IN THE SUPREME COURT
STATE OF GEORGIA

APPEAL NO. S21A0329

ALBERT E. LOVE et al.

Appellants,

vs.

FULTON COUNTY BOARD OF TAX ASSESSORS, et al.

Appellees.

MOTION TO DISQUALIFY JUSTICE SARAH WARREN

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IN THE SUPREME COURT
STATE OF GEORGIA

ALBERT E. LOVE, et al. Petitioners, v. FULTON COUNTY BOARD OF TAX ASSESSORS, et al. Respondents, v. ATLANTA FALCONS STADIUM COMPANY, LLC AND GEORGIA WORLD CONGRESS CENTER AUTHORITY Intervenors.	)	APPEAL NO. S21A0329

APPELLANT'S MOTION TO DISQUALIFY
JUSTICE SARAH WARREN

COME NOW the Appellants, above named, and file this their Motion to Disqualify Justice SARAH WARREN, stating as follows:

FACTUAL BACKGROUND

1.

This case was docketed in this Court on October 23, 2020, five days ago.

2.

The Atlanta Falcons Stadium Company, LLC, (hereinafter referred to as

StadCo) is a party to this case having successfully filed a motion to intervene.

3.

Prior to the initiation of this litigation, StadCo was represented by the law firm of King & Spalding in attempting and ultimately accomplishing an ad valorem tax exemption from the Fulton County Board of Tax Assessors (hereinafter referred to as FCBTA).

4.

The ad valorem tax exemption obtained by StadCo through the legal representation of King & Spalding is the subject of this case.

5.

Woodrow W. Vaughan, III, was a partner at King & Spalding and personally represented StadCo in obtaining the ad valorem tax exemption obtained by StadCo from the FCBTA. He left King & Spalding in 2014 and has been employed at Holland & Knight since then. (R. v. 13, p. 3116).

6.

Woodrow W. Vaughan, III, is now the executive partner of the law firm of Holland & Knight in its Atlanta office, who in that capacity is responsible for managing the firm's Atlanta office. According to his deposition testimony, StadCo remained a King & Spalding client after he departed King & Spalding. (R. v. 13, p. 3117).

7.

The law firm of Holland & Knight represents StadCo in this case.

8.

While employed by King & Spalding Woodrow Vaughan drafted a Memorandum of Law which was submitted to the FCBTA advocating for the ad valorem tax exemption that the FBCTA subsequently granted to StadCo on its interest in the Mercedes-Benz Stadium. (R. v. 13, pp. 3127 - 3128).

9.

Lawyers employed by Holland & Knight and King & Spalding have donated $22,634 in cash and in-kind donations to Justice Sarah Warren in the last election for her seat on the Georgia Supreme Court, on June 9, 2020.[1] (See Exhibit "A").

10.

Justice Warren also received a relatively small donation from former King & Spalding lawyer, Michael Egan, who is now general counsel to the AMB Group, Inc. which owns the Atlanta Falcons Football Club and the Atlanta Falcons Stadium Company, LLC.

11.

Justice Warren has received or benefited from an aggregate amount of

[1] Justice Sarah Warren was appointed to the Georgia Supreme Court in August of 2019 and was elected to the position on June 9, 2020.

campaign contributions or support from lawyers at King & Spalding, Holland & Knight, and AMB Group, Inc. so as to create a reasonable question as to her impartiality in this case.

12.

Further, Justice Warrens' impartiality can reasonably be questioned by her receipt and benefit from a pattern of campaign donations made from lawyers employed by law firms who currently represent StadCo, a party to this litigation, and who formerly represented StadCo on issues directly involved in this litigation.

13.

Robert S. Highsmith, Jr., a partner at Holland & Knight, and counsel of record for StadCo in this case, serves on the Advisory Board of the Atlanta Chapter of the Federalist Society along with Justice Sarah Warren.[2]

12.

According to its website, "the Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians dedicated to reforming the current legal order."[3]

13.

Participation by a sitting Justice of this Court in an organization involved in

[2] Justice Sarah Warren's official bio on the Georgia Supreme Court website https://www.gasupreme.us/court-information/biographies/justice-sarah-hawkins-warren/ (last viewed October 28, 2020).

[3] https://fedsoc.org/about-us (last viewed October 28, 2020).

"reforming the current legal order" with an attorney of record for a party in this case raises serious concerns of impartiality when the Justice participates and takes on a leadership role in an organization involved in influencing the judiciary on contentious political and public policy issues.

