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## Reconciling Conflicts in Illinois Judicial Ethics

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*Circuit Court of Illinois, 19th Judicial Circuit*

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# Reconciling Conflicts in Illinois Judicial Ethics

*Judge Charles F. Scott\**

## I. INTRODUCTION

The federal "Greylord" investigations and prosecutions in Chicago have resulted in numerous convictions of judges, lawyers, and court personnel in recent years. These investigations and prosecutions provided the backdrop to the adoption of the modified American Bar Association Code of Judicial Conduct (the "ABA Code")<sup>1</sup> in Illinois on January 1, 1987.<sup>2</sup> The Illinois Code of Judicial Conduct impacts upon a broad range of conduct and people. This Article will focus, however, on the innocent or incidental occasions of ethical conflict, and not the criminal or clearly corrupt conduct.<sup>3</sup>

The primary purpose for this examination of the Illinois Code of Judicial Conduct (the "Code")<sup>4</sup> is to anticipate limitations upon, and permissible latitudes for, a judge's conduct on those incidental occasions of ethical conflict. These parameters inevitably will spring from interpretations of the Code by those agencies charged with its enforcement.<sup>5</sup> A related purpose is to consider how the Code affects a judge in his judicial, personal, civic, charitable, political, and other roles. The Committee Commentary to Canon 2, on the appearance of impropriety, tersely sets the tenor of the Illinois Code: "[The judge] must expect to be the subject of con-

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\* Circuit Court of Illinois, 19th Judicial Circuit.

1. The Illinois Code of Judicial Conduct is based largely upon the code of judicial ethics proposed by the American Bar Association in 1972, but contains many modifications.

2. Although the adoption of the new rules coincided with the Greylord investigations, the preparation of these new rules began in 1979. ILL. S. CT. RULES 61-68, ILL. ANN. STAT. ch. 110A, paras. 61-68 (Smith-Hurd Supp. 1987) (Supplement to Historical & Practice Notes).

3. This Article does not consider the mechanics of Canon 8 (Supreme Court Rule 68) dealing with the declaration of economic interests.

4. The Code is set forth in Supreme Court Rules 61-68 found in chapter 110A of the Illinois Revised Statutes. ILL. S. CT. RULES 61-68, ILL. REV. STAT. ch. 110A, paras. 61-68 (1987).

5. The Judicial Inquiry Board is the investigating and prosecuting authority by virtue of article 6, section 15(b) of the Constitution of Illinois of 1970. ILL. CONST. art. 6, § 15(b). The Courts Commission is the adjudicatory authority by virtue of article 6, section 15(e) of the Constitution of the State of Illinois of 1970. ILL. CONST. art. 6, § 15(e).

stant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."<sup>6</sup> This Article proposes that the judge examine his relationships or roles with others not merely in terms of his sensibilities of fair play and appropriate conduct, but also by the public's perceptions of that conduct.

## II. RELATIONSHIPS WITH ATTORNEYS

Most judges at one time practiced law in the community in which they serve. Many professional and social relationships inevitably grew out of their legal careers. Particularly in the smaller communities of Illinois, most lawyers were acquainted with their judges as fellow practitioners. It is not unusual in such communities that the comradeship of respectful adversaries continues after one puts on a black robe. It is difficult for most judges to assume aloofness and studied separation from their former colleagues. Often, lawyers join their one time colleagues in chambers singly or en masse for a cup of coffee, or in a local restaurant for lunch. In the present Greylord milieu, members of the public may consider this activity as evidence of fixing cases or engaging in *ex parte* communications.<sup>7</sup>

A judge does not become a recluse upon assuming the bench. His former golf or tennis partners may continue their athletic activities with the judge, but may feel somewhat ambivalent about appearing as advocates in his court. Under Canon 5A, a judge may "engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties."<sup>8</sup> If the attorney is such a close personal friend that the judge could not bring himself to rule against him, then under Canon 3C(1)(a) the judge possesses "a personal bias or prejudice" and

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6. ILL. S. CT. R. 62, ILL. REV. STAT. ch. 110A, para. 62 (1987). Canon 2 corresponds to Supreme Court Rule 62. Similarly, each other canon corresponds to the Supreme Court Rule that appears with the number 6 preceding the applicable canon number.

7. An *ex parte* communication is an oral or written communication between a judge and another about a pending or impending case (not necessarily his) in the court on which he serves, when less than all attorneys of record have been notified to be present or received contemporaneously a copy of the written communication. "Another" may be an attorney, a party, a witness, a person who is interested in the outcome of the case, a journalist, a television or radio commentator, a social acquaintance, or, more expansively, any member of the public. See *In re Bonin*, 375 Mass. 680, 378 N.E.2d 669 (1978).

8. ILL. S. CT. R. 65A, ILL. REV. STAT. ch. 110A, para. 65A (1987).

should, on his own motion, disqualify himself.<sup>9</sup> Moreover, in a case in which the attorney was his campaign manager, the judge should disqualify himself because hearing the attorney's cases would give the appearance of impropriety, even though in the judge's mind he has no personal bias or prejudice. In such cases, the judge should disclose the social relationship *sua sponte*.

It is preferable that the judge disclose before, rather than after, the trial that he and his family vacation with the prosecutor and his family. In a Greylord prosecution of an Illinois judge, the social relationship between the presiding federal judge and the prosecutor was argued as a basis for reversal in the Court of Appeals.<sup>10</sup> Although the jury's verdict was not set aside, the opinion pointedly criticized the judge for presiding without first disclosing the relationship to the defendant. The court concluded, "[A]n objective observer reasonably would doubt the ability of a judge to act with utter disinterest and aloofness when he was such a close friend of the prosecutor that the families of both were just about to take a joint vacation."<sup>11</sup>

Gifts, loans, and favors to members of the judiciary have become a major focal point in light of *United States v. Holzer*.<sup>12</sup> A judge must be very circumspect regarding what he accepts from an attorney. Canon 5C(4) sets the boundaries. Under subparagraph (a), a judge may accept "an invitation to [him] and his spouse to attend a bar related function or activity devoted to the improvement of the law, the legal system, or the administration of justice."<sup>13</sup> Although subparagraph (a) does not specify from whom a judge may accept such an invitation, it would be prudent that such an invitation be accepted only from a bar association and not from an individual attorney who practices before the judge.

The Illinois State Bar Association ("ISBA") concluded that a bar association may bear the expenses of local judges for bar association activities.<sup>14</sup> The ISBA's opinion states that "[t]he presence of judges at bar association gatherings, where, presumably, all members of the association may attend, does not give rise to the

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9. ILL. S. CT. R. 63C(1)(a), ILL. REV. STAT. ch. 110A, para. 63C(1)(a) (1987).

10. *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985).

11. *Id.* at 1538.

12. 840 F.2d 1343 (7th Cir. 1988) (former judge convicted of extortion in connection with a scheme to defraud, among others, the State of Illinois, its citizens, and the parties on the other side of the cases from the lawyers who bribed him, of the right to the administration of justice by an honest judge).

13. ILL. S. CT. R. 65(C)(4)(a), ILL. REV. STAT. ch. 110A, para. 65C(4)(a) (1987).

14. Committee on Professional Ethics, Opinion No. 86-19 (June 17, 1987), *reprinted in* 76 ILL. B.J. 758, 758 (1987).

possibility of undue influence as may be present in private golf outings or boat rides."<sup>15</sup> The ethics opinion observed that many diverse bar associations are in existence and that some are plaintiff-oriented and others are defendant-oriented. The opinion allows these bar associations to invite the judge to their functions at the expense of the associations. The opinion stated: "[W]e believe that full and open exchange of ideas, philosophies and the like between the lawyers and the judges should be fostered and we further believe that the bar association's functions are a proper and healthy forum for these exchanges."<sup>16</sup> The opinion correctly noted that "under Canon 5C(4)(a) of the Code of Judicial Conduct, which became effective in Illinois on January 1, 1987, a judge may accept an invitation with his or her spouse to attend a bar related function or activity devoted to the improvement of the law, legal system, or the administration of justice."<sup>17</sup>

It is undecided whether Canon 5C(4)(a) includes attendance at bar functions that might at first blush be considered recreational, such as golf outings, variety shows, and dinner dances. These are events at which lawyers and judges come together and the conversation inevitably turns to the law. It is doubtful that the bar outing must include a panel discussion on a legal topic before "the open exchange of ideas" will come into play.

