

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT

219 South Dearborn Street
Chicago, Illinois 60604

December 16, 2013

DIANE P. WOOD
Chief Judge

No. 07-13-90091

IN RE SUPPLEMENTAL COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainants, one Member of Congress and two heads of public interest organizations, filed a Complaint on November 13, 2013, against a judge. Their complaint asserted that the judge violated Canons 2(B) and 4(C) of the Code of Conduct for United States Judges. The judge did so, Complainants charged, when the judge was featured on the program of the 2013 annual dinner of the Federalist Society. Tickets to the annual dinner cost \$200 per person.

In an Order and Memorandum dated December 5, 2013, I dismissed that Complaint after an initial review of the allegations. I concluded that dismissal pursuant to 28 U.S.C. § 352(b)(1)(B) was appropriate, because I was satisfied after my limited inquiry (authorized by 28 U.S.C. § 352(a)) that the allegations “lack[ed] any factual foundation or [were] conclusively refuted by objective evidence.” The objective evidence to which I referred demonstrated to my satisfaction that the annual dinner was not a “fund-raiser” for the Federalist Society. Since it was not a fund-raiser, the subject judge did not violate either Canon 4(C) or Canon 2(B) of the Code of Conduct by virtue of the fact that the judge was featured on the dinner program. Attached to the Memorandum explaining my conclusion were three Appendices: one from the Federalist Society, reporting the actual per capita cost of the dinner; one from the Seventh Circuit Bar Association’s 2013

program, showing that the normal cost of that dinner was also \$200 per person (shown on page 5); and one from the American Bar Association's 2013 Annual Meeting, which featured the various corporate sponsors for that event.

On December 9, 2013, the Seventh Circuit Clerk's Office received a Supplemental Complaint of Judicial Misconduct in this matter, from the same Complainants. The Supplemental Complaint shows signatures dated December 5, 2013, and so it is likely that the Supplemental Complaint was filed before Complainants received my decision in the initial matter. I am therefore addressing the Supplemental Complaint on the merits. I note, however, that if Complainants wish to pursue this matter further, the proper route is not to file more Supplemental Complaints; it is to seek review of my order before the Seventh Circuit's Judicial Council, pursuant to 28 U.S.C. § 352(c).

The initial Complaint pointed out that the dinner program for the 2013 Annual Dinner included acknowledgments from the Federalist Society of the financial support for the Society furnished by several corporations and law firms. In my initial decision, I noted that comparable acknowledgments appear in the Society's Annual Report, the Student Symposium brochure, and the Convention brochure. The Supplemental Complaint points out that the program and seating booklet for the Annual Dinner single out certain corporate sponsors (identified as "Gold," "Silver," and "Bronze" supporters) "for their generous support of the 2013 Annual Dinner." The Supplemental Complaint finds it notable that the Society did not thank these sponsors (at least not in the dinner program) for their support of the concurrent National Lawyers Convention. Complainants speculate that the sponsors received a tax deduction for their support of the dinner.

The Supplemental Complaint argues that the Annual Dinner is "clearly an event to thank and cultivate major Federalist Society donors," noting that the Society placed significant donors at tables with prominent guests, including the subject judge and at least two members of the United States Supreme Court. It then contends that the total amount each donor gives to the society each year should be added to the amounts contributed for the dinner. If all that money should be attributed to the dinner, then the amount collected for the dinner would exceed by a large margin the cost of the dinner, and thus a closer look would be necessary in order to determine whether it was indeed a fund-raiser.

Once again, it is useful to recall that Canon 4(C) provides that a judge "should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose." Commentary to Canon 4(C) explains that attendance at fund-raising events for law-related or other organizations is permitted, so long as the judge is not a speaker, a guest of honor, or

featured on the program for the event. Canon 2(B) states that “[a] judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others, nor convey or permit others to convey the impression that they are in a special position to influence the judge.”

My review of the Supplemental Complaint shows that it raises three basic issues: first, whether a dinner featuring corporate or other sponsorship dedicated exclusively to the dinner is the kind of fund-raising event to which the Canons refer; second, whether it violates the Canons for judges to be featured at a dinner sponsored by any organization that publicly holds a particular point of view on issues of major public importance (as opposed to a general bar association, law school, or other comparable organization); and third, whether it is appropriate when assessing whether a specific event is a fund-raiser to look at the total annual contributions from a specified donor, rather than the amount given for the particular event. I address these questions in turn.

