Essay

LIMITS ON JUDGES LEARNING, SPEAKING AND ACTING—PART I—TENTATIVE FIRST THOUGHTS: HOW MAY JUDGES LEARN?

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This is my beginning and tentative exploration of the strange terrain where epistemology and judicial ethics overlap. Are any of the following activities appropriate for judges?

In Boston, a judge attends a public lecture by an activist denouncing sodomy laws. At a major New York hospital, a judge is present at a speech on asbestos by a dean of epidemiology. In New Haven, at Yale, judges and professors meet for two days to consider economics and torts. In Florida, judges are students at lectures on antitrust and the free market by a Nobel Prize winner and others. Judge Cardozo listens quietly at a session of the American Law Institute in Manhattan and then writes the Palsgraf opinion closely following the discussion he has just heard. A national association of women judges invites a controversial proponent of "anti-pornography" to address a meeting in Philadelphia. In San Francisco and Chicago, a judge hearing a mass toxic tort case lunches with a Nobel Prize winner and scholar on carcinogens. In Denver, a judge hearing swine flu cases goes to medical school to study toxicology. In Washington, judges and scientists meet to discuss science and its use by the courts. In Alabama, state judges presiding over breast implant cases all over the country meet with the federal judge overseeing the federal breast implant cases. As practitioners of the socratic method you will want details and background before evaluating these and comparable cases.

The *Code of Conduct for United States Judges* provides limited guidance. Canon 4 states in part:

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This essay is the first in a three part series entitled *Limits on Judges Learning, Speaking and Acting*. This part, *Learning*, was originally given as a speech on November 15, 1993 at the University of Arizona Law School. The scope of this essay includes the participation by judges in educational events designed for the judiciary, either as a lecturer or as a student. The issue of what a judge may say publicly about the law or a pending case in another forum not designed particularly for the judiciary is taken up in Part II, *Speaking*, which will be published along with Part III, *Acting*, in the *University of Dayton Law Review*. An overview of the piece in its entirety was published in 77 JUDICATURE 322 (1994), and is based on the Hughes Lecture at the New York County Lawyers Association on March 31, 1994.

> A judge, subject to the proper performance of judicial duties, may engage in the following law-related activities, if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge:
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> (A) A judge may speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice.[1]
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> Additionally, Canon 3 states, in part:
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> (C) (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
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> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .[2]

These rules provide a framework for analyses of specific situations, but the contours of the limitations on judge's acquiring knowledge need more detailed examination.

Let us try to put the specific cases of judges acquiring knowledge in a general context. What are the boundaries? Where are the pitfalls?

We need to differentiate between law and fact; between observed facts and evidential hypotheses, known to the trier independently of litigant proffers or supplied by experts, which permit inferences to be drawn from the observations; and between "bias" that may affect the utilization of evidence inferentially and "bias" affecting policy in the interpretation and application of law.

First let me set out a few general principles that I think we would all agree upon.

I. INTRODUCTION

Judges in the United States should come to the bench with mature knowledge of the world. Unlike continental systems, our system does not expect our lawyers to select the judicial track until they have acquired a great deal of general and specific knowledge in academia as students and in practice, in government, in business, or in teaching.[3] Many are rusty on their general student-acquired knowledge of science, history, economics, sociology, anthropology, philosophy and other disciplines which are the unseen and unconscious foundations of our decisions both of fact and law.[4]

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1. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 4 (1993). The Code applies to United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges. *Id.*, Introduction. Supreme Court Justices are not subject to the Code of Conduct, but in the author's opinion, Justices should act as if they were and should formally agree to be subject to the Code.

2. *Id.*, Canon 3.

3. As Holmes said, "The life of the law...has been experience." OLIVER W. HOLMES, THE COMMON LAW 1 (1881).

4. *Cf.* William H. Honan, *Academic Disciplines Increasingly Entwine, Recasting Scholarship*, N.Y. TIMES, Mar. 23, 1994 at A19; James G. Apple, *Judicial Education Changes*

After appointment, judges should, to the extent that arduous, time-consuming duties permit, enhance their understanding of life and theory.[5] As generalists they need to continue to acquire general information — much as any intelligent, well-educated person does, by reading newspapers, magazines, and books, watching television and listening to radio, taking adult education and formal college courses, attending lectures and seminars, and talking to friends and family.[6] We cannot make intelligent fact decisions or evaluate the effect of our legal decisions on society unless we have some understanding of that society.[7]

Of course every judge brings an enormous background of knowledge to the bench — both factual and ideological — which will be utilized in drawing inferences about facts and making policy on law.[8] No one would expect that

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Direction; Humanities, Ethics and Values, Works of Literature, and Science Are Additions to Traditional Curricula, 5 STATE-FED. JUD. OBSERVER 4 (1994).

5. *See* Charles S. Claxton, *Characteristics of Effective Judicial Education Programs*, 76 JUDICATURE 11, 12 (1992) ("Judges who are new on the bench — particularly those who feel insecure about their new role — sometimes see things in very simple terms....The problem is that the issues, not just in the courts but throughout society, are outrunning the complexity of thought that people, including many judges, bring to the task. That's why judicial education should be explicitly designed to help participants think in more complex ways.").

6. *See*, Robert A. Leflar, *Continuing Education For Appellate Judges*, 15 BUFF. L. REV. 370, 376 (1965–66) ("Continuing education for judges is now an accepted thing in the United States....This would not be a good thing if it threatened the old system of private study in the judge's chambers and at home in the evenings, but there is no threat to that. Good judges will always engage in that sort of continuing legal education.

Formalized study can do for the average judge, and for nearly every judge, much that private study cannot do....Seminars for judges, whether at the trial or the appellate level, have been shown to be useful and successful.").

7. *See, e.g.*, Howard T. Markey, *A Judicial Need for the 80's: Schooling in Judicial Ethics*, 66 NEB. L. REV. 417, 425 (1987) ("... judges are in their judging being involved more and more in the management of society. If total isolation of judges from all social contact off the bench would guarantee a totally ethical judiciary, what would be the cost?"); Patricia M. Wald, *Making 'Informed' Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135, 141 (1982) ("In this era of computers, data processing machines and information retrieval systems aimed at storing, classifying and disgorging relevant information to decisionmakers at a speed unthought of a few years ago, it seems illogical to deny oneself access to information that would be useful in making a reasoned decision."). *Cf.* Morton J. Horwitz,*The Supreme Court 1992 Term — Foreword: The Constitution of Change Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 117 (1993) ("Like the *Lochner* Court, this Court has increasingly sought to evade its legitimacy problems by resorting to 'mechanical jurisprudence' — to highly technical formulae that permit the Justices to avoid coming to terms with the deepest challenges that modernism has presented.").

8. *See Conference of Association of American Law Schools: Panel on Compassion and Judging: Comments and Questions*, 22 ARIZ. ST. L.J. 53 (1990). The following is a portion of the discourse at that conference:

> Judge Noonan: ...I would go back to what I consider the best statement of the whole thing, and it's the Declaration of Rights of the Commonwealth of Massachusetts, that every citizen is entitled to a judge who is 'as free, independent and impartial as the lot of humanity will admit.' That second clause builds in the relativity that does go with different cultures in changing circumstances.
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> Professor Resnik: ...I think it important that, whatever we are saying when we say the word 'impartial,' we understand that we are all situated. We all have perspectives and come from specific places from which we judge. We must very self-consciously understand the limitations of our information and the limitations on our ability to understand that information.

Ruth Bader Ginsberg would ignore what she has learned about discrimination against women — both in her personal experience and as an advocate for other women — or that she would forget the arguments she has made in the past on equal rights now that she is on the Supreme Court. Justice Rehnquist refused to recuse himself on a case raising the issue of the constitutionality of governmental surveillance, even though he testified on behalf of the Justice Department before the Subcommittee on Constitutional Rights of the Judiciary Committee on that issue in an inquiry into "Federal Data Banks, Computers and the Bill of Rights."[9] While some aspects of knowledge and prior commitments may lead to recusal, for the most part, our knowledge is considered folded in and subsumed in what we bring to a judgeship at the time of appointment.[10]

II. GENERAL LEGAL AND NON-LEGAL KNOWLEDGE.

A. Informal Methods For Acquiring Knowledge.

We learn from everything in the world around us. We are inundated with information at home as well as at work. Like other judges, I receive a stack of mail every day that on one day may include newsletters and magazines from various organizations,[11] publication lists,[12] brochures for legal conferences,[13] law reviews,[14] reports on topics ranging from sentencing for environmental crimes to the Americans with Disabilities Act,[15] and advertisements for new

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Id. at 56–57. *See also*, Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1878 (1988).

As Justice Holmes put it, "'...all life is an experiment. Every year if not every day we have to wager our salvation upon some prophesy based upon imperfect knowledge.'" Louis Menand, *American Prodigy*, N.Y. REV. BOOKS 30, 35 (Dec. 2, 1993) (citing Abrams v. United States, 250 U.S. 616, 627 (1919)). Charles Sanders Pierce explains that "induction" and "deduction" are not the only methods of producing knowledge, there is "abduction," by which he means, simply, guessing. *Id.* "We proceed by guesses, Pierce explain[s], because 'our knowledge is never absolute but always swims, as it were, in a continuum of uncertainty and of indeterminacy.'" *Id.* (citing MS c. 1897, in *Philosophy of Pierce: Selected Writings* 356).

9. Laird v. Tatum, 409 U.S. 824 (1972) (Mem.).

10. *Cf.* J.E.B. v. Alabama, 114 S. Ct. 1419, 1423 (1994) (O'Connor, J., concurring) ("'Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them.'") (citing Beck v. Alabama, 447 U.S. 625, 642 (1980)).

