

*Established*  
1992

# ILLINOIS JUDICIAL ETHICS COMMITTEE

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

January 3, 2006

William R. Quinlan, Esq.  
Chair  
Cook County Judicial Advisory Council  
Task Force on Illinois Judicial Elections  
69 West Washington Street.  
Suite 2610  
Chicago, IL 60602-3007

Re: Illinois Judicial Ethics Committee Informal Advisory Opinion Regarding Questionnaire Urging Judicial Candidates to Announce Their Views on Controversial Legal Issues

Dear Mr. Quinlan:

I am writing on behalf of the Illinois Judicial Ethics Committee (IJE) with respect to concerns that have been raised by members of the Cook County Judicial Advisory Council's Illinois Judicial Elections Task Force (the "Task Force") concerning a political organization's use of a questionnaire seeking judicial candidates' views regarding controversial legal issues. As you know, the IJE is a joint committee of the Illinois Judges Association, Illinois State Bar Association, and Chicago Bar Association that provides advisory opinions interpreting the Illinois Code of Judicial Conduct. This letter contains an informal IJE opinion that has been circulated to and approved by an ad hoc subcommittee. Due to time constraints, this letter has not been approved by the IJE as a whole, but it will be referred to the entire Committee for formal consideration at a later date. Like all IJE opinions, this letter is intended to provide guidance to judges and judicial candidates but is not binding on either the Illinois Courts Commission or the courts.

The IJE understands that Task Force members have raised concerns about a questionnaire that an organization is currently circulating to candidates involved in contested judicial elections in Cook County. A copy of the questionnaire is attached to this letter.<sup>1</sup> The organization endorses candidates for judicial and other elective offices. The organization's questionnaire asks judicial candidates to "announce their position" on a number of controversial legal issues, including whether they are for or against (1) the death penalty, (2) a woman's right to have an abortion, (3) mandatory minimum sentencing, (4) treating juveniles as adults (presumably with respect to criminal prosecutions), and (5) gay rights, gay marriage, and civil unions. (The questions regarding these five subjects are collectively referred to as the "Questions.") The questionnaire asserts that it is not intended to require candidates to commit or appear to commit themselves with respect to cases, controversies, or issues

---

<sup>1</sup> The name of the organization has been redacted because the analysis and recommendations in this letter should not be construed as criticism of that organization and are intended to apply to similar questionnaires used by other organizations.

that may come before the court; the answers will not be construed to entail any such commitment; and the candidates are not being asked how they will rule in any case that may come before them. Contending that candidates therefore have no reason to invoke "Canon 67" (Illinois Supreme Court Rule 67) as a reason for declining to answer, the questionnaire warns in boldface type that "your invocation of Canon 67 may adversely affect your endorsement application."

This letter contains the IJEC's views regarding whether judicial candidates would violate the Code of Judicial Conduct by answering the Questions. It also contains the IJEC's recommendation how candidates should respond regardless of whether answering the Questions would violate the Code of Judicial Conduct.

### **CONSISTENCY WITH THE CODE OF JUDICIAL CONDUCT**

A candidate's decision to express an opinion on the issues addressed by the Questions could very well—depending on the subject matter and substance of the response—violate one or more provisions of our Supreme Court Rules, including Rule 67. For example, Rule 67A(3)(d)(1) prohibits judicial candidates from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues within cases that are likely to come before the court..."

The organization that submitted the questionnaire that is the subject of this inquiry apparently believes that its questions are authorized by the decision of the United States Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 735, 122 S. Ct. 2528, 153 L. Ed.2d 694 (2002). In *White*, a 5-4 majority held that the First Amendment was violated by a Minnesota rule prohibiting judicial candidates from "announcing his or her views on disputed legal or political issues." Writing for the Court, Justice Scalia concluded that the so-called "announce clause" was not narrowly tailored to achieve any plausible state interest in preserving the impartiality of the judiciary or the appearance of the impartiality of the judiciary. *Id.* at 775-81.

