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Off-the-Bench Restrictions on Judges: Ambiguity in Search of an Answer

*Honorable Philip B. Benefiel**

I. INTRODUCTION

Activities which for most citizens are legal and even commendable can lead to disciplinary proceedings against Illinois judges. The purpose of this Article is not to complain that judges are treated by rules of conduct as "second class citizens"¹ or that they should be entitled to enjoy all the privileges enjoyed by non-judicial citizens.² Rather, this Article will focus on ways to remedy the ambiguities in the Illinois Code of Judicial Conduct (the "Code")³ regarding restrictions placed on off-the-bench judicial conduct. As a means of highlighting these ambiguities, the Article will consider some interpretational difficulties in the Code regarding the political activities of judges.

In 1987, the Illinois Supreme Court adopted a new code governing judicial conduct, which provides the *exclusive* basis for disciplining Illinois judges.⁴ The Judicial Inquiry Board,⁵ which investigates and files complaints against judges, and the Illinois

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1. See Doherty, *Judges Are Not Second Class Citizens*, 62 ILL. B.J. 274 (1974); see also Greenberg, *Judges Are First Class Citizens and a Great Deal More*, 62 ILL. B.J. 378 (1974).

2. ILL. S. CT. R. 62, ILL. ANN. STAT. ch. 110A, para. 62 (Smith-Hurd Supp. 1989) (committee commentary). The committee commentary to canon 2 of the Illinois Code of Judicial Conduct provides: "A judge must . . . accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." *Id.*

3. ILL. S. CT. RS. 61-76, ILL. ANN. STAT. ch. 110A, paras. 61-71 (Smith-Hurd Supp. 1989). The Code is the product of many years of work and study by the Illinois Supreme Court. *Id.* (background). The committee to study the Code initially was appointed in 1979. *Id.* (background). The Code is based on the 1972 American Bar Association Code of Judicial Ethics, and is the final product of committee proposals, comments from the bench, the bar and the public, and supreme court recommendations. *Id.* (background).

4. *Id.*; *People ex. rel. Harrod v. Illinois Cts. Comm'n*, 69 Ill. 2d 445, 470, 372 N.E.2d 53, 64 (1977).

5. The Judicial Inquiry Board investigates complaints against judges. ILL. CONST. art. VI, § 15(b)-(d).

Courts Commission,⁶ which hears those complaints, base their decisions on the Code.⁷ Based largely on the 1972 American Bar Association Code of Judicial Ethics,⁸ the new Code is modified to accommodate the Illinois judicial system.⁹ The rules encompass several foundational principles such as independence, avoidance of impropriety, and impartiality,¹⁰ as well as other areas such as off-the-bench activity¹¹ and financial disclosure.¹²

Taken together, the rules provide an ostensibly fair and explicit designation of the parameters of ethical conduct. Nonetheless, the rules, perhaps of necessity, are drafted such that their proper interpretation is not always clear. May a judge chair a committee organized to promote civic improvement in the judge's community? May the judge attend a political function if the judge does not speak or actively participate? May the judge and his or her spouse participate in social activities with friends in the local bar association? At a recent Illinois Judicial Conference, judges differed widely on their responses to such questions.

This Article will suggest that some ambiguities in the Code need to be resolved by amendments to the rules.¹³ Also, this Article will recommend the creation of an advisory board to issue advisory opinions interpreting the Code. Judges need to know if their opinion of the Code will conform with the interpretation of the Judicial Inquiry Board and the Courts Commission. Few judges want to endure the uncertainty and expense of a test case, even if their interpretation of the Code ultimately prevails. While advisory opinions may not be binding in disciplinary proceedings, they would reduce the risk that the judge following such an opinion would be regarded as acting in bad faith.¹⁴

This Article will use the following hypothetical, originally

6. The Courts Commission hears complaints filed by the Judicial Inquiry Board. *Id.* § 15(e).

7. ILL. S. CT. RS. 61-71, ILL. ANN. STAT. ch. 110A, paras. 61-71 (Smith-Hurd Supp. 1989) (background).

8. MODEL CODE OF JUDICIAL CONDUCT (1988).

9. ILL. S. CT. RS. 61-76, ILL. ANN. STAT. ch. 110A, paras. 61-67 (Smith-Hurd Supp. 1989). The new Code replaces the rules governing judicial conduct in Illinois since 1970. *See id.* (background).

