

ILLINOIS JUDICIAL ETHICS COMMITTEE

IJEC Advisory Opinion

A joint Committee of the Chicago Bar, Illinois Judges and Illinois State Bar Associations

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Opinion No. 94-17

June 17, 1994

TOPICS: Judicial Speakers Bureau; Judges' Speech
Regarding Controversial Law-Related Subjects.

DIGEST: Judges may create a Speakers Bureau and inform the public of the judges' availability to speak on issues regarding the law, the legal system, and the administration of justice. Judges may speak about law-related issues to groups that advocate changes in the content or enforcement of laws, and other members of the public, so long as the judges (1) do not say anything that casts doubt on their capacity to decide impartially any issue that may come before them, and (2) comply with the restrictions on political speech contained in Illinois Supreme Court Rule 67.

REFERENCES: Illinois Supreme Court Rule 64 of the Code of Judicial Conduct, Canon 4 (145 Ill.2d R. 64); Illinois Supreme Court Rule 66A of the Code of Judicial Conduct, Canon 6 (145 Ill.2d R. 66); Illinois Supreme Court Rule 67 of the Code of Judicial Conduct, Canon 7 (145 Ill.2d R. 67); In re Gridley, 417 So.2d 950 (Fla. 1982); In re Nolan, Unreported Order (Ky. Comm'n 1986); Illinois Judicial Ethics Committee Opinion Nos. 93-4, 94-5, and 94-7.

FACTS

The judges in a judicial circuit wish to create a Speakers Bureau and inform service organizations and churches of the judges' availability to present a court-oriented program. A judge who speaks at such a program may be asked questions that implicate ethical restrictions on the judge's ability to engage in certain kinds of speech and political activities.

QUESTIONS

1. Can the judges create, and publicize the existence of, a Speakers Bureau?
2. Can a judge agree to speak before groups, such as Court Watchers, MADD, or AAJM, that advocate changes in the content or enforcement of laws?
3. Can a judge comment publicly on any or all of the following subjects:
 - a. Abortion;
 - b. The death penalty, including whether it is justified, whether it is an effective deterrent, and under what circumstances it should be imposed;
 - c. Other sentencing issues, including the merit and likely consequences of the proposed "three-time loser" law;
 - d. The competence, or lack of competence, of lawyers;
 - e. Programs, activities, and positions of the organized bar;
 - f. The merit, or lack of merit, of proposed or enacted legislation;
 - g. Local government issues, such as bond issues and school district tax referendums;
 - h. Policies and practices of government officials with responsibilities relating to the justice system, such as the State's Attorney, Circuit Court Clerk, or Sheriff;
 - i. Merit selection of judges;
 - j. Jail overcrowding; and
 - k. Plea bargaining?

OPINION

1. ESTABLISHING AND PUBLISHING THE EXISTENCE OF A JUDICIAL SPEAKERS BUREAU

Illinois Supreme Court Rule 64 authorizes a judge to "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." By organizing and publicizing the existence of a Judicial Speakers Bureau, judges would be cooperatively undertaking the kind of law-related activities that Illinois Supreme Court Rule 64 expressly permits them to do individually. Neither the language of, nor the policy behind, the Code of Judicial Conduct prohibits that kind of cooperative undertaking.

Although accepting an honorarium for speaking is permitted by Illinois Supreme Court Rule 66(A), the Committee believes that it would be preferable (but not mandatory) to decline such remuneration if a speaking engagement is obtained in response to a direct communication publicizing the existence of the Speakers Bureau. Accepting an honorarium in response to such publicity may foster the impression that financial gain, rather than educating the public about the judicial system, was the principal motivation for the creation of the Speakers Bureau.

2. SPEAKING BEFORE GROUPS THAT ADVOCATE LEGISLATION OR LEGAL REFORM

Illinois Supreme Court Rule 64 prohibits a judge from engaging in law-related activities that "cast doubt on his or her capacity to decide impartially any issue that may come before him or her." In Opinion No. 93-4, this Committee concluded that the appearance of impartiality may be jeopardized if a judge is a speaker and honoree at a dinner hosted by an organization that takes partisan positions on issues arising in court. See also Illinois Judicial Ethics Committee ("IJE") Opinion No. 94-7 (judge may not be a nominee for an organization's award if nominees must agree to support the organization's legislative platform).

Under the facts of this inquiry, however, the judge would not be an honoree of the organization before which the

judge is speaking. Merely addressing an organization does not carry with it the kind of implicit endorsement of the organization or its agenda that comes from agreeing to be honored by that organization. For that reason, the Committee believes that a judge is free to speak before groups, such as Court Watchers or MADD, that advocate new legislation or changes in the enforcement of existing laws. A judge should take pains, however, to ensure that his or her speech does not say anything, in violation of Illinois Supreme Court Rule 64, that casts doubt upon the judge's impartiality.