In another ethics opinion,<sup>18</sup> the ISBA concluded that it was improper to invite local judges to a law firm golf outing at which current and prospective clients would be in attendance. The opinion cited Rule 7-110(a) of the Code of Professional Responsibility, which provides that "[a] lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office."<sup>19</sup> The opinion noted that "[s]uch rule draws no distinctions based on the extent of the value given to the judge, nor, except in the instance of campaign contributions, the purpose for which the value is given."<sup>20</sup>

The ISBA's opinion on golf outings is in accord with the spirit of Canon 5C(4)(c), which prohibits the judge or members of his fam-

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15. *Id.*

16. *Id.* at 759.

17. *Id.*

18. Committee on Professional Ethics, Opinion No. 86-18 (July 17, 1987), reprinted in 76 ILL. B.J. 758 (1987).

19. *Id.* (quoting CODE OF PROFESSIONAL RESPONSIBILITY Rule 7-110(a), ILL. REV. STAT. ch. 110A, CANON 7 (1987)).

20. Opinion No. 86-18, reprinted in 76 ILL. B.J. at 758.

ily from receiving "any other gift, bequest, favor, or loan" from "lawyers who practice or have practiced before the judge."<sup>21</sup> It would seem that the judge's attendance at such a private firm's golf outing, attended by present and prospective clients, also violates Canon 2B, which states that "[a judge] should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him."<sup>22</sup>

The judge's attendance at the golf outing permits others to convey the impression that they are in a special position to influence the judge. In such a situation, the judge is window dressing for the law firm to impress its present clients and to gain new ones. The implication is that this is the law firm's judge.

### III. GIFTS, FAVORS AND ASSOCIATIONS

Under 5C(4)(b), "a judge or a member of his family residing in his household may accept ordinary social hospitality."<sup>23</sup> It would seem that hospitality, in the form of coffee, perhaps even accompanied by a roll, would be acceptable. A lavish dinner, however, from one who practices in front of a judge would be unacceptable. It also would seem that under subparagraph (b), the judge or a member of his family residing in his household may accept "a wedding or engagement gift" from such an attorney.<sup>24</sup>

Subparagraph (c) states that "a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan . . . [but not from] lawyers who practice or have practiced before the judge."<sup>25</sup> It appears that the use of the words "any other" in subparagraph (c) permits the judge to accept ordinary social hospitality from an attorney who practices in front of him, or, to accept a wedding or engagement gift under subparagraph (b). The judge may not accept any other gift, bequest, favor or loan from lawyers who practice or have practiced before him.

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21. ILL. S. CT. R. 65C(4)(c), ILL. REV. STAT. ch. 110A, para. 65C(4)(c) (1987).

22. ILL. S. CT. R. 62B, ILL. REV. STAT. ch. 110A, para. 62B (1987).

23. ILL. S. CT. R. 65C(4)(b), ILL. REV. STAT. ch. 110A, para. 65C(4)(b) (1987).

24. *Id.* Even though a judge or a member of his family may accept a wedding or engagement gift under Canon 5C(4)(b), it must be disclosed in the statement of economic interests under Canon 8 if it is in "excess of \$100." ILL. S. CT. R. 68, ILL. REV. STAT. ch. 110A, para. 68 (1987).

25. ILL. S. CT. R. 65C(4)(c), ILL. REV. STAT. ch. 110A, para. 65C(4)(c) (1987). Canon 5C(4)(b) allows a judge or member of his family to accept "a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges." ILL. S. CT. R. 65C(4)(b), ILL. REV. STAT. ch. 110A, para. 65C(4)(b) (1987).

Very recently, the Illinois Supreme Court considered the propriety of attorneys' gifts and loans to judges in *In re Corboy*.<sup>26</sup>

That circuit, appellate, and supreme court judges are elected and must conduct campaigns in Illinois presents a dichotomy under the Code. A prohibition against receiving gifts from lawyers rests uneasily alongside the fact that a judge's campaign committee may solicit campaign funds under Canon 7B(2).<sup>27</sup> The latter provision does not prohibit solicitation of funds from lawyers who practice in front of the judge. The judge, however, may not solicit any campaign funds personally; any campaign contribution is to the judge's campaign fund and not to him. Although this distinction legally is tenable, the public perception of that distinction is not sympathetic. If a judge attends his campaign function, he is sure to see the attorney contributors in attendance. He is likely to see few others, because few others contribute to judicial campaigns. Herein lies the uneasy tension between the goals of the Code and the realities of an elected judiciary.

The prohibition against receiving gifts from lawyers who practice or have practiced in front of the judge is not limited to monetary gifts. The judge under Canon 5C(4)(c) may not accept a

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26. In *In re Corboy*, et al, No. 65609 (Ill. S. Ct. June 22, 1988), attorneys who gave one thousand dollar gifts or loans to pay a judge's mother's hospital bills and loans to pay the judge's taxes were found to be in violation of the Code of Professional Responsibility. Because of the newness of the ethical provisions, however, the attorneys were not disciplined. The Illinois Supreme Court held that a charitable, compassionate, or other innocent intent when making the gift does not exonerate the attorney donor. The court stated, "Attorney gifts or loans to judges, even if well-intentioned, are simply too susceptible to abuse, and too prone to creating an appearance of impropriety." Slip op. at 5. The court found that the gifts could not be construed as "ordinary social hospitality," and that the "transactions [were] a far cry from the social dinners, gratuitous rides, birthday recognitions and gifts of books or flowers, which might be genuine instances of social hospitality . . ." *Id.* at 9.

Importantly, the court found the fact that the attorneys did not practice before the judge was no defense because "a judge is not a permanent fixture of any division, but is subject to reassignment by the chief judge." *Id.* The court enunciated the following test to determine whether a gift is "ordinary social hospitality":

We believe that ordinary social hospitality consists of those routine amenities, favors, and courtesies which are normally exchanged between friends and acquaintances, and which would not create an appearance of impropriety to a reasonable, objective observer. The test is objective, rather than subjective, and the touchstone is a careful consideration of social custom. While we cannot draw any bright lines, we believe that the following factors should be taken into account: (1) the monetary value of the gift, (2) the relationship, if any, between the judge and the donor/lender lawyer, (3) the social practices and customs associated with gifts and loans, and (4) the particular circumstances surrounding the gifts and loans.

*Id.* at 8.

27. Ill. S. Ct. R. 67B(2), ILL. REV. STAT. ch. 110A, para. 67B(2) (1987).

“favor” from a lawyer who has practiced or is practicing in front of the judge.<sup>28</sup> Consequently, he may not accept favors such as a lawyer friend calling the bank to secure a lower mortgage rate, the attorney arranging a free meal at the attorney’s country club, or the attorney calling the local car dealer to get a special discount on the purchase of a car. It is questionable under subparagraph (c) whether the attorney may write a letter of recommendation for the judge’s child to attend college.

Perhaps a rule of reason will develop that the writing of a letter of recommendation is a common courtesy among people who are not judges and lawyers and, therefore, that type of *favor* is not proscribed because the student’s parent happens to be a judge and his friend happens to be a lawyer who practices before the judge. In the course of common activities among people, a letter of recommendation between friends or acquaintances is not considered a favor that would corrupt and despoil the judiciary.

It likewise can be argued that a judge may not write a letter of recommendation for an attorney friend or for his child. Under Canon 2B, the judge “should not lend the prestige of his office to advance the private interest of others.”<sup>29</sup> It seems clear under that provision that a judge may not write a letter recommending that a client employ an attorney. Under the same rule, the judge should not “convey or permit others to convey the impression that they are in a special position to influence him.”<sup>30</sup> Hopefully, a letter of recommendation from a judge for an attorney’s child to attend college would be viewed under a rule of reason.

Also under Canon 2, the judge “should not testify voluntarily as a character witness.”<sup>31</sup> Consequently, an attorney friend or acquaintance necessarily would have to subpoena the judge before he could testify as a character witness on the attorney’s behalf. This also applies in the case of non-lawyers.

Under Canon 5C(1) the judge “should refrain from financial and business dealings” that “involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.”<sup>32</sup> The judge “may hold and manage investments, including real estate,” under Canon 5C(2).<sup>33</sup> He should, however, avoid being a member of a stock purchasing club or group of investors

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28. ILL. S. CT. R. 65C(4)(c), ILL. REV. STAT. ch. 110A, para. 65C(4)(c) (1987).

