



The Problem Needs A Solution

By Douglas T. Kendall

This dialogue is properly framed as a debate: Steven Edwards and I disagree both about the magnitude of the problem stemming from privately-funded continuing legal education (CLE) programs for judges and the specifics of the solution to that problem. Still, the most striking thing about this discussion is that all the participants in it agree that the federal judiciary should do something to address the appearance problems that stem from private judicial seminars.

The unanimity concerning this important premise is striking only because of how starkly it contrasts to the response to this controversy by the federal judiciary. Despite drawing heated criticism of private seminars by judges, ethicists, members of Congress, editorial boards and others for over two decades, the federal judiciary remains adamantly, indeed defiantly, committed to every jot and tittle of the flawed ethical guidance provided by what is known as Advisory Opinion 67.

This defense has started to border on the absurd. As Bruce Green notes, in a portion of the Second Circuit's *Aguinda* opinion, the circuit court blamed the intense press scrutiny that has focused on the private seminars conducted by the Foundation for Research on Economics and the Environment (FREE) on Community Rights Counsel's "ample access to the media." Please. Community Rights Counsel (CRC) is a public interest law firm with four employees and no press secretary. The media has focused unrelentingly on FREE because the simple, uncontroverted facts

about its operation (described below) are outrageous.

An even more disturbing example is the well-publicized memorandum written this summer by Leonidis Ralph Mecham, the director of the Administrative Office of the U.S. Courts, warning federal judges of a "secret" plot between the American Bar Association and CRC to rush an ethics opinion through the ABA's Standing Committee on Ethics and Professional Responsibility and to release this opinion "with great fanfare" at the ABA's August annual meeting. Great story, the only problem being it was almost entirely made up. Here's a portion of the ABA's angry response to Mr. Mecham:

[Y]our Memorandum not only conveys (to a most distinguished group of federal judges) a completely inaccurate and detrimental "description" of what the Standing Committee on Ethics and Professional Responsibility is doing; it also makes statements that reflect adversely on the integrity of ten lawyers who, without compensation, devote, in the aggregate, hundreds upon hundreds of hours each year to producing ethics opinions for the guidance of lawyers and judges.

By starting from the premise that there is a problem, this debate elevates the discussion of this issue to an important new level: potential solutions. After framing the problem from the perspective of an environmental litigator who defends the environmental statutes attacked at FREE's seminars, I devote most of this article to outlining what I think is a promising potential response to the problem. My proposal starts with Steve Edwards' very helpful suggestion that district and circuit courts establish committees of judges to evaluate the propriety of private

CLE programs for judges. I expand Edwards' response to address the crux of the problem: the funding of CLE programs by corporate litigants and other interested parties.

The Problem

In July 2000, Community Rights Counsel (CRC) released a 106-page report, "Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public's Trust," which explains why the judiciary should reform the rules that govern privately-funded judicial seminars. The report focuses heavily on judicial seminars conducted by the Foundation for Research on Economics and the Environment (FREE).

These are the basic facts about FREE's operation. FREE flies about 40 federal judges a year to Montana resorts to attend five- to six-day seminars on environmental law. FREE pays for the judges' tuition, room, board and travel expenses, a gift worth well over \$1,000 per judge. Judges spend 3 to 5 hours each day listening to lectures; the rest of the day is devoted to fly-fishing expeditions, horseback rides, and cocktail hours.

FREE receives about one-third of its funding from a handful of large corporations — including Texaco, General Electric and Monsanto — that regularly litigate environmental cases in federal court. FREE's remaining funding comes mainly from notoriously ideological foundations such as the John M. Olin Foundation, the Sarah Scaife Foundation, and the Charles G. Koch Charitable Foundation, which simultaneously bankroll groups like Pacific Legal Foundation to litigate environmental cases in federal court. FREE's corporate funders regularly send corporate officers to FREE seminars where they lecture,

dine with and, in some cases, share a log cabin with federal judges.

FREE seminars deliver two primary messages to federal judges. First, they argue that existing federal environmental laws are inefficient and should be repealed or struck down in favor of the free market, which will produce a more "optimal" amount of pollution. In FREE's words, its seminars "reject top-down, command and control environmentalism" and "promote private property rights, market incentives and voluntary arrangements." Second, FREE seminars instruct judges on Constitutional provisions that can be used to repeal or frustrate existing environmental laws. For example, one frequent lecturer at FREE's seminars has been James Huffman of Lewis and Clark Law School. Huffman, who sits on FREE's Board of Trustees, is one of the few academic disciples of the extreme views on the Takings Clause expressed by Chicago Law Professor Richard Epstein. Huffman has delivered lectures to judges at FREE seminars on topics such as "Liberty and the Environment: A Case for Principled Judicial Activism," and "Takings: Property, Environment, and the Constitution." In Huffman's words:

The most significant accomplishment of the Reagan-Bush Administrations has been the staffing of the federal courts with intelligent judges. My fear is that the Reagan revolution will come to nothing as these judges sit on their hands in the name of a simplistic theory of judicial restraint.

As a litigator who works for a group that defends in court the environmental protections attacked at FREE's seminars, I find these seminars offensive to the most basic notions of fairness in our adversarial system. I communicate with federal judges only through written briefs, avoiding even casual conversations with the judges I practice before, out of concern over the possible appearance of inappropriate ex-parte contact. Meanwhile, at a dude ranch in Montana,

my adversaries are wining and dining the same judges and carefully critiquing environmental laws during fly-fishing expeditions and leisurely horseback rides through Yellowstone National Park.