11. For example, I receive the following magazines: *Docket* (Journal of the Nat'l Inst. for Trial Advocacy); *Champion* (Journal of the Nat'l Ass'n of Criminal Defense Lawyers); *Journal of Proprietary Rights* (Proprietary Rights Group of Weil, Gotshal and Manges, eds.); *FBI Law Enforcement Bulletin* (Fed. Bureau of Investigation); *Law & Justice* (Journal of the Am. Ctr. of Law and Justice); *Free Perspectives* (Found. for Research on Economics and the Env't), and *Lloyd's Aviation Law* (Lloyd's of London).

12. Publications and catalogs received by mail include the Washington Legal Foundation, Legal Studies Division; Columbia Law School; Bulletin of Recent Federal Sentencing Reporters; Vera Institute of Justice; and Rand Institute Publications.

13. *See, e.g., infra* notes 21 to 72.

14. I receive the *Brooklyn Law Review*, *Columbia Law Review*, *Harvard Law Review* and a dozen others, as well as reprints sent by authors.

15. *See, e.g.*, Paula N. Rubin, *The Americans With Disabilities Act and Criminal Justice: An Overview*, NAT'L INST. JUST.: RES. ACTION (U.S. Dept. of Justice, Wash., D.C.), Sept. 1993; Benedict C. Cohen, *Corporations and the Sentencing Guidelines for Environmental Crimes*, NLCPI WHITE PAPER (Nat'l Legal Center, Wash., D.C.), Aug. 1993; Maureen E. Connor & William A. Anderson, *Mentoring in the Judiciary*, JUD. EDUC. REFERENCE, INFO. TECHNICAL TRANSFER PROJECT (1992). (Sources on file with author.)

high-tech advancements in legal research,[16] and for new methods of jury analysis.[17] There is useful information there. Should a judge protect neutrality by throwing this all away without considering it? Should the judge log it all in on a disclosure form? Neither course is practicable.

Judges participate in a wide variety of activities that could have an impact on their decisionmaking. For example, the Judicial Councils of some circuits have established judicial task forces on gender, racial and ethnic fairness in the courts.[18] They are charged with studying bias issues, including courtroom interaction among judges, lawyers, witnesses, and jurors as well as court employment practices.[19] Several of the participating judges attended planning sessions at the Federal Judicial Center.[20] These judges will continue to hear private discrimination cases. Should they apply the standards they reach as a committee? Should they disclose in specific discrimination cases their involvement with the task force? Can it be expected that an enterprise designed to make us more sensitive to discrimination within our own court system will not affect our thinking about allegations of discrimination in other settings? Can a judge forget in one discrimination case what was learned in earlier cases?

In my view, this informal education process should not be stifled. Judges should be encouraged to subscribe to and read publications advocating many different viewpoints. They also must be able to participate in activities that examine and improve the judiciary and the legal process. Isolation is certainly not desirable.

B. Seminars and Courses.

One form of judicial education that has recently drawn public attention is conferences and classes for judges. This method of education developed in part from training sessions for federal judges sponsored by the Federal Judicial Center.[21] The Center is funded by the judicial branch of the federal

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16. I receive such advertisements as *Information Power!*, a Journal Graphics advertisement for WESTLAW.

17. *See, e.g.*, ADVANCES IN JURY ANALYSIS, (FTI Corporation, Jury Analysts Group), Summer 1993 (on file with author).

18. *See* Press Release of Steven Flanders, Circuit Executive on the Second Circuit Task Force (Oct. 12, 1993) (on file with author). *See also*, Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195 (1993) (discussing pioneering role of Ninth Circuit Gender Bias Task Force in 1990); *Joint State-Federal Task Forces Study Problems of Gender Bias in Courts*, 5 STATE-FED. JUD. OBSERVER 1 (Mar. 1994) (describing efforts in Alaska, Montana and Hawaii to establish joint federal-state task forces on gender bias and efforts in the Ninth Circuit to embark on a study of ethnicity, race and religion in the federal courts).

Judicial education on bias issues is becoming more common. The Anti-Defamation League (ADL) has conducted extensive training courses for a probate judge in Massachusetts who was suspended following accusations that he repeatedly made anti-Semitic remarks and comments degrading women. *See ADL Seeks Sensitivity Training for Massachusetts Judges*, ON THE FRONTLINE, Jan. 1994 at 4. The ADL has asked the Massachusetts Judicial Conduct Commission to institute training in cultural diversity and discrimination as a major component of judicial training. *Id.*

19. See Press Release of Steven Flanders, Circuit Executive on the Second Circuit Task Force (Oct. 12, 1993).

20. *Id.*

21. Another early form of organized judicial education was the Annual Appellate Judges Seminar at the Law Center of New York University, which began in 1955 by Justice Frederick

government.[22] Private foundation money supplements the federal budget on some projects.[23] The Center was created primarily to assist newly appointed judges in making the transition from practice and academia to the bench. The early courses sponsored by the Center included evidence, civil and criminal procedure, and habeas corpus. These background courses are still taught,[24] but the Judicial Center's mission has expanded to include continuing education courses for judges,[25] preparation of training materials and research on the operation and improvement of the courts.[26] In 1984, Congress created the State Justice Institute which is a similar organization designed to improve the administration of justice in state courts.[27]

Other legal institutions have followed the Judicial Center's lead and have created judicial conferences and seminars of their own.[28] Such conferences are sponsored by universities, foundations, bar associations, special interest groups and corporations.[29]

Ethical issues for judges arise when such conferences may cause concern because the sponsor is a group that participates regularly in litigation or because the program may be perceived as biased.

G. Hamley of the state of Washington. Hon. Warren E. Burger, *School For Judges*, 33 F.R.D. 139, 140 (1963).

22. 28 U.S.C. §§ 620–629 (1993). The Center had a fiscal 1993 appropriation of $18,600,000; it employed 162 people; it has an appropriation of $18,450,000 for fiscal 1994. 1993 FED. JUD. CENTER ANN. REP. 4 (on file with author).

23. 1993 FED. JUD. CENTER ANN. REP. at 7.

24. *See* FEDERAL JUDICIAL CENTER, 1993–1994 SERVICES FOR JUDGES AVAILABLE FROM THE JUD. EDUC. DIVISION (1993) (on file with author).

25. *Id.* at 4.

26. *Id.* at 17.

27. *See* STATE JUST. INST.,PROGRAMS TO IMPROVE THE ADMINISTRATION OF JUSTICE IN THE STATE COURTS: FINAL GRANT GUIDELINE, FISCAL YEAR 1994 14 (Oct. 1993) (on file with author). The State Justice Institute does not host conferences or training programs itself, but instead provides funding to organizations through grants for long-term projects, training programs, and scholarships. *Id.* at 1–3. Some of the money is only available to states or local courts or individual judges. Other grants are more generally available. *Id.* The Institute has entered into interagency agreements. For example, the Institute funds joint programs with the National Institute of Corrections, with the Federal Judicial Center, and with the Center for Substance Abuse and Treatment of the Department of Health and Human Services. *Id.* at 4.

28. The author is interested in seeing established, independently or as part of an existing organization, a national entity for the education of judges on non-legal issues. The Federal Judicial Center focuses on legal topics. The foundation would fund, sponsor and organize a broader range of courses for judges. It would pick up where the Federal Judicial Center leaves off. Payment of judicial scholarships for courses at Universities and leaves of absence for extended study should be encouraged.

29. One example is the American Bar Association's National Judicial College. The Judicial College sponsors a wide variety of judicial education programs all over the country. Its offerings for the month of May 1994 included Introduction to Personal Computers in the Courts, Opinion Writing, Logic for Judges, Effective Sentencing and Probation Management, and Traffic Court Proceedings.

See also, e.g., Seminar for Judges on "International Human Rights Law: Its Application in National Jurisprudence.", held by the Aspen Institute Justice and Society Program, 1982–1992; Managing Federal Litigation in the 1990's: The Civil Justice Reform Act and the New Discovery, Trial and Civil Litigation Plans Adopted by the Eastern and Southern Districts of New York, The World Trade Center (Mar. 5, 1992) (sponsored by Winthrop, Stimpson, Putnam & Roberts) (on file with author).

1. Funding.

Yale Law School hosts civil liability conferences that are aimed at the judiciary, although they are also attended by professors, experts and practitioners representing all elements of the profession. The conferences are run by the Program on Civil Liability headed by Professor George Priest. It receives funding primarily from corporations and corporate foundations that do not have any input on the substance of the conferences.[30]

In 1988 and again in 1990, the Yale program held conferences at Yale Law School that were sponsored exclusively by Aetna Casualty and Life.[31] A conference at New York University headed by Professors Samuel Estreicher and Linda Silberman was also funded by Aetna Insurance Company alone.[32] The Yale and N.Y.U. programs selected the papers that would be presented at the conferences and afforded no substantive control to Aetna.[33] The papers were designed to be published in scholarly journals.[34] These Aetna conferences have come under fire from a group called the Alliance for Justice in a report titled *Justice For Sale: Shortchanging the Public Interest for Private Gain.*[35] The report criticizes what it labels as the "pro-corporate shadow" that was cast by Aetna's highly visible sponsorship.[36]

There are dangers. An insurance company has an interest in reducing tort-claim recoveries. Even though, in my opinion, having attended some of these sessions, they appeared content neutral, there is a possibility that the conference will be perceived as biased.

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30. Telephone Interview with Professor George L. Priest, Director of the Yale Law School Program on Civil Liability (Nov. 1, 1993). The Program has one grant from the National Science Foundation. It has also attempted to balance its funding, but has not been successful in attracting donations from plaintiffs' groups such as the American Trial Lawyers Association. *Id.*

Although the Program has no written policy on the funding's impact on the content of the seminars, in practice donors have no substantive control over the content, and the Program turns down money that is given conditionally. *Id.*

31. *See* Letter from Judyth Pendell, Vice-President, Aetna Life & Casualty, to Jack B. Weinstein (Nov. 8, 1993) (on file with author).

32. *See id.* This conference was given by the Institute of Judicial Administration, which is a non-profit organization with a president and an independent board of directors. Letter from Professor Linda Silberman, New York University, to Jack B. Weinstein (Apr. 5, 1994) (on file with author).

