

ETHICAL CONSIDERATIONS SURROUNDING
JUDICIAL POLITICAL ACTIVITY
by Judge Patrick E. McGann

I. Introduction

Campaigns for judicial office, especially to an Appellate or Supreme Court seat, are becoming the subject of greater interest to individuals and organizations with political agendas. This activity includes the recruiting of candidates and the financing of campaigns. In addition, most vacancies for a judicial position attract multiple candidates to the primary election. As a result, almost every election to judicial office will be contested by candidates attempting to attract votes for themselves or discourage voting for the opponent. As the actual campaign progresses, the investment of time and money by the candidate and supporters frequently obscures the ethical rules governing campaign activity. This can result in disciplinary action which will make the election victory pyrrhic.

At the same time, these contested elections are beginning to draw increased media attention. Frequently, the reporters and commentators have little or no understanding of the restraints placed on candidates for judicial office. More importantly, these individuals and the public at large do not realize that these ethical restraints exist for the benefit of the community at large. They are unaware that the Code of Judicial Conduct exists not merely to restrain the actions of judges and candidates for judicial office. The purpose of this document is, in part, to educate those we serve that these rules exist largely to promote public confidence in the work of the judiciary. Increased public confidence in judicial decisions will directly lead to a better sense of community in our increasingly diverse society.

In addition, the political actions of a sitting judge are also impacted by the Code of Judicial Conduct. Many judges may fail to appreciate that these activities are also subject to scrutiny under most, if not all, of the Code provisions that govern judicial lives. There also appears to be some unresolved issues surrounding the impact of these Rules on a judge's family and staff. This guide will attempt to identify these issues and provide some guidance.

The Committee also notes that juxtaposed against the Code of Judicial Conduct are the First Amendment Rights of Freedom of Speech and Assembly which all Americans enjoy. These rights can only be abridged when the state can demonstrate a compelling interest and the speech related restriction is narrowly tailored to meet it. The United States Supreme Court recently determined that a state's strong interest in an independent judiciary could not justify preventing a candidate for judicial office from "announcing" positions on contested issues that could possibly come before the elected judge.¹ Since 1993, candidates for judicial office in Illinois have not been subject to any restriction similar to the one found in the clause found unconstitutional by the Supreme Court.² A plurality of that Court did acknowledge that a state could probably justify restrictions on the political speech of a judge after taking the bench. These and other issues will be discussed at length in this Guide.

II. Guidelines for Judicial Candidates

Lawyer-candidate participation in judicial elections is governed by both the Code of Judicial Conduct (Rule 67, Illinois Supreme Court) and Rules of Professional Conduct (Article VIII, Rules of the Illinois Supreme Court; Rule 8.2). However, the entire text of The Code of Judicial Conduct applies to judges seeking retention as well as election to another judicial office. The Code creates an interconnected standard of conduct, which has led to disciplinary cases against candidates for judicial election and retention in Illinois. Similar proceedings have been instituted in other states that have adopted such standards.

These rules apply to the conduct of the lawyer-candidate and also create accountability for the actions of family members, colleagues, employees, campaign staff and workers. In Illinois, three judges have been disciplined for conduct in relation to seeking judicial office.³ Other states such as Florida, Michigan and Ohio have been more aggressive.

It is important to understand that the Canons for candidates for judicial office in Illinois are not as restrictive as the Model Code established by the American Bar

¹ *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)

² Illinois Supreme Court Rule 67 (3) (d)

³ *In re Tully*, 2 Ill. Cts. Comm. (1991); *In re Golniewicz*, Ill. Cts. Comm. ();
In re Dwyer, Ill. Cts. Comm. (2004)

Association. Materials from that organization, other states or the American Judicature Society, while instructive, are not controlling.