29. ILL. S. CT. R. 62B, ILL. REV. STAT. ch. 110A, para. 62B (1987).

30. *Id.*

31. *Id.*

32. ILL. S. CT. R. 65C(1), ILL. REV. STAT. ch. 110A, para. 65C(1) (1987).

33. ILL. S. CT. R. 65C(2), ILL. REV. STAT. ch. 110A, para. 65C(2) (1987).



buying real estate when the activities involve a lawyer "likely to come before the court on which he serves."<sup>34</sup> That phrase in Canon 5C(1) is more restrictive than "lawyers who practice or have practiced before the judge."<sup>35</sup>

In Canon 5C(6), the Code contains an insider provision similar to § 16(b) of the Securities and Exchange Act of 1934.<sup>36</sup> Canon 5C(6) provides that "[i]nformation acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties."<sup>37</sup> Consequently, a judge hearing a public trial concerning financial matters may not buy or sell involved securities or tell friends about them. Members of the public, who hear the proceeding, however, may act in their own personal interests.

#### IV. *EX PARTE* COMMUNICATIONS

Canon 3A(4) states in part that a judge "shall not permit *ex parte* or other communications concerning a pending or impending proceeding."<sup>38</sup> This rule would seem to indicate that a judge may speak about a case only when all attorneys in a case are present. On its face, the rule would prohibit a judge from scheduling a pre-trial or other matter by speaking with less than all attorneys by phone or in other casual fashion. It certainly prohibits the judge from discussing the case with parties or witnesses unless all parties are represented.

It might be advisable that the judge never accept a phone call directly. Perhaps, courtroom personnel always should answer the phone and ask the caller his business. Once the judge picks up the phone, it may be too late to avoid receiving an *ex parte* communication from an attorney, witness, party, juror, or concerned person.

Illinois case law indicates that a judge's *ex parte* communications are not per se prejudicial. The Illinois Supreme Court found in a criminal prosecution that the judge's *ex parte* communication with a prospective witness did not require reversal of a conviction.<sup>39</sup> The court stated, "To say that any involuntary meeting or

34. ILL. S. CT. R. 65C(1), ILL. REV. STAT. ch. 110A, para. 65C(1) (1987).

35. Compare ILL. S. CT. R. 65C(1), ILL. REV. STAT. ch. 110A, para. 65C(1) (1987) with ILL. S. CT. R. 65C(4)(c), ILL. REV. STAT. ch. 110A, para. 65C(4)(c) (1987).

36. 48 Stat. 896, codified at 15 U.S.C. § 78(p) (1982).

37. ILL. S. CT. R. 65C(6), ILL. REV. STAT. ch. 110A, para. 65C(6) (1987).

38. ILL. S. CT. R. 63A(4), ILL. REV. STAT. ch. 110A, para. 63A(4) (1987).

39. *People v. Hicks*, 44 Ill. 2d 550, 256 N.E.2d 823, cert. denied, 400 U.S. 845 (1970). The judge had an *ex parte* communication with a prospective State's witness who wandered into his chambers. The individual objected on the record to a continuance of

conversation, no matter how trivial, gives rise to cause for disqualification would present too easy a weapon with which to harass the administration of criminal justice and to obtain a substitution of judges."<sup>40</sup> In another case, a judge's receiving *ex parte* a memorandum of law in chambers from a prosecutor, who was in the presence of an FBI agent, was insufficient to reverse the judge's denial of a motion for substitution of judge.<sup>41</sup>

In one sentencing matter, the judge discussed his views about the defendant with an attorney who was not involved in the case.<sup>42</sup> He indicated that he believed the State was sorry it recommended probation.<sup>43</sup> The judge sentenced the defendant to penitentiary time. The judge's refusal to allow the defendant to withdraw his guilty plea was affirmed on appeal.<sup>44</sup> In a contrasting case, however, a sentence was reversed on appeal because the sentencing judge had various *ex parte* communications in which he solicited opinions of non-judges about what the sentence should be.<sup>45</sup> The case was remanded with instructions that resentencing be done by another judge.<sup>46</sup>

In many criminal courts, a judge is assigned one state's attorney and one public defender. Under these circumstances, the judge inevitably will find himself alone with the prosecutor or public defender. Accordingly, at the outset of the relationships, the judge should let it be known in unequivocal terms, that he will not discuss any case in any way, including scheduling, unless both attorneys are present.

Under the unmodified ABA Code, a judge may confer with a law professor regarding a pending case so long as the judge gives

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the trial before entering the judge's chambers. The judge disclosed that the witness asked whether she might sit in the front portion of the courtroom. *Id.* at 555-56, 256 N.E.2d at 826. The defendant's motion for substitution of judge was denied without sending the matter to another judge. The court held that "the judge's conversations . . . , one of which was in open court, did not give cause for his disqualification, or give rise either to unfairness or a probability of unfairness which fatally infected the trial." *Id.* at 556, 256 N.E.2d at 827.

40. *Id.*

41. *People v. Dunigan*, 96 Ill. App. 3d 799, 421 N.E.2d 1319 (1st Dist. 1981).

42. *People v. Horstman*, 103 Ill. App. 3d 17, 23, 430 N.E.2d 523, 528 (5th Dist. 1981).

43. *Id.*

44. *Id.*

45. *People v. Sumner*, 40 Ill. App. 3d 832, 838, 354 N.E.2d 18, 23 (4th Dist. 1976).

46. *Id.* at 839, 354 N.E.2d at 24. It should be noted that the foregoing cases considered the effects of the *ex parte* communications upon criminal defendants' rights. They do not necessarily indicate like results in disciplinary hearings before the Illinois Courts Commission.

notice to the parties involved and gives them an opportunity to respond.<sup>47</sup> Under the Illinois Code, a judge may not have such a conference with a law professor.<sup>48</sup>

Although the rule does not state what should be done after an *ex parte* communication has been made or attempted, the spirit of the Committee Commentary indicates that there should be disclosure to the other attorneys involved in the case. There is nothing specific under Canon 3C that would require recusal or disqualification after an *ex parte* communication has been made. Under Canon 3C(1)(a), however, a judge would have to disqualify himself if the communication gave him "personal knowledge of disputed evidentiary facts concerning the proceeding."<sup>49</sup> For that type of disqualification there cannot be any remittal of disqualification under Canon 3D and the judge would have to disqualify and recuse himself permanently. If someone merely engaged in hyperbole or made bizarre accusations, the judge would not necessarily have to recuse himself unless he believed the statements and, therefore, had a "personal bias or prejudice concerning a party or his lawyer."<sup>50</sup> Such a personal bias or prejudice under 3C(1)(a) cannot be cured by a remittal of disqualification under 3D. If the *ex parte* communication was made under other circumstances in which the judge's "impartiality might reasonably be questioned," the judge might consider whether he should disqualify himself though there is no specified ground of disqualification under Canon 3C. That canon requires disqualification when the judge's "impartiality might reasonably be questioned, including but not limited to . . ." specific grounds under subparagraphs (a) through (e).<sup>51</sup> Thus, when deciding whether to disqualify himself, the judge should consider the public's perception of the circumstances that might call his impartiality into question. This means that the judge should reach beyond his personal feelings regarding whether he can continue to be impartial and should look to more external considerations in tune with the spirit and climate of the times.

When a judge is at a social function, it should be anticipated that friends and acquaintances may discuss a media item about a case that the judge is handling. The judge should firmly but politely advise that he cannot discuss the case because it is pending before

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47. ABA CODE OF JUDICIAL CONDUCT Canon 3A(4) (1988).

48. See generally ILL. S. CT. R. 63A(4), ILL. ANN. STAT. ch. 110A, para. 63A(4) committee comments (Smith-Hurd 1987).

49. ILL. S. CT. R. 63C(1)(a), ILL. REV. STAT. ch. 110A, para. 63C(1)(a) (1987).

50. *Id.*

51. ILL. S. CT. R. 63C(1), ILL. REV. STAT. ch. 110A, para. 63C(1) (1987).

him.<sup>52</sup> Here is an instance where the concern is not only what others might necessarily say to him, but also what he might say to them. The judge's most neutral remarks about the case might be conveyed to the parties, their attorneys, or the media and result in an impression that the judge is prejudiced.

One shortcoming of Canon 3A(4) is that it does not differentiate between innocent and culpable *ex parte* communications. A random remark by a social acquaintance that he has read or heard about a case pending before the judge would not be viewed as suspect by a reasonable person when the communicator has no connection or personal interest in the outcome of the case, the purpose of the communication was not intended to establish the communicator's position with the judge, and the circumstances or setting of the communication does not reasonably convey a design to influence the judge.