10. ILL. S. CT. RS. 61-63, ILL. REV. STAT. ch. 110A, paras. 61-63 (1987).

11. ILL. S. CT. RS. 64-65, 67, ILL. REV. STAT. ch. 110A, paras. 64-65, 67 (1987).

12. ILL. S. CT. RS. 66, 68, ILL. REV. STAT. ch. 110A, paras. 66, 68 (1987).

13. The ABA Standing Committee on Ethics and Professional Responsibility is considering a comprehensive revision of the ABA Code of Judicial Conduct. The Committee plans to submit a revised code to the ABA House of Delegates in February 1990.

14. *See Jordan, Ethics Questions Deserve an Answer*, 76 ILL. B.J. 318 (1988).

presented at the September 1988 Judicial Conference, as a point of reference throughout the discussion:

Judge Pro's small, rural county is in serious economic trouble with a double digit unemployment rate, businesses closing, and property values sinking. The State Department of Corrections is considering the county as the site for a new prison. Many people in the county see the hundreds of jobs to be created by the prison construction and operation as the answer to their economic woes. They have organized a committee to promote locating the prison in their county and have selected Judge Pro as their chairman and spokesperson.

But other citizens vehemently oppose having the prison in their community. It is a highly controversial issue.

II. THE ETHICAL DILEMMA OF OFF-THE-BENCH CONDUCT

The foregoing hypothetical engenders many questions. Does Judge Pro violate any ethical rules by heading the committee seeking the prison? Can he allow his name to be used on the committee's letterhead and brochures soliciting funds for the prison effort? Can Judge Pro make public speeches urging support for the effort?

The judges attending the ethics session viewed a video tape of Judge Pro¹⁵ giving a public speech supporting the prison site. In the video enactment, a lawyer in the audience spoke up in opposition to the prison and accused the judge of violating the Code by engaging in political activity and by allowing his name to be used on the committee's letterhead and brochures which solicited funds for the prison effort.

The lawyer's charge that the judge violated the Code by allowing his name to be used for fund raising easily can be resolved. If the judge permitted his name to be used on letterheads of letters soliciting funds for the prison effort or on brochures which solicited donations, he clearly has violated canon 5B.¹⁶ That canon provides:

A judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

.....

(2) A judge should not solicit or permit his name to be used in

15. Judge Pro was portrayed in the video dramatization by Judge John Sype of Rockford, Illinois. The lawyer opposing the prison was portrayed by Judge Marion W. Garnett of Chicago, Illinois.

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

any manner to solicit funds or other assistance for any such organization. He should not allow his name to appear in the letterhead of any such organization where the stationery is used to solicit funds¹⁷

In the dramatization, Judge Pro responded to the accusation by indicating that he had ordered the use of his name for solicitation purposes stopped. If his name had been used without his knowledge or approval, this might be a defense to disciplinary action, particularly if he acted diligently to stop the practice when he became aware of it. Nonetheless, as chairman of the organization, it is difficult to see how such fund raising efforts could have been launched without his knowledge. His responsibility might be a question of fact which the Judicial Inquiry Board, and possibly the Courts Commission, would have to resolve.

Much more difficult to resolve is the issue of whether the judge may accept a chairmanship of this controversial organization and speak publicly regarding its goals. This issue turns on the definition of the term "political activity" within the context of canon 7 of the Code.¹⁸ Canon 7A of the Code provides in pertinent part:

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

. . . .

(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.¹⁹

In the scenario, the lawyer opposing the prison accuses the judge of violating the judicial canon on political activity.²⁰ Ordinarily, participation in a campaign to locate a prison in the county would not be "political" in nature, and might even be considered an activity "concerning the law, the legal system, and the administration of justice."²¹ Judges expressly are permitted to serve as members, officers, or directors of organizations devoted to those purposes, and to speak publicly about those topics.²²

Whether the prison issue is a political matter might depend on other facts. In the hypothetical, the lawyer opposing the prison