The IJEC believes it is a mistake to conclude, just because the Minnesota announce clause was unconstitutional, that there are no ethical constraints on judicial candidates' ability to announce their views on issues that may come before them on the bench. The Illinois Code of Judicial Conduct does not contain an announce clause. Rather, as previously noted, the relevant Illinois rule prohibits candidates from "mak[ing] statements that commit, or appear to commit, them with respect to cases, controversies, or issues within cases that are likely to come before the court..." Significantly, there was no challenge in *White* to the Minnesota rule prohibiting judges from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." 536 U.S. at 770. All of the parties in *White* agreed that the State may constitutionally prohibit judicial candidates from pledging or promising how they would decide certain cases or issues. *Id.* at 813 (Ginsburg, J., dissenting). That is precisely what the Illinois Supreme Court did in prohibiting judicial candidates from committing with respect to cases, controversies, or issues that are likely to come before the court. Supreme Court Rule 67A(3)(d). The Court went a step further—but not much further—by prohibiting judicial candidates from *appearing to commit* themselves with respect to cases, controversies, or issues that are likely to come before the court.

The IJEC recognizes that the decision in *White* has engendered a great deal of uncertainty regarding the constitutionality of judicial ethics rules purporting to constrain the electioneering activities of

judicial candidates. However, there has been no ruling invalidating Supreme Court Rule 67A(3)(d), nor so far as IJEC is aware any litigation even challenging that rule. Under all of these circumstances, as well as the presumption that court rules are constitutional (*cf. In re Blauvelt*, 115 Wn.2d 735, 741, 801 P.2d 235, 239 (1990) (challenged provision of Code of Judicial Conduct is presumed constitutional)), the IJEC believes that it behooves judicial candidates to comply with Rule 67A(3)(d).

In answering the Questions, candidates could easily refrain from expressly committing to rule in a particular manner if those issues came before them while they are on the bench. The crucial issue, therefore, is whether candidates who announce their views regarding those issues without expressly committing to rule in a particular manner would impermissibly *appear* to commit how they would rule.

The IJEC recognizes that the organization that submitted the questionnaire expressly disavowed any intention of asking candidates to commit or appear to commit with respect to cases, controversies, or issues. Further, the organization asserted that it would not interpret the candidates' answers in that fashion and averred that "[i]t is clearly understood that you are not being asked as to how you would rule or not rule in any case that may come before you." However, the organization's actions speak louder than its words. The questionnaire is not an abstract academic exercise; it is intended to help the organization decide whether to endorse judicial candidates. It defies credulity to suppose that the organization would have asked the Questions unless it believed the answers would have some bearing on how the candidates would rule on those legal issues.

In terms of compliance with Rule 67A(3)(d), the issue is whether a particular candidate's answer crosses the line between providing a mere inkling how they would rule, or a commitment or appearance of a commitment. This determination must be made on a case-by-case basis by reference to the particular language used by each candidate. As a general matter, the most that can be said is that candidates who answer the Questions would risk violating Rule 67A(3)(d).

### **RECOMMENDED APPROACH TO ANSWERING THE QUESTIONS**

Although the full implications of *Republican Party of Minnesota v. White* remain unclear, one thing is certain: even if states cannot prohibit judicial candidates from announcing their views on certain issues, candidates are certainly not required to do so. Regardless of whether Rule 67A(3)(d) is constitutional and candidates can manage to answer the Questions without violating that rule, the IJEC strongly urges them to decline to provide such answers. Like the entire Code of Judicial Conduct, Rule 67A(3)(d) merely embodies minimum standards of behavior which, if violated, subject the offender to discipline. The IJEC believes, however, that judges and judicial candidates should aspire to conduct themselves in a manner which exceeds the bare minimum—and which thereby improves the public respect and confidence enjoyed by judges and the judicial system in our state.