In a pre-Code decision by the Illinois Courts Commission, a judge was suspended for one month for an *ex parte* discussion in chambers with the defendant's attorney, regarding a pending criminal case and its possible disposition. Though the judge rejected an envelope left with the bailiff by the attorney, the Courts Commission disciplined the judge and stated: "The respondent did not report the incident to 'any authority' even though he assumed [the attorney] was offering something in return for an anticipated ruling in favor of [the attorney's] client."<sup>53</sup> It is sufficient under the present Code's Canon 3B that the judge "take or initiate appropriate disciplinary measures."<sup>54</sup>

Canon 3A(6) states that "[a] judge should abstain from public comment about a pending or impending proceeding *in any court*. . . ."<sup>55</sup> Consequently, Judge Bonin, the Chief Judge of the Superior Court in Massachusetts, was disciplined for attending a

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52. In Rehnquist, *Sense and Nonsense about Judicial Ethics*, 28 REC. A.B. CITY N.Y. 694 (1973) [hereinafter Rehnquist], Associate Justice William H. Rehnquist attended a dinner party at which guests discussed the then very topical Watergate. One of the participants suggested the discussion stop because Justice Rehnquist might rule in Watergate matters. Justice Rehnquist's reaction was as follows:

I thanked him for his consideration, but added that if listening to this conversation were to render me damaged goods for the purpose of adjudication, it was at most harmless error in view of the damage I had already sustained by being exposed to the daily newspapers and television news programs.

*Id.* at 711.

53. *In re Laurie*, 2 Ill. Cts. Comm'n 91, 94 (1985).

54. ILL. S. CT. R. 63B(3), ILL. REV. STAT. ch. 110A, para. 63B(3) (1987).

55. ILL. S. CT. R. 63A(6), ILL. REV. STAT. ch. 110A, para. 63A(6) (1987) (emphasis added).

lecture by Gore Vidal that was for the benefit of certain homosexual defendants in criminal cases pending before the Superior Court, but not before Judge Bonin.<sup>56</sup> A Boston newspaper carried on its front page a photo of Judge Bonin and Mr. Vidal taken after the program. The photo was accompanied by a headline reading, "Bonin at benefit for sex defendants."<sup>57</sup> The Massachusetts Supreme Court found that "[b]y his attendance at the meeting the Chief Justice not only exposed himself to *ex parte* or one-sided statements and argumentation on matters before his court, but further compromised his position by seeming to favor or to have particular sympathy with the views of the partisan group which sponsored the affair."<sup>58</sup> It should be noted that Judge Bonin neither made statements about the pending charges nor gave any related opinions about homosexuality. The Massachusetts Supreme Court stated:

The special factor or difficulty in the present case — the stone of stumbling — which did call for caution was that the Chief Justice had good reason to infer that the particular meeting would trench on matters pending in his court; and so it did in fact. That called for a measure of abstention on his part.<sup>59</sup>

The *Bonin* decision appears to elevate the possibility of making an *ex parte* statement to the level of having made one. It would seem that an "appearance of impropriety" was given particular weight in the absence of any discernible violations of any other canon. Though Judge Bonin made no *ex parte* statements, the Massachusetts Supreme Court warned, "A judge must distance himself from pending and impending cases by taking reasonable precautions to avoid extrajudicial contact with them."<sup>60</sup>

A judge is ethically responsible for the conduct of his staff. Under Canon 3A on adjudicative responsibilities, the judge "should require similar abstention [from *ex parte* communications] on the part of court personnel subject to his direction and control."<sup>61</sup> Under Canon 3B(2) on administrative responsibilities, "[a] judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him."<sup>62</sup>

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56. *In re Bonin*, 375 Mass. 680, 378 N.E.2d 669 (1978).

57. *Id.* at 701, 378 N.E.2d at 680.

58. *Id.* at 707, 378 N.E.2d at 683.

59. *Id.* at 708, 378 N.E.2d at 683.

60. *Id.* at 706-07, 378 N.E.2d at 682.

61. ILL. S. CT. R. 63A(6), ILL. REV. STAT. ch. 110A, para. 63A(6) (1987).

62. ILL. S. CT. R. 63B(2), ILL. REV. STAT. ch. 110A para. 63B(2) (1987).

## V. DISQUALIFICATION

A judge *must* disqualify himself from future participation in a case under circumstances set forth in Canons 3C(1)(a) and (b). No action of the attorneys or parties can empower him to resume hearing the case after he discloses facts under subparagraph (a) or (b). If the item of disqualification is found under Canons 3C(1)(c), (d), or (e), the judge also must disclose the factual basis to the parties. In such cases, he may resume hearing the case if a remittal of disqualification under Canon 3D is signed by all the parties *and* lawyers, "independently of the judge's participation."<sup>63</sup>

Subparagraph (a) pertains when the judge "has a personal bias or prejudice concerning a party or his lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding."<sup>64</sup> Subparagraph (b) applies when he has "served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it."<sup>65</sup> There is no requirement under subparagraph (b) that the associated lawyer be handling the case at the same time it comes before the judge or that the judge know the facts of the case. It probably is wise for a recently installed judge to leaf through his court files to note attorney appearances, including withdrawn appearances.

A waivable ground of disqualification under subparagraph (c) exists if, within the last three years, the judge has associated in private practice with a firm or a lawyer currently representing any party in the controversy. When the Code first went into effect January 1, 1987, the requirement was five years. This was reduced to three years as a practical consideration for small counties in which the bar is small and the likelihood of association with lawyers who practice before the judge is greater.

Interestingly, under subparagraph (d), the disqualification arising from the judge's or his family member's having "a substantial financial interest in the subject matter in controversy or in a party to the proceeding" may be waived under remittal of disqualification.<sup>66</sup> Under subparagraph (e), "a person within the third degree of relationship" to the judge or spouse may continue as a party or an attorney in a proceeding before the judge if there is a written

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63. ILL. S. CT. R. 63D, ILL. REV. STAT. ch. 110A, para. 63D (1987).

64. ILL. S. CT. R. 63C(1)(a), ILL. REV. STAT. ch. 110A, para. 63C(1)(a) (1987).

65. ILL. S. CT. R. 63C(1)(b), ILL. REV. STAT. ch. 110A, para. 63C(1)(b) (1987).

66. ILL. S. CT. R. 63C(1)(d), ILL. REV. STAT. ch. 110A, para. 63C(1)(d) (1987).

remittal of disqualification.<sup>67</sup>

Under Canon 3C(1)(a) through (e) there is no express requirement that a judge recuse himself because the attorney or litigant before him is a friend. Nor is there any specific requirement that the judge even disclose that fact. Nonetheless, the items of disqualification under subparagraphs (a) through (e) are not exhaustive. Those subparagraphs are preceded by the catchall statement, "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, *including but not limited to instances where . . .*"<sup>68</sup> It seems clear that a close friend relationship should be raised by the judge to parties and attorneys who have no knowledge of it, even though it is not specifically required by Canon 3.

The test of the canon seems not to leave the decision of disclosure and disqualification to the subjective fairness of the judge. Canon 3C appears to impose a test employing the public's perception of the information to determine "what reasonably might be questioned." In *United States v. Holzer*,<sup>69</sup> the Seventh Circuit Court of Appeals discussed the issue of whether material information fraudulently was withheld by the judge in a federal mail fraud prosecution<sup>70</sup> and stated: "A judge need not disclose information that would not make a reasonable person think him incapable of presiding impartially in the case."<sup>71</sup>

The inescapable converse is that a judge must disclose information that would make a reasonable person think him incapable of presiding impartially. The prudent course is to disclose such information, even though it is not required by subparagraphs (a) through (e) of Canon 3C. Once the information that would "make a reasonable person think [the judge] incapable of presiding impartially" is disclosed, the judge should not resume hearing the case, if at all, until a written remittal of disqualifications is received.

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67. ILL. S. CT. R. 63C(1)(e), ILL. REV. STAT. ch. 110A, para. 63C(1)(e) (1987).

68. ILL. S. CT. R. 63C(1), ILL. REV. STAT. ch. 110A, para. 63C(1) (1987) (emphasis added).

69. 816 F.2d 304 (7th Cir. 1987).

70. The *Holzer* decision followed the long established test that the prosecution in a mail fraud case need only show a loss of "intangible rights" to good government as a consequence of the fraudulent conduct. *Id.* at 310. The "intangible rights" test was rejected by the United States Supreme Court in *McNally v. United States*, 107 S. Ct. 2873 (1987), which required a showing of loss of "money or property." 55 U.S.L.W. at 5014. In a memorandum decision, the United States Supreme Court vacated the judgment in *Holzer* and remanded the case to the Seventh Circuit for further consideration in light of *McNally*. See *United States v. Holzer*, 108 S. Ct. 53-54 (1987).

71. *Holzer*, 816 F.2d at 307.

