

1991

## Judicial Ethics: Political Activity and Fund Raising

Marlene Arnold Nicholson  
*Prof., DePaul University College of Law*

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Judges Commons](#), [Law and Politics Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

---

### Recommended Citation

Marlene A. Nicholson, *Judicial Ethics: Political Activity and Fund Raising*, 22 Loy. U. Chi. L. J. 597 (1991).  
Available at: <http://lawcommons.luc.edu/lucj/vol22/iss3/5>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# Judicial Ethics: Political Activity and Fund Raising

*Marlene Arnold Nicholson\**

## ILLINOIS CODE OF JUDICIAL CONDUCT

### CANON 7

#### A Judge Should Refrain From Political Activity Inappropriate to His Judicial Office

##### A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office may not act as a leader or hold any office in a political organization.

(2) A judge may not, except when a candidate for office or retention, participate in political campaigns or activities, or make political contributions.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a nonjudicial office.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

##### B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office filled by election or retention

(a) should maintain the dignity appropriate to judicial office;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this canon; and except to the extent authorized under subsection B(2) he should not allow any other person to do for him what he is prohibited from doing under this canon; and

(c) 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, qualifications, present position, 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

---

\* Professor, DePaul University College of Law.

capacity to decide impartially any issue that may come before him.

(2) A candidate, including an incumbent judge, for a judicial office filled by election or retention should not himself solicit campaign funds, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign. A candidate's committees may solicit funds for his campaign not earlier than 90 days before the filing of nominating petitions or an official declaration of intention to be retained in a judicial office but no later than 90 days after the last election in which he participates during the election year.<sup>1</sup>

## I. INTRODUCTION

Judges are unlike other office holders in that they are not elected to represent a constituency.<sup>2</sup> Rather, a judge's task is to follow and interpret the law in an impartial manner. The political realities of judicial elections to some extent are at odds with the ideal of a judiciary that can maintain the confidence of the public by functioning, and appearing to function, in this independent manner. Illinois, like the many other states which that judges in popular elections,<sup>3</sup> has attempted to deal with this concern by placing restrictions upon the campaign activities of judicial candidates and upon the political activities of judges who are not currently candidates. The Illinois restrictions are found in Canon 7 of the Illinois Code of Judicial Conduct (Illinois Code).<sup>4</sup> Canon 7 of the Illinois Code is divided into two parts. Part 7A deals generally with political participation, including activities aiding other candidates or political parties, and activities on behalf of the judge's own campaign. Part 7B primarily addresses the activities of the judicial candidate's own campaign. This Article analyzes these two parts separately.

## II. "POLITICAL CONDUCT IN GENERAL"

Canon 7A(1) of the Illinois Code prohibits judges or judicial

---

1. ILLINOIS CODE OF JUDICIAL CONDUCT Canon 7, ILL. REV. STAT. ch. 110A, para. 67 (1989) [hereinafter ILLINOIS CODE]. The eight canons of the Illinois Code are set forth in Illinois Supreme Court Rules 61 through 68. See *id.* ch. 110A, paras. 61-68.

2. See S. MATHIAS, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 6 (1990).

3. Four-fifths of the states in this country select or retain some or all of their judges through popular elections. *Preface* to P. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS at xiii (1990).

4. ILLINOIS CODE, *supra* note 1, Canon 7.

candidates from holding an office in a political organization.<sup>5</sup> It also prohibits judges from “acting as a leader” in a political organization. Canon 7A(2) prohibits political contributions and participation “in political campaigns or activities.”<sup>6</sup> However, subsection A(2), unlike subsection A(1), explicitly exempts candidates from its restrictions.<sup>7</sup> The unresolved question of when one becomes a candidate will be considered in Section VI of this Article.<sup>8</sup>

The prohibition against being an officer (which is applicable to both judges and judicial candidates) in subsection A(1),<sup>9</sup> and the ban on contributing (which is applicable only to non-candidate judges) in subsection A(2),<sup>10</sup> need little interpretation. However, subsection A(1), which prohibits a “judge or a candidate for election to judicial office” from acting “as a leader,”<sup>11</sup> and the prohibition in subsection A(2) on “participation” by non-candidate judges “in political campaigns or activities,”<sup>12</sup> are less definite. Canon 7A(4), which prohibits judges from engaging in “other political activity,” is equally unclear.<sup>13</sup> In analyzing these three subsections of Canon 7, I will discuss separately the prohibitions applicable to judicial candidates and those applicable to judges who are not candidates.

#### A. Prohibitions on “General Political Conduct” Applicable to Judges Who Are Not Candidates

Unfortunately, there is little case law in Illinois that helps to establish the boundaries of proper political participation by non-candidate judges. Even cases from other jurisdictions are usually not very helpful, in part because these cases involve canons which contain more explicit prohibitions than Canon 7 of the Illinois Code. Also, most of the cases involve such blatant and numerous political activities by judges that there could be little argument that the prohibitions should be applicable.

One Illinois case which addresses improper political activity by a non-candidate judge is *In re Quindry*.<sup>14</sup> In *Quindry*, the Illinois

---

5. *Id.* Canon 7A(1).

6. *Id.* Canon 7A(2).

7. *Id.* Canon 7.

8. See *infra* text accompanying notes 135-55.

9. ILLINOIS CODE, *supra* note 1, Canon 7A(1).

10. *Id.* Canon 7A(2).

11. *Id.* Canon 7A(1).

12. *Id.* Canon 7A(2).

13. *Id.* Canon 7A(4).

14. 1 Ill. Cts. Comm'n 24 (1974) (judge's removal from bench was based on both proven political violations referred to in the opinion and other, non-political violations).

Courts Commission found clear and convincing evidence that the judge had engaged in partisan politics by influencing the withdrawal of a candidate from a primary election and by soliciting a signature on a letter which was later used in a political advertisement for another candidate.<sup>15</sup> The judge was also found to have changed absentee ballots to assure the victory of a particular candidate.<sup>16</sup> However, the Commission found insufficient evidence to support charges that the judge had selected school board candidates, attended a political meeting, or made a speech urging the election of a candidate.<sup>17</sup> Presumably, all of the activities charged were thought by the Judicial Inquiry Board to violate either the bans on serving as a "party leader" or taking "part in political campaigns," activities which were prohibited under former Illinois Supreme Court Rule 70,<sup>18</sup> the predecessor to Canon 7. Apparently, the Judicial Inquiry Board believed that even attendance at a political campaign meeting should be considered taking "part in" a political campaign. It seems likely that the Inquiry Board would interpret the current prohibition on participation in "political campaigns or activities" in the same manner. Of course, it is not clear that the Illinois Courts Commission would have shared the Judicial Inquiry Board's interpretation had sufficient evidence to support the charge of attendance at a campaign meeting been found.

The issue of the boundaries of political participation by non-candidate judges is addressed in *In re Pincham*,<sup>19</sup> a case filed in 1988 by the Illinois Judicial Inquiry Board. In *Pincham*, the complaint alleged that the judge had made a speech at a political gathering in support of the candidacy of the late Mayor Harold Washington. Later, Judge Pincham resigned from the bench to become a candidate for a non-judicial office; at present, there has been no final disposition of the complaint.<sup>20</sup> The *Pincham* case raises the issue of whether judges who are not candidates for office may attend

---

15. *Id.* at 26-27.

16. *Id.* at 25-26.

17. *Id.* at 26-27.

18. ILL. REV. STAT. ch. 110A, para. 70 (1985) (repealed 1987); see also *supra* text accompanying note 1 for the current version of this provision.

19. No. 88 CC 1 (Ill. Cts. Comm'n 1988). Judge Pincham sued the Courts Commission for violating his rights of free speech, equal protection, and due process. The action was dismissed based on the abstention doctrine. *Pincham v. Illinois Judicial Inquiry Bd.*, 681 F. Supp. 1309, 1325 (N.D. Ill.), *aff'd*, 872 F.2d 341 (7th Cir. 1988), *cert. denied*, 493 U.S. 975 (1989).

20. Disciplinary actions against judges in Illinois are considered moot once the judge has left the bench. *In re Dempsey*, 2 Ill. Cts. Comm'n 100, 105 (1987). Therefore, presumably, the case against Pincham will be dismissed.

political gatherings, make speeches on behalf of other candidates, and publicly endorse political candidates. Although Canon 7 of the Illinois Code does not refer to endorsements of other candidates or speeches on their behalf, such conduct would presumably be considered "participation" in a political campaign, an activity which non-candidate judges are prohibited from doing under Canon 7A(1).<sup>21</sup> Arguably, even a judge's attendance at such a gathering would fall within the prohibition.

