

**NORTH DAKOTA JUDICIAL ETHICS ADVISORY COMMITTEE
OPINION 2012-2**

ISSUES

A judge with special legal and technical skills largely acquired before becoming a judge has requested an opinion under N.D.Sup. Ct. Admin. R. 54, addressing the amended Code of Judicial Conduct, effective July 1, 2012. The judge inquires whether the judge may present at legal seminars sponsored and promoted by lawyer and judicial non-profit organizations. The judge further inquires whether the judge may present at seminars sponsored and promoted by “for-profit lawyer or judicial education providers.” The judge further inquires whether the judge may “work or affiliate with” an industry expert in presenting.

The industry expert is privately employed, serves as a company CEO, has served as an expert witness in a variety of courts, and has been asked to speak at international and national conferences. The expert is not a lawyer, but does engage in expert consulting for lawyers, and has provided expert testimony in other courts. The expert is unlikely to come before the court on which the requesting judge serves. The requesting judge and industry expert receive frequent invitations to speak to lawyers, bar associations, judges, judicial organizations, and others regarding legal and judicial ethics, the impact of technology in law practice, and technology matters impacting the judiciary. The industry expert regularly presents for a nearby state’s bar association, and the requesting judge has received “an open invitation to join” the industry expert in teaching at future presentations. The two would jointly prepare instructional materials, and would “work together and affiliate with each other on subsequent presentations.”

ANALYSIS

1. The Code of Judicial Conduct encourages public speaking.

Judges are encouraged to utilize their specialized skills to contribute to the advancement of the law by speaking, teaching, or similar activities. According to Rule 3.1 of the North Dakota Code of Judicial Conduct, “A judge may engage in extrajudicial activities, except as prohibited by law or this Code.” The Code provides that extrajudicial conduct cannot: 1) interfere with performance of judicial duties; 2) lead to frequent disqualification of the judge; 3) create appearances undermining a judge’s independence, integrity, or impartiality; 4) appear coercive; or 5.) improperly utilize court resources. N.D. Code Jud. Conduct Rule 3.1 (A-E). Comment 1 to Rule 3.1 further provides:

To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate

extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.

See also, N.D. Code Jud. Conduct, Rule 3.14, cmt. 1 (“Judges are encouraged to attend educational programs, as both teachers and participants”). The Code permits and encourages this type of extrajudicial activity, as long as the duties of judicial office take precedence. N.D. Code Jud. Conduct Rule 2.1.

2. The judge may “work or affiliate with” the expert.

The requesting judge and industry expert share specialized knowledge, skills, and experience, which is particularly suitable for jointly presented training. The joint development of instructional materials is a necessary incident of this permissible extrajudicial activity. Financial, business, and remunerative activities are governed by N.D. Code Jud. Conduct, Rule 3.11. The rule prohibits a judge from serving “as an officer, director, manager, general partner, advisor, or employee of any business entity,” with the exception of certain family businesses. N.D. Code Jud. Conduct, Rule 3.11(B). Accordingly, while the judge may “work or affiliate with” the industry expert for purposes of jointly preparing instructional materials, the judge cannot serve as an employee or business partner of the expert. Moreover, the work and affiliation must not: 1) interfere with performance of judicial duties; 2) lead to frequent disqualification; 3) involve frequent business relationships with persons likely to come before the court on which the judge serves; or 4) otherwise violate the Code of Judicial Conduct. N.D. Code Jud. Conduct, Rule 3.11(C); see also, *id.*, cmt. 1 (noting it would be improper for a judge to use his official title or appear in a judicial robe in business advertising).

3. The judge may speak at seminars promoted and sponsored by or for-profit education providers (or presented to for-profit groups), but the judge must exercise considerable caution.

The Committee’s research reveals varying conclusions regarding whether a judge may speak at seminars sponsored by for-profit education providers, or presented to for-profit groups. While Rule 3.7(A)(4) specifically permits a judge to appear or speak at functions sponsored by not-for-profit organizations, similar permission to speak at for-profit sponsored seminars is not explicit. The Committee concludes the North Dakota Supreme Court’s adoption of N.D. Code Jud. Conduct, Rule 1.3, implicitly permits speaking at seminars sponsored or promoted by for-profit providers. Cf. N.D. Code Jud. Conduct, Rule 1.3, cmt. 4 (noting judges may write or contribute to publications for

profit). The Committee, however, urges that substantial caution must be employed to protect a central goal of Canon 1—avoiding the appearance of impropriety.

A. The “abuse of prestige” standard permits speaking to for-profit groups.

According to N.D. Code Jud. Conduct, Rule 1.3, “A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.” (emphasis added). Former Canon 2(B), N.D. Code Jud. Conduct, provided: “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.” (emphasis added). The North Dakota Judiciary Standards Committee recommended retention of the former language, prohibiting “lend[ing] the prestige of judicial office,” rather than adopting the “abuse [of] prestige” standard. See Minutes, North Dakota Judiciary Standards Committee, Sept. 7, 2007 (discussing proposed Rule 1.3); see also Minutes, North Dakota Judiciary Standards Committee, June 9, 2009 (noting retention of canon reference of “lending” prestige versus adoption of model code reference of “abusing” prestige). The North Dakota Supreme Court rejected the Committee recommendation, adopting the “abuse [of] prestige” standard.

