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Invitation To Debate

Privately-Funded Seminars For Judges

By Bruce A. Green

As a general rule, judges are free to educate themselves outside the courtroom and are encouraged to do so, at least when they pay their own way. There are some limits, of course. For example, a judge may not preside over a case if, in an educational program or any other setting outside the courtroom, he or she previously acquired personal knowledge of the evidence. But for the most part, judges are encouraged not only to speak, lecture and teach, but also to learn.

When judges are educated at someone else's expense, however, some additional concerns may be raised. If someone reimburses a judge's expenses to attend an educational program, the judge has accepted a gift. The applicable codes of judicial conduct and other legal provisions governing judicial conduct place restrictions on judges' receipt of gifts. Ordinarily, the most significant question is, who is paying? If the gift is provided by a party that is before the court, or is likely to come before the court, there may be a problem. Judges are not supposed to take gifts from parties because doing so raises the specter that the judges' decisions will be influenced as a result.

Not all "gifts" of education are problematic. Needless to say, judges are encouraged to participate in programs of the Federal Judicial Center and similar organizations which are funded by the government and overseen by judges themselves. Judges also are welcome, even encouraged, to participate on a complementary basis with other lawyers in educational programs sponsored by bar associations, by law schools and by similar not-for-profit organizations that rarely appear as parties in litigation and that do not appear to be promoting a particular litigation objective or partisan viewpoint.

For more than two decades, however, debate has surrounded judges' involvement in expenses-paid educational programs of a wholly different sort: seminars presented at resort settings that are designed exclusively for judges, that are offered by private organizations that arguably seek to promote particular approaches to the decision of litigation, and that are funded by corporations appearing frequently as parties before the courts.

The following "point/counterpoint" between Steven M. Edwards and Doug Kendall continues the ongoing debate. What follows first is a brief description of the history of the controversy and the currently applicable law.

The Origin Of The Debate

The controversy began not long after 1974, when Henry Manne founded the Law and Economics Center (LEC) to provide education regarding law and economics. Two other private institutions, the Foundation for Research on Economics and the Environment (FREE) and the Law and Organizational Economics Center (LEC), were subsequently established, also in part for the purpose of educating judges. Over the years, with the financial support of corporations, foundations and law firms, these three organizations have hosted seminars attended by hundreds of judges relating to law and economics, science and the environment.

One of the earliest expressions of concern about these programs was a 1979 Washington Post article by Jack Anderson that asserted that "[m]ore than 100 federal judges have gone to sunny Florida for a crash course in conservative economics, courtesy of some of the biggest corporate fat cats that will ever appear before them as defendants." The article quoted a confidential memo in the Senate Judiciary Committee that called the seminars for judges "a brazen attempt by the Business Roundtable crowd to influence the enforcement of antitrust laws," and stated that "[f]inancing for the program comes from companies like Proctor & Gamble, IBM and General Electric . . . . Isn't there any question about the ethics of judges accepting, even indirectly, the hospitality of defendants in federal cases?"

In August 1980, not long after the article appeared, the United States Judicial Conference's Advisory Committee on Codes of Conduct issued Advisory Opinion 67, addressing whether judges may attend "seminars and similar educational activities organized by non-governmental entities and may have the expenses of their attendance paid by such entities." The committee concluded that judges may do so. It reasoned that "[p]ayment of tuition and expenses involved in attendance at non-government sponsored seminars" is a gift that judges are specifically authorized to accept under provisions of the federal judicial code that permit judges to accept a fellowship or scholarship "awarded on the same terms applied . . . to other applicants," or to accept any other gift "so long as the donor is not a party in litigation before, and its interests are not likely to come before, the invited judge." The opinion noted the following limitation, however: "It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics to be covered in the seminar are likely to be in some manner related to the subject matter of such litigation." The opinion further stated that judges have an individual responsibility to satisfy themselves that their participation would be permissible and, if it is and they choose to attend, they "must report the reimbursement of expenses and the value of the gift on their financial disclosure reports."

Days after Advisory Opinion 67 was issued, the Institute for Public Representation petitioned the United States Judicial Conference to provide further guidance. The petition specifically addressed the programs of the Law and Economics Center, then located at University of Miami Law School. The United States Judicial Conference declined, however, to undertake a detailed review of LEC's judicial seminars or to adopt guidelines for judicial participation in privately-funded programs as requested.