33. Letter from Professor Samuel Estreicher, New York University to Jack B. Weinstein (Nov. 9, 1993) (on file with author).

34. *See* Symposium, *Modern Civil Procedure: Issues in Controversy*, 54 LAW & CONTEMP. PROBS. 1 (1991); and Symposium, *Issues in Civil Procedure: Advancing the Dialogue*, 69 B.U. L. REV. 467 (1989).

35. ALLIANCE FOR JUSTICE, JUST. FOR SALE: SHORTCHANGING THE PUB. INTEREST FOR PRIVATE GAIN 70–74 (1993) [hereinafter JUST. FOR SALE]. *See also Alliance for Justice: Public Interest or Special Interest*, ORGANIZATION TRENDS, Aug. 1993 at 1; Henry J. Reske, *Expense-Paid Judicial Seminars Hit*, 79 A.B.A. J. 36, (Aug. 1993); *Morning Edition: Report Slams Judges for Corporate Seminar Attendance* (National Public Radio broadcast, May 24, 1993) (transcript on file with author); Jay Mathews, *Business Tries to Shape Legal System, Report Says*, WASH. POST, May 19, 1993, at F4.

36. JUST. FOR SALE, *supra* note 35, at 76.

I should add that I have little doubt of the bona fides of Aetna. It is trying to "improve" tort adjudication.[37] The improvements sought would, arguably, however, have a favorable impact on insurance company finances.

The public and litigants may nonetheless sense that an insurance company — and it is the insurance industry that pays for most recoveries — is attempting to influence judges to find for defendants.[38] Any educational institution sponsoring such research or meetings should make every effort to use general university funds or obtain funding from a sufficiently broad spectrum of donors so that the suspicion of bias is minimized.

Judges who attended the Yale and New York University programs were informed that Aetna was the sole sponsor,[39] and by special request judges could have their expenses paid by the general funds of the school rather than by the sponsor.[40] A better practice would be to routinely provide payment for expenses only by the law school or by funds from the federal Administrative Office or Judicial Center. Judges may overlook the notice in an invitation that they have this option and may be embarrassed when this is brought to their attention at a later time.

The Alliance for Justice report also criticizes the Law and Economics Center of the George Mason University School of Law for providing a series of judicial education programs. According to the report, the Law and Economics Center headed by Dean Henry Manne presents a conservative or corporate oriented view intended to influence the judiciary.[41]

The Center sponsors seminars for federal judges on law and economics and on science and the law.[42] The courses are taught by prestigious faculty

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37. Interview with Judyth Pendell, Assistant Vice-President, Aetna Life & Casualty Co., in Washington, D.C. (Nov. 5, 1993). *See also* Letter from Judyth Pendell to Jack B. Weinstein, *supra* note 31 ("... Aetna's civil justice reform efforts have been focused in large measure on reducing transaction costs while preserving or enhancing the fairness of the system, which you will note is the major thrust of the conferences. Aetna does not advocate caps on pain and suffering damages, which we believe discriminate against the young and severely injured, and we do not support adoption of the 'loser pays' or English Rule because we believe it would limit access to the courts. We emphasize reforms which have the potential to reduce or eliminate excessive transaction costs and fraudulent and frivolous litigation.").

38. Canon 2(A) of the MODEL CODE OF JUDICIAL CONDUCT states: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The Commentary expands somewhat on the Canon: "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

39. Letter from Judyth Pendell, *supra* note 31; Letter from Professor George L. Priest, Director of the Yale Law School Program on Civil Liability, to Jack B. Weinstein (Nov. 9, 1993) (with attachment) (on file with author).

40. Telephone Interview with Professor George Priest, *supra* note 30; and Interview with Judith Pendell, Vice-President of Aetna Life and Casualty Co., *supra* note 37.

41. *See* JUST. FOR SALE, *supra* note 35, at 74.

42. In April and June of 1993, the three courses offered by the Center were "Basic Economic Institute," a basic course in economics and on the applicability of economic theory to legal issues; "Basic Course on Science and Public Health," a course designed to provide judges with a better understanding of scientific evidence; and "Advanced Course on the Economics of Risk, Injury, and Liability," a course on the economics of the judicial allocation of risks through tort law. LAW & ECON. CENTER, LAW AND ECONOMICS CENTER PROGRAMS FOR FEDERAL JUDGES 4–6 (Oct. 1992) (on file with author).

from a wide range of universities throughout the country.[43] As of October 1992, 398 federal judges had attended at least one course sponsored by the Law and Economics Center.[44] The seminars are funded by unrestricted grants from private, non-corporate foundations that do not participate in litigation.[45]

The Alliance for Justice report implies that the program is biased toward advancing the financial interests of corporate America, and that the programs for judges are an attempt to sway the judiciary toward free market ideals and away from governmental intervention in the economy.[46] The report bases many of its implications on the fact that the Center itself is funded by corporations.[47] That is true, but as I mentioned, the judicial programs are funded solely by non-corporate foundations. The corporate donations fund other Center projects. The report also asserts that the non-corporate foundations that fund the judicial seminars were originally established with corporate money and therefore have agendas that favor corporations.[48]

These criticisms appear unsound. First, the funding seems to come primarily from sources that will find no direct venal gain from judicial decisions. This factor is significant. Funding from groups that regularly participate in litigation would be more suspect.[49]

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43. For example, the "Advanced Course for Federal Judges on Basic Science and Public Health" was taught by Bruce N. Ames, Professor of Biochemistry and Molecular Biology at the University of California, Berkeley; Leon Lederman, Frank L. Sulzberger Professor at the University of Chicago Enrico Fermi Institute and Department of Physics; James S. Trefil, Robinson Professor of Physics at George Mason University; and W. Kip Viscusi, George G. Allen Professor at Duke University Department of Economics. LAW & ECON. CENTER, LAW AND ECONOMICS CENTER 1992 ANNUAL REPORT 4 (1993) (on file with author).

44. LAW & ECON. CENTER, LAW AND ECONOMICS CENTER CUMULATIVE LIST OF PARTICIPANTS, FIRST THROUGH NINETEENTH LEC ECONOMIC INSTITUTES AND OTHER LEC COURSES FOR FEDERAL JUDGES 7 (Oct. 1992) (on file with author).

45. Letter from Richard Fielding, Director, George Mason University Law and Economics Center, to Federal Judges (Nov. 12, 1993) (on file with author); Telephone Interview with Henry G. Manne, Director, George Mason University Law and Economics Center (Nov. 1, 1993); Memorandum from Henry G. Manne, to Federal Judges who have attended or shown an interest in the Economics Institute for Federal Judges (Oct. 31, 1980) (on file with author).

The Center originally accepted restricted funds, and funds from corporations. Memorandum from Henry G. Manne, *supra*. The Center changed its policy as a result of criticism that its funding created a potential for a bias in the programming. *See* Celia W. Dugger, *Paid Course for Judges May Pass*, WASH. POST, Aug. 23, 1980 at C1, and Fred Barbash, *Big Corporations Bankroll Seminars For U.S. Judges*, L & EC Memo, Extra Edition, January 24, 1980 at 1, *reprinted from* the *Washington Post*. The Center now takes only unrestricted funding from non-corporate foundations as part of an agreement with the Federal Judicial Center, which co-sponsored the Law and Economics Center's first science and law seminar. Telephone Interview with Henry Manne, *supra*.

46. JUST. FOR SALE, *supra* note 35, at 71–72.

47. *Id.* at 70.

48. *Id.* at 73.

49. The ABA Advisory Committee on Codes of Conduct Advisory Op. 67 (June 1990) discusses the propriety of judges attending seminars and similar educational activities organized by non-governmental groups and having their expenses paid by those groups. The opinion states:

> It would be improper to participate in such a seminar if the sponsor, or the source of the funding, is involved in litigation, or likely to be involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of such litigation.

Id.

The fact that sponsorship is by an accredited law school provides the judge with a buffer and assurance of impartiality. The view provided by statistical, econometric and utilitarian comprehensive analysis of risks, benefits and costs seems designed to provide a judge with neutral analytical tools and skills. They are useful in many areas of the law including torts, antitrust, and discrimination cases. The instructors are first rate teachers, drawn from the best universities.

In the past, when this kind of education was in its infancy, joint control and sponsorship of such programs in statistics by the Federal Judicial Center and the Law and Economics Center at George Mason University were utilized.[50] Joint sponsorship provided even more protection for judges. Such joint sponsorship, where appropriate, should be encouraged since it extends the Judicial Center's resources beyond its limited budgetary restrictions. Were sufficient funding available, it would be best to have much of the training paid for by the most neutral source of all — the government. How this can be accomplished depends on management decisions of state and federal training centers which, properly, tend to emphasize more directly useful instruction in current substantive and procedural developments, although the scope of the Judicial Center's courses is broadening.[51]

The Advisory Committee on Codes of Conduct has stated in an Advisory Opinion that no impropriety exists where a judge and spouse are reimbursed for hotel and travel expenses required for their attendance at a dinner or similar social event sponsored by a lawyers association.[52] The opinion warns, however, that an impropriety might arise if the lawyers association is identified with a particular viewpoint regularly advanced in litigation.[53] This delineation is helpful, but does not cover all areas of potential impropriety.

Generally, judges should be entitled to rely on the neutrality of government bodies such as the Judicial Center, the Court Administrative Office, the State Justice Institute, the Federal Judicial Conference, and the Administrative Conference of the United States. Yet, reliance entirely on government agencies has its own dangers. The view of a government agency may itself be slanted. As an example, there may be a tendency of some in the federal establishment to close the courthouse doors by an ideological bent toward procedural and other restrictions.[54] The Justice Department, the major federal litigator, has definite views that vary with different administrations and that are reflected in federal policies.

A useful model, which seems to me to be beyond reproach, is that of the Carnegie Commission on Science, Technology and Government. Its studies of

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50. Telephone Interview with Manne, *supra* note 45.

