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Summer 2014

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A Free Lunch in Chicago

By Curtis E.A. Karnow

“TANSTAAFL”¹

A couple of years ago I attended a very good program on law and economics at Northwestern University law school. Most of my expenses- airfare and lodging- were paid. I had spoken with some of our ethics experts and determined that accepting benefits from the educational organization was unobjectionable. Hundreds of state and federal judges from across the United States have attended this session and a like one offered by George Mason University.

But there was funny moment at the end of the session. We’d undergone a week of courses on regulation, markets, statistics, and basic economic theory, with a decided emphasis on classic economics which I vaguely associated with the conservative Chicago school (yes, I was in Chicago) view that rational private planning with the least amount of governmental regulation (“interference”) generally provides the best results. At the end of the last day we were kindly asked for our comments and thoughts for improvement. I had just read some books which argued many decisions including economic decisions are deeply irrational, and so I suggested that, as a balance, more time be spent on behavioral economics (which studies this area of irrational choice). I was met with a deafening silence, which at the time I attributed to my poor fashion taste and the late hour.

But I wondered. How are these programs funded? Are these schools just paying for these out of their general budget? I hope so, I whispered to myself on the flight back.

After more reading in behavioral economics,² I wondered why the programs at George Mason and Northwestern continued to focus as they did. For the first time I visited George Mason’s web pages site devoted to the judges’ program and saw this:

The JEP [Judicial Education Program] recognizes that the US civil justice system imposes tremendous burdens on American businesses through high discovery costs, regulation through litigation, class action abuses, and litigation or the threat of litigation. Providing an unprecedented opportunity to improve the nation’s judiciary, the JEP offers intense

¹ “There ain’t no such thing as a free lunch.” David Rothman, CALIFORNIA JUDICIAL CONDUCT HANDBOOK § 9.65 (3D ED. 2007).

² E.g., Daniel Kahneman, THINKING, FAST AND SLOW (2011).

programs designed to build understanding of critical economic disciplines so that judges may apply this knowledge when assessing complex issues surrounding legal disputes.³

Well, I thought, perhaps. I don't like high discovery costs either. But how about the *benefits* of litigation, of *appropriate* class actions, for example?

The Northwestern program was offered by the Northwestern Law's Searle Center on Law, Regulation and Economic Growth, and was previously affiliated with the Brookings Institution and the American Enterprise Institute.⁴ Who are these guys? Now I was intrigued.

Well, it is interesting. The Center of Public Integrity reports that the top funders of these programs are "the conservative Charles G. Koch Charitable Foundation, The Searle Freedom Trust, also a supporter of conservative causes, ExxonMobil Corp., Shell Oil Co., pharmaceutical giant Pfizer Inc. and State Farm Insurance Cos. ..."⁵ The report says,

The Koch Foundation and The Searle Freedom Trust supported most of the conferences organized by George Mason and Northwestern. The energy industry was a sponsor in roughly three-fourths of the conferences hosted by Northwestern. Billionaire brothers Charles and David Koch, major supporters of conservative causes, and their foundations have given millions to George Mason University. As the Center recently reported, the George Mason University Foundation received \$4.4 million in 2011 from the Charles Koch Foundation, making up 15 percent of its revenue that year.⁶

The Kellogg/Searle Center and George Mason programs share some history⁷ as well as funding, but Northwestern reports that corporate sponsorship of the programs ended in 2010,⁸ and its web site no longer lists the judicial education program. I have heard from George Mason,

³ <http://www.masonlec.org/programs/mason-judicial-education-program>

⁴ <http://www.northwestern.edu/newscenter/stories/2008/07/judicial.html>

⁵ Center for Public Integrity, "Corporations, pro-business nonprofits foot bill for judicial seminars," <http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars> (March 28, 2013). The Center for Public Integrity itself is funded by various interests including "the Open Society Institute, a foundation founded by liberal investor George Soros, focused mainly on human rights law."

http://investigations.nbcnews.com/_news/2013/03/28/17478588-corporations-free-market-nonprofits-foot-bills-for-judicial-seminars?lite

⁶ <http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars>. According to the report, the Searle Freedom Trust, a foundation advocating 'economic liberty' which regularly donates to conservative groups contributed a combined \$400,000 to George Mason's judicial education programs in 2010 and 2011.