14.

The role of a judge or justice is to follow the law and not to engage in "reforming the current legal order" or interjecting his/her personal philosophical and political predilections onto the law when deciding cases.

15.

The commentary to Rule 4.6 of the Georgia Code of Judicial Conduct provides, in part that:

> *Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free* ***and appear to be free from political influence and political pressure.*** (emphasis added).

GA Jud. Conduct Rule 4.6 Applicability of the Political Conduct Rules

16.

Justice Sarah Warren's participation in a leadership role within the Federalist Society alongside StadCo's counsel of record, Robert S. Highsmith, Jr., constitutes her participation in an organization widely viewed by the public and the

Appellants in this case as her participation in an organization which is a political subset of the Republican party.

17.

Further, Justice Warren's impartiality is reasonably questioned by her receipt and benefit from a pattern of campaign donations made from lawyers employed by law firms who currently represent StadCo, a party to this litigation, and have formerly represented StadCo on issues directly involved in this litigation.

ARGUMENT AND CITATION TO AUTHORITY

Canon 1 and specifically, Rule 1.2 thereunder, of the Georgia Code of Judicial Conduct, provides that "[j]udges shall act at all times in a manner that promotes public confidence in the *independence*, *integrity*, and *impartiality* of the judiciary." Consistent with the federal analog of this Canon and Rule, the Judicial Conference of the United States has adopted Advisory Opinion 116 which provides a set of parameters that severely restrict the ability of federal judges to participate in and hold leadership roles in organizations such as the Federalist Society. It is a model that should provide guidance in this case. See Exhibit "B".

Given its stated objectives and the role it has come to play in the selection of judges and justices both locally and nationally, the Federalist Society has become a political organization in which membership has become a prerequisite for advancing a judge's career under state and federal Republican executive

administrations. In essence, the organization has become sort of a finishing school for aspiring judges while billing itself as a debating society.

Georgia Judicial Conduct Rule 2.11(A) provides that "[j] judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, or in which:"

> *The judge has received or benefited from an aggregate amount of campaign contributions or support so as to create a reasonable question as to the judge's impartiality. When determining impartiality with respect to campaign contributions or support, the following may be considered:*
>
> > *(a) amount of the contribution or support;*
> > *(b) timing of the contribution or support;*
> > *(c) relationship of contributor or supporter to the parties;*
> > *(d) impact of contribution or support;*
> > *(e) nature of contributor's prior political activities or support and prior relationship with the judge;*
> > *(f) nature of impending matter or pending proceeding and its importance to the parties or counsel;*
> > *(g) contributions made independently in support of the judge over and above the maximum allowable contribution that may be contributed to the judicial candidate; and*
> > *(h) any factor relevant to the issue of campaign contribution or support that causes the judge's impartiality to be questioned*.

Georgia Judicial Conduct Rule 2.11(A)(4).

The Comments to Rule 2.11 provide that a judge is subject to disqualification whenever her impartiality might reasonably be questioned, regardless of whether any of the specific items in Rule 2.11(A) apply. In this case, counsel for one of the parties serves in a leadership role in a self-described

debating society committed to the mission and purpose of influencing lawyers, judges, law students and the general public on issues of public policy centered around certain civic and political philosophies - which civic and political philosophies may be attendant to the issues involved in this litigation. Justice Sarah Waren's leadership association on the Board of Advisors of the Atlanta Chapter of the Federalist Society with StadCo's counsel of record, Robert S. Highsmith, diminishes the appearance of independence and impartiality of this Court in this case.

The Comments to Rule 2.11(A)(4) speak to a pattern of contributions made by a particular party or its law firm, wherein, if such a pattern exists then the judge should consider recusal in accordance with the considerations enumerated in Rule 2.11(A)(4). In the case of Justice Sarah Warren, in the last election culminating on June 9, 2020, twenty-five (25) separate campaign contributions were made by lawyers employed by the two (2) interested law firms who have represented StadCo on the matters involved in this case. One contribution was made by a lawyer employed by an affiliated entity of a party to this case. (See Exhibit "A").