On the other hand, candidates who answer the Questions would denigrate the fundamental principles of integrity and impartiality which are a cornerstone of the judicial office. Good judges follow and apply the law regardless of their personal views about the wisdom of the law or the policy decisions

underlying it. By contrast, candidates who express their personal views on “hot button” issues—views which should have no bearing on their impartial application of the law and adherence to established precedent—foster the misimpression that such views would (and could properly) affect how they would rule if confronted with those issues on the bench.

The corrosive effect on the appearance of impartiality of answering the Questions would be exacerbated if a judge presides over a case involving one of the issues covered by the Questions. Take, for example, a judge who had announced that he is pro-choice. Even if he had qualified that statement by declaring that he would decide cases on the basis of the law without regard to his personal views, if he subsequently rules that a statute regulating a minor’s ability to obtain an abortion is unconstitutional, there would inevitably be an appearance that the judge’s ruling was influenced by his personal views.

Answering the Questions would also threaten judicial independence, another cornerstone of the judicial office. Such independence includes judges’ ability to make decisions without being influenced by outside interests or even their own self interest. The questionnaire is especially problematic because it attempts to pressure candidates by threatening not to endorse them if they decline to answer the Questions. Candidates who bow to that pressure would fail to demonstrate the kind of independence possessed by our finest judges, and would establish a precedent that would make it more difficult for other candidates to decline to answer such Questions in the future.

Practical considerations also support the IJEC’s belief that candidates should not answer the Questions. No matter how careful and nuanced candidates may be in formulating their answers, they will have no control over how the inquiring organization uses or publicizes those answers. Qualifications and subtleties are ignored when, as sometimes occurs if issue-oriented questions are answered, organizations abbreviate candidates’ positions to a conclusory “support” or “oppose.”

Candidates who answer Questions of this nature also would impede the efficient administration of justice by inviting motions for substitution of judge under 735 ILCS 5/2-1001(a)(2), as well as motions to disqualify under Supreme Court Rule 63C(1) on the basis that the judge’s impartiality might reasonably be questioned. Candidates should avoid unnecessarily creating roadblocks to the prompt and cost-effective adjudication of cases.

## CONCLUSION

Even the majority in *Republican Party of Minnesota v. White* acknowledged that the First Amendment does not require campaigns for judicial office to sound the same as those for legislative office. 536 U.S. at 783. Because judicial candidates who answer issue-oriented questions may run the risk of violating the Code of Judicial Conduct, may undermine the appearance and potentially the

William R. Quinlan, Esq.  
Chair, Cook County Judicial Advisory Council  
Task Force on Illinois Judicial Elections  
January 3, 2006  
Page 5

existence of an impartial and independent judiciary, and may interfere with the efficient administration of justice, the IJEC strongly urges candidates to refrain from answering the Questions.

Sincerely,

Warren Lupel  
Chair, Illinois Judicial Ethics Committee

CIRCUIT COURT QUESTIONNAIRE – Section 1

DATE \_\_\_\_\_ PARTY \_\_\_\_\_

CANDIDATE FOR \_\_\_\_\_ VACANCY \_\_\_\_\_

NAME \_\_\_\_\_

VOTING ADDRESS \_\_\_\_\_

HOME PHONE \_\_\_\_\_ BUSINESS PHONE \_\_\_\_\_

E-MAIL \_\_\_\_\_ WEB SITE \_\_\_\_\_

CAMPAIGN ADDRESS \_\_\_\_\_

CAMPAIGN PHONE \_\_\_\_\_ FAX \_\_\_\_\_

CAMPAIGN MANAGER \_\_\_\_\_

NUMBER OF PETITION SIGNATURES FILED \_\_\_\_\_ NUMBER REQUIRED \_\_\_\_\_

Elective or appointive public and/or party offices previously held including dates.

Other elective offices for which you have been a candidate.

Principal business, educational, professional and civic activities of the past ten years.

What subjects have you studied and what experience have you had which will be most helpful to you in the office you seek?

