RESEARCH PAPER

Tobacco industry use of judicial seminars to influence rulings in products liability litigation

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Objectives: This paper examines the tobacco industry's efforts to influence litigation by sponsoring judicial seminars.
Methods: Thousands of internal tobacco documents were examined, including memos, reports, presentations, and newsletters. Connections to outside organisations were corroborated by examining tobacco industry financial records, budgets, and letters pledging funds. Facts about outside organisations were triangulated through examining their websites and publicly-filed financial records, and verifying facts through their representatives' statements in newspaper and law review articles.
Results: There are direct financial ties between the tobacco industry and groups that organise judicial seminars in an effort to influence jurisprudence, and judges who attend these seminars may be breaching judicial ethics either by not inquiring about the source of funding or by ignoring funding by potential litigants.
Conclusions: The tobacco industry's attempts to clandestinely influence judges' decisions in cases to which they are a party endangers the integrity of the judiciary.

In 2004, United States Supreme Court Justice Antonin Scalia infamously took part in a duck hunting trip with Vice President Richard Cheney and an oil industry executive, and accepted a ride on Vice President Cheney's jet, Airforce II, all the while knowing he would shortly be hearing the case against Vice President Cheney for concealing the substance of his meeting with energy industry executives. Justice Scalia's fraternisation with a defendant in an active case and his participation in a vacation sponsored by oil industry executives who also were concerned with the outcome of Cheney's case raised concerns about the ability of corporate interests to access and influence judges' rulings in cases in which they have a proprietary interest.

While Justice Scalia ultimately refused to recuse himself, denying that he had discussed the pending case or had any substantial conversations with the Vice President and that his actions could not reasonably affect his impartiality,[1] the situation has highlighted the importance of preventing certain corporate interests from having unequal, extra-judicial access to judges outside of the courtroom. This is true particularly when such interests have potential or actual litigation interests before their courts. Recent studies have shown possible links between judges' attendance at privately funded judicial seminars and their rulings in favour of the corporate entities who sponsored them.[2 3]

This tactic of gaining access to judges through the guise of ''judicial education''—some would call them ''judicial junkets''—is common not only among corporations interested in swaying the outcome of cases brought by environmentalists, but also among cigarette manufacturers eager to influence products liability litigation and other types of cases that could affect the long term financial viability of the tobacco industry. In the United States, there are rules that prevent litigants with pending or potential claims from trying to influence the outcome of cases by interacting outside the courtroom with judges who might be hearing their cases. Further, the rules also set boundaries for judges' extra-judicial activities, including attending seminars. The most troubling aspect of the tobacco industry's use of judicial seminars is that its involvement is usually without disclosure, so that many judges exposed to the tobacco industry's ''educational'' seminars or materials may not even know that the tobacco industry, which is a potential litigant in all jurisdictions throughout the United States and indeed the world, may be shaping their agenda. Shedding some light on the network of relationships between the tobacco companies and the groups hosting educational judicial seminars will help judges better understand the implications of attending seminars and enable plaintiffs in tobacco cases to seek the appropriate remedy if their judge had attended a tobacco industry-funded seminar.

METHODS

Thousands of internal tobacco document were examined, including memos, reports, letters, presentations, and newsletters, using document databases available at www.tobaccodocuments.org. Search terms included ''judge'', ''judicial'', ''law school'', ''lawyer'', ''legal'', ''seminar'', ''class'', and ''education''. Of particular interest were budget plans that included allocations for organisations and groups with a legal or political agenda. Search terms that emerged from these documents included the names of these organisations and the individuals who authored the original documents. Connections to outside organisations were corroborated by examining tobacco industry financial records, budgets, and letters pledging funds to these groups. Information on groups who either conducted or provided funding for judicial seminars were triangulated through the tobacco document databases, the groups' web pages, and news databases such as Lexis/Nexis and television network web pages. Information also was cross-checked by examining news accounts and law review articles, and by examining publicly filed tax forms at www.guidestar.org. Information about the instructors of judicial seminars was obtained from internal tobacco industry documents. Information about the

Abbreviations: CRC, Community Rights Council; LEC, Law & Economics Center at George Mason University School of Law; LOEC, Law and Organizational Economics Center; WLF, Washington Legal Foundation

legislative and administrative response came from news accounts and official government websites.