CONCLUSION

Justice Sarah Warren should favorably consider recusal and disqualification from this case due to her receipt of $22,634 in cash and in-kind donations from law firms who previously, and currently, represent StadCo on matters involved in

this lawsuit. Her service on this case is further questioned by her association with Robert S. Highsmith, Jr. on the Board of Advisors to the Atlanta Chapter of the Federalist Society, an organization dedicated to espousing a particular political and public policy viewpoint designed to influence the manner in which cases are decided. Further cause for recusal and disqualification is the fact that Mr. Highsmith serves as counsel of record to StadCo in this case and is a member of the law firm which has been a campaign donor to Justice Warren.

Respectfully submitted this 28th day of October 2020.

WAYNE B. KENDALL, P.C.

/s/ Wayne B. Kendall
Georgia Bar No.: 414076

Attorney for Appellants

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Appellants' Motion To Disqualify Justice Sarah Warren on the below listed individual(s) by electronic filing and by depositing the same in the United States Postal Service with adequate postage thereon to insure delivery to the following:

Patrice Perkins-Hooker, County Attorney
Kaye W. Burwell, Deputy County Attorney
Cheryl Ringer, Senior Staff Attorney
Fulton County Office of the County Attorney
141 Pryor St. SW, Suite 4038
Atlanta, GA 30303

Alex F. Sponseller, Senior Assistant Attorney General
J. Scott Forbes, Assistant Attorney General
40 Capitol Square, SW
Atlanta, GA 30334

Robert S. Highsmith, Jr., Esq,
A. André Hendrick, Esq.
Philip J. George, Esq.
HOLLAND AND KNIGHT, LLP
1180 W. Peachtree Street
Suite 1800
Atlanta, GA 30309

This 28th day of October 2020.

Respectfully submitted,
WAYNE B. KENDALL, P.C.

155 Bradford Square
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(770) 778-8810

/s/ Wayne B. Kendall
Attorney for Appellants
GA BAR NO. 414076

Exhibit "A"

IN THE SUPREME COURT
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AFFIDAVIT OF WAYNE B. KENDALL
IN SUPPORT OF MOTION TO DISQUALIFY
JUSTICE SARAH WARREN

Personally appeared before the undersigned officer authorized to administer oaths, Wayne B. Kendall, after being duly sworn, states and deposes under oath as follows:

1.

I am Wayne B. Kendall. I am over 18 years of age and competent to give this Affidavit. I am a licensed attorney in the State of Georgia, and I am counsel

of record for the Appellants in the above-styled case. I have personal knowledge of the facts set forth herein.

2.

From public records maintained on the website of the Georgia Government Transparency and Campaign Finance Commission my staff and I prepared the document which is attached hereto as Exhibit "A".

3.

Exhibit "A" is a true and accurate compilation of records maintained by the Georgia Government Transparency and Campaign Finance Commission indicating all persons who made cash and in-kind campaign contributions to Justice Sarah Warren during her last election.

4.

Exhibit A" indicates that Justice Warren received and accepted $22,634 in cash and in-kind donations from lawyers employed by the two law firms that the Atlanta Falcons Stadium Company, LLC employed on matters involved in this lawsuit. (See Exhibit "A").

5.

Upon information and belief, the Atlanta Falcons Stadium Company, LLC is a current client of both King & Spalding and Holland & Knight.

6.

Both King & Spalding and Holland & Knight have provided legal services to the Atlanta Falcons Stadium Company, LLC on matters which are the subject of this case.

7.

I have reviewed the publicly available information on the website of the Atlanta Chapter of the Federalist Society to note that Robert S. Highsmith, Jr., is a member of the Advisory Board of the Atlanta Chapter of the Federalist Society.

8.

I have reviewed the biographical information for Justice Warren on this Court's website which indicates that Justice Sarah Warren serves in a leadership capacity on the Advisory Board of the Atlanta Chapter of the Federalist Society.

9.

The combination of Justice Warren having received significant sums of money from lawyers at both King & Spalding and Holland & Knight; and given her association with Robert S. Highsmith, Jr. on the board of an organization dedicated to influencing how judges rule on contentious matters of public policy; and also given that this case involves the utilization of public resources and could result in an adverse ruling that would cost Mr. Highsmith's client tens of millions

of dollars annually, there arises the prospect that Justice Warrens' impartiality might reasonably be questioned in this case.

FURTHER AFFIANT SAYETH NOT.

Wayne B. Kendall
Affiant

Sworn to and subscribed before me

this 28th day of October 2020.