51. The Federal Judicial Center sponsors a wide variety of training programs for judges. In addition to sponsoring and funding seminars on various topics, the Center also puts together curriculum packages that court personnel can deliver at a local level. The Center also buys commercially produced curriculum packages. Self-study programs and computer-based training are also available. *Center (FJC) Offers Expanded Training Options*, CT. ADMIN. BULL. 5 (Sept. 1993) (on file with author).

52. Advisory Comm. on Codes of Conduct Op. 17 (June 1990).

53. *Id.*

54. Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901 (1989).

how the judiciary incorporates scientific and technological knowledge into decisions and its proposed improvements in process and organization are first rate. Cooperative efforts with the Federal Judicial Center have culminated in a pilot project at the Judicial Center to create a Science and Technology Resource Center that focuses on judicial education in science and technology.[55]

As a result of joint work involving federal and state judges, scientists and law professors, a continuing program of general training in science is being devised.[56] It uses substantial funds of the Carnegie Commission and the know-how and connections with the judiciary of the Federal Judicial Center.[57] The jointly sponsored seminars and training materials will cover topics ranging from the use of DNA evidence to computer generated evidence to proving causation in toxic tort litigation.[58]

Following the Supreme Court's decision in *Daubert* regulating a judge's role in controlling scientific experts, the Commission and the Federal Judicial Center jointly sponsored a retreat for the judges of the Eastern District of New York. It was extremely useful as a model for further work that the Federal Judicial Center will be undertaking in science education in the next few years.[59] The judges from my court who attended learned a great deal. More important, perhaps, the educational process bonded us further to each other in our joint enterprise of improving the administration of justice. This is an excellent example of sound cooperation of government and private institutions.

Some programs are arranged by groups of judges.[60] One was a program for federal judges in San Francisco at Stanford Law School in California on October 1, 1993 called "Finance For the Judiciary." [61] It included presentations by academics on the use of different finance theories in the calculation of damages in securities cases.[62] This is an ideal arrangement for judicial education. The cost is negligible and the program is designed by an accredited law school for a small group of interested judges.

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55. *See Science and Technology in Judicial Decisionmaking: Creating Opportunities and Meeting Challenges*, CARNEGIE COMMISSION ON SCI., TECH. & GOV'T, (Mar. 1993).

56. *See* Victoria Slind-Flor, *Helping Judges to Judge Science*, NAT'L L. J., Apr. 14, 1994 at A5 ("The Federal Judicial Center is now taking steps to help judges who are charged with gatekeeping scientific testimony...a reference manual for judges on scientific evidence is in preparation, to be due out some time in late 1994.").

57. *See, e.g.*, Science, Technology and the Courts: The Use of Court Appointed Experts, Federal Judicial Center, Washington D.C., (Nov. 4–6, 1993) (sponsored by the Federal Judicial Center; American Association for the Advancement of Science; American Bar Association; National Conference of Lawyers and Scientists; American Chemical Society; and Carnegie Commission on Science, Technology, and Government).

58. *See, e.g.* Letter from Steven G. Gallagher, Coordinator of the Carnegie Commission on Science, Technology and Government, to Judge I. Leo Glasser, United States District Court of the Eastern District of New York (Aug. 31, 1993) (describing the judicial retreat, "Expert Scientific Evidence: the Trial Judge's Gatekeeping Role", in Port Jefferson on September 9–10, 1993); Robert Lee Chartrand and Robert C. Ketcham, *Opportunities for the Use of Information Resources and Advanced Technologies in Congress* CARNEGIE COMMISSION ON SCI., TECH. & GOV'T (Oct. 1993).

59. Letter from Steven G. Gallagher, *supra* note 58.

60. *See, e.g.*, Cooperative educational venture of state and federal judges in the 1970's at Hunter College in the City of New York.

61. *See* Memorandum from Hon. Vaughn Walker to all Ninth Circuit judges (Sept. 3, 1993) and accompanying materials (on file with author).

62. *Id.*

The funding problem for universities is, I recognize, a serious one. In medicine, where pharmaceutical companies sponsor many lectures, attempts have been made to limit the impact of that sponsorship. Some articles, even those in well recognized legal journals, undoubtedly result from funding by special interest groups or work by professors or lawyers for paying clients. A footnote should alert the reader to this possible bias so a judge can evaluate the article with this fact in mind. Where non-suspect, non-criticizable funding from a foundation without any apparent axe to grind is available, it seems appropriate to use joint arrangements of official groups such as the Federal Judicial Center, ALI/ABA, and national and local bar associations.[63] If sponsorship by a narrower bar association such as the Association of Trial Lawyers of America is used, balancing by the Defense Research Institute is desirable.[64]

The Alliance for Justice report also raises the issue of whether the "resort locations" where the Law and Economics Center holds its conferences help to entice judges to take the courses.[65] This criticism of the lush settings for the courses is not, in my opinion, entitled to much weight. If it were, no judicial conference could ever be held in lovely Tucson. Off-season recreational locations in Florida and the Carolinas are where I attended classes on statistics, economics and risk analysis.[66] Spouses are discouraged from coming and the readings are intensive — constituting the equivalent of a college course in a week. While classes are conducted only from 8:00 a.m. to 12:00 noon, with an occasional night session, the readings require a great deal of homework. Given the age of the students these courses can hardly be characterized as jaunts.

Providing comfortable settings for education may be objectionable if carried to an extreme, since the public believes it pays us enough and perks are resented by taxpayers. "Junkets" [67] with judges' expenses paid may cement bar

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63. *See, e.g.*, The Art of Judging: Individual and Societal Perspectives, Princeton University, (June 9–14, 1994) (jointly sponsored by the Judiciary Leadership Development Council and the Federal Judicial Center); Letter from Justice Sidney H. Asch, New York Supreme Court, and others, to Members of the State Judiciary in New York City, (Jan. 21, 1994) (describing joint programs for judges on social sciences and the law sponsored by the New York County Lawyers Association and New York Law School); The Role of International Law in the U.S. Courts, Washington, D.C., (Mar. 6–8, 1994) (jointly sponsored by the Federal Judicial Center, Georgetown University Law Center, and the American Society of International Law); *ALI-ABA/Federal Judicial Center Satellite Program on New Directions in Federal Civil Practice and Procedure* (broadcast in 70 cities, Dec. 9, 1993) (jointly sponsored by the ALI-ABA and the Federal Judicial Center). *See also* Do Sequential State and Federal Prosecutions Serve the Interest of Justice?, Fordham Law School, New York, (Nov. 9, 1993) (sponsored by the Federal Bar Council and Fordham Law School).

64. *But cf., e.g.*, Products Liability Seminar: New Approaches to Dealing With Experts, Evidence, Discovery, Administrative Enforcement, and Warnings, San Diego, California, (Feb. 10–11, 1994) (sponsored solely by the Defense Research Institute, Inc.) and Insurance Coverage and Practice Symposium, New York, New York, (Dec. 9–10, 1993) (same); *see also* Breakfast Meeting With Ernest Mikhailovich Ametistor, Patterson, Belknap, Webb & Tyler, (Nov. 17, 1993) (sponsored by the Lawyer's Committee for Human Rights).

65. JUST. FOR SALE, *supra* note 35, at 71.

66. *See, e.g.*, 1994 Law and Economics Center Educational Programs for Federal Judges, (Mar.–Apr. 1994) at the Harbour Town Yacht Club, Hilton Head, South Carolina 3 ("Participants should not expect all of the services usually provided by large luxury hotels.").

67. *See, e.g.*, Letter from Bettina B. Plevin and Kenneth A. Plevin, 1994 Co-Chairs, Federal Bar Association Winter Bench & Bar Conference to "Friends" (Oct. 20, 1993) (inviting

and bench healthy relationships, but they could be subject to understandable lay criticism since judges affect lawyers' livelihoods. Judges may be perceived as favoring the bar over the public as a "payment" for pleasant vacations.

While I was pondering these issues, I was sitting by designation in Eugene, Oregon and presiding over a suppression motion in a criminal case in which the defendant was represented by a Federal Public Defender. Unrelated to the case, during a break in the argument, the local Public Defender's Service in Eugene invited me to lecture at a program it planned for Hawaii in 1994. I respectfully declined the invitation. The situation could easily be misunderstood by the public as an attempt to influence my decision on that or other motions.

Justice Antonin Scalia arguably came out differently in a similar situation. In 1988, Justice Scalia delivered a speech on the Constitution at a function sponsored by the Kentucky Bar Association and University of Kentucky Law school. He accepted a fee for the engagement.[68] At the time he agreed to give the speech, a case involving the Kentucky Bar Association was pending before the Supreme Court. Justice Scalia was later one of three justices to vote in favor of the bar association.[69] There is not the slightest suggestion that the Justice's vote was affected.

While teaching and lecturing might be characterized as speaking, they can be treated, for our purposes, as learning. Preparing to teach a class and writing lectures probably is the most effective way to learn.

The present statute and regulations on earnings by judges seem like a useful compromise between unrestricted rights to earn extra income by lecturing and a complete prohibition.[70] Inns of court or law school functions or judicial conferences with judges paying their own way (preferably as a government budgetary charge) provide a more acceptable forum for educational programs.[71]

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judges to the 26th Annual Bench and Bar Conference to be held February 19–26, 1994 at the Pierre Marques Princess, a deluxe resort in Acapulco).

68. John Michael Fritz & Tony Mauro, *Supreme Court: Is It More Equal? Laws Difficult to Apply To the High Court*, USA TODAY, Sept. 14, 1992 at 1A. Although part of the fee was paid by the bar group, "'Justice Scalia understood the honorarium and expenses were to be paid by the University of Kentucky,' not the bar group." *Id.* (quoting court spokeswoman Toni House).