If one focuses on the plain meaning of the words used in Canon 7A(1), attendance at political meetings, endorsements of candidates, and speeches made on behalf of candidates could be considered participation "in political campaigns or activities," in violation of the canon. Also, all of these activities could implicate the policy concern for maintaining a judiciary free from political influence. However, endorsements and speeches by judges on behalf of other candidates seem to present a more serious risk than attendance at political meetings, due to a greater likelihood of quid pro quo arrangements or feelings of obligation.

The American Bar Association's Model Code of Judicial Conduct (Model Code) specifically prohibits non-candidate judges from attending political meetings and making public endorsements and speeches.<sup>22</sup> Although the Model Code's prohibitions lend support to the assumption that such activities should be considered improper, one may nevertheless infer that by failing to follow the very explicit provision of the Model Code, the drafters of Illinois Canon 7 intended to allow all of these activities, contrary to what would seem to be the plain meaning of the word "participate." On the other hand, if the intention of the Illinois drafters had been to permit such activities, that intention could have been made clear in Canon 7. Indeed, some states specifically provide that all judges are permitted to engage in certain specified activities.<sup>23</sup> Furthermore, if activities such as endorsements and speeches are not covered, there would seem to be little conduct left to come within the ban on political participation by non-candidate judges that would not also fall within the ban on being a political "leader."<sup>24</sup> More

---

21. ILLINOIS CODE, *supra* note 1, Canon 7A(1).

22. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(1)(a), (d) (1990) [hereinafter 1990 MODEL CODE].

23. *See, e.g.*, MICHIGAN CODE OF JUDICIAL CONDUCT Canon 7(A)(1)(a), (b) (West 1991) (permitting all judges to attend political meetings, make speeches on behalf of judicial candidates, and contribute to political parties).

24. ILLINOIS CODE, *supra* note 1, Canon 7A(1) (prohibition on being a leader applies to candidate and non-candidate judges).

significantly, at least with respect to endorsements and speeches, the important policy concern of maintaining an independent judiciary free from political influence requires an interpretation that would ban such activities by non-candidate judges.

Some light may be shed on the meaning of the general term "participation" in the Illinois Code by looking at cases in other jurisdictions which have applied general prohibitions to various political activities. The question of whether attendance at political events is improper when not explicitly prohibited was at issue in cases in Missouri and Massachusetts. In the Missouri case, a judge's attendance at the monthly meetings of a partisan political club was found to violate a general rule against "engaging 'in partisan activities.'" <sup>25</sup>

On the other hand, in the Massachusetts case, a judge who was present at breakfast campaign planning meetings for a gubernatorial candidate was found not to have taken an "active" part in partisan politics. The meetings took place in the judge's home under the auspices of his wife who was working on the campaign.<sup>26</sup> The court did find that the judge had engaged in other political activities which were less innocuous than being present at his wife's meetings. For instance, the judge had arranged and attended other political meetings; the court found this conduct to be detrimental to "the public image of the courts."<sup>27</sup> Nevertheless, the court refused to discipline the judge for these activities because the rules applicable at the time of the alleged offenses did not give sufficient notice that this conduct was prohibited.<sup>28</sup> Although the standard of judicial conduct in effect in Massachusetts at the time of the alleged infractions was even less explicit than the comparable Illinois canon,<sup>29</sup> the case does suggest that the failure specifically to

---

25. *In re Corning*, 538 S.W.2d 46, 53 (Mo. 1976). The judge was also found to have violated the rule against making political contributions and to have engaged in other improper non-political activities. *Id.* at 50.

26. *In re Troy*, 364 Mass. 15, 66, 306 N.E.2d 203, 232 (1973).

27. *Id.* at 67, 306 N.E.2d at 232.

28. The court stated that "judges, like other citizens, are entitled to fair treatment. This includes fair warning of what is permitted and what is forbidden." *Id.*

29. At the time of the alleged violations in *Troy*, Massachusetts had not yet adopted its own code of judicial conduct. However, the court previously had applied the ABA Canons of Judicial Ethics (a predecessor to the Model Code), which "merely put into writing what had been accepted earlier." *Id.* at 65, 306 N.E.2d at 232 (quoting *In re DeSaulnier*, 360 Mass. 787, 809, 279 N.E.2d 296, 308 (1972)). Rather than cite the canon that broadly prohibited "partisan activities," however, the court quoted a more specific provision, which stated that "'suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another.'" *Id.* (quoting CANONS OF JUDICIAL ETHICS Canon 28 (1950)). Apparently,

define prohibited activities might cause a court to interpret Canon 7 of the Illinois Code narrowly and thus find attendance at political gatherings to be permitted.

A broad range of political activities has been found to violate bans on political participation in jurisdictions outside Illinois. These include driving a van with political posters while delivering campaign material on election day,<sup>30</sup> inducing a candidate to withdraw from a contested primary while supporting another candidate,<sup>31</sup> developing campaign strategies and campaign issues, and privately soliciting support for candidates from members of the bar.<sup>32</sup>

### B. Prohibitions on "General Political Activities" of Judicial Candidates

Under Canon 7 of the Illinois Code, judicial candidates have more freedom to engage in political activities than judges who are not candidates. Candidates are exempted from the specific prohibition on judges giving political contributions.<sup>33</sup> Also, the general

---

the court in *Troy* found this admonition to be too vague to be the basis for discipline on charges of attending and arranging political meetings. *Id.*

After the alleged violations in *Troy*, Massachusetts adopted its own code of judicial conduct, which specifically prohibited attendance at political events. See MASSACHUSETTS CODE OF JUDICIAL CONDUCT Canon 7 (1973). The *Troy* court stressed, however, that the higher standards incorporated in the new code would apply only to future conduct. *Troy*, 364 Mass. at 64-65, 306 N.E.2d at 231-32 (citing *DeSaulnier*, 360 Mass. at 810, 279 N.E.2d at 309).

30. *In re Bayles*, 427 Mich. 1201, 399 N.W.2d 394 (1986). The opinion described the signs as bumper stickers; however, the Decision and Recommendation for Order of Discipline of the Michigan Judicial Tenure Commission described the signs as "posters." *In re Bayles*, No. 33 (Mich. Jud. Tenure Comm'n Sept. 2, 1986). Michigan specifically prohibits judges from public endorsement of candidates for non-judicial office. MICHIGAN CODE OF JUDICIAL CONDUCT Canon 7A(1)(b) (West 1991). Presumably driving a car with political posters was considered an "endorsement."

31. *In re Bayles*, No. 33 (Mich. Jud. Tenure Comm'n Sept. 2, 1986). The Commission did not explain what provision of the canon this conduct violated. The Michigan Code does not include a general prohibition on "participation" or "acting as a leader." See MICHIGAN CODE OF JUDICIAL CONDUCT Canon 7 (West 1991). Michigan does prohibit holding an office in a political party and making a speech on behalf of a non-judicial candidate, but permits attendance at political gatherings, speeches on behalf of the candidate's or other person's judicial candidacies, and contributions to a political party. *Id.* Canon 7A(1)(a), (b).

32. *In re Defoor*, 494 So. 2d 1121, 1123 (Fla. 1986). The Florida canon applicable to non-candidate judges includes prohibitions on acting as a leader in a political organization, publicly endorsing or making a speech for a political candidate, or organization and engaging "in any other political activity except on behalf of measures to improve the law, the legal system or the administration of justice." FLORIDA CODE OF JUDICIAL CONDUCT Canon 7A(4) (1983).