L W MCGUINE
NOTARY PUBLIC
FAYETTE COUNTY, GA
MY COMMISSION EXPIRES
JUNE 17 2023

Notary Public

My Commission expires: 6/17/2020

Exhibit "B"

Committee on Codes of Conduct Advisory Opinion
No. 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates

This opinion considers the propriety of participation by a judge or law clerk (either current or future) in programs sponsored by research institutes, think tanks, associations, public interest groups, or other organizations engaged in public policy debates. Over time, the Committee has received multiple inquiries generally related to this topic, including requests related to organizations as varied as national bar associations; state and local bar associations; associations of lawyers, judges, and law students; advocacy groups; research institutes; public interest groups; and other organizations.

A. Background: The Organizations

In recent years, the types of organizations covered by this Advisory Opinion have played an ever-more prominent role in the public policy discourse of the nation. As a result, judges and judicial employees are more frequently called upon to decide whether participation in a particular educational seminar or conference is consistent with their role in the judiciary. Organizations that were once clearly engaged in efforts to educate judges and lawyers have become increasingly involved in contentious public policy debates. Gone are the days when it was possible for a judge to identify the sponsoring organization and know that the judge was within a bright-line "safe zone" for participation.

In assessing the propriety of participation in a conference or seminar (either as lecturer, panel member, or attendee), a number of important considerations confront the judge or judicial employee. The factors that relate to the sponsoring organization itself include: (1) its identity; (2) its stated mission, including any political or ideological point of view; (3) whether it engages in education, lobbying, or outreach to members of Congress, key congressional staffers, or policymakers in the executive branch; (4) whether it conducts outreach or educational programs for the media, academia, or policy communities; (5) whether it is actively involved in litigation in the state or federal courts, including the filing of amicus briefs, participating in moot courts or boards to prepare candidates or advocates; (6) whether it holds rallies, meetings, or appearances in conjunction with hearings or trials with a view towards influencing public opinion; (7) whether it advocates for specific outcomes on legal or political issues; (8) its sources of funding; and (9) whether it is generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations.

Additional factors that relate to the educational program itself need to be considered by the judge or judicial employee, including: (1) whether the cost of attendance (including items such as scholarships, tuition waivers, and room and board)

will be borne by sponsoring organization; (2) whether the sponsoring organization requests that participation, materials, or subject matter be maintained secret or confidential; and (3) whether participation is limited to certain applicants based on criteria designed to screen out persons of particular backgrounds or points of view or is open for general participation.

B. Applicable Canons and Commentary Background

The activities of judges and judicial employees are governed by different codes of conduct, but many of the obligations under both the Code of Conduct for United States Judges ("Judges' Code") and the Code of Conduct for Judicial Employees ("Employees' Code") are the same for either a judge or law clerk participating in outside educational activities.

The foundational principle of the Judges' Code is found in Canon 1: "An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved." As explained in the Commentary to Canon 1, this foundational principle exists because "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges." A judge's compliance with the law and the Judges' Code preserves public confidence in the impartiality of the judiciary, whereas "violation of this Code diminishes public confidence in the judiciary and injures our system of government under law." Commentary to Canon 1. Indeed, Canon 2A directs that "[a] judge should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The Employees' Code mirrors the foundational Canon 1 principle of the Judges' Code. Canon 1 of the Employees' Code states: "An independent and honorable Judiciary is indispensable to justice in our society." Judicial employees must therefore "personally observe high standards of conduct so that the integrity and independence of the judiciary are preserved and the judicial employee's office reflects a devotion to serving the public." Id. All provisions of the Employees' Code should be construed and applied to further these objectives." Id. Notably, in addition to the standards called for under the Employees' Code, judicial employees are further subject to potentially "more stringent standards required by law, by court order, or by the appointing authority." Id. Canon 2 of the Employees' Code similarly directs that a judicial employee should not engage in any activities that would call into question the propriety of the judicial employee's conduct in carrying out the duties of the office.

Participation in outside educational activities also must be consistent with the Canon 2 principle, found in both the Judges' and Employees' Codes, mandating the avoidance of both impropriety and the appearance of impropriety in all activities. To that end, Canon 2B of the Judges' Code provides:

> A judge should not allow . . . social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

In nearly identical terms, Canon 2 of the Employees' Code provides that "[a] judicial employee should not allow . . . social, or other relationships to influence official conduct or judgment. A judicial employee should not lend the prestige of the office to advance or appear to advance the private interests of others."