Notably, the “abuse of prestige” standard was also controversial in consideration of the 2007 ABA Model Code. See Cynthia Gray, The 2007 Model Code: Taking Judicial Ethics Standards to the Next Level, 90 *Judicature* 284-85 (May-June, 2007). In consideration of the Model Code, opposition stated “‘abuse’ was vaguer than ‘lend,’” and the change “would encourage the use of the prestige of office by suggesting it is presumptively appropriate unless it rises to some undefined, abusive level.” Id. at 285. Stated differently, it is “presumptively appropriate” for a judge to engage in extrajudicial activity which is otherwise permissible.

B. Decisions of other committees.

There exists limited authority interpreting the “abuse of prestige” standard. Most advisory committees addressing the former Canon standard of “lending prestige” concluded speaking at a privately-sponsored CLE is impermissible. See Texas Committee on Judicial Ethics, Op. 276 (2001) (a judge may not speak at a CLE program for a private law firm), Kan. Jud. Ethics Adv. Comm. Op. JE-170 (Oct. 22, 2010) (a judge impermissibly advances the economic interests of others by speaking at a seminar presented by a for-profit organization). But see, S.C. Adv. Comm. on Standards of Jud. Conduct, Op. 7-1996 (noting a judge may teach at a privately-sponsored CLE).

Some cases addressing the “abuse of prestige” standard have concluded affiliation with for-profit entities violates Rule 1.3, even if the judge does not directly profit. See e.g., Ark. Jud. Eth. Adv. Comm. Op. 2010-01 (Aug. 21, 2010), 2010 WL 6025342 (advising against permitting broadcasting of drug court proceedings “by or with a for-profit enterprise or purpose” because the activity violates abuse of prestige rule even if

the judge “will not directly profit financially”); see also, Neb. Jud. Eth. Op. 11-3 (July 12, 2011), 2011 WL 7637778 (judge should not appear in video presentation by architectural firm that worked on courtroom improvements because doing so “appears to endorse the private interests of the architects or abuse the prestige of the [judicial] office”). A recent Ohio decision notes recommending or endorsing candidates for bar association elective office abuses the prestige of judicial office. Ohio Bd. Comm’rs Grievances & Discipline Op. 2011-3 (Dec. 1, 2011), 2011 WL 6328295. The Ohio Board of Commissioners on Grievances and Discipline (“Board”) decision is particularly instructive in its analysis of the adoption of the “abuse of prestige” standard.

First, the Board concluded the “primary purpose for substituting the term ‘abuse’ for ‘lend’ in regard to the prestige of judicial office was to make clear that judges may provide references and letters of recommendation based upon personal knowledge.” Ohio Bd. Comm’rs Grievances & Discipline Op. 2011-3 (Dec. 1, 2011), 2011 WL 6328295. Secondly, the Board noted the plain meaning of the term “abuse” is to “use improperly” or “misuse.” Id. Correspondingly, the plain meaning of the term “lend” is “to allow the temporary use” of something. Id. Third, the Board acknowledged the current “abuse of prestige” standard may be less restrictive. Id. Notwithstanding, the Board concluded, “Despite the possible loosening of the ‘prestige of office’ standard, the plain meaning of the term ‘abuse’ indicates that if the Board finds a use of judicial office to be improper, the use will violate Jud.Cond.R. 1.3.” Id.

Most importantly, the Board noted the prestige of office standard “must also be read in conjunction with” the requirement that judges “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary” and “avoid impropriety and the appearance of impropriety.” Id. (citing Ohio Jud.Cond.R. 1.2). Considering the rules in conjunction with one another, the Board concluded a judge’s endorsement of a candidate in a bar association election “shows favoritism and does not promote confidence in the judge’s ability to remain impartial.” Id. As a result, the Board concluded “judicial recommendations and endorsements of candidates for a bar association elective office create the appearance of impropriety and are prohibited by Jud.Cond.R. 1.2.” Id.

Some committees and boards opine that affiliation with for-profit entities abuses the prestige of judicial office, irrespective of whether the judge will personally profit. Still other committees have permitted judges to speak to particular groups, while providing cautionary recommendations. See e.g., N.M. Jud. Advisory Op. 12-01 (Jan. 3, 2012), 2012 WL 444076 (judge permitted to be guest speaker at bail bondsmen convention but advised not to accept expense reimbursement or compensation). The Committee agrees this cautionary approach is most appropriate.