It is assumed,<sup>72</sup> though not by any means established, that a remittal of disqualification applies to nonspecified grounds for disqualification, or grounds found in the nebulous "including but not limited to" language for disqualification in Canon 3C. This assumption is made notwithstanding the limited reference in Canon 3D that remittal of disclosure applies to "Canon 3C(1)(c), Canon 3C(1)(d) or Canon 3C(1)(e) . . . ."<sup>73</sup> This is another way of stating that the specified grounds of disqualification in Canon 3C(1)(a) and Canon 3C(1)(b) were being singled out as not being waivable by a remittal of disqualification. It would appear that omission of the nonspecific grounds for disqualification from Canon 3D was inadvertent.

## VI. REMITTAL OF DISQUALIFICATION

The remittal of disqualification under Canon 3D must set forth, in writing, the basis of the disqualification and must be signed by all "parties and lawyers." The agreement of the parties and attorneys must be made "independently of the judge's participation . . . ."<sup>74</sup> Accordingly, the judge may not require or encourage any agreement that "the judge's relationship or interest is immaterial, the judge is no longer disqualified, and may participate in the proceeding."<sup>75</sup> Given the increased frequency of disqualification scenarios, especially in small counties, it is hoped that a judge may provide the remittal of disqualification forms to the parties and attorneys after they have agreed, and not be guilty of violating the provision requiring "independ[ence] from the judge's participation."

When the attorneys indicate that their clients will sign the remittal of disqualification form but presently are unavailable, the Committee Commentary indicates, "[T]he judge, without violating this section, may proceed on the *written* assurance of the lawyer that

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72. Some lecturers on Ethics at the Illinois Judicial Conference, September 3-5, 1987, including your writer, believed the authors of the Code must have intended for there to be a procedure by which nonspecified grounds for disqualification could be waived. The obvious available procedure lies within Canon 3D. See ILL. S. CT. R. 63D, ILL. REV. STAT. ch. 110A, para. 63D (1987).

73. ILL. S. CT. R. 63D, ILL. REV. STAT. ch. 110A, para. 63D (1987). The Committee Commentary to Canon 3D makes no mention whether remittal of disqualification is available for nonspecified grounds for disqualification in Canon 3C. See ILL. S. CT. R. 63D, ILL. ANN. STAT. ch. 110A, para. 63D committee commentary (Smith-Hurd Supp. 1987).

74. ILL. S. CT. R. 63D, ILL. REV. STAT. ch. 110A, para. 63D (1987).

75. *Id.*



his party's consent will be subsequently filed."<sup>76</sup> Required practice is to reserve ruling until the remittal of disqualification, signed by the clients, is received. The judge may not make a decision while he is disqualified. He does not become qualified until all attorneys and parties sign a remittal of disqualification, which states that "the judge is no longer disqualified." If a remittal of disqualification is not received in a reasonable time, the judge should sign an order recusing himself and sending the case to the Chief Judge for reassignment.

There is one specific exception to remittal of disqualification procedure under Canon 3D, that of an insubstantial existing or potential financial interest of the judge or his family. The canon reads that "the judge shall make a disclosure of such interest to the parties . . . ."<sup>77</sup> This writer believes such a disclosure should be made to "the parties," as the canon requires, and not merely to their attorneys. Moreover, the disclosure should be memorialized formally in the court record. Once the disclosure is made, the judge "may either choose to participate in the proceeding or state his intent to so participate in the absence of written objections filed by any party within 10 days of the disclosure and the statement of the intent to participate."<sup>78</sup> Though the permissive word "may" is used and the statement is in the disjunctive, conservative practice would be to employ the ten day procedure.

Canon 3 disqualifications may work hardship upon the attorneys and parties. A disqualification may require in the case of a small county that they travel a great distance outside of their county to have even perfunctory matters heard. Notwithstanding such hardship, it should not deter a judge from doing what ethically is required. Error, if any, should be made on the side of disclosing too frequently.

## VII. THE JUDGES'S RIGHT TO WITHDRAW

Canon 3D does not require that the judge give the parties and attorneys the option to keep him in the case when he feels compelled to recuse himself. The procedure is one "of withdrawing from the proceeding." If the judge believes he should withdraw, he may do so on his own motion. The judge should then feel no vested interest or duty to hear the case. If the judge has a serious

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76. ILL. S. CT. R. 63D, ILL. ANN. STAT. ch. 110A, para. 63D committee comments (Smith-Hurd Supp. 1987) (emphasis added).

77. ILL. S. CT. R. 63D, ILL. REV. STAT. ch. 110A, para. 63D (1987).

78. *Id.*

ethical question whether he should continue with the case, the appropriate answer often is that he should withdraw.

A judge should disqualify himself when he questions his own ability to be fair or believes that non-recusal will raise a serious appearance of impropriety; a judge, however, should not search for ways to disqualify himself from a case as a matter of convenience. The buck must stop with an upright judge who will decide difficult and controversial cases without fear of political, professional, or media criticism. Chief Justice William H. Rehnquist put it very well in a speech before the American Bar Association in 1973:

During my sixteen years of the private practice of law, the judge who was the most 'sensitive' to the 'appearance of impropriety' of any I knew sat in a court of general jurisdiction in the state where I practiced. He was so 'sensitive' to the appearance of impropriety that if he had so much as shaken hands at a large political gathering with one of the litigants who appeared before him, he would summarily disqualify himself. The principal result of this 'sensitivity' on his part, so far as I could see, was that at least one working day a week he was able to reach the first tee of the golf course before eleven o'clock in the morning, or else get home and do some of those odd jobs which escape the attention of all of us on the weekends.<sup>79</sup>

### VIII. CONDUCT ON THE BENCH

Two Illinois Courts Commission cases illustrate that a judge should not use the court as a forum for personal opinions on socially sensitive matters. In one case, the judge told a pregnant attorney that "ladies should not be lawyers" and "do not belong in court."<sup>80</sup> He stated, "[N]o industry would allow you to work in the condition you are in,"<sup>81</sup> and added, "[I]f your husband had kept his hands in his pockets you would not be in the condition you are in."<sup>82</sup> The judge was reprimanded for violating what now is governed by Canon 3A(3).<sup>83</sup> This canon requires that "[a] judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity . . . ."<sup>84</sup>

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79. Rehnquist, *supra* note 52, at 712-13.

80. *In re Cieslik*, 2 Ill. Cts. Comm'n 111, 111 (1987).

81. *Id.*

82. *Id.*

83. ILL. S. CT. R. 63A(3), ILL. REV. STAT. ch. 110A, para. 63A(3) (1987).

84. *Id.*

In another matter,<sup>85</sup> the judge was charged with using obscene language in vividly describing to juveniles the sexual atrocities awaiting them at the Juvenile Department of Corrections. Some of the descriptions portrayed the sexual transgressors as members of an ethnic minority group. The Courts Commission dismissed the petition and stated that "[v]iewed in the context in which the language was used and the purpose for which it was used, we cannot find that the respondent violated any Supreme Court rules."<sup>86</sup> The Courts Commission stated that the evidence did not rise to the requisite clear and convincing standard. The Courts Commission, however, made the following admonition: "We do not approve of the respondent's selection of language at issue and will not look favorably upon any future use of such language."<sup>87</sup>

### IX. WHISTLE BLOWING

Under Canon 3B(3) "[a] judge having knowledge of a violation of these canons . . . or a violation of Rule 1-102 of the Code of Professional Responsibility on the part of a lawyer shall take or initiate appropriate disciplinary measures."<sup>88</sup> This does not mean that he necessarily must make a report to the Judicial Inquiry Board or to the Attorney Registration and Disciplinary Commission. In the case of an errant lawyer, bringing the unlawyer-like courtroom conduct to the lawyer's attention in private may be sufficient. Reporting such conduct to the chief judge also may be sufficient and may provide a procedure to assist in determining whether the violations are repetitive.

There is no doubt that being offered a bribe by an attorney requires decisive action under Canon 3B(3). The Illinois Courts Commission has disciplined a judge when the judge assumed that the attorney "was offering something in return for an anticipated ruling" and "did not report the incident to any authority" under the previous Code.<sup>89</sup> There also is no doubt that a judge who sees and hears a bribe being accepted by another judge has "knowledge" of a violation and must report it under the mandatory provi-

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85. *In re Teschner*, 2 Ill. Cts. Comm'n 43 (1983).

86. *Id.* at 61.

87. *Id.* at 60.