In determining whether to attend or participate in an outside activity, judges also should be guided by Canon 3, which directs a judge to perform the duties of the office "fairly, impartially, and diligently." Canon 3A(1) admonishes that "a judge … should not be swayed by partisan interests, public clamor, or fear of criticism." The Commentary to Canon 3A(3) also reaffirms a judge's "duty under [the Judges' Code] to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all of the judge's activities," whether professional or personal. Likewise, law clerks should be guided by Canon 3 of the Employees' Code, which requires employees to "adhere to appropriate standards in performing the duties of the office." Specifically, Canon 3C mandates:

> A judicial employee should diligently discharge the responsibilities of the office in a prompt, efficient, nondiscriminatory, fair, and professional manner . . . [and] should never . . . perform any . . . function of the court in a manner that improperly favors any litigant or attorney, nor should a judicial employee imply that he or she is in a position to do so.

Of particular relevance to outside educational activities, Canon 4 of both the Judges' Code and Employees' Code offers guidance on participation in extrajudicial activities. For judges, Canon 4 allows that "a judge may engage in extrajudicial activities, including law-related pursuits . . . and may speak, write, lecture and teach on both law-related and nonlegal subjects" but cautions that "a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, [or] lead to frequent disqualification." The Commentary to Canon 4 reflects that, because a judge is "a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice" and that, "[t]o the extent the judge's . . . impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law." For law clerks, Canon 4 directs that, "[i]n engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with disclosure requirements." When considering

outside activities that concern the law, the legal system, or the administration of justice, however, a judicial employee must "first consult with the appointing authority to determine whether the proposed activities are consistent with . . . [the] code."

Additionally, judges and employees must consider canons governing reimbursement for expenses. Canon 4H of the Judges' Code allows a judge to "accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety," subject to certain restrictions. However, judges must be cognizant of Canon 4D(4), which requires judges to "comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in [The Judicial Conference Ethics Reform Act Gift Regulations ("Gift Regulations")]." Canon 4E of the Employees' Code similarly reflects:

> A judicial employee may receive compensation and receipt of expenses for outside activities provided that receipt . . . is not prohibited or restricted by this code, the Ethics Reform Act, and other applicable law, and provided that the source of the payment or amount of such payments does not influence or give the appearance of influencing the judicial employee in the performance of official duties or otherwise give the appearance of impropriety.

Canon 4E further directs that expense reimbursement "be limited to the actual cost of travel, food, and lodging reasonably incurred by a judicial employee . . . . Any payment in excess of such an amount is compensation."

Lastly, outside activities also are governed by Canon 5 restrictions found in both the Judges' and Employees' Codes regarding the proscription against political activity. Canon 5A specifies that "[a] judge should not make speeches for a political organization" or attend any "event sponsored by a political organization." The Commentary to Canon 5 defines "[t]he term 'political organization' . . . [as] a political party, a group affiliated with a political party or candidate, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office." Canon 5(C) provides further that "[a] judge should not engage in any other political activity."

For law clerks, the Employees' Code likewise directs against engaging in political activity, whether partisan or nonpartisan. In particular, Canon 5A provides that "[a] judicial employee should refrain from partisan political activity; . . . should not make speeches for or publicly endorse or oppose a partisan political organization or candidate; . . . and should not otherwise actively engage in partisan political activities." Canon 5(B) further provides that "[a] member of the judge's personal staff [or] a lawyer who is employed by the court and assists judges on cases . . . should refrain from nonpartisan political activity."

C. Summary of Prior Committee Advisory Opinions on Attendance or Participation in Privately Funded Seminars

The Committee has provided guidance on the permissibility of judicial participation in legal seminars in Advisory Opinion Nos. 67, 87, 93, and 105.

Advisory Opinion No. 67 addresses a judge's attendance at "seminars and similar educational programs organized, sponsored, or funded by entities other than the federal judiciary." Notably, this Advisory Opinion applies equally to law clerks, who are subject to nearly identical standards under the Employees' Code. As stated in Advisory Opinion No. 67, the education of judges (and law clerks) in various academic and law-related disciplines serves the public interest, except where particular circumstances make attendance inadvisable. That Advisory Opinion sets out six nonexclusive factors that may affect the propriety of attendance at a seminar:

(1) whether the sponsor is a recognized and customary provider of educational programs;

(2) whether an entity other than the sponsor is a substantial source of funding;

(3) whether the sponsor or a source of substantial funding of the seminar is currently involved or is likely to be involved as a party or attorney in litigation before the judge;

(4) the subject matter of the seminar, including whether contributors of seminar funding play a role in designing the curriculum or are involved as parties to litigation;

(5) the nature of the expenses paid or reimbursed or whether the seminar is primarily educational and not recreational in nature; and

(6) whether the seminar provider makes public disclosure about the sources of seminar funding and curriculum.