A person becomes a candidate for judicial office and subject to these Canons when he or she:

1. Makes a public announcement of their candidacy;
2. Files nominating papers with the election authority;
3. Authorizes solicitation or receipt of contributions.⁴

A. Financing Campaigns

Campaign financing comes within the guarantees of the First Amendment. As noted, the United States Supreme Court has recognized that States can regulate speech when there is a compelling state interest and the restriction is narrowly tailored. Courts have recognized the profound state interest in an election process that produces a judiciary that is both honest in appearance, as well as fact. The process of campaign fund-raising creates the opportunity for the public to perceive that a *quid pro quo* exists between a donor and a judicial candidate. Recent judicial elections have created great public interest in this issue. In the 2000 election cycle, over 45 million dollars were raised by candidates for Supreme Courts nationwide.⁵ In the fall of 2004 over \$ 9 million was spent in an election for a vacancy on the Illinois Supreme Court. A significant portion of these monies was contributed by special interest groups seeking to elect judicial candidates sympathetic to their agendas. It is suggested that this activity will result in greater public cynicism about judges and the judicial system.

Recognizing the importance of this issue, the Canons prohibit any candidate from personally soliciting or accepting campaign contributions. A committee must carry out all campaign fund-raising activities. Activities such as adding a P.S. to the solicitation saying something like: “We need your help now” signed by the candidate might create an issue for the Judicial Inquiry Board. Although advisory opinions in various states,

⁴ Code of Judicial Conduct *Terminology*, Ill. Sup. Ct. Rules

⁵ *Financing Judicial Elections*, Schotland, 2001

including Illinois, have approved the practice of candidates signing thank you notes acknowledging donations,⁶ recently some commentators have criticized this practice.

The committee cannot solicit funds from anyone earlier than one year prior to the election in which their principal is a candidate or 90 days after the last election in which the candidate participates in an election year.⁷

The funds collected can be used for ordinary political activity such as purchasing tickets from or contributing to a political organization, purchasing and distributing brochures or other advertisements.⁸ Candidates are prohibited from using any sums collected for the private benefit of anyone, including the candidate.⁹

In August, 2005, the Court of Appeals for the Eighth Circuit considered issues remanded by the Supreme Court in *Republican Party of Minnesota v. White*.¹⁰ That Court declared that that State's ban on soliciting campaign funds by candidates for judicial office was broader than necessary to protect the stated interests of maintaining an unbiased and open minded judiciary.¹¹ However, this decision may have limited application in Illinois. Under the Minnesota scheme, all contributions are made only to the candidate's committee; regardless of the original solicitation. Minnesota law makes it illegal for the committee to inform the candidate of the contributor's identity or the amount of the contribution. The Court reasoned that the lack of access to such information by the candidate was more than likely sufficient to protect the stated interest.

Illinois, as is explained below, requires the candidate to file and certify financial disclosure reports. Essentially, the candidate is provided with the very information, the Court of Appeals found potentially compromising.

A judicial candidate's political committee is subject to the campaign disclosure laws of Illinois.¹² These laws require compliance by any candidate who accepts or spends an aggregate amount in excess of \$3,000.00 in any one year.¹³ All candidates should become familiar with these statutes and make certain procedures assuring compliance are

⁶ Illinois Judicial Ethics Committee (IJE) Opinion 95-8 available at ija.org

⁷ Ill. Sup. Ct. R. 67 B (2)

⁸ Ill. S. Ct. R. 67 b (2)

⁹ Ill. S. Ct. R. B (1) (a) & (b)

¹⁰ Id. Note 1.

¹¹ *Republican Party of Minnesota v. White*, 416 F. 3d 738 (8th. Cir. 2005)

¹² 10 ILCS 5/9-10

¹³ 10 ILCS 5/9-1.9

in place. Failure to do so could result in disciplinary action. These financial disclosure reports require verification by the candidate or committee treasurer.¹⁴ Some observers suggest these reports be filed by the committee and verified by the treasurer, so the candidate can avoid even the appearance of impropriety.

There are currently no limits on the size of any individual contribution, but amounts and identities of persons donating any sum in excess of \$150.00 must be disclosed.¹⁵ A candidate may only receive a monetary contribution from a lawyer if it is in the form of a check draft or other instrument payable to the candidate's committee.¹⁶ Volunteer activity by a lawyer donated to a political committee supporting the election or retention of a judicial candidate is not subject to the disciplinary rules.¹⁷ The value of such services may be subject to disclosure.¹⁸

These disclosure requirements must be fully understood by the candidate, as well as, the committee. All contributions, including those received "in-kind" should be closely scrutinized lest one end up like the Ohio Judge who was sanctioned because two zealous supporters donated campaign signs made by prisoners at the county jail.¹⁹

B. Campaign Activities

While there are no restrictions in Illinois on the type of "marketing" activities a candidate may undertake, the content of those strategies is subject to some regulation. It is in this area that an individual's First Amendment right to freedom of speech has conflicted with the state's substantial interest in an independent judiciary. These content-based restrictions have faced numerous challenges nationwide.