88. ILL. S. CT. R. 63B(3), ILL. REV. STAT. ch. 110A, para. 63B(3) (1987).

89. *In re Laurie*, 2 Ill. Cts. Comm'n 91, 94 (1985). The present Code does not require reporting to "the proper authorities," as did former Supreme Court Rule 61(c)(10). The present Canon 3B(3) requires the judge to "take or initiate appropriate disciplinary measures." ILL. S. CT. R. 63B(3), ILL. REV. STAT. ch. 110A, para. 63B(3) (1987).

sion of Canon 3B(3). Mere suspicion or surmise, however, does not rise to the level of "knowledge."

### X. SEXUAL TRANSGRESSIONS

There is a division of authority as to whether a judge may be disciplined for sexual transgressions if they do not violate the law. The Ohio Supreme Court disciplined a judge who "while still married to, but separated from, his first wife, took his girl-friend' (now his second wife) with him, at his expense, on the trip to Majorca and on the two trips to Mexico . . . ."<sup>90</sup> The Ohio Supreme Court did not find persuasive the fact that the judge's conduct was no different from that of the "ordinary person" and was not unlawful. The court concluded that "[i]mproper conduct which may be overlooked when committed by the ordinary person, or even a lawyer, cannot be overlooked when committed by a judge."<sup>91</sup> It should be noted that the standard that was applied was that the judge's conduct be "beyond reproach." That phrase is not in the present Illinois Code.

The Florida Supreme Court reached substantially the same result in disciplining a judge for engaging in "sexual activities with a member of the opposite sex not his wife in a parked automobile . . . ."<sup>92</sup> On the other hand, the Supreme Court of Pennsylvania did not discipline a judge for engaging in an extramarital affair that involved overnight trips and a one week vacation in Puerto Rico.<sup>93</sup> The court noted that neither adultery nor fornication constituted a crime in Pennsylvania and that therefore there was no basis for discipline "regardless of the private views" of the court.<sup>94</sup>

In *Geiler v. Comm'n on Judicial Qualifications*,<sup>95</sup> the California Supreme Court removed a judge from office on the basis of his "crude and offensive conduct in public places."<sup>96</sup> The judge reput-

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90. *Cincinnati Bar Ass'n v. Heitzler*, 32 Ohio St. 2d 214, 221, 291 N.E.2d 477, 482 (1972). See generally Lubet, *Judicial Ethics and Private Lives*, 79 NW. U.L. REV. 983 (1985) [hereinafter Lubet, *Judicial Ethics*]. See also Lubet, *Beyond Reproach; Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges*, AM. JUDICATURE SOCIETY REP. 39 [hereinafter Lubet, *Beyond Reproach*]. The foregoing articles are used in this author's discussion of Sexual Transgressions.

91. Lubet, *Beyond Reproach*, *supra* note 90, at 39 (quoting *Cincinnati Bar Ass'n*, 32 Ohio St. 2d at 221, 291 N.E.2d at 482).

92. *In re Inquiry of Lee*, 336 So. 2d 1175, 1176 (Fla. 1976).

93. *In re Dalessandro*, 483 Pa. 431, 456-57, 397 A.2d 743, 755-56 (1979).

94. *Id.* at 462, 397 A.2d at 758.

95. 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973).

96. *Id.* at 274, 515 P.2d at 3, 110 Cal. Rptr. at 203.

edly had used vulgar language, made offensive sexual gestures, and offensively touched several individuals. The California Supreme Court stated that "[t]he ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the high responsibilities of judicial office. It is immaterial that the conduct concerned was probably lawful, albeit unjudicial, or that petitioner may have perceived his offensive and harassing conduct as low-humored horseplay."<sup>97</sup>

In a 1985 Michigan decision, *In re Tschirhart*,<sup>98</sup> a Michigan judge, while attending the National Judicial College in Reno, Nevada, had a dispute with a cab driver, who had driven him to and from the Mustang Ranch brothel. The controversy became a national media item and resulted in an ethics complaint in the judge's home state of Michigan. Prostitution is legal in the Nevada community where the judge had been driven.

Judge Tschirhart was disciplined, but not for visiting a brothel. Rather, he was disciplined for having made disparaging, disrespectful, and inappropriate statements in the media.<sup>99</sup> The Michigan Judicial Tenure Commission found that the judge's statements constituted judicial misconduct in that the statements brought the judicial office into disrepute and showed "callous disregard for the necessity of avoiding the appearance of impropriety."<sup>100</sup> One member of the Michigan Commission wrote a concurring opinion arguing that Judge Tschirhart's visit to a brothel, though legal in Nevada, constituted misconduct.<sup>101</sup>

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97. *Id.* at 281, 515 P.2d at 8, 110 Cal. Rptr. at 208. See generally Lubet, *Beyond Reproach*, *supra* note 90.

98. 422 Mich. 1207, 1208, 371 N.W.2d 850, 851 (1985). See generally Shaman, *Improper Social Activities of Judges*, 7 JUD. CONDUCT RPTR. 1 (1985).

99. The judge's remarks included the following:

You bet I would do it again, under the same circumstances. I'm more concerned about my principles than public reaction on an emotional basis about something that doesn't even count. I will fight the charge that I defrauded the Nevada taxi driver, even if it means generating publicity about my visit to a legal brothel there. I enjoyed it. It was fun. There's nowhere like it in the world. Although I am not in favor of legalized prostitution, the trade was handled a lot better in Mustang Ranch than it was on East Michigan Avenue in Lansing.

*In re Tschirhart*, 422 Mich. at 1208, 371 N.W.2d at 851 (citations omitted).

100. *Id.* at 1211, 371 N.W.2d at 853.

101. *Id.* In *Judicial Ethics and Private Lives*, the author made the following observations:

While this author believes that private, consensual sexual conduct between adults should not subject a judge (or anyone else) to discipline, the Code of Judicial Conduct does appear to contain sufficient latitude to allow a contrary conclusion, at least as a matter of statutory construction. This conclusion is

If ethical violations should be made of lawful activities, they probably shall be grounded in the language of the heading of Canon 2. Canon 2 is entitled, "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities."<sup>102</sup> Private lawful sexual activities, however, would not violate the specific language found in the body of Canon 2. Canon 2A provides, "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."<sup>103</sup> The foregoing seems to hinge on the legality of the act and the public perception of the judge's integrity and impartiality. Unless the judge hears his paramour's case as attorney, party, or witness, or is being blackmailed, private activities rarely impact upon the judge's "integrity and impartiality." If the pliable phrase "appearance of impropriety" is the test, then such appearance of impropriety would be extended beyond the legality of the conduct to moral values of those who interpret the Code.

### XI. POLITICAL ACTIVITIES

The central provision of Canon 7 on political activities is 7A(2), which provides, "A judge may not, except when a candidate for office or retention, participate in political campaigns or activities, or make political contributions."<sup>104</sup> May a non-candidate judge merely attend political events without being on the dias or otherwise actively participating? Immediately after the passage of the Code, the chairman of the Special Committee on the Administration of Justice in Cook County, contended that mere attendance

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troublesome, since it seems to leave judges at the mercy of local social conventions.

Lubet, *Judicial Ethics*, *supra* note 90, at 994. The author also offered the following observations:

If philandering judges may be disciplined for impropriety, may the same rule be applied to homosexual judges? May states require that unwed mothers or women who have chosen abortion to be removed from the bench? In each of these examples the conduct involved is lawful, at least in a significant number of states, or even constitutionally protected, but is still morally unacceptable to a large number — perhaps even a majority — of citizens.

*Id.* (citations omitted).

Indeed, lawful sexual peccadillos essentially are private. The Illinois statutes on adultery and fornication, which required open and notorious conduct, have been repealed. The activities of fornication and abortion currently receive varying degrees of constitutional protection. It is presently undecided in Illinois whether ethical violations turn on whether the activity is lawful or unlawful.

102. ILL. S. CT. R. 62, ILL. REV. STAT. ch. 110A, para. 62 (1987).

103. ILL. S. CT. R. 62A, ILL. REV. STAT. ch. 110A, para. 62A (1987).

104. ILL. S. CT. R. 67A(2), ILL. REV. STAT. ch. 110A, para. 67A(2) (1987).

was a proscribed "political activity."<sup>105</sup> Receipt of a 4A letter<sup>106</sup> from the Illinois Judicial Inquiry Board by a certain judge who attended a women's political tea served to reinforce that position.<sup>107</sup> A simple remedy to the controversy, if one is desired, is to add a provision to 7A(2) similar to that under Canon 5B(2) on attendance of civic or charitable fundraising events which counsels the judge that "he may attend such events."