Advisory Opinion No. 67 specifically notes that the circumstances of the educational program may raise questions under Canons 2, 3, and 4 of the Judges' Code. If there is insufficient information for the judge (or law clerk) to decide whether attendance may run afoul of the Code, the judge (or law clerk) should decline the invitation or take reasonable steps to obtain additional information. Ultimately, if the necessary additional information is not available or if additional information obtained does not resolve questions concerning the propriety of attendance, the judge (or law clerk) should not attend. Finally, judges and law clerks should keep in mind that payment of tuition and expenses involved in attendance at an independent seminar constitutes a gift within the meaning of the Code, the Gift Regulations, and applicable statutes, and thus acceptance of such payment may be restricted or prohibited. It is the

judge's or law clerk's obligation to ensure that acceptance of the payments is in compliance with all applicable rules.

Advisory Opinion Nos. 87 and 105 also provide guidance on the permissibility of judicial participation in legal seminars. Advisory Opinion No. 87 discusses participation in continuing legal education ("CLE") programs offered by "CLE providers, accredited institutions, and similar established educational providers." In Advisory Opinion No. 87, the Committee opined that Canon 2 principles are implicated when a judge participates in legal training programs whether such programs offer CLE credit or not and whether the sponsor is a "for-profit" or "non- profit" entity. Thus, merely because a provider offers CLE credit or is a "non-profit" entity does not eliminate the requirement that a judge determine whether his or her participation runs afoul of Canon 2.

Advisory Opinion No. 105 focuses on "private law-related training programs other than those offered by CLE providers, accredited institutions, and similar established educational providers . . . offered to a selected audience of attorneys and/or litigants and designed to improve attendees' legal skills or performance in judicial proceedings." Advisory Opinion No. 105 identifies five factors that a judge should consider before participating in a private law-related training program:

(1) the sponsor of the training program;

(2) the subject matter;

(3) whether there is a commercial motivation for the program;

(4) the attendees, including whether members of different constituencies are invited to attend; and

(5) other factors, including the location of the program and advertising or promotion of the event.

In the case of programs offered by bar associations and other nonprofit entities, consideration of these five factors "raise[s] fewer concerns than [in programs] sponsored by for-profit entities, mainly because the sponsors do not have a commercial motivation and the programs are generally open to a broad audience." Id. However, "[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." Id. As an example, the Committee has said that "judge participation in legal training offered by an issue-specific advocacy group that appears regularly in the judge's court may be perceived as lending the prestige of the judicial office to advance the interests of the group." Id.

Advisory Opinion No. 93 addresses the ethical implications of a judge's or law clerk's extrajudicial, law-related activities arising under Canons 1, 2, 4, and 5:

> [T]o qualify as an acceptable law-related activity, the activity must be directed toward the objective of improving the law, qua law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective.

Advisory Opinion No. 93 further states that, while "[a] judge's participation in law-related activities is encouraged . . . not every activity that involves the law or the legal system is considered a permissible activity." This is so because "[l]aw is, after all, a tool by which many social, charitable and civic organizations seek to advance a variety of policy objectives." Id. "A permissible activity . . . is one that serves the interests generally of those who use the legal system, rather than the interests of any specific constituency, or [a permissible activity is one that] enhances the prestige, efficiency or function of the legal system itself." Id. On the other hand, "judicial participation in organizations that advocate particular causes rather than the general improvement of the law is prohibited." Id.