17. *Id.*

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

19. ILL. S. CT. R. 67A, ILL. REV. STAT. ch. 110A, para. 67A (1987) (emphasis added).

20. *Id.*

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

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

asserts that securing the prison site is a part of the local Republican Party's platform, and that Judge Pro would be a candidate of the Republican Party in the next election. Given these facts, it appears that the cause which Judge Pro supported is a partisan, political cause. Thus, his involvement violates the Code, unless it can be justified as being "on behalf of measures to improve the law, the legal system, or the administration of justice."²³

Is locating a prison within a certain county a measure "to improve the administration of justice"? In *Judicial Inquiry Commission v. McGraw*,²⁴ the West Virginia Supreme Court found that a judge's public debate over the budgetary needs of the court did not violate Code provisions pertaining to off-the-bench conduct.²⁵ Moreover, in *In re Staples*,²⁶ the Washington Supreme Court found that a judge did not act improperly in circulating petitions, making campaign speeches, organizing a committee and running newspaper advertisements advocating a state constitutional amendment to avoid the transfer of superior court sessions from one town to another.²⁷ The court stated that the policy reasons behind the general prohibition of judges' participation in political activities were inapplicable to the situation under their review.²⁸ The court noted that it had not been alleged that Judge Staples' political activities were so extensive as to impair his primary judicial obligations.²⁹ Nonetheless, the budgetary needs of the court or a constitutional amendment relating to the structure of the court arguably are less political in nature than the location of a prison as each involves the day-to-day functioning of the administration of justice. Thus, although the West Virginia and Washington cases provide some insight into the question of where the boundaries are to be drawn, they are not dispositive of the issue raised in the hypothetical.

The judge's adversary in the video asserts that the judge will be a candidate in the next election. If the judge is a candidate, his political activity might be approved under canon 7(A)(2), which provides that "[a] judge may not, *except when a candidate for office or retention*, participate in political campaigns or activities"³⁰

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

24. 299 S.E.2d 872 (W. Va. 1983).

25. *Id.* at 875. See also Shaman & Reiter, *Political Activities of Judges*, 8 JUD. CONDUCT REP. 56 (1986).

26. 105 Wash. 2d 905, 719 P.2d 558 (1986).

27. *Id.* at 911-12, 719 P.2d at 562.

28. *Id.*

29. *Id.* at 910, 719 P.2d at 561.

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

This provision raises one of the most troubling questions under the new Code: When does a person become a candidate? Is it when he files his petition, or when he announces his candidacy, or perhaps the day after he is elected or retained and begins to make plans for retention at the end of his six-year term?³¹

Thus far, no clear answer has emerged in Illinois. It is unrealistic to expect a judicial candidate to wait until he files his petition or notice of seeking retention to begin the political activity necessary for election or retention. In most cases, some fund raising and organizing must precede the filing date. Yet if one is always a candidate from the day he takes office, as some successful politicians maintain, the Code is meaningless in proscribing political activities for a judge who is not a candidate. A judge who has been appointed to a judicial office for which he must now seek election, and a judge seeking higher judicial office or retention must know at what time he becomes a candidate, otherwise he risks either disciplinary action for participating in a political campaign before he is a candidate or defeat for not starting his campaign soon enough.

Not only is it unclear precisely when a judge becomes a candidate, but it is also unclear what is a political activity which a judge must avoid.³² Moreover, it is unclear what actions are encompassed by the words "participate in" and "engage in" for purposes of canon 7.³³ Does mere attendance at a political function constitute "participating in" or "engaging in" a political activity, as proscribed by canon 7? Does a judge participate or engage in political activity even though he merely sits in the back of the room, does

31. The rules governing Maryland judges eliminate this dilemma by outlining the status of a judge as a candidate. Canon 5C provides as follows:

A newly appointed judge is a 'candidate' for judicial office from the date of taking office until the general election pertaining to that judge's election or initial retention. Any other incumbent judge is a 'candidate' for a period commencing two years prior to the general election pertaining to that judge's reelection or subsequent retention, or when a newly appointed judge to that court becomes a 'candidate' in the same general election, whichever first occurs. A judge who is seeking election to another judicial office is a 'candidate' for that office when the judge files a certificate of candidacy in accordance with the state election laws, but no earlier than two years prior to the general election for that office, or when a newly appointed judge to that court becomes a 'candidate' in the same general election, whichever first occurs.