As a non-candidate, 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."<sup>108</sup> The latter would seem to allow the judge to write his legislator about a pay bill, or a bill to increase the number of judges, or to pass or not pass a criminal statute. "[L]egislative proposals that might affect the organization, structure, operation or administration of the judicial branch of government," however, first must be submitted to a subcommittee on legislation under the auspices of the Illinois Judicial Conference's Executive Committee.<sup>109</sup> The subcommittee in turn advises the Supreme Court, which has the ultimate administrative and supervisory authority of the Illinois judiciary. It would also seem permissible for the judge to communicate to the county board the judge's views about a new courthouse or a new jail, or to

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105. Chicago Daily Law Bulletin, December 3, 1986, at 16, col. 5. Chairman Jerold S. Solovy stated, "If a judge is popping up at Washington's parties or Vrdolyak's parties, how is the public going to think they can render a fair decision." *Id.*

106. The following was explained by Judge Philip Benefiel, a member of the Judicial Inquiry Board, when lecturing at the Illinois Judicial Conference at Chicago, Illinois on September 3-5, 1987. A "4A letter" derives its name from Rule 4A of the Judicial Inquiry Board. It is a request to the judge to come in and talk over a possible ethical violation. Attendance is not mandatory, although no Illinois judge has declined the request to date. Such 4A letters do not contemplate proceedings before the Illinois Courts Commission. None have to date, although there is no prohibition that a 4A letter might later ripen into 4D letter. So far none has gone to the 4D stage. 4D reflects Rule 4D of the Judicial Inquiry Board.

A 4D letter requires attendance before the Board and contemplates filing a formal proceeding before the Illinois Courts Commission. A 4D letter is a prerequisite to such a proceeding.

Approximately one half of the complaints received by the Judicial Inquiry Board are disposed without 4A or 4D letters. Most of the balance are 4A matters. Approximately two dozen ripen into Commission proceedings on an annual basis.

Court reporters take down all testimony at 4A and 4D proceedings. Untruthful testimony can constitute a perjury charge before the Courts Commission.

107. A member of the audience at the Ethics lecture of the Illinois Judicial Conference stated that an associate judge from his circuit received a 4A letter from the Judicial Inquiry Board regarding this activity.

108. ILL. S. CT. R. 67A(4), ILL. REV. STAT. ch. 110A, para. 67A(4) (1987).

109. Advisory letter of January 25, 1988 to the Judges of Illinois from Mr. Samuel D. Conti, Director, Administrative Office of the Illinois Courts.

make comment to an Illinois Supreme Court Justice regarding the appointment of a judge or the adoption of a court rule.

When may a judge begin his campaign for election? Under Canon 7B(2), the judge may begin his campaign fund "90 days before the filing of nominating petitions or an official declaration of intention to be retained in a judicial office . . . ."<sup>110</sup> The Code provides nothing more specific as to when the campaign begins. As to when it ends, the Code provides nothing more specific than Canon 7B(2)'s provision that campaign fund solicitation ends "no later than 90 days after the last election in which he participates during the election year."<sup>111</sup>

When the judge is a candidate for election or retention, he has diminished rights in expressing his opinions on controversial subjects. Under Canon 7B(1)(c), the judge or judicial candidate should not "announce his views on disputed legal or political issues . . . ."<sup>112</sup> Abortion and the death penalty seem to qualify within that area. As a candidate, however, he may express "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>113</sup>

It might be thought that once a judge is a candidate for election or retention he may put on the full mantle of political campaigner. Not so, under Canon 7B(1), a candidate for election or retention "should maintain the dignity appropriate to judicial office."<sup>114</sup> In a Michigan disciplinary matter,<sup>115</sup> a judge, while a candidate for election, criticized a legislative candidate in front of a high school class and told the newspaper that he was stuffing envelopes and making signs for the candidate's opponent. In disciplining the judge, the Michigan Supreme Court found that the judge became involved in "mudslinging," thus diminishing the public confidence in the judiciary.<sup>116</sup> The candidate judge, or non-judge running for the bench, also should be careful when discussing his toughness or sensitivity because of Canon 7B(1)(c). That canon warns that a candidate "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties

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110. ILL. S. CT. R. 67B(2), ILL. REV. STAT. ch. 110A, para. 67B(2) (1987).

111. *Id.*

112. ILL. S. CT. R. 67B(1)(c), ILL. REV. STAT. ch. 110A, para. 67B(1)(c) (1987).

113. *Id.*

114. ILL. S. CT. R. 67B(1)(a), ILL. REV. STAT. ch. 110A, para. 67B(1)(a) (1987).

115. *In re Bennet*, 403 Mich. 178, 194, 267 N.W.2d 914, 920 (1978).

116. *Id.* at 195, 267 N.W.2d at 920.



of the office . . . ."<sup>117</sup>

## XII. RIGHTS RESERVED TO THE JUDGE

A judge may serve by virtue of Canon 5D as a fiduciary for "the estate, trust, or person of a member of his family," but "then only if such service will not interfere with the proper performance of his judicial duties."<sup>118</sup> "Member of his family" includes a "person with whom the judge maintains a close familial relationship."<sup>119</sup> The judge should not serve as such a fiduciary if the proceedings "would ordinarily come before him" or if the ward "becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction."<sup>120</sup>

Under Canon 4, a judge may "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice."<sup>121</sup> He also may appear at public hearings "on matters concerning the law, the legal system, and the administration of justice . . . ."<sup>122</sup> Likewise, he may be a "member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice."<sup>123</sup> In all of these cases he may participate only "if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him."<sup>124</sup> In a Florida disciplinary matter,<sup>125</sup> a judge wrote letters to a local paper that were critical of capital punishment. The Florida Supreme Court found no misconduct, but found that the judge's comments came "close of the dividing line."<sup>126</sup> The court put great weight on the fact that the judge said he would follow the law notwithstanding his strong view.<sup>127</sup>

In a Minnesota case,<sup>128</sup> a judge was disciplined for criticizing the attorney general for being "less than diligent" and being "politi-

117. ILL. S. CT. R. 67B(1)(c), ILL. REV. STAT. ch. 110A, para. 67B(1)(c) (1987).

118. ILL. S. CT. R. 65D, ILL. REV. STAT. ch. 110A, para. 65D (1987).

119. *Id.*

120. ILL. S. CT. R. 65D(1), ILL. REV. STAT. ch. 110A, para. 65D(1) (1987).

121. ILL. S. CT. R. 64A, ILL. REV. STAT. ch. 110A, para. 64A (1987).

122. ILL. S. CT. R. 64B, ILL. REV. STAT. ch. 110A, para. 64B (1987).

123. ILL. S. CT. R. 64C, ILL. REV. STAT. ch. 110A, para. 64C (1987).

124. ILL. S. CT. R. 64, ILL. REV. STAT. ch. 110A, para. 64 (1987).

125. *In re Inquiry Concerning A Judge, Gridley*, 417 So. 2d 950, 954 (Fla. 1982). See Lubet, *Beyond Reproach*, *supra* note 90, at 26.

126. 417 So. 2d at 954.

127. *Id.* at 955.

128. See Shaman and Reiter, *Off-the Bench Speech*, 8 JUD. CONDUCT RPTR. 1, 1 (1986) (quoting *In re Roberts*, No. 51071 (Minn. Jan. 20, 1981)) [hereinafter Shaman and Reiter].

cally motivated" in certain controversial prosecutions.<sup>129</sup> The disciplinary authority also was concerned about the judge's comments that he was forced to overturn the jury's verdict because of his "Christian belief" that the defendant was not guilty.<sup>130</sup> Lastly, the disciplinary authority noted that the judge had told a reporter, "[T]ell the people that I'm a strange person and sometimes I do strange things."<sup>131</sup>

Canon 5 deals with extrajudicial activities. The judge "may write, lecture, teach, and speak on nonlegal subjects, and engage in the arts, sports, and other social and recreational activities . . ."<sup>132</sup> The judge may participate in Canon 5A activities "if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties."<sup>133</sup> A recent law review article points out, "[I]t is possible to say that the more dignified, temperate, and measured off-the-bench speech is, the less likely it will be found to be improper."<sup>134</sup>

Canon 5 also provides that "[a] judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with his performance of his judicial duties."<sup>135</sup> Nonetheless, if the extrajudicial activity provides a serious conflict with his judicial duties, the judge may have to abstain from any participation. Canon 5B states, "A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court."<sup>136</sup> This seems to exclude a judge's participation in a group such as "Mothers Against Drunk Driving" when the judge regularly presides over drunk driving cases. Likewise, it would seem to exclude a judge's participation in a group seeking greater enforcement of sexual offense statutes when the judge regularly hears sexual offense charges. The Committee Commentary singles out charitable hospitals and legal aid agencies because of their increased likelihood to be involved in litigation. The Committee Commentary to Canon 5B(1) also points out that it is "necessary for a judge regularly to reexamine the ac-