In Illinois, a prior version of one of the Canons was declared to be an unconstitutional restraint on Free Speech Rights. A candidate for the Illinois Supreme Court had circulated materials that stated while serving on the Appellate Court, the candidate had "never written an opinion reversing a rape conviction." Shortly before the election, the Judicial Inquiry Board filed charges against the candidate alleging a violation of the rule which provided that "a candidate for judicial election or retention...

¹⁴ 10 ILCS 5/9-14

¹⁵ 10 ILCS 5/9-11

¹⁶ Illinois Code of Professional Conduct 3.5 (h)

¹⁷ Id.

¹⁸ 10 ILCS 5/9-1.4 & 1.12

¹⁹ *Disciplinary Counsel v. Evans*, 733 NE2d 609 (Ohio 2000)

should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity ... or other fact; provided, however, that he may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so he does not cast doubt on his ability to decide impartially any issue that comes before him". The Courts Commission found that the candidate had violated the restriction, but no sanction was imposed.²⁰

In its decision invalidating those provisions, the Seventh Circuit Court of Appeals divided the Rule into the "announce" and the "promise" clauses. The "announce" clause prohibited a candidate from announcing his views on disputed legal or political issues. After acknowledging that the "principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process, including candidates for judicial office" the Court determined that the broad sweep of the prohibition was not sufficiently narrow to meet the State's acknowledged interest.²¹ The Court noted that almost all speech except promises of faithful performance of judicial duties was subject to sanction under the language that existed prior to 1993. Fear of discipline, the court suggested, would chill the debate between candidates for an important office. The effect would be to deprive the voters of the crucial information at the time it was most needed, during the election campaign. This is the rationale accepted by a plurality of the Court in *Republican Party v. White*, noted above. As Justice Brandeis once noted, "public discussion is political duty."²²

Left unresolved by the court in either *Republican Party* or *Buckley* was the validity of the "promise" clause. Indeed, the United States Supreme Court specifically noted that the restrictions imposed by this clause were not before the Court. This restriction prohibits a person seeking election to judicial office from making any statements that commit or appear to commit the candidate with respect to any cases, controversies, or issues within cases that are likely to come before the court.²³ However,

²⁰ *In re Buckley*, 3 Ill. Cts. Com. 1 (1991)

²¹ *Buckley v Judicial Inquiry Board*, 997 F2d 224, 231 (7th Cir. 1993)

²² *Whitney v. California*, 274 U.S. 357, 375 (1927)

²³ Ill. Sup. Ct. Rule 67 A (3) (d) (i)

in several states before the *Republican Party v White* decision, Judges were disciplined for the following statements:

- I will always have the heart of a prosecutor²⁴
- Candidate supports the death penalty and isn't afraid to use it coupled with an "I support the death penalty for all convicted murderers";²⁵
- I will put a stop to putting criminals on probation;²⁶

These candidates appear to clearly indicate they would be sympathetic to the prosecution in a criminal case thereby running afoul of the prohibition against committing or appearing to commit with respect to cases likely to come before the court. While the "promise" clause remains a restriction on the campaign rhetoric of candidates, one would be well advised to follow the admonition of the Courts Commission and include in all public statements that regardless of personal views, a judge has a duty to follow and uphold the law.²⁷

Some commentators have begun to criticize a more subtle tactic called signaling. This activity consists of a candidate seeking or accepting the endorsement of interest groups that have a clear litigation agenda. This is permissible as long as the candidate does not commit to rule on any issue that may come before the court. The candidate will then distribute only this endorsement information to targeted voters "signaling" the candidate's likely ruling in such cases. Earlier ethical opinions have found no problem with this practice.²⁸ However, as interest groups become more involved in judicial elections, commissions overseeing judicial and attorney conduct may become more sympathetic to these complaints.

