JUDICIAL INQUIRY COMMISSION

DATE ISSUED: February 8, 2012 ADVISORY OPINION 12-913

PRESIDING OVER A MOCK TRIAL AT A LAW FIRM'S EDUCATIONAL SEMINAR CONDUCTED EXCLUSIVELY FOR ITS ATTORNEYS

ISSUE

May judges within the same circuit preside over and evaluate mock trials that are the culmination of a large law firm's annual training weekend for its young litigators from around the Southeast? **Answer:** No.

FACTS

A large law firm conducts an annual training weekend for its younger associates from around the Southeast. The weekend concludes with mock trials, which are based on a hypothetical factual scenario and held at the county courthouse. Judges and experienced trial attorneys have been invited to preside in all phases of the trials and orally evaluate the performances of the attorneys, which presumably would include instruction to them to improve their trial techniques. A similar request from any law firm would be treated the same. The judges would not receive compensation.

DISCUSSION

It is appropriate and desirable for judges to participate in the professional, educational, and social activities of legal organizations. Participation in private law-related training programs, however, implicates several provisions of the canons. In general, Canon 4A permits a judge to speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice, subject to the limitations that such activity does not affect the proper performance of the judge's duties or cast doubt on his capacity to decide impartially any issue that comes before him. Canon 2C provides, in part, "A judge . . . should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him." *See also* Canon 2 (a judge should avoid impropriety and even the appearance of impropriety in all his activities); Canon 2A (a judge should conduct himself at all times in a manner that promotes public confidence in the integrity and the impartiality of the judiciary).

Most judicial ethics advisory bodies that have addressed the issue whether a judge may participate in closed training programs offered exclusively to a law firm have advised that the judge should not participate. Cindy Grey, *"Speaking to the Appropriate Audience,"*

Judicial Conduct Reporter at 10 (Spring 2009), citing Florida Advisory Opinion 2003-03 (judges should not participate in a national law firm's members-only litigation retreat, held at a local upscale resort, by presiding over one-day mock trials and giving instructions in an effort to improve the associates' trial skills; the judges' participation would be solely for the benefit of the firm, which has an office in the circuit of the inquiring judge); New Jersey Advisory Opinion 1-89 (a judge should not accept a law firm's invitation to speak at its luncheon where the primary purpose would be to talk to the firm's younger associates about the nuances of appellate practice); Pennsylvania Informal Advisory Opinion 9/8/04 (a judge should not participate in a legal seminar conducted solely for the members of the sponsoring law firm); South Carolina Advisory Opinion 36-2001 (a judge should not speak at a retreat hosted and financed by a law firm whose members are likely to appear before the judge); Texas Advisory Opinion 276 (2001) (a judge should not speak at an in-house CLE sponsored by a law firm for its attorneys even if that firm allows lawyers not affiliated with the firm to attend without charge); Texas Advisory Opinion 262 (2000) (a judge should not present a legal overview of a particular type of case in the judge's court to an in-house law firm seminar attended by the firm's attorneys, its clients, and its prospective clients even if the firm does not currently have a case pending in the judge's court). *See also* Florida Code of Judicial Ethics, Canon 4(B), Commentary ("A judge invited as an honored guest of a law firm at that law firm's educational retreat to preside over mock trials would violate the spirit and intent of several Canons."); New Mexico Advisory Opinion 08-06 (a judge may not speak to the criminal defense lawyers association about domestic violence cases over which he presides; failure to publicize the event as "open to all" retains the exclusivity of the event); New York Advisory Opinion 09-92 (a judge may not present an in-house CLE program on Internet research resources for the attorneys and paralegals of his former law firm); New York Advisory Opinion 01-58 (a judge should not teach a CLE course on legal writing and advocacy skills to a law firm's junior litigation associates even if the firm does not have cases pending before the judge); Pennsylvania Informal Advisory Opinion 6/20/05 (a judge may not participate in a seminar for only a certain law firm at the firm's office); United States Advisory Opinion 105 (2010) (a judge may not participate in programs sponsored by a law firm or legal department solely for the benefit of its members).[1]

[1] *But see* California Judges Association Informal Opinion (March 2006) (a judge may accept a large law firm's invitation to be a mock trial judge for the firm's training purposes if he is also available to other law firms and he is satisfied that the facts involved in the mock trial are not patterned on any case pending or impending in the judge's jurisdiction or on any case being handled by the law firm, but he must disclose his participation if lawyers from the firm subsequently appear in his court); Maryland Advisory Opinion 1988-02 (a judge may give an after-work training session on civil practice in district court for the young associates of a law firm if it does not interfere with the proper performance of judicial duties, it does not reflect adversely on his impartiality, he does not convey or permit others to convey the impression they are in a special position to influence judicial conduct, he is reasonably available to accept similar invitations from other lawyers or firms, and his participation with the particular firm is only occasional).