MD. RULES, MD. CODE ANN., Rule 1231, Canon 5C (1988).

32. For a general discussion regarding the uncertainty of judges in interpreting various aspects of the canon on political activities, see Volcansek, *Code of Judicial Ethics: Do They Affect Judges' Views of Proper Off-The-Bench Behavior?*, 17 AM. BUS. L.J. 493, 496-99 (1980).

33. ILL. S. CT. RS. 67A(2), 67A(4), ILL. REV. STAT. ch. 110A, para. 67A(2), 67A(4) (1987).

not make a speech or sit at the speaker's table, and is not introduced?³⁴

The ABA Model Code³⁵ from which the Illinois rule is derived provides:

A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, *attend* political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.³⁶

The Illinois Supreme Court, by deleting the word "attend" from its canon 7, seemed to indicate an intent not to prohibit a judge's attendance at political events, provided the judge does not actively participate. Nonetheless, the Committee Comments to the Code make no specific reference to the omission and, accordingly, the committee's intent is uncertain.³⁷

Although the determination of when a judge becomes a candidate is difficult, it is clear that when a judge is a candidate for judicial election or retention, the restrictions on his political activities are substantial. A candidate for judicial office, like an incumbent judge, is required to maintain the dignity appropriate to the judicial office.³⁸ He may not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.³⁹ Moreover, he may not "announce his views on disputed legal or political issues."⁴⁰

In the hypothetical, if Judge Pro is a candidate, he would violate the latter provision by speaking in favor of the prison because the prison issue is a disputed legal or political issue. If Judge Pro is a

34. Some commentators have expressed the view that mere attendance at such an event is participating in a political activity in violation of the rule. On the other hand, some judges such as Judge David Shields of Cook County and Justice Tobias Barry of the Appellate Court for the Third District argue that attendance alone should not be considered a violation of the Code, and their reasoning would seem to find support in well-established rules of construction.

35. MODEL CODE OF JUDICIAL CONDUCT (1988).

36. MODEL CODE OF JUDICIAL CONDUCT Canon 7A(2) (1988) (emphasis added). In contrast, the analogous Illinois canon provides that "[a] judge may not, except when a candidate for office or retention, participate in political campaigns or activities, or make political contributions." ILL. S. CT. R. 67A(2), ILL. REV. STAT. ch. 110A, para. 67A(2) (1987).

37. See generally ILL. S. CT. R. 67, ILL. ANN. STAT. ch. 110A, para. 67 (Smith-Hurd Supp. 1989) (committee commentary & supplement to historical and practice notes).

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

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

40. *Id.*

non-candidate, however, speaking in favor of building a prison in the judge's county may be an activity concerning the administration of justice as authorized in canon 4A.⁴¹ Canon 4A provides that a non-candidate judge may "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice."⁴² Such activities are subject to the requirement that the judge maintain the proper performance of his judicial duties. The judge's activities must not cast doubt on his capacity to decide impartially any issue that may come before him.⁴³ The determination of what activities cast doubt on a judge's capacity to decide issues impartially is subjective.

In a system in which judges are elected, it would be prudent to advise both the judiciary and the public where the lines are to be drawn, and thereby to remove as much subjectivity as possible. Campaigning judges often are confronted with situations in which the Code would seem to limit their conduct, but in which political realities would seem to demand that very conduct. For example, the proscription in rule 67B(1)(c) that a judicial candidate should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office, and should not announce his views on disputed legal or political issues,⁴⁴ raised a number of dilemmas for judges attending the September 1988 Judicial Conference. Many of those judges were candidates in the 1988 election and had been questioned by special interest groups seeking to know the candidates' views on various issues such as abortion, gun control, the death penalty, and other issues which were raised in the 1988 presidential campaign. Some judges had been interviewed, and many had received questionnaires warning that if the candidate failed to state his views on the issue of concern to the group, it would be assumed he opposed the special interest group's views. This approach poses a considerable threat to a candidate. Clearly, the rule prohibits a judge from stating his personal views on the subjects mentioned above. Can the judge, however, state a view on less controversial issues? Or, can the judge speak in general about legal principles such as *stare decisis* which would dictate his resolution of those issues?