69. *Id.*

70. 5 U.S.C.A app. 7, § 501 (1994) reads in part:

> § 501. Outside earned income limitation.
> (a) Outside earned income limitation. —
> (1) [A judge]...may not in any calendar year have outside earned income attributable to such calendar year which exceeds 15 percent of the annual rate of basic pay....
> (b) Honoraria prohibition. — An individual may not receive any honorarium while that individual is a [judge].
> (c) Treatment of charitable contributions. — Any honorarium which, except for subsection (b) might be paid to a [judge], but which is paid on behalf of such [judge] to a charitable organization, shall be deemed not to be received by such [judge]....

71. The judiciary should pay the judge's expenses. Arguably, payments should be turned into the government's general funds. All payments to the judge and reimbursements for expenses are listed in federal judges' Annual Financial Disclosure. *See Financial Disclosure Instructions for Judicial Officers and Judicial Employees*, FIN. DISCLOSURE OFF. (Administrative Office of the United States Courts) (Jan. 1993) (on file with author).

2. Ideological Bias.

Both the Yale conferences and the Law and Economics Center seminars have been criticized in the Alliance for Justice report for what they perceive as an ideological bias.[72] The report attacks the Yale program because of Aetna's sponsorship and because of Professor Priest's background in law and economics and his support of comprehensive tort reform.[73]

This criticism seems unfounded. In my opinion the material presented was balanced. Discussions were lively and uncontrolled by the sponsors or even the moderators in charge. In point of fact, I and other judges disagreed strongly with the views of some presentations and we voiced our opinions forcefully.[74]

Allegations of ideological bias against programs such as the Law and Economics Center programs are aimed at the Center's Director and Dean. Professor Manne has a long and distinguished history as an advocate of law and economics. At the seminars I attended, however, there were no overt attempts that I noticed to proselytize. After attending some of the seminars, I have become more sensitive to economic analysis. As a result I believe my thinking on torts may have shifted somewhat away from a pro-tort view. But, it has moved toward a regime of court and bureaucratic protections in the field of mass torts that would probably not be congenial to either corporate or plaintiffs' lawyers' interests.[75]

Mature and experienced judges' thoughts can seldom be rechanneled by an instructor's bias. Judges should not be deterred from attending conferences that espouse a certain viewpoint, as long as the funding of the programs is balanced, and any potential bias is disclosed.[76]

This issue arose on an appeal to the Sixth Circuit Court of Appeals in a murder case in which a significant issue was whether blood found at the scene of the crime had come from the defendant.[77] The defendant asked one of the appellate judges to recuse himself because the judge had attended scientific conferences on DNA testing that the defendant alleged were biased.[78] The judge

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72. JUST. FOR SALE, *supra* note 35, at 70–78.
73. *Id.* at 74.
74. *See* Jack B. Weinstein, Comment, *What Discovery Abuse? A Comment on John Setear's the Barrister and the Bomb*, 69 B.U. L. REV. 649 (1989).
75. *See generally* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U.L. REV. 469 (1994).
76. The ABA Advisory Committee on Codes of Conduct Advisory Op. 67 (June 1990) states:

> The education of judges in various academic disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to weigh them.

Id.
77. United States v. Bonds, 18 F.3d 1327 (6th Cir. 1994).
78. *Id.* at 1328.

refused. He wrote:

> [A] judge should never be reluctant to inform himself on a general subject matter area, or participate in conferences relative to any area of the law, for fear that the sources of information might later be assailed as 'one sided.' Just as a judge's personal reading list is not subject to monitoring and condemnation on that basis, neither is the speaker's list at a conference that the judge may attend.[79]

I sat on a National Academy of Science Committee that wrote a key report on DNA testing. I, like the Sixth Circuit judge, would probably not recuse myself from cases using DNA evidence.

Judges certainly should be able to rely on the sponsor of the program to disclose biases in the presentations. Ideally, the Federal Judicial Center could provide, as a service to all judges, information about judicial education programs and their sponsors. Judges should be able to call or write the Center for information if they are interested in attending a conference. They could then feel confident that the Center would provide fair information about the programs so that the judges could make educated decisions about whether to attend. I doubt, however, if the Center would want to get into controversies with organizations that might object to the Center's evaluations.

Even in what might be viewed as a neutral setting, the judge may be subject to criticism. The local community, for religious, ethical, or other reasons, may take a narrower view of what is appropriate for the judge.

An example of this is the suspension and censure of the Chief Judge of the Superior Court of Suffolk County, Massachusetts for his attendance at a public lecture by Gore Vidal.[80] The lecture was held as a benefit for homosexual defendants in controversial criminal cases that were pending in the Superior Court, but not in front of Judge Bonin. The ticket price for the lecture was $5.00. The topic of the lecture was "Sex and Politics in Massachusetts."[81] After the lecture, the judge went to the podium to talk to Gore Vidal, and their picture was taken by a local newspaper. The paper ran a first page headline that read "[Judge] at benefit for sex defendants" and printed the picture of the judge and Vidal.[82] The Supreme Judicial Court of Massachusetts held that the judge's attendance at the lecture "created an appearance of impropriety, bias and special influence," even though he was not presiding over the cases.[83]

In general, a judge ought to be able to attend any lecture or public meeting. Judges' civil liberties remain in force during their tenure. Nevertheless, discretion is prescribed.[84] It apparently was the pictures in the newspaper in the Boston case as well as the fact that the meeting was concerned with a pending case that set off public concern. Pending cases require special

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79. *Id.* at 1330.

80. *In re* Bonin, 378 N.E.2d 669, 685 (Mass. 1978). *See also* Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 1005 (1985).

81. 378 N.E.2d at 672.

82. *Id.* at 680.

83. *Id.* at 685.

84. *See* MODEL CODE OF JUDICIAL CONDUCT, Commentary to Canon 2 (1990) ("A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.").

sensitivity lest the judge give the impression that his or her views will have some influence in the case. Yet, on the facts, the judge was apparently unaware that the meeting was connected with a pending case. If that were so, pressure to resign and his resignation were not appropriate. A firm statement by him after the event that he attended to learn and hear the view of an eminent writer, not to support a view or side in a legal dispute should have sufficed. Judges should not allow themselves to be denied elementary civil rights.

Even in a large sophisticated town like New York, a judge might hesitate to attend such a lecture. But it would be abhorrent to censure a judge for doing so. The Boston decision seems like a bad precedent. Such decisions should be opposed by the bar and the public press. The judges involved are not in a good position to defend themselves. Associations of judges should come to the judges' defense. Were I ever in the position of needing such support, I would certainly look to the Federal Judges Association or bar associations for assistance.

Even in the absence of a pending case, if the lecture is pro- or anti-abortion or radically pro- or anti-feminist or ethnically biased one way or the other, the judge should, I think, consider bearing the sensibilities of the public in mind. A view of neutrality by the judge on these issues and, particularly, those with a religious spin that seem to so set people off despite our vaunted constitutionally based predicate for free speech and association, needs to be considered by the judge. Yet, I had no negative reaction recently when a group of female judges invited the views of a feminist whose attitude on pornography were strongly opposed by civil libertarians.[85]

Judges should, nevertheless, be cautious where their participation in a seminar could be interpreted by the public or by litigants as approval of an ideology or viewpoint. My own research and studies have found, for example, the work of the Rand Institute to be neutral, scholarly and useful. I would trust its meetings and, in fact, addressed one of its sessions in New York on the future of mass torts. By contrast, I would have more reservations about the Manhattan Institute since I was somewhat surprised by what I considered the bombastic style of a book it sponsored on science in the court.[86] A more recent book sponsored by the Manhattan Institute is much more balanced and I have used it in teaching Science and Law.[87] I have not favored repeated invitations to attend or speak at Federalist Society functions because my impression is that the organization is ideologically biased, even though it may seek debates rather than

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85. Some contend that the group of judges excluded a speaker with contrary views because of the speaker's policy not to appear at programs where views contrary to hers were expressed from the platform. *See* David Margolick, *At the Bar: Catering to an Academic Superstar, Judges Find Themselves in a Free Speech Debate*, N.Y. TIMES, Nov. 5, 1993, at B11.

86. *See* PETER HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991). *See also* Kenneth J. Chesebro, *Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637 (1993).

Peter Huber's salary is paid by the Manhattan Institute. *Id.* at 1708–09 n.325. The Manhattan Institute receives its funding from private, for-profit corporations, and nearly half its funding comes from insurance companies. *Id.*

87. *See* PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW (Kenneth R. Foster et al., eds., 1993).

formal indoctrination. Other judges whose views I respect participate in its debates.[88]

My view of the Manhattan Institute and the Federalist Society may be quite unfair to these estimable organizations. It might be helpful, as I have already noted, if we naive judges could have some institution evaluate the various groups that importune us through the mails. Many would be, in any event, dubious about whether neutrality in that regard is possible and the need to obtain the imprimatur of anyone is as anathema as an *index librorum prohibitorum.*

3. Collegiality.

Judicial education conferences have made a significant contribution in promoting collegiality among the judiciary, and between judges and experts in other fields.

The educational sessions of federal judges meeting in intense small groups under distinguished professors and with excellent materials in pleasant surroundings have done much to improve the morale of the federal bench. The judges feel part of a distinguished, educated and motivated corps. This is not elitism, but the result of superior selection and training. We are impressed with each other and strive to enhance the level of work of all of us.

Conferences and other educational opportunities have become especially important in bringing federal judges together as the number of judges has increased. When I was first appointed to the bench in 1967 there were a few hundred federal judges. Most of the judges knew each other. Today there are close to a thousand authorized and senior judges. It has become increasingly difficult for the judges to get to know each other, and, consequently, they are less likely to consult with each other and involve themselves in the fellowship so important to morale.[89]

The Alliance for Justice report speculates that the Aetna conference at Yale provided an opportunity for the insurance company's representatives to hob-nob with the judges.[90] This is always a danger when judges come out of their granite keeps.