As these advisory opinions conclude, the following Canon 2 concerns may override the general desirability of judicial participation in the education of lawyers: (1) preserving the appearance of impartiality; (2) prohibiting the lending of a judge's prestige to advance the interests of others; and (3) avoiding the impression that others are in a position to influence the judge. *See generally* United States Advisory Opinion 87 (2010). Clearly, the inquiring judge's facts include mitigating factors not present in some of the authorities noted above. For example, assuming the judges' participation would be limited to presiding over the mock trials, the firm's members would not have an exclusive opportunity to intermingle with the judges, i.e., the judges would be avoiding the appearance of an opportunity for the firm members to develop a special relationship with the judges, to lobby the judges on issues pending before the court, or to gain some other advantage over everyone excluded. In addition, the judges would hear both points of view as opposed to hearing only one particular point of view. They also would not receive any compensation or be an honored guest at an upscale resort or social, informal gathering with the firm's members. It is the "private" nature of the event, *i.e.*, only members of the firm participating in the mock trials and benefiting from the judges' evaluations, however, that is controlling here.

The judges' presiding in the mock trials would create doubt about their impartiality. They could well be perceived as giving what amounts to partisan advice on questions of strategy or tactics as to how best to likely succeed in cases before them. *See* Florida Advisory Opinion 2003-03; New Jersey Advisory Opinion 1-89 (talking to a firm's younger associates about the nuances of appellate practice might be perceived as educating one group of lawyers to the potential disadvantage of another); New Mexico Advisory Opinion 08-06 (in speaking about domestic violence cases at a seminar only for the defense bar, the judge would address issues that arise in his court and also be subjected to only the defense side of any issues raised by his presentation, thereby creating an appearance that could impair public confidence in his impartiality in domestic violence cases); United States Advisory Opinion 105. *Cf.* Florida Advisory Opinion 2008-21 (even if the event is open to all attorneys, to tailor the course solely for the benefit of certain attorneys would cast doubt on the judge's impartiality); Colorado Advisory Opinion 2008-03 (presenting trial strategy to attorneys who represent only one side in dependency and neglect cases may suggest bias or partiality on the part of the judge because it gives the appearance the judge is promoting the Department of Social Services' position over the position of respondent parents or their children); United States Advisory Opinion 105 (even when speaking to an audience that includes mostly attorneys on one side of litigation, a judge should not give advice that would favor or assist that audience at the expense of their litigation adversaries). *See also* Alabama Advisory Opinion 87-289 (where an appellate court judge spoke at a meeting of a professional licensure and disciplinary commission and subsequently was assigned the commission's appeal, the judge would be disqualified if the appellate record presents any issue that had

been raised and discussed at the meeting because he would have inadvertently been a part of the decision-making process presently before him for review).

Moreover, Canon 2's prohibition against lending the prestige of the judicial office to advance the interests of others is implicated because the judges would be participating in the firm's weekend program that is designed to directly advance and improve the legal skills and trial performances of its members. *See* Florida Advisory Opinion 2003-03; Pennsylvania Informal Opinion 6/20/05; Texas Advisory Opinions 276 and 262; United States Advisory Opinion 105.

Although not as significantly implicated here as the other Canon 2 concerns is the possibility the judges would be conveying or permitting others, i.e., the firm members, to convey the impression they are in a special position to influence the judges. *See* Pennsylvania Informal Advisory Opinion 9/8/04 (participation in a legal seminar for only members of the sponsoring law firm "conveys to the public that the law firm has a special relationship with the judge"); Texas Advisory Opinions 276 and 262; United States Advisory Opinion 105 (the judge's involvement creates the impression of a special relationship between the judge and the firm – that the judge wishes to do the firm a favor, that the firm wishes to do the judge a favor, or that the firm has some special influence that enables it to enlist the judge's support for its private training program). *Cf.* United States Advisory Opinion 87 (noting, as one example, that even if a CLE is open to all, but focuses on specialized litigation topics and offers the attendees the privileged ability to learn useful litigation tactics from the judge, it suggests to a reasonable person that the attendees may be in a special position to influence the judge; noting as another example, a reasonable person could conclude a law firm is in a special position to influence certain judges where the firm solicits the judges to participate in a seminar offered by a separate provider, the firm members are scheduled to serve as the sole seminar moderators, and the seminar focuses on practice in those judges' courtrooms).