A judge's failure to answer specific questions may be publicized to hundreds of voters in his district who are committed to electing

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

42. *Id.*

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

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

persons who share their views.⁴⁵ The only help the panel at the Judicial Conference could give these candidates is that they must, of course, adhere to the judicial canons and advise the voters of their duty to do so.

Although the Judicial Conference panel's advice is useful, it assumes that judges know how to adhere to the judicial canons. As noted above, in some cases the proper path to be taken by a judge is clear. In other cases, however, interpretational difficulties make unclear a judge's determination of whether he can answer a question, attend a meeting, or make a speech. The judge's determina-

45. This points up a very real possibility that the Code could be instrumental in electing the demagogic candidate in a judicial election and in defeating his more scrupulous opponent. The following example highlights this problem.

Judge A holds office by appointment to fill a vacancy in a downstate county or circuit. Under Illinois law, to retain his judicial office, he must run in the next general election, which is a partisan, contested election. As a practical matter, Judge A must run as a Democrat or Republican, and will be opposed by Lawyer B, the candidate of the opposite party.

The county or circuit where Judge A must run has a significant number of National Rifle Association ("NRA") members, as well as other citizens who strongly oppose any legislative or judicial action to restrict the right to purchase and own guns. There is also a local organization, Citizens Opposing Gun Seizure ("COGS"), which lobbies against gun control legislation. The organization has sent questionnaires to legislative and judicial candidates in the area asking their views on gun control.

Judge A properly informs COGS that he is prohibited by the Judicial Code from announcing his views on disputed legal or political issues. See ILL. S. CT. R. 67B(1)(c), ILL. REV. STAT. ch. 110A, para. 67B(1)(c) (1987). Lawyer B, as a candidate for judicial office, also is bound by the same code provisions. *Id.* Lawyer B, however, may not be aware of the restriction. As a successful trial lawyer and pragmatic politician, he is acutely aware of the political repercussions his response may have. He replies: "My firm stand in favor of the guarantees of the Second Amendment is well known. I have made many speeches and supported every effort to preserve the rights of citizens to keep and bear arms. I would hold any laws or ordinances denying those rights to be unconstitutional."

Lawyer B's statement and Judge A's refusal to comment are published to the membership of the organization and are made known to other voters who oppose gun control legislation. It may be that only 20% of the people in the county or circuit feel strongly opposed to gun control legislation, and possibly a majority would favor some restrictions on gun ownership. Nonetheless, the 80% not opposed likely will not vote as a block, and may vote along party lines or for the judicial candidate they consider better qualified.

Assume that the 80% of those not strongly opposed to gun control are divided 60% for Judge A and 40% for Lawyer B. Thus, Lawyer B receives 32% of the total vote from the non-gun oriented voters and additionally the vote of the 20% who will vote for him because of his stand on guns. Thus, Lawyer B receives 52% of the vote, and Judge A receives 48%. Lawyer B wins the election, largely on the gun control issue.

If Judge A had responded to the gun control issue as Lawyer B did, he would be subject to discipline because he was a judge at the time of the election. Lawyer B, however, is not subject to judicial discipline because although he violated the Code of Judicial Conduct, he did so before he was elected a judge. See *In re Kaye*, 1 Ill. Cts. Comm'n 36, 50 (1974) (noting the Commission's lack of authority to proceed against a party for conduct occurring before that party became a member of the judiciary).

tion nevertheless is crucial because the disciplinary repercussions of an incorrect determination are enormous.⁴⁶

III. PROPOSAL

The vast grey areas that exist under the new Code have led to a call from judges for an agency to render advisory opinions on judicial ethics.⁴⁷ To date, the Illinois Supreme Court has neither sanctioned nor disallowed the formation of an entity designed to issue advisory opinions to judges. The Illinois Judges Association has begun exploratory meetings with delegates of the Illinois State Bar Association and Chicago Bar Association to create an agency to render opinions to judges on ethical issues.⁴⁸

When the committee studying the Illinois Code chose to adopt the ABA canons as the foundation for the Code, it predicated its decision on two interrelated considerations: the desire for uniformity in judicial codes of conduct and the need for a body of interpretive decisions to provide direction in determining the proper application of the rules.⁴⁹ With regard to the latter consideration, the committee noted that the ABA had established a Standing Committee on Ethics and Professional Responsibility which renders opinions pertaining to professional and judicial conduct.⁵⁰ Obviously, these opinions only provide guidance in Illinois for those situations in which the Illinois Code and the ABA Code contain the same language.⁵¹ For those situations in which the two codes differ,⁵² however, the ABA opinions cannot lend any guidance to the Illinois judiciary.