Public concerns were renewed in 1993 when the Alliance for Justice issued a report criticizing judges' attendance at law-and-economics programs. The following year, United States District Judge Jack B. Weinstein addressed this report in a law review article dealing in depth with the question of how judges learn. The article specifically reviewed criticisms directed at the judicial education programs of the Law and Economics Center (now located at the George Mason

(continued on p. 4)

(continued from p. 3)

University School of Law) as well as criticisms directed at conferences at Yale Law School and New York University School of Law sponsored exclusively by Aetna Casualty and Life. The criticisms directed at the LEC programs included that they are ideologically biased toward advancing corporations' financial interests, and that judges are enticed by the resort locations to take the courses.

Although Judge Weinstein's article suggested ways of reducing concerns about the bias of judicial education programs, he generally dismissed the Alliance's criticisms as "unsound." He took the view that ordinarily "[j]udges should be encouraged to gain as much general knowledge as possible, preferably from sources not tainted by venal or extreme ideological views." Although the Alliance charged that LEC presented biased programs, Judge Weinstein concluded that "[j]udges should not be deterred from attending conferences that espouse a certain viewpoint," and noted that "[m]ature and experienced judges' thoughts can seldom be rechanneled by an instructor's bias." Nor did he agree that the programs necessarily should be held at less lavish settings.

In 1998, questions about federal judges' attendance at all-expense-paid seminars were raised openly in Congress by Representative Zoe Lofgren, who suggested during a committee hearing of the House of Representatives that the federal judiciary, as an entity, ought to provide some guidance to judges. In response, District Judge William Terrell Hodges noted that there are opinions of the Advisory Committee on Codes of Conduct that already are in effect that deal with this very question. Additionally, Judge Hodges indicated that he would ask the committee to reexamine the question. A month later, on July 10, 1998, the committee issued a slightly revised Opinion 67 that adhered to the earlier conclusion.

In July 2000, Community Rights Counsel ("CRC") published a study focusing on judicial seminars relating to environmental law. It argued that the "seminars amount to a veiled effort to lobby the judiciary under the guise of judicial education" and called for a ban on private reimbursement of judges' expenses in attending educational programs. The concerns expressed in the CRC report prompted a spate of editorials criticizing privately-funded judicial education, as well as a program aired by ABC's "20/20," hosted by Barbara Walters, exposing so-called "Junkets for Judges."

The Second Circuit Weighs In

Whether a judge, once having attended a privately funded judicial seminar, is restricted in the ability to hear cases on which the seminars had some bearing, may be a separate question from whether judges may attend in the first place. Recently, the Second Circuit became the first court to examine this question in depth. Its decision, *In re Aguinda*, 241 F.3d 194 (2d Cir. 2000), arose out of a civil lawsuit brought against Texaco by citizens of Ecuador and Peru who claimed that pollution by Texaco had caused environmental damages and personal injuries in their countries. District Judge Jed Rakoff dismissed the lawsuit and, while the decision was on appeal, attended an expense-paid seminar conducted by FREE on environmental issues. Texaco was a contributor to FREE and a former Texaco executive officer spoke at the seminar. After the court of appeals remanded the lawsuit back to the district court, the plaintiffs argued that Judge Rakoff should be disqualified from continuing to preside over the environmental litigation. Judge Rakoff concluded, however, that he was not required to disqualify himself, and the court of appeals agreed.

The Second Circuit addressed the plaintiffs' arguments at considerable length. First, examining Texaco's minor contribution to FREE's funding, the court concluded that a reasonable observer would regard the donation as "too remote to create a plausible suspicion of improper influence." The court compared a judge's attendance at a FREE seminar to a judge's attendance at expense-paid programs sponsored by bar associations and law schools. The court observed that no reasonable person would expect a judge who attended such programs to favor a minor donor to the law schools or bar associations serving as sponsors.

Additionally, the Second Circuit assumed for the sake of argument that the particular environmental seminar attended by the district judge made an unbalanced presentation on policy issues. As a general rule, the court held that the judge could nevertheless preside over environmental litigation. The court reasoned that even if the seminar persuaded the judge that environmental laws are harmful, it would be presumed that the judge would put aside his personal beliefs and carry out the law. Further, it noted that judges have many encounters with writings and talks pertinent to their cases, and inquiry into how all those encounters influence their views would be impractical.

The Second Circuit saw no meaningful difference between attending an expenses-paid seminar sponsored by FREE and attending any other presentation on a debated issue sponsored by an organization that receives funding, even if minor or remote, from a

party or its attorney. Therefore, the court suggested, if attendance at the FREE seminar was thought to create an impermissible appearance of partiality, judges would have to stop attending similar seminars to avoid being disqualified from hearing future cases related to such seminars' subject matter.