Buying judicial access can adversely affect plaintiffs' cases

The primary issue in the duck hunting incident is that one of the litigants had ex parte (outside the courtroom and the presence of the other parties to the litigation) access to a judge whom he knew would shortly be hearing his case. This is a problem that already has plagued environmental litigation, and has been illustrated by two studies that show corporations with pending or potential litigation interests have privately (and sometimes secretly) funded judicial seminars, which often are hosted in exotic locales with a vacation-like atmosphere.[2 3]

The Community Rights Council (CRC) conducted studies in 2000 and 2004 showing that a significant proportion of the federal judiciary had attended judicial seminars hosted by conservative advocacy organisations with anti-environment, pro-corporate agendas. They asserted that the ''marketplace of privately-funded judicial education is overwhelmingly dominated by pro-market, anti-regulatory seminars offering a single and unchallenged line of reasoning in areas of law with many competing views.''[2] The studies drew a correlation between judges' attendance at these seminars hosted by parties with litigation before them and their judicial decisions in favour of those parties. CRC noted many examples of ''anti-environmental activism'' by judges who had attended the seminars. For example, after attending judicial seminars hosted by pro-business groups, judges have: (1) struck down the Environmental Protection Agency's proposed health standards for smog and soot; (2) invalidated Department of the Interior regulations prohibiting severe habitat modifications that would kill endangered species; and (3) expanded the Fifth Amendment takings clause to discourage the use of environmental regulation to protect against overdevelopment.[2] CRC concluded, ''It is impossible to deny the appearance of impropriety these seminar programs can cause. Left unaddressed, these programs seriously threaten public confidence in the American judicial system.''[3]

The issues important to the tobacco industry include tort reform, preventing ''junk science'' from being entered into evidence in products liability cases, risk assessment and common knowledge about the dangers of smoking. Though their issues are different, their tactics in influencing the judiciary's opinion on matters critical to them are similar to the energy industry. The tobacco industry also helps fund judicial seminars through third party groups or organisations and also funds its own seminars, often held at desirable vacation destinations, where judges hear lectures on the ''proper'' way to adjudicate cases in which the tobacco industry has a proprietary interest. In some cases, the seminars have been hosted by non-profit organisations that have been created and funded by the tobacco industry itself. In other instances, they contribute without adequate funding disclosure to other organisations that sponsor judicial seminars and share the tobacco industry's agenda of so-called tort reform and limiting corporate products liability. Overall, the tobacco industry's ''judicial junket'' strategy appears to be to infiltrate the judicial process with pitches for its own point of view disguised as neutral instruction. In fact, the seminars are taught from a pro-corporate or tobacco industry viewpoint, and judges who have attended the seminars have attested to the one-sided nature of the lectures.[4] The instructors' resumés demonstrate their conservative ideological bent, which is reflected in their seminars. There is nothing inherently wrong with judicial seminars, and those sponsored by groups such as the Federal Judicial Center (which is not a potential litigant) may help to keep judges up to date on the rapidly changing legal landscape, but allowing interest groups' propaganda to be disguised as judicial education is a dangerous practice.

The law governing judicial conduct regarding attending seminars

There are rules governing whether judges can attend privately funded seminars or other educational events, whether their expenses are paid by the sponsors or not. Several federal laws regulate the conduct of federal judges.[5–7] Another source of legal guidance is the Model Code of Judicial Conduct, created by the American Bar Association.[8–10] State codifications on this issue vary, but almost all follow the American Bar Association's Model Code of Judicial Conduct.[11]

Federal law

There are federal statutes that govern the propriety of judges attending judicial seminars. The statute governing disqualification of a judge requires a judge to recuse him or herself if outside contact with litigants makes possible that the judge's ''impartiality might be reasonably questioned''.[12] Another statute that might prevent altogether judges from attending privately funded seminars is one governing gifts to federal employees, which states that: ''…no Member of…the judicial branch shall solicit or accept anything of value from a person—(1) seeking official action from [or] doing business with…the individual's employing entity; or (2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties.''[13] Even if a judge does attend a seminar, there are statutory reporting requirements required by the Ethics in Government Act of 1978, under which judges must report ''[t]he identity of the source and a brief description (including a travel itinerary, dates, and nature of expenses provided) of reimbursements from any source aggregating more than the minimal value as established by section 7342(a)(5) of title 5, United States Code, or $250, whichever is greater and received during the calendar year.''[14]

Model code of judicial conduct

The American Bar Association has adopted a Model Code of Judicial Conduct to set standards by which judges' actions should be guided. Three of these provisions are pertinent to judges' decision to attend privately-funded seminars. Canon 2 states that ''A judge must avoid all impropriety and appearance of impropriety… 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.''[15]

Canon 3 states that ''a judge shall not be swayed by partisan interests…''[16] Canon 4 states that ''A judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) case reasonable doubt on the judge's capacity to act impartially as a judge…''[17]