D. Law Clerks Who Have Accepted an Offer but Not Yet Entered into Service

Concerns are also raised when a conference or seminar is directed to future law clerks. While the Employees' Code applies only to "employees of the Judicial Branch" and not to prospective employees, the Committee has counseled judges that they may impose limits on the pre-employment conduct of their future law clerks to avoid activities contrary to the Employees' Code, such as accepting a salary advance from a law firm prior to a clerkship. See, e.g., Advisory Op. No. 83 (advising that "[a] judge should not permit a law clerk to accept a salary advance from a law firm, either before or during the clerkship" because acceptance "could undermine public confidence in the integrity and independence of the court, and is contrary to [Canons] of the Employees[‘] Code"). The Committee also has recognized that judges may prohibit their future law clerks from engaging in conduct otherwise permissible under the Employees' Code. Id. (acknowledging that "some judges may prohibit their future . . . law clerks from accepting bonuses or payments that are [otherwise] permissible"). In directing advice to future law clerks, the Committee has restricted the term "future law clerks" to those persons who have accepted future employment in a judge's chambers but who have not yet entered into actual service. The conduct of persons who merely aspire to become employed as a law clerk at some future date are beyond the scope of the Employees' Code.

That said, the Committee is sensitive to the public perception that "law clerks are in a unique position since their work may have direct input into a judicial decision," and, "[e]ven if this is not true in all judicial chambers, the legal community perceives that this is the case based upon the confidential and close nature of the relationship between clerk and judge." Advisory Op. No. 51.

It is the Committee's view that a judge has the discretion to instruct a future law clerk regarding pre-employment educational opportunities that may have an impact on the clerkship. A future law clerk should consult his or her appointing authority for guidance. The appointing authority should recognize that future law clerks are not fully subject to the Employees' Code until they enter into service, so care should be taken by the judge to ensure that a directive not to participate in First Amendment protected activity be limited to the extent actually necessary to protect the judiciary from the identified harm.

E. Ethical Concerns for Participating in a Sponsored Educational Conference or Seminar

The Committee has counseled that it is essential for judges to assess each invitation to participate or attend a seminar on a case-by-case basis. As stated in Advisory Opinion No. 67, "[t]hat a lecture or seminar may emphasize a particular viewpoint or school of thought does not necessarily preclude a judge from attending," and a judge's determination whether to attend a particular seminar should be made considering the totality of the circumstances. (See also Note 1 below).

(1) *The identity of the seminar sponsor*

Concerns are raised when the sponsor is regularly engaged in contentious public policy debates. That is so even where the seminar or conference is an isolated offering of education. Additional concerns are raised where the seminar or conference specifically targets judges or judicial employees. See also, *Judicial Conference Policy on Judges' Attendance at Privately Funded Educational Programs*, at https://www.uscourts.gov/judges-judgeships/privately-funded-seminars-disclosure/judicial-conference-policy-judges-attendance.

One concern arises from the prohibition in Advisory Opinion No. 105 of "lending the prestige of the judicial office" to advance the interests of a special interest or issue specific group. In that Advisory Opinion, we cautioned that a judge's participation in legal training offered by an issue-specific advocacy group that would benefit only a particular constituency, as opposed to the legal system as a whole, could not be characterized as proper extrajudicial activity involving the law. The Committee has advised that participation in viewpoint-specific programs poses fewer ethical concerns if attendance is open to the general legal community. When the seminar or conference targets a narrow audience of incoming or current judicial employees or judges, the judge or employee must take care to ascertain that the program is not such that it could be seen to curry influence with the employee or judge or to impact the outcome of future cases. While it is undoubtedly true that neither judges nor judicial employees are likely to be influenced by a single seminar, both the Judges' Code and the Employees' Code prohibit participation in programs that might cause a neutral observer to question whether this type of influence is being sought by the sponsoring organization. Participation in a viewpoint-specific training program that will only benefit a specific

constituency, as opposed to the legal system as a whole, cannot be characterized as a permissible activity to improve the law.

(2) *Nature and source of seminar funding*

The Committee has advised that the existence of additional "private sponsors" at bar association CLE programs does not categorically prohibit a judge from participating as a speaker or panelist. However, the presence of such sponsors cannot be ignored by judges who participate. In fact, the presence of private sponsors likely increases the need for additional scrutiny. Thus, the Committee has advised in the past that a judge must factor funding and sponsorship information into the evaluation of whether to attend a particular educational program.

(3) *Whether a sponsor or a source of substantial funding is involved in litigation or likely to be involved*

Even if the sponsoring organization is not engaged in litigation, issues are raised if the funding to sponsor the seminar is from sources that are involved in litigation or political advocacy. Where the funding sources are unknown or likely to be from sources engaged in litigation or political advocacy, judges and judicial employees should not participate. The Committee has cautioned that, if there is insufficient information for the judge to decide whether to attend a seminar, then the judge should decline the invitation or take reasonable steps to obtain additional information. Advisory Op. No. 67.