The Second Circuit identified particular circumstances, however, where attending an expense-paid seminar might bar a judge from later participating in a case. The first is when a party or its lawyer contributes "a significant portion of [the sponsoring organization's] general funding." Whether a contribution was "significant" must be determined on a case-by-case basis; the circuit court's point was that it raises concerns when a judge accepts "something of value from an organization whose existence is arguably dependent upon a party to litigation or" its counsel.

Disqualification also might be required, the appellate court said, when the judge attended a presentation concerning legal issues material to a claim's disposition or defense in the particular lawsuit or involving parties, witnesses or counsel in particular actions. The court was unable to say with precision when there was a close enough match between the legal issues discussed at an educational seminar and those in the lawsuit to require disqualification. The court did note, however, that when parties or their lawyers fund seminars that bear too closely on a litigation in which they are involved, "the appearance created bears too great a resemblance to an ex parte contact."

The court concluded by taking a swipe at CRC, whose July 2000 report had provided the underpinnings of the plaintiffs' disqualification motion. The court noted that the plaintiffs sought to "benefit from CRC's rather ample access to the media," and observed that the question whether conduct gives rise to an appearance of impartiality must be judged "based on the facts of the presentation involved and not on the amount of publicity partisans on the particular issues can muster."

The Continuing Controversy

In the past two years, battle lines have been drawn over the propriety of the judicial seminars. Senators John Kerry and Russ Feingold have supported federal legislation to bar federal judges from attending private seminars. The Judicial Conference of the United States and the Board of the Federal Judicial Center opposed their bill as did Chief Justice Rehnquist, who defended privately funded programs as "a valuable and necessary source of education in addition to that provided by the Federal Judicial Center."

This year, the ABA sought to weigh in. Its Standing Committee on Ethics and Professional Responsibility, which issues advisory opinions on questions of legal and judicial ethics, drafted an opinion intended to give guidance to judges about when it was proper to attend educational programs at others' expense. However, both the National Conference of Federal Trial Judges and the Administrative

(continued on p. 6)

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(continued from p. 5)

Office of the U.S. Courts took umbrage upon learning of the draft opinion. The ABA agreed to continue studying the issue.

This summer, Abner J. Mikva, the former Chief Judge of the D.C. Circuit Court of Appeals, published an article in the ABA's *Litigation* magazine titled "Judges, Junkets, and Judges," to which Steve Edwards responds in his contribution to this issue of the *Federal Bar Council News*. As he had in previous fora, including in an introduction to the CRC report, Judge Mikva expressed concern about the appearance that "these seminars are being used by private interests to influence and have access to federal judges." He called on the Judicial Conference of the United States "to emphasize the perception problem" and to "give clear guidance to judges as to what they can attend."

Most recently, on October 9 of this year, the Association of the Bar of the City of New York hosted a panel discussion on this issue. Among the speakers were Judge Thomas Griesa, who defended judges' attendance at LEC seminars based on his long experience in doing so, and explained that from his perspective and that of the other judges who attend, the seminars are not in fact designed to persuade judges to decide litigation in particular ways, but provide a fair and rigorous educational experience. One opposing perspective was offered by Monroe Freedman, the Howard Lichtenstein Distinguished Professor of Law at Hofstra University School of Law. Among his concerns were that when judges attend expenses-paid seminars presented at resort settings by organizations such as LEC and financed by corporations that appear as parties before the court, there is an appearance that the party is paying experts to talk to the judges who attend and that the sponsoring organization is offering the judges a gift to induce them to listen to the experts. The judicial seminars were also criticized by CRC's Doug Kendall, whose perspective, in counterpoint to that of Steve Edwards, is offered in these pages.

Given the past 25 years of debate and controversy, it can be predicted that the issue of judges' attendance at privately-sponsored judicial seminars will not disappear from public and professional discourse. As the debate between Steve Edwards and Doug Kendall reflects, there is room for sharply different viewpoints. For that reason alone, regardless of where one stands on the issue, it may be useful for representative bodies of the judiciary, such as the Judicial Conference of the United States, to collaborate with representative bodies of the legal profession, such as the ABA, to seek a more broadly accepted resolution.

[Editor's note: This article was adapted from Bruce A. Green, May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy, 29 Fordham Urb. L.J. 941 (2002).]

Do Not Prohibit Seminars

By Steven M. Edwards

Former Judge Abner Mikva is at it again. In an article in the summer issue of the ABA's *Litigation* magazine ("Judges, Junkets and Seminars"), he criticizes judges who attend educational seminars sponsored by organizations such as FREE (Foundation for Research on Economics and the Environment), stating bluntly: "judges ought not go to such seminars." Although he claims to be "reluctant" to speak out publicly about this subject, Judge Mikva has become the leading proponent of prohibiting judges from attending educational seminars in exotic locations where all expenses are paid.