There is interchange in the corridors and over meals that is exciting. No special interest controls these contacts. I made contact at one Yale conference with a representative of the Rand Institute whose balanced and well informed views have proved invaluable in the supervision of the *Manville* Asbestos Trust.[91] The chance to speak with eminent scientists and scholars whom I never

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88. *See, e.g.*, Neil A. Lewis, *Justice Thomas Assails Victim Mentality* N. Y. TIMES, National, May 17, 1994 at A14 (speech before highly conservative Federalist Society and Manhattan Institute).

89. *Cf.* David H. Maister, *What Makes a Firm? Can a Law Firm, as an Institution, Acquire a Measure of Value That is Independent of the Talents and Successes of its Individual Partners?*, AM. LAW. 32 (Dec. 1993).

90. JUST. FOR SALE, *supra* note 35, at 78.

91. *In Re* Joint Eastern and Southern District Asbestos Litigation, 129 B.R.. 710, 762–75 (E.D.N.Y. & S.D.N.Y. 1991).

would have met otherwise has made, for me, attendance at conferences of lawyers, judges, and scientists particularly valuable.[92]

C. Disclosure.

Judges cannot disclose everything they read, hear or see, but as much disclosure as is practicable is desirable. Judges could open their calendars to the public so that their attendance at meetings, seminars and lectures is disclosed. This could be accomplished by utilizing a computerized calendar that could be updated and changed by the judge's staff, and printed and held for any member of the public by the clerk of the court.

Seminars, judicial conferences and judges' meetings should be publicized in legal newspapers and magazines, disclosing the topics, the sponsors and the attendees. Those attending, if they are public, can be observed. If they are non-public, a record of attendance should be kept with the clerk of the court, should inquiry be made. Any paper delivered by a judge should be sent to the press room. Judges are currently required to disclose publicly all reimbursements they receive for travel and related expenses, as well as the identity of the source of the funds and a brief description of the travel itinerary and the nature of the expenses provided.[93]

III. CASE SPECIFIC KNOWLEDGE

A. Facts

More care and discretion by the judge needs to be shown if the knowledge is being acquired for a specific case. Here it is important that all sides be informed as soon as possible about what the judge is reading, hearing or seeing.

Judicial notice can be relied upon.[94] Care needs to be taken that both sides are informed to prevent misconceptions by the court. This is particularly true as to facts. In the Swine Flu cases, Judge Sherman G. Finesilver attended medical school classes for background. In the Agent Orange case I have read widely, but I have filed and docketed everything I read bearing on dioxin, even newspaper stories.

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92. For example, "Science, Technology and the Courts: The Use of Court Appointed Experts," which I attended in Washington, D.C., Nov. 4–6, 1993, was attended by, among others, Donald Barnes, Director, Science Advisory Board, Environmental Protection Agency; Randall Davis, Associate Director, Artificial Intelligence Laboratory, Massachusetts Institute of Technology; R. Steven Berry, Professor, Department of Chemistry, University of Chicago; Stephen Fienberg, Professor, Department of Statistics, Carnegie Mellon University; Leon Gordis, Professor and Chairman, Department of Epidemiology, Johns Hopkins University; Barbara Hansen, Professor, Department of Physiology, University of Maryland at Baltimore; Sheila Jasanoff, Chair, Department of Science and Technology Studies, Cornell University; Lincoln Moses, Professor of Statistics, Statistics Department, Stanford University; and Franklin Zweig, Senior Research Scientist, Center for Health and Public Policy, George Washington University.

93. *SeeFinancial Disclosure Instructions for Judicial Officers and Judicial Employees,supra* note 71, at 13.

In retrospect, I probably went too far in acquiring knowledge in Agent Orange. During the Agent Orange fairness hearings, as I traveled over the country, I had the special master arrange for me to meet with eminent specialists on such matters as carcinogens and epidemiology. My recollection is that the parties may not have known of these meetings. They probably should have been informed so that they would have had opportunities to attend or provide alternative experts. But I was concerned with basic issues of epidemiology and oncology, not with the details of the Agent Orange case. This requirement inhibits the judge's freedom somewhat, but seems essential to avoid misleading of the judge as well as misconceptions of the public.

Subsequent cases I tried used this same general data I acquired in Agent Orange. Should I have been disqualified in those cases? One judge has noted that the public nature of mass tort cases effectively results in all information related to the case being public.[95] There is little, if any, information that the judge is not exposed to in some way.[96]

Traditionally, judges have been discouraged from conducting independent factual research.[97] They have been bound by the general knowledge they brought to the courtroom and evidence presented by the parties on the record and inferences drawn from them. This requirement has often been ignored by judges and their law clerks.

While I was clerking on an appellate court, I remember a judges' conference I observed by listening (with the judges' consent) to recordings. The judges were discussing the effect of the construction of an expressway that passed by a commercial area, allegedly cutting off some light. During the discussion of the case, one of the judges said, "I saw the area when I took a walk after church — there's nothing to the contention." I hasten to add that the judge I worked for, and apparently all the other judges, had already come to that conclusion on the record. The problem is more difficult for appellate judges than for trial judges, since the latter can more readily schedule new views and hearings with the cooperation of counsel when a review of the record while writing an opinion reveals a gap.

Another case from my clerkship involved an apartment building that in the 1930's and 40's provided its tenants with free bus service to the subway stop a mile away, and to the public schools a half mile away. The building management stopped providing the service and the tenants sued for breach of contract. I was trying to understand the record and I wanted to know how far

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94. 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 200(01), at 200–2 to 200–6 (1994).

95. There is a limit, however, on the extent to which a judge can become proficient in a specialized scientific area. *See* SCIENCE AND TECHNOLOGY ADVICE TO THE PRESIDENT, CONGRESS, AND JUDICIARY 471 (William T. Golden, ed. 1993) ("There is no reason to think that...Judge Jack Weinstein (who is not a scientist) would have, could have, or should have found the time to gain the enlightenment in oncology, epidemiology and pediatrics needed to render his decision...with the 'assurance of correctness'....Today, even a trained scientist often is barely more knowledgeable than a layman about the almost innumerably proliferated specialized scientific and technological areas outside the scientist's own specialty.").

96. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 557 n.348 (1994).

97. *See* MODEL CODE OF JUDICIAL CONDUCT, Commentary to Canon 3 (1990) and ARIZ. CODE OF JUDICIAL CONDUCT, Commentary to Canon 3B(7) (1993) ("A judge must not independently investigate facts in a case and must consider only the evidence presented.").

the building was from the public bus lines that ran to the subway and the schools. It was in the Bronx; I was in Manhattan. That fact was not in the record. So, I took a stroll in the neighborhood. I was able to cover my expedition because an official published report stated the location of bus stops, permitting citation to the record rather than my visit.[98] A better way would be for the court to ask the parties to supplement the record — preferably by stipulation at the appellate level or by a hearing or view with the parties present at the trial level. Fact finding should be on the record.[99] A judge must remain impartial in a pending case, but impartiality can not require the judge to stay ensconced in chambers and out of contact with the world.[100]

As a judge, I have found it useful to make site visits in a number of cases over the years. As just a few examples, I visited the segregated schools in the Mark Twain school desegregation case and walked repeatedly in the neighborhood — usually without counsel present. I also viewed the mental institutions at issue in the Suffolk County developmentally disabled case; counsel were present.

I am now in the process of visiting a number of veterans' programs funded by the settlement in the Agent Orange case. Counsel are not interested in this administration. When I make such a visit as a judge, however, I try to take a law clerk or marshall along, and she or I write a memorandum to the file. Thus the visit is made part of the record, and the parties can respond to my observations if that ever becomes necessary. At least one judge in Arizona has, I am informed, properly used a helicopter with the attorneys present to view large areas quickly.[101]

In many of my mass tort and institutional reform cases I have also found it useful to have personal contact with the affected communities.[102] In the Mark Twain Junior High School desegregation case, I used a special master to serve as both a bridge and buffer to the many communities, individuals, and government officials affected.[103] I then held a series of public hearings required under Rule 23 of the *Federal Rules of Civil Procedure* that led to sharpened

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98. *See* Fogelson v. Rackfay Constr. Co., 90 N.E.2d 881 (N.Y. 1950) ("Distant three blocks, four or five minutes by foot, is Bridge Plaza, from which point public bus lines run to intersections within a block of two public schools (Orders of New York City Police Commissioner, New York City Record, Nov. 1, 1947, p. 5894, and April 23, 1948, p. 2085), to the subway station at Jerome Avenue and to various other sections of the city.").

99. *See, e.g.*, Price Brothers Co. v. Philadelphia Gear Corp., 649 F.2d 416, 420 (6th Cir. 1981) (law clerk's off-the-record observation of premises create a presumption of prejudice); Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593, 596 (5th Cir. 1977) (testimony at trial of judge's law clerk regarding site visit prejudicial).

100. *See, e.g.*, United States v. Doering, 384 F. Supp. 1307, 1309 n.2 (W.D.Mich. 1974) ("The court, accompanied by the attorneys, court reporter, and the defendant, viewed the premises with the permission of the elder Doerings. The Judge stood behind Mrs. Doering as she explained the assembly and charge by the officers and her action in entering the living room. Her testimony at the house was extremely credible and contains the evidence given the greatest weight by the court.").

101. Interview with Richard H. Weare, Clerk of the Court, District of Arizona, in Tucson, Arizona (Nov. 8, 1993).

102. *See generally*, Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

103. *See* Hart v. Community Sch. Bd. of Brooklyn, N.Y. Sch. Dist. #21, 383 F. Supp. 699, 764–767 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

public awareness.[104] In the *Lora* case, involving allegations that "difficult" students throughout New York City were being warehoused in special schools on a racially segregated basis, I relied on a national panel of educators, as well as public hearings and trips to the schools before approving development of a curriculum to sensitize all the teachers in the school system to the problems.[105] In the Suffolk County developmentally disabled case, I combined public hearings with conversations with parents, workers and the disabled, reports from government agencies and a court-appointed inspector, and the inspection trips I have mentioned.[106] In the DES case, I listened in my chambers as women told of the their problems. Such devices can be beneficial in mass torts as a means of connecting the court with the community.[107] A subsequent motion to recuse me in the DES cases was rejected.[108] Other judges believe it best to stay in the courtroom and do nothing ex parte.