THE TOBACCO INDUSTRY HAS CREATED ITS OWN NON-PROFIT SEMINAR FOUNDATION

The tobacco industry has been deliberate in its attempts to sway judicial opinion by creating, founding and entirely funding an organisation with non-profit status whose sole mission is to host events to convince legislators, bureaucrats, and members of the judiciary that the tobacco industry should not suffer economic damages as a result of litigation, legislation, or regulation. Philip Morris/Altria, the leading cigarette manufacturer with the largest market share, has founded Libertad, Inc, which has hosted seminars for federal judges at appealing vacation destinations in America and Europe.[4] Some of the attending judges had tobacco cases

pending on their dockets, and subsequently ruled in favour of the tobacco companies. A Philip Morris spokeswoman has denied that Philip Morris had any direct control over the organisation, but Andrew Whist, a Philip Morris senior vice president for external affairs who is president of the organisation, has conceded that Libertad's official address was at Philip Morris's headquarters.[18] Whist was present at judicial seminars sponsored by Libertad, free to interact with and influence the judges.[4]

Libertad, Inc

Libertad, Inc issued a press release in 1993 written by a public relations firm on retainer to the tobacco industry that described the organisation as ''a wide international coalition of representatives of commercial, academic and legal circles as well as media and human rights experts [that] has been studying and analysing regulation of commercial speech''.[19] Considering that Libertad's sole funder and controller was Philip Morris, the claim that Libertad was a coalition of any sort is dubious at best.[4] In 1991, Philip Morris's monetary contribution to Libertad was $200 000.[20] In 1995, the amount rose to $300 000.[21] Moreover, evidence abounds in online internal tobacco industry documents that Philip Morris completely controlled the operations of Libertad. Philip Morris controlled all Libertad files and had a records retention policy for its files as well.[22] Philip Morris also compiled and distributed press kits to further Libertad's mission.[23]

A 1993 memo from Libertad president Andrew Whist discussed the threat of cigarette advertising bans and described the strategy of setting up workshops to recruit ''editors, journalists, politicians, judges, business executives, prominent lawyers'' and others to speak on behalf of the tobacco industry's agenda, with their travel expenses being reimbursed for attending such functions.[24] Libertad hosted several federal judges on trips to various vacation destinations to convey its view on the issue of commercial speech.[4] Ninth Circuit Court of Appeals Judge Alex Kozinski, who attended two Libertad conferences in 1992 and 1995 (at which president Andrew Whist was in attendance) later commented: ''I knew that the tobacco industry had an interest in the conferences, …because, I guess commercial speech is a big issue for them.'' Commercial speech is not the only issue that concerns the tobacco industry—another major concern is the use of expert witnesses in products liability litigation. After attending Libertad's seminars, Judge Kozinski later ruled in favour of corporate interests in a landmark case, Daubert, et al. v. Merrell Dow Pharmaceuticals, Inc., in which he set a precedent and national standard for rejecting plaintiffs' expert witnesses in products liability cases.[25] One can only speculate whether Judge Kozinski's decision was swayed by attending the Libertad seminars, and the mere appearance of impropriety presents an ethical dilemma. This decision raises questions about the impartiality of judges who attend these types of biased industry sponsored judicial seminars. Moreover, since Libertad operates on an international basis, America's judicial system is not the only one vulnerable to the tobacco industry's attempts to change the direction of judicial findings in its own favour.

THE TOBACCO INDUSTRY ALSO USES ESTABLISHED GROUPS TO DISGUISE ITS PARTICIPATION IN JUDICIAL SEMINARS

George Mason University School of Law, Law & Economics Center

Sometimes the tobacco industry relies upon established conservative organisations to convey its anti-products liability message to judges in order to avoid alerting judges to the fact that they are receiving the tobacco industry's agenda when they attend seminars. One of the main purveyors of judicial seminars with a pro-business slant is the Law & Economics Center at George Mason University School of Law (LEC) in Arlington, Virginia. All federal judges are eligible to attend. Classes include topics such as product liability law, public health, and risk assessment. The background of its instructors is weighted towards pro-tobacco interests. George L Priest, a Yale Law School professor, has taught product liability law for LEC.[26] He also has been affiliated with the Washington Legal Foundation (WLF), an organisation partly funded by the tobacco industry that writes conservative position papers that, according to a letter from WLF to Philip Morris chairman and CEO Hamish Maxwell, WLF ''aggressively market[s] to federal and state judges and their clerks''.[27] Kip Viscusi, a Harvard Law School professor, has taught risk assessment classes for LEC[26] and also frequently testifies about this issue on the tobacco industry's behalf in products liability litigation.[28] According to the LEC's own literature, more than 600 judges have attended its seminars since the group's founding in 1976, which shows the pervasiveness of this programme's reach into the federal judiciary.[29] Classes include topics such as product liability law, litigation theory, scientific method, public health, and risk assessment, all of which are pertinent specifically to tobacco litigation.