A second restriction on "marketing" one's candidacy may be of greater importance to candidates. No candidate may knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.²⁹

²⁴ *Inquiry Concerning a Judge, re McMillan*, 797 So. 2d 560 (Fla. 2001)

²⁵ *In re Judicial Campaign Complaint against Burick*, 705 NE2d 422 (Ohio, 1999)

²⁶ *Matter of Haan*, 676 NE 2d 740 (Ind. 1997)

²⁷ 3 IL. Cts. Com. ixvii, Committee Commentary re the August 6, 1993 Amendment to Canon 7\ IL. S. Ct. R. 67 (revised August 6, 1993).

²⁸ New York Advisory Opinion on Judicial Ethics 93-99, 1993 WL 838870

²⁹ Ill. Sup. Ct. Rule 67 A (3) (d) (ii)

This proscribes the knowing misrepresentation of information regarding the candidate, an opponent or an issue in the campaign. The limitation to a “knowing violation” is important from a freedom of speech perspective. Knowledge is defined as actual knowledge that can be inferred from the circumstances.³⁰ This is an important distinction because some states have prohibited negligent distribution of false or misleading information. These broad-brush approaches have been struck down in three cases as unconstitutional restrictions on the core of First Amendment protections, political speech.³¹ In striking down these canons, state and federal courts have acknowledged that in the real world of political campaigns misstatements are often negligently made. This is part of the give and take of the democratic process. The courts went on to say that the election of judges gives citizens the right to influence the direction of their courts and restrictions that prohibit negligent or innocent misrepresentations would suppress the flow of necessary information.

Violations of the rule against misrepresentation in election campaigning have led to the removal of one Illinois Judge³² and the censure of another.³³ In the first case, the candidate falsely claimed on his nominating petitions and campaign literature that he resided within the subcircuit in which he was campaigning. In the second matter, the candidate, a sitting judge, exaggerated his judicial responsibilities in order to contrast his qualifications with an opponent.

Under the current Illinois Rule, a candidate who knowingly makes any of the following statements may be subject to sanction:

- My opponent was away from court an average of 85 days in each of the last two years (opponent was chief administrative judge and calculation included days where judge did not preside over court but was engaged in administrative matters in chambers);³⁴

³⁰ Illinois Code of Judicial Conduct, *Terminology*

³¹ *Weaver v. Bonner*, 114 F. Supp. 2d 1337 (N.D. Ga. 2000); *In re Chmura*, 608 NW 2d 31 (Mich. 2000); *Butler v. Alabama Judicial Inquiry Commission*, 111 F. Supp. 2d 1224 (M. D. Ala. 2000)

³² *In re Golniewicz*, Ill. Cts. Comm. (2005)

³³ *In re Dwyer*, Ill. Cts. Comm. (2004)

³⁴ *In re McMillan* 797 So 2d at 567-568

- Legal community says only candidate is qualified (when only endorsed by one of seven bar associations);³⁵
- My opponent (a sitting judge) imposed \$430,00 in taxes in Wayne County; the Appellate Court told him he was wrong. I will never impose taxes while serving as a judge.³⁶
- Excerpting and printing part of a newspaper article, inferring that you were endorsed by the publication when opposite is true;³⁷
- Distributing a photo of your opponent and a notorious criminal with the caption “Defends Murderers” (opponent is a public defender discharging appointed duties)³⁸
- Distributing materials that say “highly qualified; trial lawyers group” or “highly qualified and endorsed” without identifying the persons or organizations making the endorsement;³⁹
- Creating signage implying the candidate is a judge by omitting or making almost unreadable words such as “Elect” or “Vote for”.⁴⁰

There is nothing in the rule prohibiting a candidate from truthfully contrasting his or her background and experience with that of an opponent. Nor is it improper to discuss issues such as an opponent’s health, work habits, philosophy, or sources of campaign funding, but it must be done fairly, accurately and upon facts, not [knowing] misrepresentations.⁴¹

A candidate for judicial office is required to maintain the dignity appropriate to the judicial office and act in a manner consistent with the integrity and independence of the judiciary.⁴² This provision allows a judicial candidate to appear at political gatherings, identify oneself as a member of a political party, and publicly endorse other judicial and non-judicial candidates in the same election.⁴³ Subject to legal restrictions found

³⁵ *In re Judicial Complaint Against Roberts*, 675 NE2d 84 Ohio 1996)

³⁶ *In re Judicial Campaign Complaint Against Kienzle*, 708 NE2d 800 (Ohio 1999)