We can expect, in view of the recent *Daubert* case,[109] that much more use of Rule 706 of the *Federal Rules of Evidence* will be relied upon.[110] Increasingly, *Daubert* hearings will be required.[111]

The judge should create a record of all material the judge reads and hears that is related to the facts of a pending case. I file and docket everything I read that is related to my Agent Orange and asbestos cases so that the parties can become aware of the information that might in some way affect my decision. There is, however, a limit to what can be disclosed to the parties in pending suits. During the Agent Orange case I read *Scientific American* every month. Should I have disclosed that?

A recent ruling of the Court of Appeals for the Third Circuit illustrates the seriousness with which a judge's outside contacts with the facts of a case can be treated.[112] A judge, while presiding over a national class asbestos matter, attended a conference at which experts discussed the latest scientific discoveries about the effect of asbestos on workers. Thirteen of the experts at the conference were scheduled to testify at the trial pending before him. The judge was invited to the conference by Dr. Irwin J. Selikoff, one of the leading experts on asbestos related diseases. The judge apparently had forgotten that plaintiffs had funded the conference and that he had approved the use of money

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104. *See, e.g.*, Curtis J. Berger, *Away from the Court House and into the Field: The Odessey of a Special Master*, 78 COLUM.L.REV. 707, 710, 730-33 (1978).

105. *See* Lora v. Board of Educ. of N.Y., 456 F. Supp. 1211, 1294–95 (E.D.N.Y. 1978), *vacated on other grounds*, 623 F.2d 248 (2d Cir. 1980).

106. *See* Society for Good Will to Retarded Children, Inc. v. Cuomo, 572 F. Supp. 1300, 1303 (E.D.N.Y. 1983), *vacated*, 737 F.2d 1239 (2d Cir. 1984).

107. During the course of settlement there is a good deal of secrecy involved in the in camera conferences with some parties present and some not. *Cf.* Jack B. Weinstein, *Ethics in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994). The propriety of this practice is beyond the scope of this speech.

108. Bilello v. Abbott Labs., 825 F. Supp. 475 (E.D.N.Y. 1993).

109. Daubert v. Merrell Dow Pharmaceuticals, Inc, 113 S. Ct. 2786 (1993).

110. *See* Jack B. Weinstein, Some Implications of the Supreme Court's *Daubert* Opinion and Ethical Obligations of the Scientific Community, Address before the Association of the Bar of the City of New York (Nov. 9, 1993) (transcript available in A.B.A. SEC. OF SCI. & TECHN., SCI. EVIDENCE REV., Monograph No.2, at 83).

111. *Id.*

112. *In re* School Asbestos Litig., 977 F.2d 764 (3d Cir. 1992).

from the settlement fund to pay for it.[113] The Third Circuit held that the judge was required to disqualify himself because his impartiality could be questioned. The decision was based on the combination of circumstances: the Judge attended a conference sponsored indirectly out of funds he approved, his expenses were defrayed in part out of that same fund, and he had a "preview" of fact witnesses who were to testify at trial.[114]

I am lucky that I did not attend the same conference. I was trying a case and could not get away. But, what I did may have been even worse.[115] A state judge and I were trying to settle mass asbestos cases. We had a private meeting with Dr. Selikoff at his hospital office to discuss with him the nature of epidemiological research in asbestos. He had never testified and would never testify. Nevertheless, I now think that it was a mistake not to have informed all counsel in advance and, perhaps, to have had a reporter present and to put that meeting on the record even though such formality would have eliminated much of the encounter's charm.

During the Agent Orange case, I went around the country speaking to scientists. I was impressed with one at the time, but later in the case he submitted an affidavit in support of a point, and I ruled against his position.[116] I believe the plaintiffs' attorneys against whom I ruled were aware of this encounter. Nevertheless a record should have been made.

The key in this area is openness and balance. Whenever possible, materials and notices of work and studies should be filed and docketed or announced at sessions with the attorneys and experts. Parties must have the opportunity to counter these extra-judicial sources of knowledge.

When scientific experts are appointed by the court under *Federal Rule of Evidence* 706, the parties are afforded reasonable access to the expert to allow them to prepare for trial.[117] It is dangerous for the court to rely on scientific evidence and not let the parties know. Where the expert appointed under Rule 706 does not testify at trial, courts have characterized the expert's role as that of "technical advisor" to the court and depositions have not been required.[118] I think this distinction does not justify withholding from the parties the opportunity for full access to the expert and his or her data and reports.[119] The "technical advisor" will still have some influence on the court.

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113. *Id.* at 778–79.
114. *Id.* at 781–82.
115. *Cf.* Panel Discussion, *Disqualification of Judges (The Sarokin Matter): Is it a Threat to Judicial Independence?*, 58 BROOK. L. REV. 1063, 1065 (1993) (remarks of Jack B. Weinstein).
116. *See In re* "Agent Orange" Product Liability Litigation, 611 F.Supp. 1223, 1285 (E.D.N.Y. 1985).
117. *See* Findley v. Blinken, 151 F.R.D. 540 (E.D.N.Y. Nov. 5, 1993); Unique Concepts v. Brown, 659 F. Supp. 1008 (S.D.N.Y. 1987), *aff'd*, 939 F.2d 1558 (Fed. Cir. 1991); United States v. Michigan, 680 F. Supp. 928, 987–88 (W.D. Mich. 1987), *rev'd on other grounds*, 940 F.2d 143 (6th Cir. 1991); Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981).
118. *See* Renaud v. Martin Marietta Corp., 972 F.2d 304, 308 n.8 (10th Cir. 1992); Reilly v. U.S., 863 F.2d 149 (1st Cir. 1988); Pennwalt Corp., v. Durand, 833 F. 2d 931 (Fed. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); Hemstreet v. Burroughs Corp., 666 F. Supp. 1096, 1124 (N.D. Ill. 1987), *rev'd on other grounds*, 861 F.2d 728 (Fed. Cir. 1988).
119. *See* Findley v. Blinken, 151 F.R.D 540 (E.D.N.Y. Nov. 5, 1993).

It is hard to cover the give and take over the dinner table. One judge related to me an experience of inviting some judges of the appellate court the judge sat on to meet for dinner at the judge's house with some long time friends who were educators expert in the nature of science in order to discuss scientific proof at a philosophical level. Other judges on the court were upset since the court was then dealing with concrete scientific issues. This seems too prissy an attitude.

In my own court, as chief judge, I invited distinguished visitors from academia and abroad to address the judges and law clerks at brown bag lunches. The sessions were open to the bar and a notice was posted in the clerk's office. As with any judicial seminars, it would seem useful to send notice of any such sessions to the local press and to post them.

B. Law

Law has traditionally been treated as an area where the courts are expected to do independent research since they are deemed to know the law. In the area of foreign law there are more pitfalls, but the distinction between local and foreign law has been largely erased insofar as inhibitions on judges' research are involved.[120]

Judges need to show discretion if they acquire independent knowledge of the law from persons outside their staff that implicates a pending case. Judges have to rely on their good sense. It is hard not to hear about matters at ALI meetings and the like that will come up or are already before a judge, and there is no doubt that the conferences we attend shape our decisions.

While Justice Cardozo was writing his opinion in *Palsgraf*,[121] he attended an American Law Institute (ALI) meeting that was taking place in the building next door to the one where he had his chambers. The topic for the meeting was tort law and, specifically, proximate cause. Judge Cardozo appears to have absorbed much of the discussion that took place in that meeting and put it in his opinion.[122] That opinion set out what is still the rule for proximate cause in the Restatement of Torts.[123]

Situations like the one with Cardozo are hard to prevent. Nor are they necessarily unhealthy in the law's development. I, personally, could trust Cardozo's judgment in attending even though I did not agree with the *Palsgraf* result.

Obviously, I heard and read about mass tort legal and policy problems affecting asbestos and DES in public fora — addressing them in a number of instances in civil procedure classes I taught and at public meetings — while those cases were pending. Here, general freedom should be encouraged so long as the forum is sufficiently neutral.[124] American Law Institute, American Bar Association, Federal Judicial Center training sessions, law school alumni meetings, local bar associations, and post graduate education on current issues

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120. *See* WEINSTEIN'S EVIDENCE, *supra* note 94, ¶ 200(02), at 200–11 to 200–14.
121. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).
122. JOHN T. NOONAN, PERSONS & MASKS OF THE LAW 147 (1976).
123. *See* RESTATEMENT (SECOND) OF TORTS §§ 430–462 (1964).
124. *See supra* notes 30–71 and accompanying text (discussing funding sources).

in the law are essential to a well functioning judicial system. The Judicial Center's programs on sentencing, constitutional law developments, habeas corpus and many other matters have helped produce our excellent bench.

Judges may be involved in attempts by friends and others to change their views of life or of the law. To live in an uncloistered world is to be exposed to the hazards of being misled to some degree. Possibly the most successful and famous of these attempts was that of Learned Hand, Harold Laski, Zechariah Chafee and Felix Frankfurter to induce Justice Oliver Wendell Holmes to broaden his view of free speech as protected by substantive limitations on government embodied in *Abrams v. United States*.[125] As related by Holmes' latest biographer, G. Edward White,[126] and Learned Hand's biographer, Gerald Gunther,[127] the letters criticize, cajole and praise. An article by Chafee provided a rationale for a modification of prior views. A tea party arranged for Laski, Chafee and Holmes before *Abrams* was decided provided an intimate, off-the-record discussion. Editorials in the New Republic hailed Holmes' dissent.

Most judges today would probably reject such obvious ploys as impertinent or amusing. But, law review articles, editorials, friendly round-the-table discussions, appearances by judges where they speak, teach or listen in audiences that may be supportive or critical all have an impact on educating judges about the nature of our world and its intellectual and philosophical underpinnings. Judges should, I think, prefer public rather than private communications and should especially beware of those private communications directed towards pending cases. Risk-for-risk, however, a thinking, informed judge is far less dangerous than one pickled in his own, ever-so-ethical views.