The Illinois judiciary can look to the opinions issued by the

46. See ILL. CONST. art. VI, § 15(e) (setting forth the disciplinary actions which the Illinois Courts Commission may take upon a finding of judicial misconduct).

47. See Chicago Daily L. Bull., Sept. 8, 1988, § 1, at 1, col. 2 (judges and lawyers call for appointment of committee to issue advisory opinions). See also Jordan, *Ethics Questions Deserve an Answer*, 76 ILL. B.J. 318 (1988).

48. Justice Rosemary Duschene LaPorta of the First District Appellate Court reported to the Board of Directors meeting of the Illinois Judges Association on June 16, 1989, that representatives of the three organizations have proposed an agency to render judicial ethics opinions for judges, the agency tentatively proposed to consist of twelve members, six to be judges and six to be lawyers. Many details remain to be worked out.

49. ILL. S. CT. RS. 61-68, ILL. ANN. STAT. ch. 110A, paras. 61-68 (Smith-Hurd Supp. 1989) (committee commentary).

50. *Id.* See T. MORGAN & R. ROTUNDA, 1988 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 429-31 (1988).

51. Compare MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1988) with ILL. S. CT. R. 62, ILL. REV. STAT. ch. 110A, para. 62 (1987).

52. Compare MODEL CODE OF JUDICIAL CONDUCT Canon 7A(2) (1988) with ILL. S. CT. R. 67A(2), ILL. REV. STAT. ch. 110A, para. 67A(2) (1987).

Committee on Professional Ethics of the Illinois State Bar Association (hereinafter "ISBA Committee").⁵³ These opinions are published in the ILLINOIS BAR JOURNAL, and provide useful guidance to lawyers and judges.⁵⁴ Nonetheless, neither the supreme court nor the legislature has sanctioned the ISBA Committee, and accordingly, any opinions rendered by that entity summarily can be rejected by the Judicial Inquiry Board and the Courts Commission. If, however, the ISBA Committee, or some other newly created entity, were officially recognized and authorized to issue advisory opinions, the Illinois judiciary would have concrete guidance as to whether contemplated actions are appropriate.⁵⁵

Several states have adopted legislation which designates such entities.⁵⁶ These entities typically take one of two forms. The first type of entity issues only advisory opinions.⁵⁷ The second type of entity issues opinions which protect the judge from a charge that he has violated that canon which was the subject of the opinion.⁵⁸

In those states which have an advisory entity, judges are permitted to seek advice regarding the propriety of certain actions without the fear of a binding decision. For example, the Alabama rules of procedure for the Judicial Inquiry Commission provide that a judge may request an opinion as to whether a particular action constitutes a violation of the canons of judicial ethics.⁵⁹ The Commission may in its discretion render a written opinion to the judge.⁶⁰ Any such opinion then is admissible on behalf of the judge

53. See Jordan, *supra* note 47, at 322.

54. *Id.*

55. *Id.*

56. The states which have adopted such legislation include: Alabama (Judicial Inquiry Commission), Arizona (Arizona Judicial Ethics Advisory Committee), Florida (Committee on Standards of Conduct Governing Judges), Georgia (Judicial Qualifications Commission), Kentucky (Ethics Committee of the Kentucky Judiciary), Louisiana (Supreme Court Committee on Judicial Ethics), Maryland (Judicial Ethics of the Maryland Judicial Conference), Michigan (State Bar of Michigan Ethics Committee), Missouri (Commission on Retirement, Removal and Discipline), New Hampshire (Supreme Court Judicial Conduct Advisory Opinions), North Dakota (Special Committee on the Judiciary), Oregon (Judicial Conduct Committee), Pennsylvania (Judicial Ethics Committee of Conference of State Trial Judges), South Carolina (Advisory Committee on Standards of Judicial Conduct), Tennessee (Judicial Ethics Committee), Texas (Judicial Ethics Committee of Texas), Washington (Administrator for the Courts), West Virginia (Judicial Inquiry Commission).