There is an important qualification to Judge Mikva's point of view: He would only prohibit judges from attending seminars "sponsored or funded by interests having a stake in litigation." He does not say whether the sponsor or funder must have a stake in specific litigation then pending before the judge attending the seminar, or whether he is concerned about entities that get involved in litigation generally. Given the nature of his concerns, one gets the impression that Judge Mikva would bar judges from attending seminars sponsored or funded by any private interest, because it is the rare company or institution that does not encounter at least some litigation in the course of its activities.

There is a curious inconsistency that emerges from Judge Mikva's argument. He states that he finds the notion that judges are brainwashed by the seminars hard to accept, yet he notes that "clearly the funders of these judicial seminars are getting something for their money." One almost gets the impression that the critics of judicial seminars would prefer judges to be like the "pre-cogs" in the recent movie "Minority Report" — living in a laboratory environment, completely insulated from all external stimuli.

Of course, judges do not live in laboratory environments, and they are influenced by many things. They are influenced by their parents while growing up; by what they learn in school; by their friends. They undoubtedly read newspapers and watch TV, and they may subscribe to periodicals that are less than objective in their coverage of

important issues. They may also attend religious services, belong to political societies or hear speeches at dinners where views on important issues are expressed.

If a judge attended a seminar sponsored by an organization such as FREE in his or her hometown, it is doubtful that anyone would object. It is the fact that FREE conducts the seminars at locations such as ranches in Montana, and pays the judge's expenses for getting there (while providing ample time for recreational activities such as golf), that causes concern. Indeed, I suspect that trips sponsored by organizations such as FREE would cause discomfort even if there were no educational component (i.e., when they say it's not about the money, it's about the money).

No one would dispute the proposition that it is inappropriate for a judge to go on a vacation paid for by a party appearing before that judge. But is it inappropriate for a judge to go on a vacation paid for by someone who will never appear before the judge? Leaving aside an instinctive preference we may have for judges to lead ascetic lives, it is difficult to articulate an analytical basis for prohibiting a judge from receiving something of value from someone who is not, and never will be, a litigant.

It is this thought process that has led to the creation of organizations such as FREE. If the sponsor is a not-for-profit foundation, as opposed to actual or potential litigants, there is no reason to be concerned — or so the thinking goes. The problem, as Judge Mikva points out, is that the Judicial Conference's Advisory Opinion No. 67 requires the judge to take affirmative steps to determine who the funders are (although it is unclear whether the requirement is to identify the funders of the foundation or the funders of the event), and the funders inevitably include companies who have litigation pending before the courts.

Judge Mikva's solution is to use public funds to pay for the expense of sending judges to educational seminars. The U.S. Judicial Conference or the Federal Judicial Center, in his scheme, would provide guidelines as to how the money should be spent. Presumably this would include some judgment as to whether the subject matter of the seminar is acceptable, as well as whether the location is appropriate.

While Judge Mikva's solution may solve the perception problem, it also would severely limit the availability and quality of educational seminars for judges. Given the reluctance of Congress to make money available for increases in judicial salaries, it is doubtful that any would be made available for seminars — much less seminars in attractive locations. Furthermore, the intellectual content of seminars approved by a central governing body is likely to be less interesting and varied than seminars sponsored by competing private groups.

Do we really think that judges are influenced by expense paid trips to seminars? If the answer to that question is no, then eliminating seminars seems like a relatively extreme solution to something that may not even be a problem. Nevertheless, the critics of such seminars are persistent and numerous, and their concerns must be addressed.

Perhaps one way to preserve the baby while throwing out the bathwater would be to modify Opinion No. 67 to give judges the option of seeking advice from an independent committee with respect to whether a proposed trip to a seminar creates an appearance of impropriety. This would reduce the potential for self-infection that results from Opinion No. 67's requirement that judges take affirmative steps to determine the sources of funding. It would also provide for a greater degree of consistency and objectivity.

The notion of having a standing committee of judges or lawyers to determine whether there is an appearance of impropriety may be a useful device generally. I have always found it odd that a judge is supposed to do that on his or her own. Often it puts the judge in an untenable position of trying to be objective about something that is inherently subjective, and it does little to convince the general public that judges, in fact, are impartial.

In any event, in dealing with the delicate question of judges attending educational seminars, the issue has to be the funding, not the content. A judge should be wise, and wisdom comes from exposure to ideas — good, bad and ugly. If an independent committee determines that there is no reason to believe that a judge would be influenced by a free trip to a dude ranch, that should be the end of it.

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.

(continued on p. 8)

(continued from p. 7)

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 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

(continued on p. 10)

(continued from p. 9)

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.