A judge may consult freely with his or her law clerks on issues of law. Both the *ABA Model Code of Judicial Conduct* and the *Arizona Code of Judicial Conduct* state that a judge may consult with court personnel whose function it is to aid the judge in carrying out the judge's adjudicative responsibilities.[128] A judge's law clerks are bound by the Code of Conduct for Law Clerks[129] which requires the clerks to perform their duties impartially,[130] and which mandates confidentiality regarding pending or impending proceedings before the court.[131] These ethical guidelines facilitate the communication between the judge and the law clerk. They extend to clinical law clerks widely used in federal courts as part of law school training.[132]

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125. 250 U.S. 616 (1919).

126. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 422 ff. (1993).

127. GERALD GUNTHER, LEARNED HAND 351 (1994).

128. Canon 3(7)(3) of MODEL CODE OF JUDICIAL CONDUCT and the ARIZ. CODE OF JUDICIAL CONDUCT: "A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibility or with other judges."

129. CODE OF CONDUCT FOR LAW CLERKS *in* GUIDE TO JUDICIARY POLICIES AND PROCEDURES, VOLUME II: CODES OF CONDUCT FOR JUDGES AND JUDICIAL EMPLOYEES, II-55 (June 1990).

130. *Id.*, Canon 3, II-57.

131. *Id.*, Canon 3(C), II-58. *But cf.* BOB WOODWARD, THE BRETHEREN: INSIDE THE SUPREME COURT (1979).

132. *See* Jack B. Weinstein & William B. Bonvillian, *A Part-Time Clerkship Program in Federal Courts for Law Students*, 68 F.R.D. 265 (1975). *See also* ARIZ. CODE OF JUDICIAL

I have used the specialized knowledge of several of my law clerks. In a prison case dealing with the right to practice religion, I relied upon my law clerk at the time who had gone to Divinity School at Yale. In the opinion I discussed the Christian, Islamic and Jewish requirement of participating in communal services. I filled in the Jewish, my law clerk helped with the Christian, and we jointly researched the Islamic backgrounds.[133]

A number of judges at the trial and appellate level deliberately have chosen law clerks with technical and scientific backgrounds designed to assist with work on their cases implicating this kind of knowledge.[134] Thoroughly prepared lawyers know the backgrounds of the judge's clerks as well as that of the judge. It might be useful to provide either through a private publication or the Judicial Center, a short biography of present clerks. My own experience has been with clerks who wrote a note or paper on a topic implicated in a case. Familiarity of the clerk with the field speeds up research somewhat but almost never affects the final decision.

A judge may not now freely utilize an outside private advisor though this practice was widespread only a few years ago. One judge, while he sat on the New York Court of Appeals, consulted extensively with law professors on his pending cases.[135] Some of the consultations were mere phone conversations in which new developments in the law were discussed. In other instances the judge sent the professor the briefs in a pending case and asked the professor to draft an opinion.[136] The New York Court on the Judiciary considered the matter. It held that under the *Model Rules of Judicial Conduct*, Canon 3A(7), a judge may consult with a disinterested expert on the law, but only if he notifies the parties of the identity of the expert and the substance of the consultation, and affords the parties an opportunity to respond.[137] The *Arizona Code of Judicial Conduct* has a similar provision. The commentary to the Arizona Code suggests that when a judge requests advice from an expert on legal issues that the judge invite the expert to file a brief *amicus curiae*.[138]

C. Funding

Funding issues are particularly sensitive for case specific educational programs. The judge criticized for participation in the New York asbestos conference raised an issue for the appellate court at least in part because the conference was paid for by a fund approved by the judge and the judge's expenses were defrayed out of the same fund.[139]

The asbestos conference attended by this judge was also attended by state judges. Apparently the state judges' expenses were paid for by state funds.[140]

CONDUCT, Commentary to Canon 3B(7) (1993) ("A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Canon 3B(7) is not violated through law clerks or other personnel on the judge's staff.")

133. *See* Wilson v. Beame, 380 F. Supp. 1232 (E.D.N.Y. 1974).

134. Jack B. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 42, n.131 (1986).

135. *In re* Fuchsberg, 426 N.Y.S.2d 639, 646 (Ct. Jud. 1976).

136. *Id.*

137. *Id.*

138. ARIZ. CODE OF JUDICIAL CONDUCT, Commentary to Canon 3B(7) (1993).

139. *See supra* notes 112–114, and accompanying text.

140. Conversation of Jack B. Weinstein with Justice Helen E. Freedman, Federal Courthouse, Brooklyn, New York (Oct. 11, 1992). *But cf.*, *In re* School Asbestos Litig., 977

Government funding is preferable. Expenses of state judges in connection with the State Court Mass Tort Litigation Committee have been paid by the National Center for State Courts and the State Justice Institute, with federal monies.[141]

Early in the Manville Trust litigations, state judges attended conferences paid for out of Manville Trust funds expended through the National Judicial College, Reno, Nevada.[142] This was at a time when the Trust was not involved with the litigation. Nevertheless, the practice seems ill-advised since litigation was likely.

In the breast implant cases, the attorneys for plaintiffs and defendants voluntarily provided a fund of $50,000 used to pay expenses of state trial judges who traveled to meetings with the federal judge assigned to the case in order to coordinate state and federal discovery and pre-trial control. The federal judge uses federal government sources of funds for his own expenses.[143] Many, but not all state judges' expenses were paid for by federal money expended through state disbursing agencies.[144]

Coordinating state and federal cases is vital, but judges' expenses should not be paid for by litigants.[145] Even if both sides fund the meetings, the payment could still create an appearance of bias toward the lawyers. Arguably the judge will be grateful that the lawyers have co-operated in establishing the joint fund and may be more likely to approve payment of attorneys' fees due under a trust or a settlement agreement, or might be more lenient in dealing with the lawyers. Especially in class action suits where the judge must approve attorneys' fees, or in tort cases where the attorneys work on a contingency basis, the lawyers have a financial interest in the litigation, and consequently have a relationship with the judge that is similar to that of the parties.

Lawyers are themselves an interest group. The same funding precautions should be followed for lawyer-sponsored functions as are followed for those sponsored by any other interest that regularly participates in litigation. Judges should have expenses paid by a government fund, not the ABA or local bar if possible.

Sometimes the relationship seems tenuous, but it ought to be faced. A publishing company funded a cocktail party for the judges at the Multidistrict Judges meeting I attended in Florida. The chairman announced that anyone with ethical qualms should feel free not to attend. I had a little bit of a qualm, even though I only drank a diet coke. The whole issue should be avoided. The judges could pay for the gathering as part of their meal costs reimbursable from federal funds.[146] Federal judges are potential customers for legal publications.

F.2d 764, 770 (3d Cir. 1992) (allegations that judge had some of his own expenses at conference paid for out of funds controlled by litigants).

141. Conversation with Justice Freedman, *supra* note 140.

142. *Id.*

143. Oral statement of Judge Samuel C. Pointer, Jr. at the XXVI Transferee Judges Conference, Palm Beach, Florida (Oct. 6, 1993) (heard by author).

144. Interview with Richard Van Duizand, Deputy Director, State Justice Institute, in Washington, D.C. (Nov. 5, 1993).

145. GUIDE TO JUDICIARY POLICIES AND PROCEDURES § 5.4–3 (1993) ("A judge may not permit travel expenses incurred in the performance of judicial duties to be paid by litigants.").

146. The Committee on Codes of Conduct of the Judicial Conference of the United States disagrees. GUIDE TO JUDICIARY POLICIES AND PROCEDURES § 5.4–5(b) (1993) ("It is

IV. SUMMARY

Judges should be impartial and unbiased. Two different models exist to achieve these traits. The first model—judges living in a hermetically sealed granite tower with no outside influences of any kind—is unrealistic and unwise. That leaves us with a second model—judges who require a knowledge of the real world. If judges cannot be shielded from acquiring information, how can we insure that they remain impartial? Encouraging and allowing judges to learn as much as they can about the world, their craft and the cases before them is desirable. Some limits and caveats are required to give the parties a fair opportunity to meet the judges' possible misperceptions and to assure the public of an unbiased and fair minded judiciary. As a first tentative approach, I offer, with much trepidation, the following suggestions:

1. Judges should be encouraged to gain as much general knowledge as possible, preferably from sources not tainted by venal or extreme ideological views.

2. Educational institutions such as the American Bar Association, the Federal Judicial Center, ALI/ABA, local bar associations and law schools should obtain funding for judicial education programs from the government, neutral, or balanced sources.

3. Too rich a setting for conferences should be avoided.

4. Flouting by judges of local sensibilities by public attendance at controversial meetings should be avoided.

5. In case-specific situations, judges should rely on staff and parties and not on third persons for advice on the law. Limited consultation with judges in the same hierarchical level is often appropriate. On facts, the judge should inform the parties of fact discovery and consultations outside the record.

6. Funding for educational programs is critical. It should come from sources that will not benefit from the programs. Where possible, funding through impartial buffering is desirable. Judges' expenses should be paid by neutral government bodies or educational institutions. Joint meetings of judges in a pending case should not be funded by attorneys.

7. Disclosure of judges' participation in educational events is desirable. Judges should make their calendars available to the general public. Seminars and conferences should be publicized in legal newspapers describing the agenda, the participants and the sponsors. Meetings should be open to the public and practitioners where possible.

8. An independent source for the evaluation of the background of organizations running programs judges expect to attend is desirable.

9. Law clerks' backgrounds should be available for those interested.

10. Consultations with Special Masters, Rule 706 advisers, and other judges about a case should be revealed to the parties if there is any possibility of the information being significant.

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permissible for judges to attend bar association events such as receptions where a legal publishing firm has donated the hors d'oeuvres and beverages to the bar association.").