33. ILLINOIS CODE, *supra* note 1, Canon 7A. The Model Code is somewhat ambigu-



ban on political participation found in Canon 7A(1) of the Illinois Code includes an explicit exception for judges who are candidates for judicial office.<sup>34</sup> Because the term "participate" is so general, the precise scope of activities in which judicial candidates may engage is not clear. Furthermore, under Canon 7A(1), even a candidate may not act as a "leader or hold any office in a political organization."<sup>35</sup> Therefore, judicial candidates may find it difficult to determine where to draw the line between permitted participation in political activities under Canon 7A(2),<sup>36</sup> and acting as a "leader," which is prohibited even to candidates under Canon 7A(1).<sup>37</sup>

The fact that the Illinois Code has not included some of the Model Code's specific bans on the political activities of judicial candidates implies that the Illinois drafters may have considered these activities appropriate. For instance, unlike the Model Code, Illinois does not expressly prohibit assessments to political parties or organizations<sup>38</sup> and most endorsements of political candidates.<sup>39</sup> Although this deletion may signify that the drafters of Canon 7 of

---

ous as to whether judicial candidates can contribute to other candidates. Canon 5 permits judicial candidates to contribute to "political organizations." 1990 MODEL CODE, *supra* note 22, Canon 5C(1)(a)(iii). Such an organization is defined as "a political party or other group the principal purpose of which is to further the election or appointment of candidates to political office." *Id.* terminology. This definition seems to exclude the campaign committee of a single candidate, but might be interpreted to include a joint campaign committee for more than one candidate. However, the view that contributions to candidates are not authorized under the Model Code provision is reinforced by the fact that the general prohibition on contributions by judges applies to "political organization[s] or candidate[s]." *id.* Canon 5A(1)(e), while the exception for contributions from judicial candidates applies only to contributions given to "political organizations," *id.* Canon 5C(1)(a)(iii).

34. ILLINOIS CODE, *supra* note 1, Canon 7A(2).

35. *Id.* Canon 7A(1).

36. *Id.* Canon 7A(2).

37. *Id.* Canon 7A(1).

38. 1990 MODEL CODE, *supra* note 22, Canon 5A(1)(e).

39. The general prohibition on endorsement of candidates found in Model Code Canon 5A(1)(b) is modified by permitting judicial candidates to endorse some other judicial candidates. *Id.* Canon 5C(1)(b)(iv). Canon 5 permits the public endorsement of or public opposition to "candidates for the same judicial office in a public election in which the judge or judicial candidate is running." *Id.* Prior to the 1990 amendments, judicial candidates were prohibited from endorsing other candidates. CODE OF JUDICIAL CONDUCT Canon 7A(1)(b) (1972) [hereinafter 1972 MODEL CODE]. The 1990 Model Code also makes clear that a candidate may appear in campaign materials and other "promotions of the ticket" along with other candidates, 1990 MODEL CODE, *supra* note 22, Canon 5C(3), thus, apparently, resolving in the negative the question of whether joint campaign materials should be considered endorsements by all the candidates participating. Courts in some jurisdictions have found joint campaign activities to be endorsements. See J. SHAMAN, S. LUBET & D. ALFINI, JUDICIAL CONDUCT AND ETHICS § 11.07, at 328-29 (1990) [hereinafter J. SHAMAN].

the Illinois Code meant to permit these activities, one could respond that if that had been their intention, they could specifically have provided that those activities were permissible, as they did with respect to contributions.<sup>40</sup> It should also be kept in mind that such conduct could, under some circumstances, raise issues under Canon 2, which provides that an Illinois judge should "conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."<sup>41</sup> Indeed, even activities explicitly permitted under the Illinois Code, such as making political contributions, could in some situations implicate the broad concerns of Canon 2.<sup>42</sup>

The result in a recent case suggests that the Illinois Courts Commission will interpret the restrictions on judicial candidates to provide a good deal of leeway for some forms of political activity. In *In re Tully*,<sup>43</sup> the Commission found that the Illinois Code does not prohibit expressions of support by judicial candidates for non-judicial candidates.<sup>44</sup>

### III. CAMPAIGN CONDUCT

#### A. Political Expression

##### 1. Discussion of Legal or Political Issues

Under Canon 7B(1)(c) of the Illinois Code, a judicial candidate is specifically permitted to "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 capacity to decide impartially any issue that may come before him."<sup>45</sup> Judicial candidates are expressly subject to other restrictions which presumably would be implicitly required of all judges.<sup>46</sup> Under Canon 7B(1)(c), a ju-

---

40. ILLINOIS CODE, *supra* note 1, Canon 7A(2).

41. *Id.* Canon 2A.

42. *Id.* Canon 2. See generally Shaman, *The Illinois Code of Judicial Conduct and the Appearance of Impropriety*, 22 LOY. U. CHI. L. J. 581 (1991).

43. No. 90 CC 2 (Ill. Cts. Comm'n Oct. 25, 1991).

44. *Id.* slip op. at 8.

45. ILLINOIS CODE, *supra* note 1, Canon 7B(1)(c).

46. Presumably, the restriction in Canon 7A(4) which prohibits judges from engaging "in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice," would be interpreted to include, at least, the same restrictions applicable to judicial candidates in Canon 7B(1)(c). *But see infra* text accompanying notes 61-92 for a discussion of recent cases casting doubt on the constitutionality of the limitations on campaign speech by judicial candidates. Similar first amendment arguments might be asserted with respect to the restrictions on the political speech of judges who are not candidates. However, in the recent cases overturning, on first amendment grounds, restrictions on the political speech of judicial candidates, the

dicial candidate may not comment upon a subject that would "cast doubt on the candidate's capacity to decide impartially any issue that may come before him."<sup>47</sup> Furthermore, the same canon bars making "pledges or promises of conduct in office other than the faithful performance of the duties of the office." Finally, the judicial candidate may not announce "his views on disputed legal or political issues."<sup>48</sup> Drawing the line between the permissible discussion of "measures to improve the law" on the one hand, and the impermissible discussion of "disputed legal or political issues" or even "pledges or promises of conduct in office" on the other, is no easy task. Indeed, in *In re Buckley*,<sup>49</sup> the Illinois Courts Commission recently interpreted the words "pledges or promises of conduct in office" to include a judge's statement that he had "never written an opinion reversing a rape conviction."<sup>50</sup> Although the violation was found to be "insubstantial, insignificant" and thus not warranting even a reprimand,<sup>51</sup> the Commission asserted that the statements suggested that "a higher standard must be met by a defendant charged and convicted of rape whose case is argued before the respondent on review."<sup>52</sup> The Commission relied on a Washington Supreme Court decision involving an incumbent judge who was censured for stating that he was "tough on drunk driving."<sup>53</sup> The Washington court had stressed that the statements "single out a special class of defendants [to be] held to a higher standard."<sup>54</sup>

In other jurisdictions violations have been found even when the campaign statements did not relate to a particular type of defend-

---

courts have stressed the interest of voters in having information to make informed choices. See *infra id.* This concern would not be relevant in cases involving judges who were not political candidates.

47. ILLINOIS CODE, *supra* note 1, Canon 7B(1)(c).

48. *Id.*

49. No. 91 CC 1 (Ill. Cts. Comm'n Oct. 25, 1991).

50. *Id.* slip op. at 4. Justice Buckley has filed a complaint in federal court against the Illinois Judicial Inquiry Board and the Illinois Courts Commission asking that Canon 7B(1)(C) be declared unconstitutional on its face or as applied to him, and that the Commission vacate its order and expunge the finding of a violation of the Illinois Code. Complaint for Injunctive Relief, *Buckley v. Illinois Judicial Inquiry Bd.*, No. 91 C 7635 (N.D. Ill. filed Nov. 27, 1991). See the discussion of constitutional issues *infra* text accompanying notes 61-92.

51. *Buckley*, No. 91 CC 1, slip op. at 5 (Ill. Cts. Comm'n Oct. 25, 1991).

52. *Id.* at 4.

53. *In re Kaiser*, 111 Wash. 2d 275, 280, 759 P.2d 392, 395-96 (1988), cited in *Buckley*, No. 91 CC 1, slip op. at 4 (Ill. Cts. Comm'n Oct. 25, 1991); see also J. SHAMAN, *supra* note 39, § 11.09, at 330-35.