An internal Philip Morris memo with the heading ''Strategic Focus'' listed LEC as one of its ''Key Allies''.[30] A 1995 list of public policy grants by Philip Morris included a contribution of $85 000 to the George Mason School of Law, home of LEC.[31] In honour of the 200th Anniversary of the United States Constitution, the Tobacco Institute planned a programme to ''make an unambiguous statement about tobacco and rights'', whose target audience included ''the legal profession including…judges…''.[32] This plan for the bicentennial observance included granting $160 000 to George Mason University for a ''summer event''. The proposal pragmatically explained the use of third-party allies such as George Mason University, stating: ''Broad-based coalitions often help establish credibility and place an unpopular issue in a broader, more acceptable context.''

As early as 1980, the true nature of these biased seminars was being investigated and exposed by the popular press, as in an article that appeared in the *Washington Post*.[33] When confronted with the question of the propriety of accepting corporate donations from parties with potential litigation interests before the judges who were receiving the seminar training, LEC director Henry G Manne admitted that ''it would be 'disingenuous' to suggest that they don't see the program 'in ideological terms'.'' While some judge attendees interviewed said they were unaware of the corporate nature of the programme's funding, others did realise the source of their benefaction came from corporations and were unconcerned about it. Their lack of concern for the strongly ideological nature of the lectures might indicate sympathy with the sponsors' message, or just demonstrate a confusion about or indifference to the rules governing judicial seminar attendance, which require judges to avoid the appearance of impropriety by associating with potential litigants.

Both the judges' lack of knowledge of the nature of the funding and their disregard for it if they did know raise ethical issues as to whether they should be accepting the value of the seminars from potential litigants and also whether they should attend seminars with a biased agenda. Senior Federal District Court Judge Jack B Weinstein, who is now presiding over a civil racketeering case regarding ''light'' cigarettes,[34] wrote an article assessing the merits of LEC's seminars, in which he claimed that he thought the presentations were ''balanced,'' but nevertheless admitted:

"[i]t is likely that the knowledge and perspective Professor Manne helped impart did affect my decisions and those of my colleagues in the judiciary."[35] In affecting Judge Weinstein's judgments, the seminars sponsors' achieved their objective of influencing public policy and litigation through the judiciary. Further, Judge Weinstein mistakenly observed that "non-corporate foundations funded the judicial programs". A report by the Alliance For Justice[36] as well as tobacco industry internal documents have showed that in fact LEC accepted corporate funding, thus invalidating Judge Weinstein's implication that the seminars escaped an ethical taint. This means that the seminars' sponsors are succeeding in disguising their agenda and its funding source from at least some of the seminars' attendees.

University of Kansas, Law and Organizational Economics Center

The Law and Organizational Economics Center (LOEC), formerly based at the University of Kansas and now operated from the Argyos School of Business and Economics at Chapman University in California, sponsors seminars for all state judges. The bi-annual seminars began in 1995 and are held at resorts located in Florida and Utah.[37] The cost of the seminar, paid in full by its hosts, is about $5000 per judge.[38] LOEC's director, Henry Butler, used to work for LEC.[37] Class offerings include scientific methodology and the admissibility of expert testimony—again, pertinent topics in tobacco litigation.

Philip Morris is one of over 50 corporations that help fund LOEC.[37] According to an internal tobacco industry memo, LOEC is considered a "key all[y]" in its attempt to shape products liability law.[30] In fiscal years 1998[39] and 1999,[40] Philip Morris allocated $10 000 each year for LOEC's administrative costs. One seminar LOEC hosted touched on whether to admit expert witness testimony, a topic that is central in products liability cases.[41]

Newspaper interviews with judges who have attended the seminars have had varied responses. Although some judges did not detect any bias in the presentations, one seminar attendee stated "the concepts seemed to favor one view".[42] Another judge took issue with the way LOEC presenters portrayed products liability plaintiffs, and claimed that she "dropped out because the program presented economic theories clearly favoring big business". She stated: "I didn't think it was objective in any way."