(4) *Subject matter of the seminar*

Ordinarily, the subject matter of seminars is not an issue unless the judge or judicial employee is aware that the sponsor or source of substantial funding for the seminar is a litigant before the judge and that the topics covered in the seminar are directly related to the subject matter of the litigation. Advisory Op. No. 67. When the judge or judicial employee is unable to determine the sources of funding, the Committee cautions potential speakers or applicants against participation.

Further, Canon 4A of the Employees' Code reminds judicial employees that, as a general matter, their outside activities "should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves." The Committee has previously advised that these concerns may be present when an advocacy organization takes positions on legal issues that frequently come before the federal courts. Where the participation of a judge or judicial employee in a seminar could create the impression of a predisposition regarding a legal issue or could suggest that a proposed decision may be influenced by the relationship with the advocacy group, participation is likely inappropriate. The Committee previously has advised that, although attendance at a seminar that emphasizes a particular viewpoint could be perceived as merely legal

training, attendance that requires the attendee to form a lasting association with the sponsoring organization is impermissible.

(5) *Nature of expenses paid*

Payment of tuition and expenses involved in attendance at an independent seminar constitutes a gift within the meaning of the Code, the Gift Regulations, and applicable statutes, and thus acceptance of such payment is subject to restrictions.

The Gift Regulations, which implement 5 U.S.C. §§ 7351 and 7353, prohibit judicial officers and employees from soliciting or accepting a gift from any person (1) who is seeking official action from or doing business with the court or (2) whose interests may be substantially affected by the performance or nonperformance of the judge's or employee's official duties. *Guide to Judiciary Policy*, Vol. 2C, Ch. 6, §§ 620.30, 620.35. The acceptance of gifts by judges and judicial employees implicates Canons 1, 2, 3, 4, and 5 of the Judges' and Employees' Codes regarding preserving the integrity and independence of the judiciary, avoiding even the appearance of impropriety, and discharging the duties of their offices with respect, dignity, and impartiality. See also Advisory Op. No. 67.

The Gift Regulations preclude a judicial officer or employee from accepting a gift "if a reasonable person would believe it was offered in return for being influenced in the performance of an official act or in violation of any statute or regulation." *Guide to Judiciary Policy*, Vol. 2C, Ch. 6, § 620.45. The Committee has previously opined that judges and law clerks may accept a waiver of tuition and reimbursement of expenses to attend independent, law-related seminars where neither the sponsor nor the source of the funding for such activities (1) is involved in litigation before the court, (2) is likely to come before the court, (3) is seeking to do business with the court, or (4) has any interests that may be substantially affected by the performance or nonperformance of the judge's or law clerk's official duties. In addition, where the sources of the funding for the event are unknown, judges and law clerks should inquire as to the specific sources to ensure that there is no actual or potential conflict or appearance of impropriety.

(6) *Other Factors*

One additional factor meriting further consideration is political activity. Canon 5 of both the Judges' Code and the Employees' Code prohibits political activity by judges and law clerks. The Committee has broadly interpreted "political activity" to include any activity involving "hot-button issues in current political campaigns" or which is "politically-oriented" or has "political overtones." For instance, the Committee has advised law clerks to avoid outside activities that involve contentious political issues and has advised law clerks not to attend a legal training program sponsored by an issue-specific advocacy group that may be involved in federal litigation.

When a judge engages in law-related activity with political overtones, a judge should consider whether the express or implied values of other canons will be contravened. "A judge should be sensitive to the nature and tone of the activity, and should not be drawn into an activity in a manner that would contravene Canon 2's goals of propriety and impartiality or Canon 5A's prohibition of activities pertaining to political organizations and candidates." Advisory Op. No. 93. Where participation would undermine public confidence in the impartiality of the judiciary, would give rise to an appearance of engaging in political activity and of undue influence on the judge, or would otherwise give the appearance of impropriety, the Committee has advised against attending a seminar or conference.

Notes for Advisory Opinion No. 116

[1] Although Advisory Opinion No. 67 provides guidance to judges, this guidance is equally applicable to law clerks. As members of a judge's personal staff, law clerks must be more circumspect in their activities than other court employees due to their direct association with a single judge. Because of this close association and the application of similar ethical standards, the Committee's evaluation of whether a judge may participate in a seminar or conference also incorporates whether a law clerk may participate, except as otherwise noted.

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