I am not alone in this outrage. FREE's seminars have been criticized by a long and growing list of commentators that includes: (1) the editorial boards of more than 30 major newspapers from across the ideological spectrum; (2) prominent judicial ethics experts from law schools across the country; (3) members of both the Senate and House Judiciary Committee; (4) former judges including Abner Mikva; and (5) good government groups such as Common Cause and the Center for Public Integrity.

Towards A Meaningful Solution

Steve Edwards proposes an important first step towards reform in suggesting that the judiciary establish committees of judges in districts (and presumably circuits) around the country to evaluate whether or not an appearance of impropriety stems from a private judicial seminar. He's right in pointing out that individual judges lack both the information needed to make this determination and the time to conduct an investigation.

Edwards' proposal falls short, however, because it fails to confront the principal problem with private seminars: the appearance problem and actual conflicts of interest that stem from having interested parties fund and inevitably shape the CLE received by federal judges. Edwards' solution would simply shift to these new committees judgment calls that ought to be eliminated altogether. What, for example, should the committee do if faced, ex-ante, with the fact pattern of *Aguinda* (discussed in some detail in Bruce Green's introduction to this debate)? A district judge decides an important environmental case in favor of Texaco and that case is on appeal. The

judge petitions to attend an environmental law seminar run by an organization that receives 6 percent of its general revenues from Texaco. Texaco's former CEO is scheduled to speak at this seminar. Should the committee allow the judge to attend? Plainly, if Edwards thinks the committees he recommends can reach an answer that satisfies both the petitioning judge and the lawyers for *Aguinda*, he is asking a lot.

A far better solution would be to give the committees Edwards recommends sufficient funds to pay the tuition, room and board for judges who want to attend seminars funded by private organizations. This is precisely what happens with respect to executive branch lawyers who are involved in litigation. If an Assistant United States Attorney wants to attend a CLE program, he or she has the trip approved by a supervisor and paid for by the Department of Justice.

The most significant procedural and substantive objections to this solution can each be addressed.

Edwards raises the major procedural objection: where would the money come from? He doubts that the same Congress that refuses to raise judicial salaries would make available funds for private judicial seminars. This objection misses the nuances of the Congressional appropriations process. Federal judicial pay raises are trapped in the political morass of Congressional pay raises. Pay for judges has been linked to pay for members of Congress and members of Congress are afraid of the constituent backlash that accompanies attempts by Congress to raise their own salaries. For this, judges suffer unfairly.

Outside this unique context, however, Congress generally grants the reasonable appropriation requests of the federal judiciary. There is every reason to believe that if the judiciary requested an appropriation to fund continuing legal education programs for judges, Congress would grant this request. This request would be tiny by federal appropriations standards. Currently, approximately 100

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judges attend private CLE programs each year (if this category of activities is narrowly defined to include only multi-day educational programs directed toward federal judges). Even if these seminars cost \$5,000 a judge (a generous estimate) the total amount of money involved is \$500,000. Quadruple this (to pick a number out of the air), to expand judicial education opportunities, and one still is talking about a \$2 million line item, not even a full drop in a very large bucket. Although some provision might have to be made to handle the unlikely scenario where sufficient funding is not available to fund a particular trip, generally this should not be a problem.

Substantively, my proposal could be attacked simultaneously as too permissive and too restrictive. Too permissive, some will say, because it could mean that taxpayers would end up funding FREE seminars. Too restrictive, others will argue, because judges would no longer be able to make their own decisions about what expense-paid seminars to attend (judges would of course be free to attend any seminar they choose to pay for on their own).

My answer to the too permissive argument is: "so be it." Taxpayer funding would dramatically alter the market for privately-provided CLE programs for judges. Judges would no longer enter the market seeking handouts, they would enter as paying customers. Providers would compete for judicial dollars by offering the most essential and best-run programs. The availability of taxpayer money should encourage entry into the market of CLE programs for judges. Money should no longer be a serious impediment for any group that believes that judges would benefit from legal

education on a particular topic. If FREE survives in this free market, and is sanctioned by the committees recommended by Edwards, there is little basis for objection. Stripped of the stain and bias that stems from its funding by corporations and other interested parties, FREE's seminars would become far less problematic as a matter of judicial ethics.

The too restrictive argument seems unfounded. As mentioned above, taxpayer funding would remove the most glaring and intractable ethical problem that stems from private CLE seminars — the funding of these programs by interested parties. The district and circuit court committees' role would generally be limited to filtering out programs that are run by litigants or are so rabidly one-sided on particular legal issues that they resemble ex-parte communications. The committees should, in general, authorize funding for any legitimate continuing legal educational activity (and, given that these committees would be made up entirely of judges, they can be expected to do so). The availability of public funding should increase the CLE offerings available to judges. I would suspect that the vast majority of federal judges would happily trade a slight amount of freedom in accepting CLE gifts for the insulation that taxpayer funding and committee approval would provide against charges of ethical impropriety.

The problems with private CLE programs for judges, and the flaws with the existing ethical guidance on the topic, have now been documented overwhelmingly. It is time to find a solution to this problem that preserves every legitimate educational opportunity available to federal judges. Steve

Edwards makes a valuable contribution to this debate by proposing that decisions regarding the propriety of attending CLE programs be removed from individual judges and entrusted to committees established in district and circuit courts around the country. I have grafted onto Edwards' framework the proposal that the committees be given the resources to pay the tuition, room, and board for any program authorized by one of these judicial committees.

My proposal is painted in broad strokes and is intended only as one potential solution; others can and should be contemplated. My hope is only to demonstrate that, if it chose to, the federal judiciary could solve the problem my organization and others have raised with private judicial seminars (1) on its own, (2) with a minimal expenditure of taxpayer resources, and (3) without any negative effect on the availability of educational opportunities for judges.