54. *Kaiser*, 111 Wash. 2d at 280, 759 P.2d at 396, quoted in *Buckley*, No. 91 CC 1, slip op. at 4 (Ill. Cts. Comm'n Oct. 25, 1991).

ant. For instance, in Kentucky, a candidate was disciplined for stating that he had a "solid reputation for law and order" and did "not allow plea bargaining,"<sup>55</sup> while in Michigan, the slogan "a strict sentencing philosophy" was found to be improper.<sup>56</sup>

However, it appears that in Illinois, the Judicial Inquiry Board and the Courts Commission may not be interpreting Canon 7 to prohibit such general statements. In *In re Tully*, the Commission found that statements to the effect that the candidate was "tough on crime" and "tough on taxes" were neither "pledges or promises of conduct in office" nor "statements on disputed legal or political issues."<sup>57</sup> Rather, they were described as lying "within the realm of general comment" permissible under the Illinois Code.<sup>58</sup>

Candidates have been disciplined in some jurisdictions for commenting on specific cases in which they had been involved.<sup>59</sup> It appears that the Illinois Courts Commission and the Judicial Inquiry Board are not now interpreting Canon 7 to cover such comments. In *Tully*, several statements about specific cases were not found to have violated the Illinois Code.<sup>60</sup>

55. See J. SHAMAN, *supra* note 39, § 11.09, at 330 (discussing *In re Nolan* (Ky. Judicial Ethics Comm'n 1984)).

56. State Bar of Mich. Comm. on Professional and Judicial Ethics, Formal Op. C-219 (1980); see also J. SHAMAN, *supra* note 39, § 11.09, at 330.

57. *In re Tully*, No. 90 CC 2, slip op. at 6 (Ill. Cts. Comm'n Oct. 25, 1991).

58. *Id.* at 7. The Commission also found that the complaint of the Judicial Inquiry Board did not allege that these comments fell within the realm of impermissible "pledges or promises" or "comments about disputed legal or political issues." *Id.* Similar general comments in *Buckley* were found not to violate the prohibition on "pledges or promises." *Buckley*, No. 91 CC 1, slip op. at 3 (Ill. Cts. Comm'n Oct. 25, 1991). The comments included the following: "Our Toughest Anti-Crime Team"; "FOR THE VICTIMS OF CRIME"; "the strongest anti-crime team we can elect"; "I'll deliver justice with an even hand, making public safety one of my top concerns—never forgetting the victims of crime"; and "Help win the war against crime and drugs." *Id.* at 2.

59. See J. SHAMAN, *supra* note 39, § 11.09, at 332. However, judges have been permitted to discuss court procedures and "the law governing a judge's duty in particular situations." *Id.* Also, at least one jurisdiction would find a violation only if the comments related to a matter presently before the court. *Id.*

60. The following advertisements allegedly were approved by the candidate and were not found to violate the Canon:

"I went to a disabled Sr. Citizen's home to sign arrest warrants against two home invaders . . . The detective on the scene said 'without Judge Tully going to see the woman, we wouldn't have made an arrest.'"

. . . "I saved Cook County Taxpayers \$2.5 Million in 1989 in decision [sic] involving the CTA."

. . . "In a recent ruling the Illinois Appellate Court upheld Judge Tully's ruling that resulted in saving the tax payers [sic] of Cook County \$2,500,000 in 1989 and a fare increase for CTA users."

*Tully*, No. 90 CC 2, slip op. at 2-3 (Ill. Cts. Comm'n Oct. 25, 1991) (quoting various newspaper advertisements). In *Buckley*, no violation was found based on the statement

This narrow interpretation of the provisions applicable in *Tully* may well have been influenced by a spate of recent cases that have cast serious doubt on the constitutionality of broad prohibitions on the campaign expression of judicial candidates. In *J.C.J.D. v. R.J.C.R.*,<sup>61</sup> the Kentucky Supreme Court found that the prohibition on discussion of "all 'disputed legal or political issues'" violated the first amendment.<sup>62</sup> Although the court found a compelling state interest in assuring that judges act objectively and give the appearance of objectivity, the bans were not sufficiently narrowly tailored to satisfy the requirements of the first amendment.<sup>63</sup> In *J.C.J.D.*, the court commented that bans on misleading statements or comments on cases likely to come before the courts would be constitutional. However, the restriction at issue was not limited to such expression. Instead, it prohibited all speech "[o]ther than allowing a judicial candidate to state a professional history, and promise faithful and impartial performance of duties if elected."<sup>64</sup>

In *J.C.J.D.*, the court stressed that if judges are to be chosen by popular elections, voters should be able to obtain sufficient information to make an informed choice.<sup>65</sup> In recent federal district court cases, the same prohibitions were found to be unconstitutional, applying nearly identical reasoning to that of the Kentucky Supreme Court in *J.C.J.D.* In *American Civil Liberties Union v. Florida Bar*,<sup>66</sup> decided shortly before *J.C.J.D.*, the court commented that "when a state decides that its trial judges are to be popularly elected . . . it must recognize the candidates' right to make campaign speeches and the concomitant right of the public to be informed about the judicial candidates."<sup>67</sup>

In a Pennsylvania federal district court case decided after

---

that the candidate had "[r]einstated the conviction of a major drug dealer.'" *Buckley*, No. 91 CC 1, slip op. at 2 (Ill. Cts. Comm'n Oct. 25, 1991) (quoting campaign advertisement).

61. 803 S.W.2d 953 (Ky. 1991).

62. *Id.* at 956 (emphasis in original); see also *Clark v. Burleigh*, 228 Cal. App. 3d 1369, 1389, 279 Cal. Rptr. 333, 346 (limiting candidate's statements to state-supplied pamphlets setting forth his or her qualifications and background is a prior restraint on expression in violation of the first amendment), *reh'g granted*, 283 Cal. Rptr. 381, 812 P.2d 562 (Cal. 1991).

63. *J.C.J.D.*, 803 S.W.2d at 956.

64. *Id.*

65. Such information would include "knowledge of the law, and personal views and beliefs." *Id.* The court described the judge's expression as criticism "of the Code and published court decisions." *Id.* at 957.

66. 744 F. Supp. 1094 (N.D. Fla. 1990).

67. *Id.* at 1097 (emphasis in original).

*J.C.J.D.*, *Stretton v. Disciplinary Board of the Supreme Court*,<sup>68</sup> the court concluded that “[t]here was an array of less restrictive means to preserve the fact and appearance of judicial impartiality.”<sup>69</sup> The courts in *J.C.J.D.* and *Stretton* seemed to be influenced by the fact that the Model Code had just been modified to loosen the strictures on political expression by judicial candidates.<sup>70</sup> The revised Model Code provision has deleted the ban on announcing views on “disputed legal or political issues.”<sup>71</sup> Instead, it prohibits “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”<sup>72</sup>

Although *Stretton* eventually was overruled by the Third Circuit Court of Appeals,<sup>73</sup> the appellate decision upheld the constitutionality of the applicable canon only by accepting the narrow interpretation proffered by the Pennsylvania Judicial Inquiry and Review Board. In accordance with the rule that “‘every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,’”<sup>74</sup> the Third Circuit interpreted the words “disputed legal or political issues” to refer to “those issues that are likely to come before the court,”<sup>75</sup> thereby satisfying the requirement that the restriction on speech be “narrowly tailored to serve the state’s compelling interest in an impartial judiciary.”<sup>76</sup> Thus narrowed, the canon is virtually identical to the Model Code provision as revised in 1990.<sup>77</sup>

Even the narrowed restriction on matters “likely to come before the court” arguably would be subject to first amendment challenge; however, such a restriction would probably be upheld. In a recent case, a federal district court in Kentucky had “no difficulty finding

---

68. 763 F. Supp. 128 (E.D. Pa.), *rev’d*, 944 F.2d 137 (3d Cir. 1991). In *Stretton*, the judicial candidate wanted to criticize a recent Supreme Court opinion that found a coerced confession to be harmless error. *Stretton*, 763 F. Supp. at 131-32.

69. *Stretton*, 763 F. Supp. at 137; *accord* *Beshar v. Butt*, 773 F. Supp. 1229 (E.D. Ark. 1991). The court in *Stretton* also found the prohibition to be unconstitutionally vague. *Stretton*, 763 F. Supp. at 139.

70. *J.C.J.D.*, 803 S.W.2d at 956; *Stretton*, 763 F. Supp. at 139.

71. 1972 MODEL CODE, *supra* note 39, Canon 7B(1)(c).

72. 1990 MODEL CODE, *supra* note 22, Canon 5A(3)(d)(ii). The court in *J.C.J.D.* explained that the change was made because the revision committee believed the previous Model Code provision to be “overly broad.” *J.C.J.D.*, 803 S.W.2d at 956-57.

73. *Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137 (3d Cir. 1991).

74. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)), *quoted in Stretton*, 944 F.2d at 144.

75. *Stretton*, 944 F.2d at 144.