OFFICIAL RESPONSE TO THE PROBLEM

As news outlets and advocacy groups began to publicise allegations that conservative think tanks were acting as front groups for corporate entities interested in influencing the judiciary to adopt a pro-business jurisprudence, the institutions responsible for overseeing the ethical conduct of the judiciary reacted with various viewpoints and proposals. The United States Congressional House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property held hearings to investigate the matter.[43] Judge William L Osteen, the Chairman of the Judicial Conference Committee on Codes of Conduct, testified before the Congressional committee: "Let me suggest that in the modern day of proliferating litigation, some caused by Congressional enactment, some by increased population, and some by the nimble minds of a litigious society, seminars are a necessity."[44] Judge Osteen himself has attended seminars hosted by George Mason's LEC. An investigation by the television show "20/20" in 2001 included a poolside interview with Judge Osteen that revealed his blasé attitude towards the nature and funding of these trips.[45] In response to the question of whether he considered the trip a junket, Judge Osteen replied: "Well, it depends what you mean by junket." It is also noteworthy that Judge Osteen is a former lobbyist for tobacco growers[46] who has ruled in the tobacco industry's favour in its challenge to the Environmental Protection Agency's classification of environmental tobacco smokes as a class A known carcinogen (which was overturned on appeal).[47]

What this paper adds

This study exposes a practice by which judges attend tobacco company-sponsored seminars that consist of curricula dealing with litigation issues that are central to tobacco litigation. The biased seminars are sponsored by tobacco companies who may be potential litigants in every jurisdiction, state or federal.

In his 2001 official statement approving the practice of judges attending such seminars, Judge Osteen ignored contradictory language contained in the Code of Conduct Committee's 1980 Advisory Opinion No. 67, which states: "It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics of the seminar are likely to be in some manner related to the subject matter of such litigation."[48] Advisory Opinions explain the official rules governing judicial conduct. Since the tobacco industry is a likely defendant in every jurisdiction in America, allowing judges to attend tobacco industry funded judicial seminars raises serious ethical issues. On 16 August 2004, the Committee on Codes of Conduct, still led by Judge Osteen, issued a clarification on Advisory Opinion No. 67. An analysis of the committee's clarifications by the Community Rights Council found that they resulted in the rules having been significantly weakened.[49] For instance, the committee's new interpretation of Advisory Opinion No. 67 allows attendance at judicial seminars funded by potential litigants, provided that the sponsoring organisations assert that their donations only support their organisations in general, not the seminars specifically, a distinction without a practical difference. Further, the newly clarified Opinion dropped the formerly explicit requirement that judges "report…the value of the gift on their financial reports", sometimes as much as $10 000 per seminar. Finally, the new Opinion removes the onus from judges to investigate the funders' identities, which might result in a judge receiving a financial benefit from potential litigants.

Not only did the House of Representatives hold hearings on the propriety of judges attending these seminars, but members of the Senate took an interest in the matter as well. Senators John F Kerry (D-Massachusetts) and Russell D Feingold (D-Wisconsin) co-sponsored legislation in July 2000, proposing a ban on providing judges with all-expenses-paid attendance at privately funded judicial seminars, or "judicial junkets".[50] United States Supreme Court Chief Justice William H Rehnquist denounced the Kerry/Feingold proposal as "antithetical to our American system and its tradition of zealously protecting freedom of speech".[51] The Federal Bar Association also opposed the legislation as being "overly broad" and "rais[ing] a number of serious constitutional issues, and instead recommended the formation of a congressional panel to study the matter further".[52] So far, the Kerry/Feingold bill has not advanced through the legislative process. In response to the proposed legislation, the American Bar Association also began examining the issue under the aegis of its Standing Committee on Federal Judicial Improvements & Judicial Division, but thus far has not proposed any changes.[53]

CONCLUSION

The secrecy that surrounds the identity and agenda of the funders of judicial seminars calls out for a remedy that includes mandating that seminar organisers proactively provide full disclosure of funders' identities to judges so that they can assess the propriety of their attending seminars. This way, plaintiffs have the opportunity to request that a judge be recused from a case in which they detect a conflict. Further, if judges adhered to both the letter and the spirit of the various statutes and model codes the issue probably would become moot: they most likely would not be attending such biased seminars because they would know that they were not receiving a balanced look at the issues and that the seminars' funders are potential litigants whose cases they might adjudicate someday. Ideally, the practice of sponsoring biased kinds of judicial seminars would wither under improved public scrutiny. With specific information about the nature and funding of these seminars, the public health community will be in a better position to argue that judges are only getting one side of the story. In the end, the issue of influencing judges' rulings through the use of tobacco industry sponsored seminars is not as crass as slipping dollars into the judges' pockets, but rather more insidious by planting ideas into their heads. Given the global nature of tobacco companies' influence, and their stated mission of influencing tobacco policy on a global scale, full disclosure of seminar sponsorship by tobacco companies is relevant not only for litigants in American courts but anywhere in the world where the judiciary makes determinations that could affect the tobacco industry.

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