3. PERMISSIBILITY OF SPEECH REGARDING PARTICULAR SUBJECTS

The Code of Judicial Conduct contains two restrictions on the content of judges' speech about law-related matters. The primary restriction, as noted above, is the admonition in Illinois Supreme Court Rule 64 against judges saying anything that casts doubt on their capacity to decide impartially any issue that may come before them. In addition, Illinois Supreme Court Rule 67 restricts political speech by judges. The following analysis applies these provisions to the particular law-related topics that are the subject of this inquiry.

Abortion. Judges are free to discuss abortion publicly so long as they do not cast doubt upon their ability to decide impartially any abortion-related case that may come before them.

The death penalty. Judges may be asked to speak about a variety of issues regarding this subject, including whether the death penalty is justified, whether it is an effective deterrent, and under what circumstances it should be imposed. Judges are free to address these issues so long as they do not say anything that casts doubt on their capacity to decide impartially any cases that involve those issues. Accord, In re Gridley, 417 So.2d 950, 954-55 (Fla. 1982) (judge was not subject to discipline for expressing opposition to death penalty where he expressly stated that he would follow the law as written).

Other sentencing issues. The proposed "three-time loser" law is a prime example of other sentencing issues that judges may be asked to address. Once again, judges may speak about that issue if they are careful to ensure that

they do not cast doubt on their ability to decide impartially any cases that may involve that issue.

The competence, or lack of competence, of lawyers. This subject is fair game for judges, particularly if the remarks are limited to lawyers generically. Unflattering comments about a specific lawyer would be more problematic. Under certain circumstances, such comments could cast doubt on the speaker's ability to decide impartially cases involving that lawyer.

Programs, activities, and positions of the organized bar. Judges are generally free to discuss these subjects. However, Illinois Supreme Court Rule 67(A)(1)(b) prohibits judges from publicly endorsing or opposing a candidate for public office. (Rule 67B(1)(b)(iv) contains a partial exception to this rule for judges who are running for office.) While it is permissible to discuss the merits and shortcomings of bar associations' judicial evaluation procedures, a statement by a non-candidate judge agreeing or disagreeing with a bar association's rating of a particular judge would violate Rule 67A(1)(b)'s prohibition against endorsing or opposing a candidate for public office.

Proposed or enacted legislation. Judges may speak regarding the merits of proposed or enacted legislation so long as they do not cast doubt on their capacity to later decide impartially any cases involving that legislation.

Local government issues. Judges may speak publicly about local government issues, such as bond issues and school district tax referendums, so long as any such speech is not on behalf of a political organization. See Supreme Court Rule 67(A)(1)(c). Once again, care must also be taken to ensure that such speech does not cast doubt on a judge's ability to decide impartially any cases involving those issues.

Policies and practices of government officials with responsibilities relating to the justice system. Judges may praise or criticize the performance of government officials with law-related responsibilities, such as the State's Attorney, Circuit Court Clerk, or Sheriff. However, if any of those officials are candidates for office, the prohibition in Illinois Supreme Court Rule 67 against endorsing or opposing candidates for public office would be applicable. Moreover, particularly with respect to persons

who may appear in court as witnesses or attorneys, judges must be careful not to say anything that casts doubt on their ability to decide impartially any cases in which those persons are involved.

Merit selection of judges. Judges may speak freely about the advantages and disadvantages of merit selection of judges. As stated previously, a non-candidate judge should refrain from discussing the qualifications of a particular judicial candidate.

Jail overcrowding. Judges may discuss jail overcrowding issues so long as they do not say anything that casts doubt on their capacity to impartially decide issues in criminal cases.

Plea bargaining. Judges may also speak about plea bargaining so long as they do not say anything that casts doubt on their ability to impartially decide issues in criminal cases. As illustrated by In re Nolan, Unreported Order (Ky. Comm'n 1986), while it is permissible for judges to state their views regarding plea bargaining, they should refrain from suggesting that they would invariably decline to approve plea bargains. In Nolan, a judge was censured for distributing campaign literature stating, inter alia, that the judge "does not allow plea bargaining." In addition to casting doubt on the judge's capacity to decide impartially whether to accept plea bargains, the judge's statement violated Canon 7 of the Code of Judicial Conduct by appearing to commit the judge with respect to cases, controversies, or issues that are likely to come before the judge. See Illinois Supreme Court Rule 67A(3)(d)(i).

NOTE: As with many of the controversial subjects that are the subject of this inquiry, the Committee believes that it is advisable (but not mandatory) for any judge who chooses to discuss any of these issues to guard against any violation of Illinois Supreme Court Rule 67 by stating affirmatively that, regardless of their personal views, they would follow the law if called upon to decide any of these controversial issues. Cf. IJEC Opinion No. 94-5 (judge can publish essay supporting gun control that contains a strong statement of the judge's commitment to impartiality).