76. *Id.*

77. 1990 MODEL CODE, *supra* note 22, Canon 5A(3)(d)(ii).

a compelling state interest in an impartial judiciary,"<sup>78</sup> and thus upheld a restriction on "pledges and promises of conduct in office and commitments with respect to [legal] issues likely to come before the court."<sup>79</sup> The court acknowledged that a candidate might have difficulty determining which issues would be likely to come before him, but nevertheless rejected a vagueness challenge and found the constraint necessary to the impartiality of the judicial system.<sup>80</sup> However, the same court found that the restriction was unconstitutional as applied to administrative issues likely to come before the court.<sup>81</sup>

If the broad prohibition in Canon 7 of the Illinois Code on comments relating to "disputed legal or political issues" faces a constitutional challenge, the courts probably will follow either *Stretton* (and narrow the reach of the prohibitions)<sup>82</sup> or *J.C.J.D.* (and invalidate the restriction on its face).<sup>83</sup> Indeed, two recent Illinois Courts Commission cases seem to have strained in order to avoid raising first amendment challenges.

In *In re Tully*, the Commission avoided a constitutional challenge to the prohibitions on "pledges or promises of conduct in office" and pronouncements on "disputed legal or political issues" by finding that the statements made by the candidate were not within those categories of expression, and that in any event, the complaint of the Judicial Inquiry Board did not allege a violation of those prohibitions.<sup>84</sup> The statements made included general comments such as "tough on crime" and "tough on taxes,"<sup>85</sup> as well as comments on specific cases the candidate had decided in the past.<sup>86</sup>

The Commission's narrow interpretation of Canon 7 and the complaint in *Tully* may well have avoided serious constitutional challenges. On the other hand, in *In re Buckley*, the Commission seemingly attempted to avoid a constitutional challenge by inter-

---

78. *Ackerson v. Kentucky Judicial Retirement and Removal Comm'n*, 776 F. Supp. 309, 313 (W.D. Ky. 1991).

79. *Id.* at 315.

80. *Id.*

81. The court explained that "impartiality is an attribute of the exercise of a court's adjudicatory power, not its administrative function." *Id.* at 314.

82. *See supra* text accompanying notes 68-81.

83. *See supra* text accompanying notes 61-65.

84. *In re Tully*, No. 90 CC 2, slip op. at 6 (Ill. Cts. Comm'n Oct. 25, 1991).

85. *Id.*

86. *See supra* note 60.

preting the same canon quite broadly.<sup>87</sup> It has become obvious based on the recent cases in other jurisdictions discussed above that the very general prohibition on commenting on legal or political issues is more vulnerable to constitutional challenge than the narrower prohibition on “pledges or promises of conduct in office.”<sup>88</sup> Perhaps that explains why the Commission chose to categorize the statement in *Buckley* that the candidate had “never written an opinion reversing a rape conviction”<sup>89</sup> as a “pledge or promise.” However, if the statement fits within either of the two categories, it would seem to be the prohibition on commenting on legal issues. Of course, that conclusion is reached primarily because the prohibition is so general as to include almost any statement other than comments on the relative qualifications or diligence of the candidates.<sup>90</sup> It is this very generality that raises the constitutional problem.

It is not clear that the constitutional issue can be avoided in *Buckley* by finding a violation of the more specific rather than the more general prohibition. Traditional first amendment jurisprudence, which would require that a provision be interpreted narrowly to avoid serious constitutional challenges,<sup>91</sup> may be violated by the Commission’s “implicit pledge” theory. Furthermore, the Commission’s conclusion that the statement was “tantamount to an implicit pledge that rape convictions on review have been and will continue to be treated summarily”<sup>92</sup> seems to stray rather far from an obvious interpretation of the language used. Such a broad application of the “pledges or promises” prohibition may not be necessary to further the compelling interest in an impartial judiciary. Also, the possibility of other similar broad and unpredictable interpretations of Canon 7 raise the specter of a “chilling” effect on protected political speech.

---

87. Justice Buckley has, however, challenged the Commission’s holding on first amendment grounds. See *supra* note 50.

88. See *supra* text accompanying notes 61-82.

89. *In re Buckley*, No. 91 CC 1, slip. op. at 2 (Ill. Cts. Comm’n Oct. 25, 1991).

90. Indeed, the prohibition has been interpreted that broadly. One expert has explained:

Advisory committees have been careful to point out that restrictions on campaign speech are not intended to limit the judicial candidate solely to promises of faithful performance of the duties of the judicial office. However, interpretations of Canon 7B(1) of the Code do appear to limit the candidate to discussion of judicial system improvements and reforms the candidate wishes to implement, and truthful criticism of the qualifications of an opponent.

J. SHAMAN, *supra* note 39, § 11.09, at 333.

91. *Frisby v. Schulz*, 487 U.S. 474, 483 (1988).

92. *Buckley*, No. 91 CC 1, slip op. at 4 (Ill. Cts. Comm’n Oct. 25, 1991).



## 2. Misleading and False Campaign Expression

Canon 7B(1)(c) of the Illinois Code also prohibits judicial candidates from misrepresenting their "identity, qualifications, present position, or other fact."<sup>93</sup> Judges in a number of jurisdictions have been disciplined for making false statements in their political campaigns.<sup>94</sup> However, a more difficult issue arises when representations are not actually false, but create a false impression when taken out of context. The Illinois Courts Commission considered this question in 1977, in *In re Elward*.<sup>95</sup> In that case, a circuit court judge was charged with publishing advertisements which were "materially misleading." He had quoted only a "truncated version" of a bar association evaluation, thereby giving a false impression of support when the association had actually found the candidate unqualified.<sup>96</sup> However, because numerous newspaper articles, editorials, and advertisements were published which had clearly stated that the candidate had been found unqualified, the Courts Commission found that "measured against this 'total mix' " of information, the candidate's advertisement did not create a false impression.<sup>97</sup>

Based on *Elward*, at least for issues of omission, the focus appears to be on the overall likelihood that voters will be misled, rather than upon the intent of the candidate in publishing the representation. Such an approach may make it difficult for a candidate to determine in advance whether an omission will be found to violate Canon 7, because it frequently cannot be known whether additional information will have been widely publicized. More importantly, this focus is clearly inconsistent with the purpose of the Illinois Code, which presumably is to assure that only persons of the highest ethical standards serve in the judiciary. Using the *Elward* analysis, even if it were clear that a judicial candidate had attempted to mislead the voters, no discipline would be administered if the attempt were unsuccessful due to information supplied to the public from other sources.

In *In re Tully*, the most recent Illinois case involving misleading statements, the Courts Commission did not address the question of the overall likelihood that voters would be misled. Instead, the Commission focused solely on the tendency of the statements

---

93. ILLINOIS CODE, *supra* note 1, Canon 7B(1)(c).

94. See J. SHAMAN, *supra* note 39, § 11.10, at 335-36.

95. 1 Ill. Cts. Comm'n 114, 116-19 (1977).

96. *Id.* at 116.

97. *Id.* at 121.

themselves to mislead. Judge Tully, a successful candidate for the appellate court who was a sitting circuit court judge during the campaign, was reprimanded for a misleading newspaper advertisement that implied that he was an incumbent running for retention on the appellate court.<sup>98</sup> He was further reprimanded for statements the Commission found even more misleading to the effect that he had been endorsed and found highly qualified by lawyers' organizations.<sup>99</sup>

### B. Fund Raising in Judicial Campaigns

Although Canon 7B(2) of the Illinois Code prohibits judges or judicial candidates from personally soliciting campaign funds, they may "establish committees of responsible persons to secure and manage the expenditure of funds."<sup>100</sup> There are no prohibitions on who may be solicited; however, the general requirement of Canon 2 that the judge should avoid the "appearance of impropriety"<sup>101</sup> may affect some solicitation decisions.

Ethical guidelines in New York and South Dakota prohibit contributions by parties who have or are likely to have cases pending before the judge.<sup>102</sup> However, South Dakota explicitly permits solicitation directed at attorneys, even those with cases pending before the candidate, so long as "the solicitation makes no reference, direct or indirect, to any particular pending or potential litigation."<sup>103</sup> The rationale for distinguishing between parties and

98. The advertisement stated in large print the phrase "VOTE FOR \* \* \* JOHN P. \* \* \* TULLY \* \* \* APPELLATE COURT JUDGE." *In re Tully*, No. 90 CC 2, slip op. at 6 (Ill. Cts. Comm'n Oct. 25, 1991).