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129. Additionally, the judge dismissed a criminal charge against a defendant who had been found guilty by a jury. *Id.*

130. *Id.*

131. *Id.*

132. ILL. S. CT. R. 65A, ILL. REV. STAT. ch. 110A, para. 65A (1987).

133. *Id.*

134. Shaman and Reiter, *supra* note 128, at 3.

135. ILL. S. CT. R. 65B, ILL. REV. STAT. ch. 110A, para. 65B (1987).

136. ILL. S. CT. R. 65B(1), ILL. REV. STAT. ch. 110A, para. 65B(1) (1987).

tivities of each organization with which he is affiliated to determine if it is proper for him to continue his relationship with it."<sup>137</sup>

Under Canon 5C, a judge may hold and manage investments including real estate, but "should not assume an active role in the management or serve as an officer, director, or employee of any business."<sup>138</sup> This provision leaves undecided many issues about what a judge may do in the running of the family farm. The family farm certainly is an "investment, including real estate," but may well take on dimensions of a business.

Canon 5C(3) states that, "A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified."<sup>139</sup> If the judge's financial investment is a frequent source of conflict, "he should divest himself . . ." of it "[a]s soon as he can do so without serious financial detriment . . . ."<sup>140</sup>

Under Canon 5G, a judge "should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice."<sup>141</sup> Therefore, he may not belong to the local library board, to the mayor's commission to foster the performing arts, or to an investigatory committee such as the Warren Commission. He may not be Secretary of State while being a judge, as was Chief Justice John Marshall, or Secretary for Foreign Affairs, as was Chief Justice John Jay. Nor can he be the President's envoy to France, as was Chief Justice Oliver Ellsworth.<sup>142</sup> The judge also may not be an advisor to the executive branch, as were Justice Louis Brandeis to President Woodrow Wilson, Justices Felix Frankfurter and James Burnes to President Franklin D. Roosevelt, Chief Justice Fred Vinson to President Harry Truman, and Justice Abe Fortas to President Lyndon Johnson.<sup>143</sup> It also would be inappropriate for the judge to be a special prosecutor, as was Justice

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137. ILL. S. CT. R. 65B(1), ILL. ANN. STAT. ch. 110A, para. 65B(1) committee comments (Smith-Hurd 1987).

138. ILL. S. CT. R. 65C(2), ILL. REV. STAT. ch. 110A, para. 65C(2) (1987).

139. ILL. S. CT. R. 65C(3), ILL. REV. STAT. ch. 110A, para. 65C(3) (1987).

140. *Id.*

141. ILL. S. CT. R. 65G, ILL. REV. STAT. ch. 110A, para. 65G (1987).

142. See McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9 (1970). See also Appendix, *Nonjudicial Activities of Justices of the Supreme Court of the United States: A Selective Summary*, 35 LAW & CONTEMP. PROBS. 27, 36 (1970).

143. *Id.*

Robert Jackson at the Nuremberg Military Trials.<sup>144</sup>

Under Canon 4C, the judge may assist an organization or governmental agency devoted to improvement of the law, the legal system, or the administration of justice in raising funds and may participate in their management and investment, "but should not personally participate in public fund-raising activities."<sup>145</sup> The foregoing provision would seem to allow Illinois judges to participate on the State Pension Board for judges and the American Judiciary Society.

Canon 5 prohibits the judge from soliciting or allowing his name to be used in any manner to solicit funds or other assistance for any civic or charitable organization. A judge may not solicit funds for a halfway house for criminal probationers, for a refuge for battered women and their children, for a status offender agency devoted to minors, or for a fundraising project for the local YMCA. Because the canon prohibits the judge from soliciting in any manner for funds or other assistance, it probably is improper that a judge call a local merchant and ask him to donate a bed to the local refuge for battered women and their children. Arguably, it also would be improper for a judge to collect money at pancake breakfast for the Brownies or for the high school athletic fund. It also might be improper for the judge to pass the plate at church services. Currently, Canon 5B(2) does not embody any *de minimis* rule. Whether a *de minimis* rule applies is open to debate.

Canon 5B(2) specifically provides that a judge should not allow his name to be used on the letterhead of any civic or charitable organization if the stationery is used to solicit funds.<sup>146</sup> Although the ABA Code specifically allows a judge's name to appear on the letterhead of a charitable or civic organization, the Illinois Code does not.

The judge has the further obligation under Canon 5B(2) to see to it that "his staff, court officials and others subject to his direction or control" not solicit "on his behalf for any purpose, charitable or otherwise."<sup>147</sup> Consequently, the judge's bailiff, clerk, and court reporter may not sell tickets to the judge's civic or charitable organization's pancake breakfast.

Although under Canon 5C(4)(a) a judge may accept a gift incident to a public testimonial for him, under Canon 5B(2), the judge

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144. *Id.*

145. ILL. S. CT. R. 64C, ILL. REV. STAT. ch. 110A, para. 64C (1987).

146. ILL. S. CT. R. 65B(2), ILL. REV. STAT. ch. 110A, para. 65B(2) (1987).

147. *Id.*

may not "be a speaker or the guest of honor at an organization's fund-raising events, but he may attend such events."<sup>148</sup> Consequently, a judge may not accept the Jurist of the Year Award at the YWCA's fundraising dinner, although he may accept it at another YWCA event that is not a fundraiser.

### XIII. CONCLUSION

In a law review article written eighteen years ago, former Justice Tom Clark stated, "Illinois has adopted the most stringent set of canons and rules of any of the states."<sup>149</sup> He also observed, "[T]he judges do not renounce their citizenship . . . when they take on the robes, and I submit that they should continue to take an active part in public affairs."<sup>150</sup> Now a new Code has been adopted after certain Greylord judges were convicted and sentenced to the penitentiary. Judges throughout Illinois are trying to abide by the requirements of the Code and to maintain their rights as citizens. Terminology in the Code makes it difficult to know when one's ethical obligations are fulfilled, and when one's rights of citizenship begin.

The specter of the "appearance of impropriety" does not assist the judge in determining whether his conduct is ethical. When he exercises a right to speak, write, or participate, he often is troubled that his conduct may "cast doubt on his impartiality." He is permitted to participate in civic and charitable activities, but knows he may not engage in the main activity of such affairs, namely fundraising.

The judge perhaps should recoil from handling money at his charity's pancake breakfast since the Code prohibits solicitation. There may be someone who believes the judge's collecting two dollar tickets is a subterfuge for a bribe or that someone is currying the judge's favor. The Code also requires the judge to re-examine whether he should belong to the organization in question.

The Code prompts the judge to examine his contacts with attorneys who practice before him lest critics charge him with *ex parte* communications and accepting prohibited gifts. The Code causes the judge to scrutinize whether he can trade buying lunches with an attorney for fear the activity might be viewed as more than "ordinary social hospitality." The judge must not appear too much of

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148. *Id.*

149. Clark, *Judicial Self-Regulation—Its Potential*, 35 LAW AND CONTEMP. PROBS. 37, 38 (1970).

150. *Id.* at 37.

a friend of a lawyer, if he may acknowledge being one at all. One wonders too if the judge's writing a letter of recommendation for a lawyer's child will one day be scrutinized as an ethical violation requiring discipline.

The Code compels the judge to give serious thought to what he can or cannot do as a non-candidate and candidate. The non-candidate currently must strive toward non-political purity. The candidate must be on guard that he not appear too political even when he is competing in the political arena.

The judge is aware that times have changed and require him to be ever considerate of public perceptions of his conduct. Unfortunately, the process breaks down when the judge misgauges how the public perceives his conduct. This may be especially true when the judge's extrajudicial contacts with the public are few.

It is hoped that judges need not restrict their dining and socializing to fellow judges and their families. The judge should continue to be an active and visible member of the community and "not become isolated from the society in which he lives."<sup>151</sup> Perhaps in being an active member of the community, the judge will keep in touch with community values and be better equipped to rule on conflicts that arise in the real world.

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151. Committee Commentary to Canon 5A reads: "Complete separation of a judge from extrajudicial activities is neither possible nor wise; he should not become isolated from the society in which he lives." ILL. S. CT. R. 65A, ILL. ANN. STAT. ch. 110A, para. 65A committee comments (Smith-Hurd 1987).