³⁷ *In re Alley*, 699 So 2d 1369 (Fla. 1997)

³⁸ *Id.*

³⁹ *In re Tully*, 2 Ill. Cts. Comm. 150

⁴⁰ *In re Judicial Campaign Complaint Against Emrich* 669 NE 2d 586 (Ohio 1996)

⁴¹ *In re Baker* 542 P. 2d 701 (Kansas, 1975)

⁴² Ill. Sup. Ct. Rule 67A (3) (a)

⁴³ *Id.* 67 B (1) (a) (2) and(b) (iv)

elsewhere, the Canons do not prohibit candidates for judicial office from permitting their names to appear on election materials along with the names of other candidates for political office or promotional materials for a party ticket.⁴⁴

Candidates for judicial office can never act as a leader or hold office in a political organization. Judges cannot pay an assessment to or solicit funds for a political organization, but may purchase tickets to and attend political gatherings.

Candidates may be requested to respond to requests from newspapers, community organizations and interest groups for views about issues and earlier court rulings. Recently, interest groups have begun to publish voters' guides. These are distributed among their membership, as well as, the general public. They list the candidate's answers to questions on issues such as legalized gambling, sexual orientation, gun control, and tort reform. These questionnaires cite to an appellate or trial court opinion which could be perceived as adverse to the group's position, asking the candidate whether he or she agrees or disagrees with the decision, is undecided or declines to answer. This is not unlike a multiple choice quiz. The group refuses to accept or publish any answer other than the one or two-word selection. Others issue public endorsements supporting candidates with views or philosophies that appear to be supportive of the group's agenda, based upon answers to similar questions.

Candidates answering such questionnaires must be cognizant of the obligations imposed by the Codes of Professional and Judicial Conduct. There is some authority that prohibits responding to these questionnaires if the answer appears to commit the candidate to rule in a certain way in cases that may come before the court.⁴⁵ Some questions touch upon complex legal issues and cannot be answered in a single word or by selecting a short phrase. In such instances, the candidate may be well advised to respond in an elaborate, thoughtful way to satisfy the spirit of the canons. Finally, at least one advisory opinion suggests that a judge promising to ignore precedent encourages disrespect for the law and the office of judge.⁴⁶

C. Responsibility for the Conduct of Family, Employees and Campaign Workers.

⁴⁴ Id. 67 B (3)

⁴⁵ Alabama Judicial Inquiry Commission Advisory Opinion 00-763

The Canons governing lawyer and judicial conduct in judicial elections place the responsibility for the conduct of the campaign squarely on the shoulders of the candidate. There is an affirmative duty to encourage one's family to adhere to the same conduct required of the candidate.⁴⁷ The Canons require the office seeker to prohibit individuals who serve at their pleasure from engaging in any activity the candidate is prohibited from doing.⁴⁸ The candidate must also discourage people under his or her direction from engaging in prohibited activity. A strict reading of these provisions could require the candidate to meet with each of these groups and affirmatively discuss the issues and explain the ethical restrictions on campaigns for judicial elections.

D. Sanctions

Violations of the Code of Judicial Conduct and the Rules of Professional Conduct are subject to disciplinary action. Violations by an unsuccessful candidate are investigated and charges by the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court. Successful candidates will have their activities scrutinized by the Judicial Inquiry Board. If the Inquiry Board files charges, the case is heard by the Courts Commission.

These Illinois Boards can impose sanctions, if a violation is found, that range from a reprimand, to disbarment or removal from office. Many of the reported cases from Illinois and other jurisdictions have resulted in a reprimand or censure. Recently, a judge in Florida was removed from the bench in large part for the unethical manner in which he campaigned. In addition to the written sanctions, in some states the judge is summoned before the tribunal where the reprimand is administered in public. In many states the offending judge is ordered to refund improper campaign donations and/or pay the costs, including attorney's fees related to the prosecution of the case.

Informal sanctions have been imposed by private organizations, such as bar associations or other groups. These sanctions are usually imposed in a very public withdrawal of the organization's support. Recently, bar evaluation ratings have been withdrawn from candidates whose campaigns were found to be contrary to the spirit of

⁴⁶ In re Maislin, Determination (New York State Commission on Judicial Conduct (August 7, 1998)

⁴⁷ Illinois Supreme Court Rule 67 A (3)(a)

⁴⁸ Id. 67 A (3)(6)(a)

the canons. Such actions generate a significant amount of public embarrassment and negative publicity for the candidate.