99. The candidate placed a newspaper advertisement which stated: "HIGHLY QUALIFIED & ENDORSED" and "'HIGHLY QUALIFIED,' TRIAL LAWYERS GROUP." *Id.* at 6-7.

100. ILLINOIS CODE, *supra* note 1, Canon 7B(2). Canon 7 of the Illinois Code contains no provision like the one in the Model Code that prohibits judicial candidates from personally soliciting "publicly stated support." *Compare id.* Canon 7 with 1990 MODEL CODE, *supra* note 22, Canon 5C(2). Presumably, this activity is considered appropriate in Illinois, subject to the general requirement of Canon 2 that judges must maintain the appearance and reality of integrity and impartiality. *See* ILLINOIS CODE, *supra* note 1, Canon 2; *see also* Shaman, *supra* note 42.

The Supreme Court of Oregon recently upheld the constitutionality of that State's ban on personal solicitation of campaign contributions by judicial candidates. *In re Fadeley*, 310 Or. 548, 548-49, 802 P.2d 31, 44 (1990).

101. ILLINOIS CODE, *supra* note 1, Canon 2.

102. SOUTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 7B(2) guidelines, S.D. CODIFIED LAWS ANN. § 12-9 app. (1982); N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 289 (1973).

103. SOUTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 7B(2) guidelines, S.D. CODIFIED LAWS ANN. § 12-9 app. (1982).

attorneys is based on the determination that "lawyers may be better able than laymen to appraise accurately the qualifications of candidates for judicial office."<sup>104</sup> On the other hand, New York's ethical guidelines state that candidates should not accept contributions from attorneys who have cases pending in the candidate's court.<sup>105</sup>

Although there is no Illinois authority on the definition of "solicitation," other jurisdictions have considered this question. According to a Kentucky ethics opinion, the word "solicitation" simply denotes asking for something.<sup>106</sup> In another jurisdiction, letters and newspaper advertisements inviting persons to fund raisers were found to be solicitations.<sup>107</sup>

Canon 7B(2) of the Illinois Code prohibits personal solicitation of contributions by judicial candidates.<sup>108</sup> However, unlike Canon 5 of the Model Code<sup>109</sup> and similar provisions in most other states, Canon 7 of the Illinois Code does not prohibit personal acceptance of contributions by the candidate. Indeed, the prohibition on acceptance of campaign contributions was deleted by a 1974 amendment to former Illinois Supreme Court Rule 70, the predecessor of Canon 7. The historical note to the 1974 amendment states that the prohibition on receipt had placed "an unrealistic prohibition on candidates for elective office. . . . It is the vice of personal solicitation at which the rule is aimed."<sup>110</sup>

Therefore, it is clear that the personal receipt by a judicial candidate of a contribution is not a *per se* violation of ethical canons in Illinois; however, the circumstances of a particular contribution could raise concerns under Canon 2 regarding the appearance of impropriety.<sup>111</sup> Contributions accepted under conditions that would lead the contributor or others to believe that a *quid pro quo* may be involved would be an obvious example. There is no explicit prohibition either in Canon 7 or in the Illinois Election Code regarding the receipt of contributions in cash; however, the acceptance by judicial candidates of cash contributions might cause bystanders to question the transaction.

Any receipt of contributions by the candidate or the campaign

---

104. *Id.*

105. N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 289 (1973).

106. Ky. Judicial Ethics Comm., Op. JE-42 (1983).

107. La. Sup. Ct. Comm. on Judicial Ethics, Ops. 11, 13 (1973).

108. ILLINOIS CODE, *supra* note 1, Canon 7B(2).

109. 1990 MODEL CODE, *supra* note 22, Canon 5C(1).

110. ILL. REV. STAT. ch. 110A, para. 70 (1970) (amended 1974) (repealed 1987).

111. ILLINOIS CODE, *supra* note 1, Canon 2.

committee should be handled in such a manner that compliance with the reporting and disclosure requirements of the Illinois Election Code will be assured. The Election Code requires that:

Every person who receives a contribution in excess of \$20 for a political committee shall, on demand of the treasurer, and in any event within 5 days after receipt of such contribution, render to the treasurer a detailed account thereof, including the amount, the name and address of the person making such contribution, and the date on which it was received.<sup>112</sup>

Furthermore, the donors of all contributions of \$150 or more must be listed in the campaign committee's disclosure reports.<sup>113</sup>

Thus, contributions received in cash might make compliance with these laws difficult. Also, the acceptance of two or more contributions from different persons which are "bundled" and given by one person would be improper unless the relevant information regarding the actual sources of all the funds given in excess of \$20 were provided.<sup>114</sup> Furthermore, another provision of the Illinois Election Code prohibits any anonymous contribution or contribution "made in the name of another."<sup>115</sup> These statutes cast doubt on campaign fund raising practices such as "passing the hat" at political meetings.

Clearly, judicial candidates who wish to be involved in the funding of their campaigns should be familiar with the laws regulating campaign financing in Illinois, in addition to the rules of Canon 7, in order to assure that they comply with the admonition of Canon 2 that judges should "respect and comply with the law."<sup>116</sup>

#### IV. RECUSAL OR NOTIFICATION OF OPPOSING COUNSEL WHEN CAMPAIGN SUPPORTERS APPEAR IN THE CANDIDATE'S COURT

Judges sometimes face the dilemma of whether or not they must recuse themselves or at least inform the opposing counsel when a campaign supporter appears in court. Neither the Illinois Code nor the Model Code directly addresses this question. However, in a recent Illinois appellate court case, *Gluth Brothers Construction, Inc. v. Union National Bank*,<sup>117</sup> the court held that a judge need

---

112. ILL. REV. STAT. ch. 46, para. 9-6 (1989).

113. *Id.* para. 9-11.

114. *Id.* para. 9-6.

115. *Id.* para. 9-26. Contributions made in violation of this statute escheat to the State. *Id.*

116. ILLINOIS CODE, *supra* note 1, Canon 2A.

117. 192 Ill. App. 3d 649, 548 N.E.2d 1364 (2d Dist. 1989).

not inform opposing counsel that the plaintiff's attorney had served as an officer of the judge's 1976 campaign.<sup>118</sup> The opinion stressed that the campaign had been nearly six years before the complaint in the case had been filed and that there was no evidence of an ongoing relationship between the attorney and the judge.<sup>119</sup>

According to a 1984 Illinois State Bar Association advisory opinion, public endorsement by an attorney of a judicial candidate should not result in per se disqualification of the judge when the attorney later appears before him.<sup>120</sup> This conclusion has also been reached in several other jurisdictions.<sup>121</sup> However, an advisory opinion from Alabama stressed that the circumstances of the particular case should be considered carefully by the judge before determining whether recusal is necessary.<sup>122</sup> The same 1984 Illinois advisory opinion determined that receipt of a campaign contribution by a judge from an attorney appearing before him does not in and of itself require recusal.<sup>123</sup> This rule is consistent with cases in other jurisdictions.<sup>124</sup> In other cases, notification of opposing counsel that a contribution had been made was determined to be unnecessary.<sup>125</sup>

#### V. POLITICAL ACTIVITIES OF SPOUSES AND OTHER CLOSE RELATIVES

Canon 7 of the Illinois Code does not directly refer to the political activities of relatives. The most reasonable interpretation of this provision leads to the conclusion that no restrictions were meant to be placed on truly independent political activity of family members.

Canon 7B(1)(b) of the Illinois Code does provide, however, that the candidate "should not allow any other person to do for him what he is prohibited from doing under this canon,"<sup>126</sup> yet even this prohibition provides an exception for the activities of the can-

---

118. *Id.* at 654-56, 548 N.E.2d at 1367-69.

119. *Id.*

120. Ill. State Bar Ass'n Comm. on Professional Ethics, Op. 866 (1984).

121. *See, e.g.*, Ala. Judicial Inquiry Comm., Op. 84-213; Fla. Comm. on Standards of Conduct Governing Judges, Op. 78-7.

122. Ala. Judicial Inquiry Comm., Op. 84-213.

123. Ill. State Bar Ass'n Comm. on Professional Ethics, Op. 866 (1984).

124. Ala. Judicial Inquiry Comm., Ops. 84-213, -227; Fla. Comm. on Standards of Conduct Governing Judges, Op. 78-7; N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 511 (1979).