57. See, e.g., ALA. CODE, Rule 17 (1984 & Supp. 1988) (Rules of Procedure of Judicial Inquiry Commission).

58. See, e.g., MD. RULES, MD. CODE ANN., Rule 1231, Canon 7 (1988) (Judicial Ethics Committee).

59. ALA. CODE, Rule 17 (1984 & Supp. 1988) (Rules of Procedure of Judicial Inquiry Commission).

60. *Id.*

to whom it is directed in the event he or she is made the subject of a disciplinary proceeding.⁶¹ The disciplinary organization, however, is not bound by the advisory opinion of the Commission.⁶²

The judicial ethics committee in Kentucky is granted powers similar to those given to the Judicial Inquiry Committee in Alabama.⁶³ In Kentucky, however, the ethics committee does not have discretion over whether to render the opinion.⁶⁴ Rather, the committee must render an opinion, but may choose between an informal opinion, to be given only to the questioner, and a formal opinion, to be published in complete or synopsis form.⁶⁵ In either event, the opinion is advisory in nature. The supreme court, however, must consider the judge's reliance on the ethics committee opinion in the event that judge should become subject to disciplinary proceedings.⁶⁶ Although the disciplinary entity is not bound by the opinion of the ethics committee, a party affected by a formal opinion of the ethics committee nonetheless may obtain review of the opinion by the supreme court.⁶⁷

In the second type of entity, the decision is binding in any disciplinary proceeding if the judge has complied with the opinion.⁶⁸ Maryland has adopted this system.⁶⁹ Thus, a judicial officer may in writing request the opinion of the Judicial Ethics Committee regarding the proper interpretation of the Code of Judicial Conduct.⁷⁰ If disciplinary proceedings later are instituted against the judge, and he has complied with the ethics opinion, he is protected from a charge that he violated the particular provision.⁷¹

Both types of ethics organizations serve a useful purpose by providing a forum for receipt of inquiries from the judiciary before any action is taken. Moreover, both types of organizations provide proper interpretation of the canons of ethics. The Illinois committee appointed to study and to develop the Code recognized that

61. *Id.*

62. *Id.* See *Balogun v. Balogun*, 516 So. 2d 606 (Ala. 1987) (explaining that the commission's advisory opinions are not binding but are admissible on behalf of a judge should he act consistent with the opinion and then have disciplinary proceedings brought against him for that conduct).

63. See KY. S. CT. R. 4.310(1), KY. RULES ANN. (1988).

64. KY. S. CT. R. 4.310(2), KY. RULES ANN. (1988).

65. *Id.*

66. KY. S. CT. R. 4.310(3), KY. RULES ANN. (1988).

67. KY. S. CT. R. 4.310(4), KY. RULES ANN. (1988).

68. See, e.g., MD. RULES, MD. CODE ANN., Rule 1231, Canon 7 (1988) (Judicial Ethics Committee).

69. *Id.*

70. *Id.*

71. *Id.*

there was a need for interpretation when the proper application of a rule is unclear.⁷² Nonetheless, to date there is no officially sanctioned organization in Illinois which provides this needed interpretation.

The judges of Illinois should have a forum designed to guide them in interpreting the Code. The forum could be structured to limit its functions to the issuance of advisory opinions.⁷³ Moreover, the framework of the forum could be structured to permit issuance of an advisory opinion in response to inquiries from a judge, or on the forum's own motion.⁷⁴

The states which have created ethics committees typically have members of the judiciary and of the state bar association sitting on the committee.⁷⁵ Others require that at least one member of the committee not be a lawyer or an employee or officer within the judicial branch of government.⁷⁶ Still others require that the members of the committee not be members of the disciplinary entity in that state.⁷⁷

There appears to be valid reasons why it would not be desirable or practicable for either the Judicial Inquiry Board or the Courts Commission to render advisory opinions on judicial ethics in Illinois. Nor should ethical opinions, from whatever source, be binding on the disciplinary agencies as they are in some jurisdictions. The duties imposed on those disciplinary agencies by the Illinois Constitution could be compromised if either agency were bound by an advisory opinion issued by the agency itself or any other agency.

