not define "fundraising events" or "fundraisers." Similarly, this Committee has not previously considered the issue of fundraising in the context of a CLE seminar. Previous opinions have dealt with a judge's solicitation of funds for the National Judicial College (Va. JEAC Op. 99-3 (1999)) and a judge's participation in an honorary capacity during a festival and related events sponsored by a community-based (non-legal) non-profit organization. (Va. JEAC Op. 17-1 (2017) (cautioning against the judge soliciting funds or allowing the judge's name or title to be used in soliciting funds)). In neither case was the Committee called upon to define "fundraiser" as that term is used in the Canons.

Thus, whether a CLE seminar that charges an admission fee may be considered an impermissible "fundraiser" is a question of first impression for the Committee. Advisory opinions in other jurisdictions have dealt with the propriety of judges' participation in charitable activities, but discussion of fundraising in the context of legal seminars is less common. No singular definition of "fundraiser" exists, and a review of other jurisdictions reveals determinations based on individual factual scenarios. But in those states that have considered whether extra-judicial activities are in fact impermissible fundraisers (in the context of judicial ethics), certain considerations and characteristics are prevalent. Those considerations and characteristics are instructive in analyzing the current question.

Analyses often begin with examining the admission fee relative to the cost of the function, with excess proceeds being one possible indicia of a fundraiser.¹ The inquiry usually does not end there, because the use of any excess proceeds realized is also relevant. For example, an event organized with a goal of making a profit in order to fund other activities, as opposed to excess proceeds being an incidental aspect of the event, can be an important distinction.² The purpose of the event itself may also be a relevant inquiry, especially if guests are requested to donate money for charitable causes, or if the event is advertised as a fundraiser or benefit for charity.³

In examining legal seminars and issues of fundraising and admission fees, the Committee finds that advisory opinions from Florida and Texas, while not binding, are particularly instructive. The Florida Judicial Ethics Advisory Committee (the "Florida Committee")

determined that a judge would be prohibited from participating in a local Bench and Bar Professionalism Seminar due to the fundraising character of the event. Fla. JEAC Op. 99-27 (1999). The seminar had been advertised by the local bar association and in a local newspaper as a fundraising seminar, and the local bar association was known to have had recent financial difficulty. *Id.* The Florida Committee also recognized that the issue of excess proceeds alone did not answer the inquiry:

A judge is not disqualified from being a speaker at a legitimate legal education seminar simply because the event is intended to produce income, or a profit, for the sponsor. If these programs were not able to operate on a sound financial basis, they would cease to be offered. However, the event described by the inquiring judge is a fundraiser, in the Committee's view, because it was advertised and intended as one.

Id. (Emphases added).

Although not focusing on the fundraising issue, the Texas Committee on Judicial Ethics (the "Texas Committee") found that a judge may speak at a CLE event sponsored by a local bar association, where members could attend at a reduced rate from nonmembers. TX Jud. Ethics Op. 276 (2001). Asked whether the judge may be promoting the private interests of the bar association (because the fee schedule encourages membership), the Texas Committee found the activity permissible because the event was open to all lawyers and no one group of lawyers was benefitting. *Id.*

Whether a CLE seminar constitutes an impermissible fundraising activity will naturally be determined on a case-by-case basis depending on the unique facts. It is clear from the examples from other states that there are considerations beyond just whether an organization realizes a profit from an event in determining whether something is a fundraiser, and more specifically, a prohibited fundraiser.

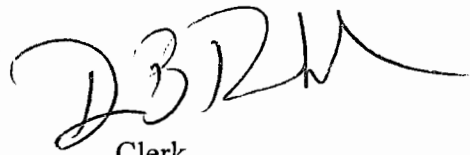
In this case, the facts available to the Committee suggest that the judge's participation is not prohibited. The extra-judicial activity is advertised as a CLE seminar by a legal association, covering trial practice topics, and makes no mention of the event being a fundraiser or benefitting any charity. A fee is charged for admission. The seminar is open to bar association members and guests, and members are charged less than guests. Although characterized as likely to result in a profit, the Committee has not been provided any information that the fee charged each attendee in fact exceeds the cost of the event, or if so, whether it does so disproportionately. No requests for donations have been made, nor has any information been provided that if there are excess proceeds that they would be applied to other bar association projects or donated to other charitable causes. By all appearances, the CLE seminar is what it purports to be and nothing more: an opportunity for attorneys to receive CLE credits for a seminar on trial practice topics by a panel of practitioners and a judge. Under the facts presented, the CLE seminar is not an impermissible fundraising activity within the proscriptions of Canon 4D(3)(b)(v).