125. Ala. Judicial Inquiry Comm., Op. 84-227; Fla. Comm. on Standards of Conduct Governing Judges, Op. 78-7.

126. ILLINOIS CODE, *supra* note 1, Canon 7B(1)(b).

didate's campaign committee. Canon 7 may, therefore, be interpreted to permit anyone, other than the candidate, to solicit campaign contributions for the candidate, if he or she is acting through a campaign committee. This interpretation is reinforced by the Illinois drafters' omission from Canon 7 of language contained in the 1972 Model Code, which stated that a judicial candidate "should encourage members of [her] family to adhere to the same standards of political conduct that apply to [her]."<sup>127</sup>

It is therefore reasonable to interpret Canon 7 of the Illinois Code to permit close relatives to serve on campaign committees and to solicit contributions for the candidate. However, if contributors perceive the family member as a mere surrogate for the candidate, questions might be raised under the more general provisions of Canon 2, which require judges to promote public confidence in the impartiality and integrity of the judiciary.<sup>128</sup>

Under Canon 7 of the Illinois Code, spouses of judges or judicial candidates are not subject to any restraints with regard to their independent political activity on behalf of unrelated candidates or political organizations.<sup>129</sup> The only problem in this context arises when there is a suspicion that the activity is not truly an independent act of the judge's spouse, but rather a surrogate act for the judge or judicial candidate. No reported Illinois cases deal with this issue. In the few cases decided in other jurisdictions, the courts have been reluctant to attribute the political activity of a spouse to the judge and have stressed that "the autonomy of the judge's spouse should simply be accepted as an understood premise of modern life."<sup>130</sup>

---

127. 1972 MODEL CODE, *supra* note 39, Canon 7B(1)(a). The Model Code now provides that a judicial candidate shall "encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate." 1990 MODEL CODE, *supra* note 22, Canon 5A(3). The Canon was revised from the 1972 version, which did not include the reference to the judge's own campaign. 1972 MODEL CODE, *supra* note 39, Canon 7B(1)(a). The purpose of the change was to make clear that the limitations on political participation of family members were meant to apply only to the judicial candidate's campaign. Note to MODEL CODE OF JUDICIAL CONDUCT 69 (Discussion Draft 1989) (submitted for consideration at the 1990 Annual Meeting of the House of Delegates of the American Bar Association).

128. ILLINOIS CODE, *supra* note 1, Canon 2A.

129. The corresponding Model Code provision also permits the judge or judicial candidate's family to engage in unlimited political activity. 1990 MODEL CODE, *supra* note 22, Canon 5A(3) commentary. However, unlike the Illinois provision, Model Code Canon 5A(3) limits activity of relatives in the judicial candidate's campaign. *Id.*

130. *In re Gaulkin*, 69 N.J. 185, 196-97, 351 A.2d 740, 746 (1976) (quoting Professor Geoffrey C. Hazard, Jr., special consultant and draftsman for the ABA Special Committee on Standards of Judicial Ethics); *accord In re Troy*, 364 Mass. 15, 64-66, 306 N.E.2d 203, 231-32 (1973).

However, in *In re Briggs*, which specifically dealt with a contribution made by the spouse of a judge, the Missouri Supreme Court accepted the finding of its discipline commission that the contribution was not an "independent act" of the wife.<sup>131</sup> Although the court was not explicit with respect to the reasons for this conclusion, the opinion did stress the judge's knowledge of the contribution and the fact that it came from a joint bank account.<sup>132</sup> It should also be noted, although the court did not address this factor, that the wife in the case was employed outside the home and therefore could be presumed to have deposited independent income to the bank account.<sup>133</sup> Nevertheless, one should not assume that every political contribution made from a joint bank account, even when the spouse has no independent income, will necessarily be attributed to the judge. In *Briggs*, the judge had engaged in other very extensive political conduct which surely cast doubt upon the independence of the contribution.<sup>134</sup>

However, the result in *Briggs* does suggest that if a spouse wishes to make political contributions, care should be taken to insulate the judge from this activity. Nevertheless, no general rule can be given; the resolution of such disputes will probably be highly fact specific, depending in large part on both the financial arrangements between the spouses and the history of political activities by both the husband and wife. Extensive political activity on the part of the judge may cast doubt on a purportedly independent contribution made by the spouse. On the other hand, when a spouse has a history of independent political activity, it seems less likely that he or she would be viewed as a mere conduit for an improper judicial contribution.

## VI. WHO IS A CANDIDATE FOR JUDICIAL OFFICE?

Under Canon 7 of the Illinois Code, judicial candidates (including incumbent judges) have a great deal more freedom than judges who are not candidates to engage in political activity, both on behalf of their own campaigns and for the benefit of others.<sup>135</sup> However, Canon 7 does not explain when an individual will be considered a judicial candidate. It seems to be a reasonable assumption that the restrictions on political activity by non-candi-

---

131. *In re Briggs*, 595 S.W.2d 270, 272-73 (Mo. 1980).

132. *Id.* at 272.

133. *Id.* at 272-73.

134. *Id.* at 270-78.

135. *See supra* text accompanying notes 14-32.

date judges found in Canon 7 were enacted to further the important policy goals of maintaining the appearance and reality of judicial independence and impartiality.<sup>136</sup> Therefore, one would expect that these restrictions were not intended to be mere formalistic barriers which could be easily circumvented so that judges would be free to engage in political activity for long periods of time prior to elections. Furthermore, given the relatively long terms of office of Illinois judges,<sup>137</sup> the need for extensive political activity would appear to occur rather late in their tenure, at least for those seeking retention.

These considerations lead to the conclusion that for a substantial period of time prior to elections, judges should not have the status of "candidate" under Canon 7, either for retention or for election to a higher judicial office. Admittedly, these general considerations offer little guidance to judges who would like to know precisely when they can begin their campaigns. Furthermore, looking to the Illinois Election Code for a definition of "candidate" can be confusing because the Election Code and the Code of Judicial Conduct do not always fit together. Moreover, as will be explained below, there are possible interpretations of the meaning of "candidate" as used in the Election Code that virtually nullify the restrictions on political activity by judges in most elections.

The Illinois Election Code provides that one becomes a candidate when one "takes the action necessary under the laws of this State to attempt to qualify for nomination for election, election to or retention in public office."<sup>138</sup> To qualify for the primary election, one must file nominating petitions together with a statement of candidacy;<sup>139</sup> a judge seeking retention need only file a "declaration of candidacy."<sup>140</sup>

It is clear that the Election Code does not solve the problem of when one becomes a candidate for judicial office in a primary election for purposes of applying Canon 7, because subsection B(2) of that canon provides that a "candidate" may solicit funds ninety days before filing petitions.<sup>141</sup> Thus, the drafters apparently assumed that one could be considered a "candidate" for purposes of

---

136. See J. SHAMAN, *supra* note 39, § 11.01, at 317-18.

137. Illinois circuit court judges serve for six years, while appellate and supreme court judges serve for 10 years.

138. ILL. REV. STAT. ch. 46, para. 9-1.3 (1989).

139. *Id.* para. 7-10.

140. *Id.* para. 7A-1.

141. ILLINOIS CODE, *supra* note 1, Canon 7B(2).



Canon 7 prior to the point in time when one becomes a candidate under the Election Code by filing a petition.

Although the point when one becomes a judicial candidate in a primary election for purposes of Canon 7 is unclear, it is clear that funds cannot be solicited earlier than 189 days prior to the election. This conclusion follows from two facts. First, candidates running in primary elections cannot, according to the Election Code, file their nominating petitions until ninety-nine days prior to the primary election.<sup>142</sup> Second, Canon 7B(2) prohibits solicitation of contributions earlier than ninety days before filing these petitions.<sup>143</sup>

Under the Election Code, persons seeking retention presumably are entitled to file their "declaration of candidacy" at any time after assuming office.<sup>144</sup> Therefore, a technical argument can be made that pursuant to Canon 7, so long as an attempt to file the declaration is made, one could be treated as a candidate for retention during the entire six- or ten-year tenure in judicial office. Furthermore, Canon 7B(2) permits solicitation of contributions ninety days before "an official declaration of intention to be retained in judicial office."<sup>145</sup> These two provisions, taken together, lead to the odd result that a candidate for retention could begin soliciting for his or her retention campaign ninety days before assuming his or her first term as a judge. Under this reasoning, circuit court retention candidates would have six years and ninety days to solicit funds for their retention bid if they declared their intention to run for re-election immediately upon assuming office.

