



California Workers' Compensation Institute
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January 7, 2008

Ms. Maureen Gray
Regulations Coordinator
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

RE: **Ethical Standards for Workers' Compensation Judges**
Sections 9720.1 – 9723

Dear Ms. Gray:

These comments on the Judicial Ethics regulations are presented on behalf of the members of the California Workers' Compensation Institute. Recommended modifications are indicated by underline and ~~strikethrough~~.

Gifts -- 9720.2(f)
Recommendation

... The term "gift" does not include:

- (1) Informational material such as books, reports, pamphlets, calendars, periodicals, cassettes and discs, or free or reduced-price admission, tuition, or registration, for informational conferences or seminars that are directly related to the judicial function. No payment for travel or reimbursement for any expenses shall be deemed "informational material."

Discussion: While it is implicit that legally related and work related training materials are to be exempt from the restrictions on gifts, this clarification is necessary to avoid any unintended expansive interpretation.

Writing and Teaching -- 9720.2(g)(2) and 9721.31

Discussion: For a judge, teaching or writing books, articles, and training materials that provide an interpretation of the laws that the judge administers or are directly related to the judicial function can pose a difficult ethical problem. These regulations should not establish or imply any exemption from the Code of Judicial Ethics relating to activities like publishing or teaching, no matter how legitimate the setting.

It may be entirely appropriate for a WCALJ to teach a class in Tort law at the university level. Conversely, in a similar setting, a sitting judge could violate the code by using a pending case as an example and disclosing how he intends to rule on the issues. Or an article on the new apportionment laws could advise how to avoid or subvert the statutes.

Even in the context of an award or a judicial opinion, a judge can overstep his or her ethical obligations. The Supreme Court ruled in Oberholzer v. Commission on Judicial Performance, 20 Cal.4th 371, that a judge could be disciplined for legal error, if the error is committed in bad faith, out of bias, or because he intentionally chose to disregard the law.

To the extent that the regulations imply that writing, teaching, or similar activities might create a “safe harbor” or some sort of presumption to protect WCALJs from a fair application of the Code of Judicial Ethics, the regulation should be revised and clarified. As with publication (section 9721.31), it may be appropriate for these activities to be approved, in advance, by the Court Administrator or the Administrative Director.

Impartiality -- 9721.12(c) -- Disqualification Recommendation

(10) The judge believes that recusal would further the interests of justice or believes there is a ~~substantial~~ doubt as to his or her capacity to be impartial.

(11) The judge has actual bias against or in favor of an attorney for a party and the judge has a ~~substantial~~ doubt as to his or her capacity to be impartial.

...

Discussion: If a WCALJ harbors a doubt as to his or her ability to remain impartial in a case, for whatever reason, the judge should be disqualified.

Mandatory Disqualification -- 9721.12(c) Recommendation

(c) Disqualification for the following circumstances cannot be waived:

(1) The judge, the judge's spouse, a relative of either within the third degree of relationship, or spouse of such relative, is likely to be a material witness

(2) The judge served as a lawyer in the case

(3) Actual Bias.

Discussion: Bias is a sufficient factor to require mandatory disqualification and as bias subverts the impartiality of the process, it should not be subject to a waiver by the parties.

Thank you for your consideration. Please contact me for further clarification or if I can be of any other assistance.

Sincerely,

Michael McClain
General Counsel and Vice President

MMc/pm

cc: Court Administrator, Keven Star
CWCI Medical Care Committee
CWCI Claims Committee
CWCI Legal Committee
CWCI Associate Members