In addressing whether a judge could teach legal writing and advocacy skills to a law firm's junior litigation associates, New York Advisory Opinion 01-58 states the following:

> [W]hat is dispositive is the fact that the judge is performing such a service on behalf of, not merely a profit-making entity, but a law firm. Certainly, neither this firm nor any other is dependent upon a particular judge's availability in order to obtain adequate instruction for its junior associates. Other vehicles exist for such purposes, and, indeed, no claim of necessity or lack of alternatives is made.
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> In our view, a full-time judge may not be a provider of instruction in legal writing and advocacy skills to a private law firm. Engaging in such a practice would associate the judge with the competence of a private law firm and would serve the

> exclusive interests of that firm (see 22 NYCRR 100.2[C]),[2] rather than the common professional interests of a heterogeneous, unconnected group of lawyers, who, in a different setting, under different auspices, might be the beneficiaries of a judge's lecture on legal practice, e.g., at a bar association program. Entering into an arrangement where the judge is providing the benefit of his or her judicial knowledge, expertise and experience to the lawyers of a particular firm and that firm alone is, in our opinion, an extra-judicial activity which is incompatible with judicial office . . . .

Thus, "a judge's participation in a training program that will only benefit a specific constituency, as opposed to the legal system as a whole, cannot be characterized as an activity to improve the law within the meaning of Canon 4." United States Advisory Opinion 105. *See also* Utah Advisory Opinion 88-5 (where a course is solely for "the improvement of a single adversarial component of the justice system," it is not devoted to the improvement of the legal system overall, and the judge should not participate).

After careful consideration of the above rationale, the Commission expands and clarifies two prior advisory opinions: Alabama Advisory Opinions 93-471 and 96-610. In these opinions, the Commission advised that the judge could participate in particular educational activity exclusively for a law firm if doing so would not cast doubt on his impartiality: in Advisory Opinion 93-417, teaching courses on Alabama Drug Laws and Moot Court at the Southwest Alabama Police Academy, and in Advisory Opinion 96-610, teaching a three-hour seminar at a local law firm's annual seminar at the Gulf in exchange for lodging, food, and recreational entertainment. Today, we expand the general caution that the judge not cast doubt on his impartiality. The judge in either situation may not (1) give partisan advice on questions of strategy or tactics as to how best to likely prevail in cases before him; (2) be perceived as educating one group of lawyers to the potential disadvantage of another; (3) create the impression of a special relationship between the judge and the firm; and (4) permit others to convey the impression they are in a special position to influence the judge. Moreover, to attempt to avoid the appearance of impropriety by being available to other law firms for similar events, as suggested in Advisory Opinion 96-610, is unrealistic here, given the numbers of attorneys and firms in the judges' jurisdiction and the court's limited resources.

The Commission concludes that the judges may not provide instruction on trial strategy or tactics at an educational program conducted exclusively for a law firm's members. Moreover, even if the firm allows attorneys not affiliated with the firm to attend, the judges may not participate because the event is an in-house training for the firm. Texas Advisory Opinion 276; United States Advisory Opinion 87. *See also* New Jersey 1-89

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[2] "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. A judge shall not testify voluntarily as a character witness."

(speaking or lecturing to young associates of law firms should more appropriately be done in a seminar held, for example, under the auspices of the county bar association).

Note: This opinion does not address a judge's participation in training or educational programs offered by continuing legal education providers, accredited institutions, law schools, or bar associations. *See* United States Advisory Opinion 105 ("Bar association training programs offer valuable opportunities for judges to share their experience and expertise with the legal community by making themselves available to a large and diverse group of practitioners."). This opinion also does not address a judge's participation in government-sponsored training of government attorneys. *See* United States Advisory Opinion 108 (2009) (approving such participation subject to certain limitations, e.g., the judge must be willing and available to participate in training for interested attorneys representing the other side, and the judge should not provide guidance on the particulars of practice before his court if the audience is closed and includes attorneys likely to appear before him).

REFERENCES

Alabama Canons of Judicial Ethics, Canons 2, 2A, 2C, and 4A

Alabama Advisory Opinions 96-610 and 93-471

California Judges Association Informal Opinion (March 2006)

Colorado Advisory Opinion 2008-03

Florida Advisory Opinions 2008-21 and 2003-03

New Jersey Advisory Opinion 1-89

New Mexico Advisory Opinion 08-06

New York Advisory Opinions 09-92 and 01-58

South Carolina Advisory Opinion 36-2001

Texas Advisory Opinions 276 and 262

Pennsylvania Informal Advisory Opinions 6/20/05 and 9/8/04

United States Advisory Opinions 108, 105, and 87

Utah Advisory Opinion 88-5

Cindy Grey, *"Speaking to the Appropriate Audience,"* Judicial Conduct Reporter at 10 (Spring 2009)