This would not in any way preclude those disciplinary bodies from considering the fact that a judge whose conduct is called into question acted with diligence and good faith in securing and following the advisory opinion. Surely, such diligence and good faith would be strong evidence to dispel charges of "wilful misconduct in office."⁷⁸

72. ILL. S. CT. RS. 61-68, ILL. ANN. STAT. ch. 110A, paras. 61-68 (Smith-Hurd Supp. 1989) (committee commentary).

73. See, e.g., 8 LA. REV. STAT. ANN. Appendix "C" (West Supp. 1989) (Committee on Judicial Ethics).

74. See *id.* See also KY. S. CT. R. 4.310(2), KY. RULES ANN. (1988).

75. See, e.g., KY. S. CT. R. 4.310(1), KY. RULES ANN. (1988); 8 LA. REV. STAT. ANN. Appendix "C" (West Supp. 1989) (Committee on Judicial Ethics); MD. RULES, MD. CODE ANN., Rule 1231, Canon 7 (1988) (Judicial Ethics Committee).

76. See MD. RULES, MD. CODE ANN., Rule 1231, Canon 7 (1988) (Judicial Ethics Committee).

77. See, e.g., KY. S. CT. R. 4.310(1), KY. RULES ANN. (1988).

78. The Illinois Constitution gives the Judicial Inquiry Board authority to file complaints charging a judge with "wilful misconduct in office, persistent failure to perform

IV. CONCLUSION

In light of today's heightened awareness of judicial conduct,⁷⁹ it is not unreasonable to expect judges to assume some restrictions in their daily off-the-bench conduct not required of other citizens. But judges should be afforded some answers to what those restrictions and limitations are, particularly where the Code of Judicial Conduct leaves doubt and uncertainty.

Two possible remedies may afford at least partial relief in resolving the doubts and ambiguities found in the Code. One is for the Code to be revised so as to be more explicit in defining what a judge may and may not do ethically. While the American Bar Association considers modification in its Model Code,⁸⁰ the ultimate determination as to what changes, if any, are to be made in the Illinois Code lies with the Illinois Supreme Court. However, committees of the Illinois Judges Association, the Illinois State Bar Association, and other bar and civic organizations should continue to study the Code and make recommendations for revisions to resolve the ambiguities and uncertainties of the Code.

But in some areas more explicit definition may not be practicable or desirable. Just as jury instructions do not attempt to define "reasonable doubt," so the Code should leave any explanation of certain provisions and terms (such as "appearance of impropriety"⁸¹) to the good judgment of those who must follow and apply the rules.

Reasonable men and women often differ as to the interpretation to be given a particular rule, and for a judge such differences of opinion may have severe consequences. The expense and trauma of defending his or her actions before the Judicial Inquiry Board or the Courts Commission may be harsh.

The other proposed solution to resolving ambiguities in the Code is to provide an agency to render advisory opinions.⁸² In Illinois, it

his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute" or that the judge "is physically or mentally unable to perform his duties." ILL. CONST. art. VI, § 15.

79. See Jordan, *supra* note 47, at 318 (focusing on the ramifications of the Greylord scandal).

80. See *supra* note 13.

81. "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities." ILL. S. CT. R. 62, ILL. REV. STAT. ch. 110A, para. 62 (1987).

82. A "Judicial Ethics Committee" to give advisory opinions on judicial conduct is recommended for all jurisdictions by the Discussion Draft for the proposed revision of the ABA Code, Appendix, at 71 (May 1, 1989). The appendix provides an example of how such a committee might be established by appointment of the chief judge of the highest court of the jurisdiction. The example also provides for such opinions to have

does not appear that any such opinions could be binding on the Judicial Inquiry Board or the Courts Commission. Nevertheless, where a judge conscientiously seeks an opinion from a reliable, recognized agency created to give such opinions, and where the judge relies on the advice given, it is reasonable to conclude that he or she has acted with diligence and good faith. It is hoped that the efforts of the Illinois Judges Association, the Illinois State Bar Association, and the Chicago Bar Association will soon bring forth such an agency.

binding effect in disciplinary proceedings and for publication of opinions in edited versions so as not to disclose the identity of the person requesting the opinion and other confidential data.