CONCLUSION

The Committee finds that under the facts presented, the judge may participate in the CLE seminar sponsored by a local bar association where attendees are charged a fee for admission and which may result in a profit for the bar association. Each invitation to a judge to participate in a CLE seminar must be reviewed on a case-by-case basis, but as long as a judge's role in such an extra-judicial activity is consistent with the Canons, a judge is free – and in fact encouraged – to serve and participate in such an activity aimed at improving the law, the legal system and the administration of justice.

A Copy,

Teste:



Clerk

REFERENCES:

Canons of Judicial Conduct for the Commonwealth of Virginia, Canon 1, Canon 2, Canon 2A, Canon 2B, Canon 3, Canon 3B(9), Canon 3E(1), Canon 4, Canon 4A, Canon 4B, Canon 4D(3)(b)(v).

Va. JEAC Op. 01-4 (2001).

Va. JEAC Op. 99-3 (1999).

Va. JEAC Op. 17-1 (2017).

Cynthia Gray, *A Judge's Attendance at Social Events, Bar Association Functions, Civic and Charitable Functions, and Political Gatherings*, at 10 (paper prepared for American Judicature Society under grant from State Justice Institute, 1996).

Mass. Code of Jud. Conduct Rule 3.7, Comment [3].

Utah Jud. Ethics Informal Op. 90-9 (1990).

Md. Jud. Ethics Comm. Op. 1979-06 (1980).

Fla. JEAC Op. 99-27 (1999).

TX Jud. Ethics Op. 279 (2001).

FOOTNOTES:

¹ “A charitable function is considered a fund-raiser if the guests are requested to donate money or if the tickets are priced to exceed the cost of the function.” Cynthia Gray, *A Judge’s Attendance at Social Events, Bar Association Functions, Civic and Charitable Functions, and Political Gatherings*, at 10 (paper prepared for American Judicature Society under grant from the State Justice Institute, 1996) (citing three various state advisory opinions).

² See, e.g., Massachusetts’ Code of Judicial Conduct in Rule 3.7, Comment [3]: “[A] fundraising event is one for which the organizers’ chief objectives include raising money to support the organization’s activities beyond the event itself. Unless that is the case, an event is not a fundraising event, even if the revenues ultimately exceed the cost.” *Id.* (Emphases added); Utah Jud. Ethics Informal Op. No. 90-9 (1990) (determining that an educational seminar where, historically the registration fees exceeded the actual costs, and the seminar was organized and planned to generate proceeds, which were used to subsidize other sponsor projects, the seminar was a fundraising activity); Md. Jud. Ethics Comm. Op. 1979-06 (1980) (finding that at a nonprofit organization’s annual dinner, distribution of any excess proceeds from ticket sales to an undesignated charity was “merely a contingent, incidental aspect” of the event, and not a fundraiser). See also Fla. JEAC Op. 99-27, *infra* p. 5; Gray, *supra* note 1, at 10.

³ See Md. Jud. Ethics Comm. Op. 1979-06 (noting that although excess proceeds at issue are turned over to a charity or other worthy cause, “[t]he purpose [of the dinner] is not to benefit any charity. No particular charitable enterprise is named on the ticket or letter invitation.”) “[P]ertinent considerations” for determining the propriety of attending such a function included “[t]he purpose of the function, the degree of charitable involvement, and the extent to which a charity may financially benefit” *Id.* See also Fla. JEAC Op. 99-27, *infra* p. 5.

AUTHORITY:

The Judicial Ethics Advisory Committee is established to render advisory opinions concerning the compliance of proposed future conduct with the Canons of Judicial Conduct. . . . A request for an advisory opinion may be made by any judge or any person whose conduct is subject to the Canons of Judicial Conduct. The Judicial Inquiry and Review Commission and the Supreme Court of Virginia may, in their discretion, consider compliance with an advisory opinion by the requesting individual to be a good faith effort to comply with the Canons of Judicial Conduct provided that compliance with an opinion issued to one judge shall not be considered evidence of good faith of another judge unless the underlying facts are substantially the same. Order of the Supreme Court of Virginia entered April 18, 2019.