III. Political Activities of Sitting Judges

The political activities of sitting judges are also affected by Supreme Court Rule 67. However to a much greater extent, the other provisions of the Code of Judicial Conduct also impact on an individual judge's decision to become involved in the political process. These restrictions are not confined to election cycles, but affect a judge's ability to influence legislation or merely public opinion. The State's interest in placing these restrictions on a judge's right to speak is found in the Preamble to the Code of Judicial Conduct which provides in part:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all provisions of this code are precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.

The Code is a standard of conduct for judges. As the words express, it contains "rules of reason that should be applied consistent with constitutional requirements, statutes and other court rules and decisional law." They govern the conduct of judges as authoritative rules governing the conduct of Illinois judges. They are also intended to increase the confidence of our fellow citizens in the legal system that serves them.

The major restrictions on political activity by sitting judges are almost the same as those imposed on individuals seeking judicial office. A sitting judge who is not a candidate for election may not;

- act as a leader or hold public office in a political organization
- publicly endorse or publicly oppose a candidate for public office
- make speeches on behalf of a political organization
- become a candidate for a non-judicial office
- solicit funds for or pay an assessment to a political organization or candidate.

However, a judge may:

- purchase tickets for or attend political gatherings
- identify oneself as a member of a political party

- contribute to a political party
- engage in political activities on behalf of measures to improve the law, legal system or administration of justice or as otherwise expressly authorized by law.

While many of these rules seem to be readily understandable, there are some overriding principles found in other Canons that serve to blur these seemingly clear lines. In fact, discussions of some common situations have led to what one might suggest are some rather startling opinions. Hence, each time a judge contemplates actions which may be deemed “political” consideration must not only be given to the express provisions of Rule 67, but also restrictions found in other Canons as well. It is important for every judicial officer to understand that the Code expressly provides that it is to be construed and applied to preserve the integrity and independence of the judiciary.⁴⁹

For example, Judges are prohibited from engaging in any activity which either reflects adversely on the judge’s impartiality or interferes with the performance of official duties.⁵⁰ This is a significant consideration because a judge has an obligation to disqualify himself in those instances where the judge’s impartiality might reasonably be questioned.⁵¹ There are restrictions upon a judge’s avocational and community activities,⁵² as well as, the ability to work with other branches of government.⁵³ Hence, it is important to understand that judges can be sanctioned for conduct that may appear to be outside the strictures of Rule 67 but nevertheless violates a restriction found elsewhere or creates the appearance of impropriety.

This multi-phased analysis led to an interesting discussion in the State of Texas. A judge desired to serve as a treasurer of a local “get out the vote” campaign. This was to be a non-partisan effort led by community leaders not political parties. The opinion rendered by its Judicial Ethics Committee in that State revealed sharp disagreement on the issue. The consensus of the Committee was that no violation of our Rule 67 would occur. The Canon, they determined, was focused on partisan political activity. The Committee was divided over questions such as whether the judge was lending the prestige of judicial office to a private organization or whether the fact that judge

⁴⁹ Rule 61, Illinois Supreme Court

⁵⁰ Rules 62 A and 65 B, Illinois Supreme Court

⁵¹ Rule 63 C, Illinois Supreme Court

⁵² Rule 65 Illinois Supreme Court

⁵³ Rule 64, Illinois Supreme Court

treasurer was so identified with fund raising that violation of their version of our Rule 65⁵⁴ would occur. Other states have taken a more restrictive approach, defining a political organization as a meeting of two or more persons for a political purpose.⁵⁵

Every day situations present hidden dangers for a sitting judge. Judges have questioned whether they are able to sign a nominating petition for a judicial candidate or write a letter of endorsement to a local newspaper for a qualified lawyer seeking judicial or other office. It appears clear that a non-candidate judge may not write the letter of endorsement.⁵⁶ A nominating petition may be signed, however, if the act is not considered the equivalent of endorsing the nominee and the petition cannot be used for any other purpose.⁵⁷ The answer to the first question depends in a large part on the language of the petition. The real problem is the secondary use by the candidate's campaign. The judge must be certain that there will be no campaign activity identifying the judge as supporting the candidate. The best action is to not identify oneself as a judge when signing the petition.