Please detail your prior political activity, if any. Give positions held, dates, organizational memberships, role you played in political campaigns.

As concisely as possible, state why you feel you should be endorsed over the other candidate(s). What goals for the office you seek are most important to you personally?

Please state any evaluation ratings you have ever received for any judicial office by any bar association. List the office and the date of the election for which the evaluation was made. Please use the following format:

<i>Date</i>	<i>Position</i>	<i>Bar Association</i>	<i>Rating</i>
-------------	-----------------	------------------------	---------------

## CIRCUIT COURT QUESTIONNAIRE – Section 2

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2003), the United States Supreme Court held that it violated the First Amendment to the United States Constitution for states to forbid judges and judicial candidates from “announcing” their positions on issues of interest to prospective voters. *See id.* at 788; *see also Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 229 (7<sup>th</sup> Cir. 1993). Accordingly, please “announce” your positions on each of the following questions.

We acknowledge your duty to uphold the law regardless of your personal views. These questions are not intended to commit or appear to commit yourself with respect to cases, controversies, or issues within cases that are likely to come before the court. *See* Illinois Code of Judicial Conduct, Canon 67 A.(d)(i). We hereby acknowledge that we do not and will not interpret your answers in that way, and that any such interpretation by third parties should be considered a misinterpretation of both the intent of the questions, and of your answers. It is clearly understood that you are not being asked as to how you will rule or not rule in any case that may come before you.

In light of the fact that we are merely requesting you to “announce” your positions on these questions, rather than requesting you to commit or appear to commit yourself with respect to cases, controversies, or issues within cases that are likely to come before the court, you should have no reason to invoke Canon 67. Thus, your invocation of Canon 67 may adversely impact your endorsement application.

1. Without committing or appearing to commit yourself with respect to cases, controversies, or issues within cases that are likely to come before the court, please “announce” your position concerning the death penalty. First, irrespective of the current moratorium on carrying out the death penalty in Illinois, are you for or against the death penalty? Second, whether you are for or against the death penalty, please “announce” your reasons for being for it or against it, with particular reference to the four traditional goals of criminal punishment (deterrence, retribution, incapacitation, and rehabilitation), as well as any other reasons that you care to add.
2. Without committing or appearing to commit yourself with respect to cases, controversies, or issues within cases that are likely to come before the court, please “announce” your position concerning the right of a woman to have an abortion. First, are you for it or against it? Second, whether you are for it or against it, please “announce” your reasons for being for it or against it.
3. Without committing or appearing to commit yourself with respect to cases, controversies, or issues within cases that are likely to come before the court, please “announce” your position concerning mandatory minimum sentencing. First, are you for it or against it? Second, whether you are for it or against it, please “announce” your reasons for being for it or against it.
4. Without committing or appearing to commit yourself with respect to cases, controversies, or issues within cases that are likely to come before the court, please “announce” your position concerning treating juveniles as adults. First, are you for it or against it? Second, whether you are for it or against it, please “announce” your reasons for being for it or against it.
5. Without committing or appearing to commit yourself with respect to cases, controversies, or issues within cases that are likely to come before the court, please “announce” your position concerning gay rights. Next, putting aside whether it is an issue for the legislature instead of the judiciary (since the Massachusetts Supreme Judicial Court seems to have done so), are you in favor of gay marriage? If not, are you in favor of civil unions instead? Please explain your reasoning on this issue.

6. What do you believe are the major strengths and weaknesses of the Circuit Court? Would you change the manner in which the Circuit Court functions?
7. How should the Chief Judge of the Circuit Court be chosen?
8. How should judges be assigned to the various divisions of the Court? If you are elected, to what division would you like to be assigned and why?
9. As a circuit court judge, how would you balance any moral or ethical/philosophical disagreements that you may have with any existing statutes or legal precedents?
10. If a sitting judge were indicted, should the judge remain on the bench, resign or take a leave of absence? Please explain.