FIRST, my decision of December 5, 2013, did not turn on the fact that the dinner sponsors were listed in more than one brochure. Although, as Appendix 1 to that decision indicates, the Federalist Society does list sponsors in a number of different places, the memorandum from the Federalist Society’s representative states that the sponsors make contributions to the Federalist Society “as an institution.” They do not, it indicates, pay specifically for the annual dinner, even if the program thanks certain donors “for their generous support of the 2013 Annual Dinner.” It is essential, in deciding whether a particular event is a fund-raiser, to look at all of the circumstances. The most important points in this case were, in my view, (1) the fact that the total dinner expenses came to \$304,739, or approximately \$225 per person, and the non-member price for tickets was close to that amount, at \$200, and (2) the fact that, unlike many events, there was no indication on the ticket or elsewhere that any portion of the price was designated as an independent contribution to the Society, tax deductible or otherwise. The price for this dinner was comparable, I found, to the price of similar dinners sponsored by other organizations. Taking everything into account, I concluded that this dinner was not the kind of event to which Canons 4(C) and 2(B) refer.

SECOND is the question whether a judge is permitted under the Canons to be featured on a program sponsored by an organization dedicated to a particular point of view, a characterization that many would say fits the Federalist Society, the American Constitution Society, the Defense Research Institute, and the American College of Trial Lawyers, to name just a few. Canon 4 permits a judge to engage in a wide variety of extra-judicial activities that are consistent with the obligations of judicial office. Canon 4(A)(1) provides that “[a] judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.”

Subsection (3) of the same Canon allows a judge to participate in the work of “a nonprofit organization devoted to the law, the legal system, or the administration of justice” (to which I refer as a “law-related organization”). Canon 4(C), as noted earlier, states that a judge should *not* personally participate in fund-raising activities. This prohibition extends to all organizations – including the local children’s hospital, one’s university, or one’s church – not just law-related entities. The Commentary notes that judges are not prohibited from attending fund-raising events, but they may not be “a speaker, a guest of honor, or featured on the program of such an event.” Nothing in this Canon requires the judge to associate only with organizations devoid of any viewpoint. Indeed, it is hard to imagine how the judge could comply with such a rule, other than by refraining from all contact with law-related organizations. Yet Canon 4(A)(3) affirmatively permits judges to work with such organizations. I conclude that as long as the judge is complying with the Canon as a whole, including its provisions on fund-raising, and the organization is not one that would otherwise be objectionable under the Canons (for example, because it advocates discrimination on the basis of race), the judge is permitted to participate in the work and events of law-related organizations.

THIRD is the question whether, in assessing the factual question whether a particular event is a fund-raiser, one should look at the entire annual contribution of a sponsor to the organization, or if the event should be regarded on a stand-alone basis. The Federalist Society itself appears to take the position that donations are made to the organization as a whole throughout the year, and so for the sake of argument, I will assume that it is not accurate to focus on any funds earmarked for accounting convenience to the Annual Dinner. But that is not the end of the matter. The question remains whether the dinner itself functions as a fund-raiser, or if it is simply an event that the Society offers roughly at cost (just as it offers seminars and other programs throughout the year). Complainants argue that the dinner should be considered a fund-raiser because it is useful in recruiting sponsors and in rewarding those who support the Society. I am willing to accept the proposition that the Federalist Society earns the good will of its sponsors by placing representatives at tables with interesting and influential people, such as Justices, prominent judges, leading lawyers, and others. But I have not found any ethical opinion or binding interpretation of the Canons that prohibits such a generic and indirect link to the organization’s financial support. Unless this subtle effect is enough to transform the Annual Dinner into a fund-raiser, and I find nothing to support the conclusion that it is, then the subject judge is not prohibited by the Canons from being featured at the dinner.

In summary, I have concluded that none of the additional facts in the Supplemental Complaint requires an outcome different from the one I reached in my initial decision. Nor, upon further consideration, am I persuaded that my initial decision was incorrect.

I therefore reaffirm my conclusion pursuant to 28 U.S.C. § 352(b)(1)(B) and Rule 11(c)(1)(A) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings that the Complaint and the Supplemental Complaint should be dismissed. Complainants are entitled to petition the Judicial Council of the Seventh Circuit for review of this order, pursuant to 28 U.S.C. § 352(c), should they so desire.