C. The judge should use considerable caution in speaking at seminars involving for-profit entities.

While the Committee agrees the judge may present to for-profit groups or at seminars sponsored by for-profit agencies, the Committee urges substantial caution. See

e.g., Conn. Comm. Jud. Eth. Op. JE 2010-21 (July 16, 2010), 2010 WL 6179625 (permitting a judge to speak to employees of state department of public health who license and regulate daycare facilities but imposing many conditions). Whether a particular presentation or affiliation will constitute abuse of judicial prestige, or whether such presentation will create an appearance of impropriety, is a fact-specific inquiry.

A judge clearly cannot speak to or on behalf of an agency or group that engages in discriminatory practices. See N.D. Code Jud. Conduct, Rule 3.6 (prohibiting affiliation with discriminatory organizations). A judge's speaking engagements cannot interfere with her judicial duties, lead to frequent disqualification, involve frequent transactions with those who are likely to come before the court, or otherwise result in a violation of the Code. N.D. Code Jud. Conduct, Rule 3.11.

The judge should not present when the audience is exclusive, like a private law firm, or a plaintiff's or defense attorney seminar exclusive to a particular group. See Texas Committee on Judicial Ethics, Op. 276 (2001) (presenting exclusively to a private law firm would appear to advance the interests of that firm, and would indirectly allow the firm to convey the impression that the firm has a special position of influence with the judge irrespective of whether that firm has a pending case in the judge's court). A judge should not enter a partnership or business with another to provide continuing legal education because that partnership "is a business activity that inherently exploits [the] judge's judicial position." Ohio SupCt, Op. 91-10 (1991). See also, N.D. Code Jud. Conduct, Rule 3.11(B) (prohibiting a judge from serving "as an officer, director, manager, general partner, advisor, or employee of any business entity").

The judge must exercise substantial control over advertising and promotional materials for the presentation. See e.g., N.D. Code Jud. Conduct, Rule 3.11, cmt. 1 (noting it would be improper for a judge to use his official title or appear in a judicial robe in business advertising). The judge should equally exercise substantial control over presentation materials and content of a jointly-presented seminar. See e.g., N.D. Code Jud. Conduct, Rule 1.3, cmt. 4 (noting special considerations arise when judges write or contribute to publications of for-profit entities and noting a judge must exercise control over "anyone associated with the publication").

If the judge or an affiliated presenter receives compensation or reimbursement for the presentation, further concerns arise. A judge is permitted to accept reasonable compensation for permissible extrajudicial activities, unless acceptance of that compensation appears to undermine the judge's independence, integrity, or impartiality. N.D. Code Jud. Conduct, Rule 3.12. see also, N.D. Code Jud. Conduct, Rule 3.12, cmt. 1 ("A judge is permitted to accept . . . compensation for speaking . . . provided the compensation is reasonable and commensurate with the task performed."). One committee, for example, concluded a judge could speak to a bail bondsmen convention, but noted accepting expense reimbursement would be "highly inadvisable." N.M.Jud. Advisory Op. 12-01 (Jan. 3, 2012), 2012 WL 444076.

An equally significant concern is whether an affiliate or sponsor is abusing the Judge's prestige for the affiliate or sponsor's profit. A recent Arkansas committee opinion concluded affiliation with for-profit entities violates Rule 1.3, even if the judge

does not directly profit. See e.g., Ark. Jud. Eth. Adv. Comm. Op. 2010-01 (Aug. 21, 2010), 2010 WL 6025342 (advising against affiliation even if the judge “will not directly profit financially”). A recent Nebraska committee opinion concluded that a judge should not appear in a video presentation by an architectural firm that had completed courtroom improvements because doing so “appears to endorse the private interests of the architects or abuse the prestige of the [judicial] office.” Neb.Jud. Eth. Op. 11-3 (July 12, 2011), 2011 WL 7637778. A judge speaking at a seminar sponsored by or presented to for-profit entities must exercise considerable caution to ensure that the judge’s actions do not appear to “undermine the judge’s independence, integrity, or impartiality,” or “abuse the prestige of judicial office to advance the personal economic interests of the judge or others.” N.D. Code Jud. Conduct, Rule 3.1(C); N.D. Code Jud. Conduct, Rule 1.3. A judge affiliating with another person for purposes of presenting at seminars must exercise an even greater degree of caution. N.D. Code Jud. Conduct, Rule 1.3, cmt. 4 (noting that “[s]pecial considerations arise” when judges affiliate with “for-profit entities”).

CONCLUSION

The Committee concludes that a judge is encouraged to present at legal seminars sponsored and promoted by non-profit organizations. The Committee further concludes a judge may, with substantial caution, present at legal seminars sponsored and promoted by for-profit organizations. Finally, the Committee concludes a judge may “work or affiliate with” an industry expert in presenting at legal seminars, as long as the judge does not enter into a formal business arrangement, and as long as the judge maintains sufficient control over the presentation and related advertising.

Formal opinions of this Committee are non-binding. N.D. Sup. Ct. Admin. R. 54, § 3(B). Compliance with a formal opinion is evidence of good faith in any sanction decision of a disciplinary proceeding. N.D. Sup. Ct. Admin. R. 54, § 3(C).