

JEAC 1996-1

May 28, 1996

You seek the Committee's opinion on an invitation you are considering for a lecture tour in Australia this fall. The relevant facts and circumstances are stated in your letter dated May 6, 1996 requesting the Committee's opinion and in the attachments to your letter.

Professor Ian Ramsay, Harold Ford Professor of Commercial Law at the University of Melbourne Law School, invited you to speak at the University of Melbourne and other law schools on the role of the Supreme Court of Delaware in corporate law in the United States and recent judicial developments relating to corporate law. His letter mentions a number of United States corporate law scholars who have lectured at the University of Melbourne. The tentative itinerary provides for your arrival on October 28 and departure on November 22. On October 31, you would be a keynote speaker at a Conference on the Role of the Judiciary in Corporate Law sponsored by the University of Melbourne Corporate Law Interest Group, the Australian Institute of Company Directors, and the Australian Institute of Judicial Administration. The draft format shows that justices of courts throughout Australia and New Zealand will participate in the seminar. You would thereafter give lectures at the Universities of Western Australia, Adelaide, Canberra, Sydney, and perhaps other places.

The proposed lecture tour is clearly proper under Canon 4 of the Delaware Judges' Code of Judicial Conduct:

Canon 4. A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

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:

- A. A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice (including projects directed to the drafting of legislation).

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Commentary

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

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A judge's participation in law-related activities is subject to the proper performance of judicial duties. Your letter explains that during the month-long tour you will regularly communicate and work with the other justices on opinions and administrative matters, that the other justices are willing and able to handle the temporarily increased workload during your absence, and that you do not believe there will be a significant interference with judicial duties. These arrangements satisfy the requirement that participation in law-related activities is subject to the proper performance of judicial duties.

Your letter states that there will be no honorarium but that your costs of travel, food and lodging, except for pleasure trips, will be reimbursed. Your wife will accompany you but you will not seek reimbursement for any of her expenses.

Reimbursement of expenses for law-related activities is expressly permitted:

Canon 6. A Judge Should Regularly File Reports of Compensation Received for Law-Related and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the law-related and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

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- B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

You mention that private companies or law firms may contribute to the sponsoring universities for the purpose of defraying their cost of reimbursing you. Considering the sponsorship, subject, and circumstances of the proposed lectures, we consider it clear that the sources of reimbursement would not give the appearance of influencing you in the performance of your judicial duties or otherwise give the appearance of impropriety.

One of Professor Ramsay's letters says that a leading law firm in Australia would be pleased to provide \$1,000 towards your expenses if you would be willing to address partners of the firm and executives of the firms' clients on problems or difficulties that foreign companies may confront when dealing with the United States' legal system and, in particular, class actions in United States courts. A later letter says that this part of the proposal "may not have to proceed."

Acceptance of expense reimbursement may be governed by the canon on gifts. See Canon 5C(4) commentary. Canon 5C(4)(a) permits "a gift incident to...an invitation to the judge...to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice." Responding to an inquiry concerning the Code of

Conduct for United States Judges, which is similar to Delaware's Code, the federal Advisory Committee on Codes of Conduct considered a judge's acceptance of hospitality from lawyers separately with respect to lawyer organizations, law firms, and individual lawyers. In Revised Advisory Opinion No.17, the Committee says:

Hospitality extended by a law firm obviously can more readily raise questions about the appearance of impropriety. In this context, we believe that a judge and spouse may attend cocktail parties hosted by law firms in connection with bar association gatherings and an infrequent dinner commemorating a firm's significant anniversary, but should not accept hotel and travel expense reimbursement.

We are of the opinion that the proposed payment toward reimbursement of expenses would not be a gift. The earlier letter says that the law firm would contribute toward reimbursement if you would give a talk to partners and executives of clients of the law firm. In these circumstances, expense reimbursement seems more like compensation than a gift. See Canon 6A. Moreover, the contribution would go to the sponsor of the event. We therefore conclude that the proposal would not be governed by the specific provisions of Canon 5(C)(4) but rather by Canon 2: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities."

Although one might suppose that there is little risk of an appearance of impropriety in addressing an Australian law firm and its clients, one cannot be certain of that in today's global economy. If the proposed contribution were a gift, it would be permissible only if "the donor is not a party or other person who has come or is likely to come before the judge or whose interests may be substantially affected by the performance or nonperformance of his or her official duties." Canon 5C(4)(h)(ii).

The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. Canon 2A commentary. It would be prudent to address a particular law firm and its clients only if reasonable inquiry would not disclose circumstances creating an appearance of impropriety like those quoted above from Canon 5C(4)(h)(ii). Otherwise, there is a risk that the proposed conduct could create a perception that you are lending the prestige of the judicial office to advance the private interest of others, or conveying or permitting others to convey the impression that they are in a special position to influence you, in violation of Canon 2B.

It would be preferable that the event be open to other lawyers and interested persons. We counsel caution because of the combination of circumstances: a law firm offering to contribute toward reimbursement in consideration of your agreeing to give a talk limited to that law firm and its clients. However, if the event is open to others, there would be no cause for concern about a possible appearance of impropriety.

FOR THE COMMITTEE:
BERNARD BALICK, Chair