⁷ Professor Henry Butler headed the Searle Center at Northwestern and then in 2010 moved to George Mason. http://www.law.gmu.edu/faculty/directory/fulltime/butler_henry; <http://www.volokh.com/2010/06/03/searle-center-moves-from-northwestern-to-george-mason/>

⁸ Above, note 5.

which pointed me to the list of its sponsors.⁹ This now includes many different sorts of companies, firms, and other entities.

Of course I don't know whether the funders of these judicial education programs impliedly prescribed the content of the courses. The Northwestern courses were useful, and it was delightful to chat with judges from across the country and compare notes.

On the underlying debate about economic theory, I am agnostic, as I must be given my pathetic level of expertise in that field and current job description. Nor do I care whether corporations such as Shell or Pfizer win or lose: corporate interests (such as they are) sometimes prevail and sometimes they don't. Many of my matters involve companies on both sides, so corporations routinely win and lose in the same cases.

I assume that attending these sessions is fine under current law. But we might want to know more about these funders, and we might want to think harder about the ethics issues as some recommend.¹⁰ Especially in California, which in CJER has one of the best judicial programs in the country, we may wish to employ talent from academe—but have public funding and organization of the programs, as suggested by The ABA Commission on the 21st Century Judiciary.¹¹ Economic theory is difficult, it shifts, and is the subject of deep debate among the best thinkers of our time.¹² We should hear many views—and just as importantly, *know* there are many. Targeted private funding won't advance all the views we need to hear.

As David Rothman notes, we should evaluate a variety of issues when considering our activities. Just because we are travelling, we do not merely consider the propriety of accepting travel expenses, and when accepting gifts we do not merely consider gift limits. Even when there are specific rules for a given activity, other more general ethical constraints may in fact be the deciding factor whether we can engage in the activity. So it is that, for example, when

⁹ <http://masonlec.org/about/donors-date>. The University advises me in an email, "No one donor underwrites an individual judges programs. The contributions come to the LEC with an indication that they are supposed to be used the judges program, but that is where the involvement ends. The LEC, a division of the George Mason University School of Law and chartered by the university, is responsible for the content."

¹⁰ Bruce A. Green, "May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy," 29 *FORDHAM URB. L.J.* 941 (2002).

¹¹ ABA Commission on the 21st Century Judiciary, "Preserving the Judiciary's Institutional Legitimacy," *BRIEF* 54, 56-57 (Winter 2008).

¹² I can't resist noting that the 2013 winners of the Nobel prize in economics (technically the 'Nobel Prize in Economic Sciences') reveal just this split: one of them (Fama) proclaims the efficient markets hypothesis, i.e. prices of stocks and bonds are "rational" in manifesting all public knowledge about valuation. But one of his co-winners (Shiller) won by noting persistent irrationality in the markets. *See generally*, <http://www.independent.co.uk/news/world/europe/joint-nobel-prize-goes-to-economists-with-rival-theories-us-trio-eugene-fama-lars-peter-hansen-and-robert-shiller-share-award-8879266.html>; <http://www.bloomberg.com/news/2013-10-14/fama-hansen-shiller-share-nobel-economics-prize-academy-says.html>.

evaluating travel reimbursement Rothman counsels us¹³ to evaluate a *variety* of Canons, such as whether our impartiality might be compromised (Canon 1), the appearance of impropriety (Canon 2), ensuring we do not convey the appearance that others are in a special position to influence us (Canon 2B), and so on.

So it is that when accepting invitations to educational activity, we may have an obligation to discover whether the courses have a politically motivated leaning, or a leaning that tends to favor a type of litigant over another; if we can, something about the real source of the funding.

This sort of investigation may not be easy, especially in areas where judges know little of the internecine academic warfare; that is, just in those areas where judges are most likely to seek the educational opportunity. But every 'free' lunch is worth a second look.

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My thanks to David Rothman for looking over earlier versions of this note. He is not responsible for the observations and conclusions here, and all mistakes are mine.

¹³ E.g., David Rothman, CALIFORNIA JUDICIAL CONDUCT HANDBOOK (3D ED.2007), 2013 Supplement Appendix 11 (Travel Reimbursement Guide, at 5)