The Election Code also provides that one becomes a candidate whenever funds are received or spent in furtherance of his or her campaign by the person seeking the office or by one authorized by that person.<sup>146</sup> Although Canon 7 places time limitations on when a candidate may begin to solicit contributions<sup>147</sup> and when he or she must cease soliciting,<sup>148</sup> it places no such limitation on the re-

---

142. ILL. REV. STAT. ch. 46, para. 7-12(1) (1989).

143. ILLINOIS CODE, *supra* note 1, Canon 7B(2). Of course, if the candidate chooses to file his or her petitions later than 99 days prior to the primary, the period for solicitation would begin later than 189 days before the election.

144. The Election Code provides that the declaration is to be filed "*on or before* the first Monday in December before the general election preceding the expiration of his term of office." ILL. REV. STAT. ch. 46, para. 7A-1 (1989) (emphasis added).

145. ILLINOIS CODE, *supra* note 1, Canon 7B(2).

146. ILL. REV. STAT. ch. 46, para. 9-1.3 (1989).

147. ILLINOIS CODE, *supra* note 1, Canon 7B(2).

148. Judicial candidates may not solicit funds later than 90 days from the last election in which the candidate participated. *Id.* This provision is consistent with the Model

ceipt or expenditure of campaign funds.<sup>149</sup> Thus, arguably, under the Illinois Election Code, an individual might become a candidate for judicial office by accepting unsolicited contributions or spending funds in furtherance of the campaign. Presumably, this could occur at any time. However, this approach to establishing the status of a "candidate" seems to create a "Catch 22." In order to become a candidate so that one could, under Canon 7A(2), participate in political activity, one would have to engage in the "political activity" of accepting contributions or spending funds for the campaign.<sup>150</sup>

Attempting to fit the Illinois Election Code and Canon 7 together in order to determine when one becomes a "judicial candidate" is at best confusing. Although receiving unsolicited campaign funds or spending funds in furtherance of the campaign probably would not work for the reasons just stated, Canon 7 seems to assume that one could be a candidate for the primary before filing nominating petitions.<sup>151</sup> Therefore, one might argue that one becomes a candidate whenever a public announcement is made.<sup>152</sup> With respect to those seeking retention, arguably, one could become a candidate at any time merely by filing a declaration of candidacy.<sup>153</sup> It is not at all clear, however, that this technical reading of the Election Code and Canon 7 is the appropriate way to ascertain who has the status of a "candidate" for purposes of determining how much political activity is permissible. It would be rather odd if it were intended that the stringent restrictions on political activity in Canon 7 could be circumvented so easily.<sup>154</sup>

---

Code. See 1990 MODEL CODE, *supra* note 22, Canon 5C(2). Proposed revisions to the Model Code would have prevented post-election fund raising entirely because of "the potential for the exercise, or at least the appearance, of improper influence upon an elected judge." MODEL CODE OF JUDICIAL CONDUCT Canon 5B(2) commentary (Discussion Draft 1989). This change was not incorporated in the revision adopted by the ABA in 1990. Instead, the 90-day limitation on solicitation after the election was retained from the 1972 version. See 1990 MODEL CODE, *supra* note 22, Canon 5C.

149. ILLINOIS CODE, *supra* note 1, Canon 7B(2).

150. *Id.*

151. See *supra* text accompanying notes 138-50.

152. This position was taken by several judges at the 1990 Illinois Judicial Conference.

153. *Id.*

154. The Kentucky Code of Judicial Conduct specifically provides that an incumbent judge shall be deemed to be a candidate for re-election during his or her entire tenure in office. However, Kentucky candidates face greater restrictions on political activity than do candidates in Illinois. An incumbent judge in Kentucky is not permitted to identify himself as a member of a political party in any advertising or at a political gathering except in response to a specific question. Candidates may attend political gathering, and speak on their own behalf, but not on behalf of others. Further, Kentucky judicial candi-

Canon 7 of the Model Code, upon which the Illinois Code largely was modeled, has been described as a compromise "between political reality and the aim of maintaining the appearance of judicial impartiality."<sup>155</sup> Until Illinois law is clarified on the issue of when one becomes a candidate for purposes of Canon 7, a good faith attempt to maintain a reasonable balance between these two goals would seem to be the most prudent course.

## VII. CONCLUSION

The drafters of the Illinois Code were faced with the need to balance considerations of practical politics against the appearance and reality of judicial independence in every one of the provisions of Canon 7. Whether they have struck the balance by permitting too much, too little, or just the right amount of political activity is clearly a question that arouses spirited debate.<sup>156</sup> The preference of some for the usually more restrictive approach of the Model Code

---

dates may not make political contributions or pay assessments, and fund raising is limited to 120 days before the election. KENTUCKY CODE OF JUDICIAL CONDUCT Canon 7B(2) (Michie/Bobbs-Merrill 1983).

155. E. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 96 (1973). The Model Code resolves the problems discussed in this Section of the Article, very explicitly, by providing that a candidate's committee may not solicit contributions and public support earlier than one year before the primary election. 1990 MODEL CODE, *supra* note 22, Canon 5C(2). The 1972 version had a much shorter time limit on the beginning of solicitation of contributions (90 days before the primary), but made no reference to a time limit on solicitation of public support. 1972 MODEL CODE, *supra* note 39, Canon 7B(2).

The 1972 version had an even more restrictive rule for retention candidates. It provided that "[a]n incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2)." *Id.* Canon 7B(3). The 1990 Model Code deleted this restriction, so that presumably retention candidates may, like first-time candidates, solicit public support and contributions one year prior to the election, regardless of whether they have opposition. 1990 MODEL CODE, *supra* note 22, Canon 5C(2).

Despite the relaxation of time limitations in the 1990 Model Code, the one-year period is still much shorter than the period that the confusing Illinois rule seems to permit. Furthermore, the Model Code contains much more stringent limitations than the Illinois Code on the campaign activities in which judicial candidates may engage during these periods. For instance, judicial candidates may not, under the Model Code, contribute to other candidates, speak on behalf of other candidates, or endorse non-judicial candidates. *Id.* Canon 5C. Further, the Model Code prohibits judicial candidates from making speeches for political organizations or paying an assessment to a political organization or candidate. *Id.* Canon 5A. The Illinois Code can be interpreted to permit these activities. See *supra* text accompanying notes 14-42.

156. The author reached this conclusion while listening to the comments of judges participating in the 1990 Illinois Judicial Conference sessions on judicial ethics.

is viewed by others as naive and unfair, given the highly partisan environment of Illinois politics.

However, in at least one regard, the drafters of the Model Code would surely agree with those who argue for fewer restrictions on political activities. The canon of the Illinois Code that addresses limitations on the discussion of campaign issues is much more restrictive than its counterpart in the most recent version of the Model Code.<sup>157</sup> Furthermore, in recent, well-reasoned opinions, courts in other jurisdictions have found restrictions identical to those in the Illinois Code to violate the first amendment rights of candidates and voters. Despite the controversial nature of such a change, the first amendment dictates that these restrictions be narrowed to permit a broader range of issue discussion in judicial campaigns.

There is at least one question upon which I believe nearly all judges, and even academics, would agree. Canon 7 of the Illinois Code simply does not give judicial candidates and judges sufficient guidance regarding which activities are proscribed and which are permitted. Therefore, Canon 7 can be a very frustrating rule for those who must attempt to comply while functioning within the highly charged political climate of Illinois. Those who choose to be scrupulous in avoiding any hint of improper political activity may find themselves at an electoral disadvantage. On the other hand, the general nature of the prohibitions permits party leaders and non-judicial candidates to press the judiciary for greater political involvement than some believe is proper.

These concerns have led me to believe that Canon 7 must be amended to explain with a great deal more specificity just what political activity is and is not permitted. My experience as co-reporter for the Ethics Panel of the 1990 Illinois Judicial Conference has reinforced my view that the vast majority of judges and judicial candidates would be willing to comply with any reasonable restrictions that are clear and applicable in an even-handed manner. Although no document can possibly provide definitive answers to all the questions that might arise with respect to the propriety of various political activities, hopefully, the previous pages of this Article have shown that the drafters of Canon 7 of the Illinois Code can go much further in the direction of specificity. The judiciary deserves to know by what rules they are expected to play the political game in Illinois.

---

157. Compare ILLINOIS CODE, *supra* note 1, Canon 7B(1)(c) with 1990 MODEL CODE, *supra* note 22, Canon 5A(3)(d).