On the other hand, Judges should, by virtue of their experience, be aware of improvements that can be made in the operation of the court system. One state's ethics advisory committee has suggested that no violation occurs when a judge signs petitions and campaigns for a constitutional amendment to mandate alternatives to incarceration for some drug related criminal activity.⁵⁸ This political activity was found to further the implementation of measures to improve the administration of justice as allowed under Rule 67 C.

In Arizona, the Judge's Association wanted to join with other fair-minded citizens to support a non-partisan effort to increase legislative salaries. The Judicial Ethics Advisory Committee of the Arizona Supreme Court endorsed participation which included monetary donations by individual judges and the association. In addition, the Opinion supported the Association's plan to sign an argument supporting the referendum

⁵⁴ Ethics Opinion 51, Texas Committee on Judicial Ethics

⁵⁵ Utah Judicial Ethics Advisory Committee Opinions 89-7 and 91-1, available at utcourts.gov/resources

⁵⁶ See Illinois Judicial Ethics Committee Opinion ("IJE") 99-6, available at ija.org

⁵⁷ Id. 94-11, Opinion 00-2, Supreme Court of Wisconsin, Judicial Ethics Advisory Opinion, available at

⁵⁸ Opinion 002-3, Supreme Court of Ohio, Board of Commissioners on Grievance and Discipline, available at www.sonet.state.oh.us

to be placed in the publicity packet published and distributed by the Secretary of State.⁵⁹ That Committee had previously determined that a non-partisan group created to support a specific ballot initiative was not a political organization as defined by the Canon. Hence, there was no prohibited political activity. The committee also concluded that such actions were designed to at least indirectly promote “the law, legal system, or the administration of justice.” This, the Arizona Committee found would be an activity consistent with their version of our Rule 64.

However, if the judge were to lobby the legislative or executive branch to improve access to college education for all young people, arguments that this non-partisan activity would improve the community that the judge serves would most likely fall on deaf ears. That was certainly the case in Kansas, where a judge sought an opinion on seeking additional appropriations for the old *alma mater*.⁶⁰ This was not considered political activity, but did run afoul of the prohibition against appearing before the legislature on non-court related matters.⁶¹ Such conduct is prohibited in Illinois by Rule 64 B.

While the judge has voluntarily accepted restrictions on political activity, the judge’s family has not forfeited any rights in this area. Indeed, as noted above, the Code only charges the judge with responsibility for family members’ conduct in the course of an election.⁶² The earlier Code language expanding that responsibility for familial conduct in all aspects of the judge’s ethical responsibilities has been deleted. There is no presumption in today’s society that a couple or members of a family share the same political beliefs. Hence, the mere fact that a spouse engages in political activity does not create ethical dilemmas for the judge. The problem arises when the judge chooses to participate in the spouse’s activities.

In today’s world, a judge’s spouse can be a political leader, a candidate for office, or a devoted partisan. The judge may be called upon to attend rallies, appear in campaign literature or merely be the spouse’s driver to and from campaign events. Some general

⁵⁹ Advisory Opinion 98-04

⁶⁰ Opinion JE 35, Kansas Judicial Ethics Advisory Committee (1990), available at kscourts.org

⁶¹ Rule 64 B, Illinois Supreme Court

⁶² Rule 67 A (3) (a)

rules apply to these situations. Once again, the decision on the extent of participation must include an understanding of the interaction of various Canons.

Judges, consistent with Rule 67, are permitted to join political parties, appear at political gatherings and make contributions. However, judges are prohibited from using their official position to advance the interests of others or engage in activities that create an appearance of impropriety. In West Virginia, a judge was disciplined for participating in his wife's campaign for judge against the former county prosecutor. The judge visited the relatives of a victim in a notorious murder case and obtained a statement vilifying her opponent's ability as a prosecutor. This was used in the campaign. Not only was the judge censured for violating the political activity restrictions, but his conduct was found to create a strong appearance of impropriety.⁶³ A judge in Florida was reprimanded for delivering and erecting signs supporting his wife's candidacy for court clerk.⁶⁴ His conduct was found to create an appearance of impropriety, as well, as impermissible political activity.

The Florida Ethics Advisory Committee has gone so far as to suggest the a judge should not participate in a spouse's campaign by attending rallies, serving as a driver or merely serving as company on the campaign trail.⁶⁵

A more reasoned approach is found in the opinions of the Illinois Judicial Ethics Committee. The Committee's approach acknowledges the judge's right to participate in political activity by attending rallies or other gatherings. For example, a judge can attend a candidate coffee hosted by the judge's spouse in their home. The judge cannot take any action which would indicate the judge endorses the candidate. Such conduct would violate the direct prohibition found in Rule 67, as well as, create an appearance of impropriety.⁶⁶

It is suggested this is the approach that should be taken if a spouse is a candidate. The judge cannot work on the campaign committee or perform political tasks, regardless of how menial they may appear. However, a judge may join a spouse at campaign events

⁶³ *Matter of Codispoti*, 438 S.E. 2d 549 (W.Va. 1993)

⁶⁴ *In re McGregor* 614 S. 2d 1089 (Fla. 1993)

⁶⁵ Informal Opinion 89-15

⁶⁶ IJEC Opinion 01-09, available at ija.org

or appear in the obligatory family photo, as long as the judge is not identified or introduced by title or office.

Often a judge's law clerk or other employees hired by the judicial branch may be active in political campaigns. There can be no restrictions placed on such activity that takes place during non-work hours. However, the judge should make certain that the employee understands that no activities can be undertaken during regular court hours. In addition, the employee should be advised never to undertake any action that would create an appearance that the judge supports either the candidate or the political activity of the employee.

While membership in a political party is allowed, this right does not give the judicial officer the license that the language suggests. A judge cannot serve in any leadership capacity in a political organization or any political action committee affiliated with that party.⁶⁷ A judge may not be a featured speaker or introduce guests at a political event.⁶⁸ However, a non-candidate judge can be introduced at such gatherings.⁶⁹

Finally, a judge should not serve as a member of a judicial evaluation committee of a civic organization.⁷⁰ At least one state ethics committee has suggested a judge may not be a member of a bar association that evaluates candidates for judicial office.⁷¹ The same group finds no ethical concerns where the bar association actively supports the passage of a state constitutional amendment on equal rights.⁷² Earlier opinions from this advisory group had authorized judicial participation in attempts to amend the Florida constitution to increase taxes for jail improvements and impose mandatory minimum sentences on convicted felons.⁷³

IV. Conclusion

The State of Illinois and at least twenty-nine other states elect at least a portion of their judiciary. Our form of democracy will only be successful when electors are fully informed about the candidates and their positions. This is best accomplished by allowing candidates to enter and participate in the "market place of ideas" that is created by

⁶⁷ IJEC Opinion 98-15, available at ija.org

⁶⁸ IJEC Opinion 96-19, available at ija.org

⁶⁹ IJEC Opinion 94-21, available at ija.org

⁷⁰ IJEC Opinion 96-15, available at ija.org

⁷¹ Florida Advisory Opinion 2001-15

⁷² *Id.* 98-13

election campaigns. As the *Republican Party* and *Buckley Courts* noted this principle is of no lesser importance when the office being sought is in the judiciary.

However, the judiciary, as recognized by those and other jurists and commentators, represents no man or woman and carries no brief. Their responsibility is not to a cause or a contributor, but rather to the law. As such, the State has a valuable interest to protect in establishing and maintaining a judiciary that not only is independent, but is perceived by those it serves as independent, open minded and fair.

It is this balance which is sought to be maintained by the Code of Judicial Conduct. Candidates for judicial office should make certain they are familiar with its provisions. It is important to understand adherence to these “Do’s and Don’ts will do more than prevent scrutiny from licensing authorities, but will also advance the public’s positive perception of the judiciary.

Perhaps the best philosophy to be employed by anyone seeking election to the judiciary was expressed by a United Nations Conference some years ago, and although addressed to judges has application to candidates as well: “Members of the Judiciary are like other citizens entitled to freedoms of expression, belief, association and assembly; provided however, in exercising such rights, judges shall always conduct themselves in a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”⁷⁴

⁷³ Id.

⁷⁴ United Nations Basic Principles on the Independence of the Judiciary (1985).