(No. 98 CC 1. - Respondent removed.)

In re ASSOCIATE JUDGE OLIVER M. SPURLOCK
of the Circuit Court of Cook County, Respondent.

Order entered December 3, 2001

SYLLABUS

On May 13, 1998, the Judicial Inquiry Board filed a complaint with the Courts Commission, charging respondent with conduct that is prejudicial to the administration of justice and conduct that brings the judicial office into disrepute in violation of the Code of Judicial Conduct, Illinois Supreme Court Rules 61, 62 and 63. In summary form, the complaint alleged that, from on or about January 1989 through July 1997, respondent has engaged in a pattern of sexually intimidating and inappropriate conduct and has made a variety of sexually intimidating and inappropriate comments toward certain female attorneys who appeared before him in his capacity as an associate judge.

Held: Respondent removed.

McDermott, Will & Emery, of Chicago, for Judicial Inquiry Board.
Collins & Bargione, of Chicago, for respondent.

Before the COURTS COMMISSION: KNECHT, LAWRENCE, WELCH and WOLFF, commissioners, CONCURRING; McMORROW, chairperson, and BUCKLEY, commissioner, DISSENTING.

ORDER

Associate Judge Oliver M. Spurlock (respondent) of the Circuit Court of Cook County was charged on May 13, 1998, in a complaint filed by the Judicial Inquiry Board (JIB) with conduct prejudicial to the administration of justice and conduct that brings the judicial office into disrepute. The complaint contends respondent violated the Code of Judicial Conduct—Illinois Supreme Court Rules 61, 62 and 63.

During the 1998-1999 time period, an amendment to the Illinois Constitution was adopted. That amendment changed the composition of the Courts Commission by adding two lay Commissioners who were to be appointed by the Governor. There was some delay in the appointment of the lay Commissioners, and thereafter there was unavoidable delay in the approval and adoption of rules of procedure to be followed by the newly constituted Commission. These circumstances coupled with our grant of two motions for continuance sought by respondent explain the delay between the filing of the complaint, and the hearing in this matter.

The Courts Commission conducted a contested hearing on June 4-9, 2001, at which the JIB and respondent presented over 50 witnesses. After the presentation of evidence and final argument, the matter was taken under advisement. The Courts Commission now concludes the JIB has proven the allegations of the complaint and violations of Judicial Conduct by clear and convincing evidence, and the respondent should be removed from office.

THE CHARGES

The allegations and evidence against respondent may be separated into four distinct categories. First, respondent is accused of offensive, intimidating and sexually inappropriate behavior toward four female assistant state's attorneys at times when they were assigned to appear and work in the courtroom where he presided. Most of this behavior allegedly occurred during 1995-1997. Respondent denies the behavior occurred.

Second, respondent began and sustained an intimate, romantic relationship with an employee of the Cook County State's Attorneys office who participated in interviewing victims of domestic violence and filling out petitions for and orders of protection. This employee appeared in respondent's courtroom and sometimes sat at the State's Attorneys' table. This behavior occurred during 1990. Respondent admits the relationship, but denies it was improper or gave the appearance of impropriety.

Third, respondent's personal and sexual relationship with a court reporter included, on two occasions, engaging in sexual relations in his chambers. This behavior occurred in 1994-95. Respondent originally denied this behavior based on his right to privacy, but admitted while testifying that the behavior occurred and conceded it violated the code of Judicial Conduct.

Fourth, the JIB requested respondent to appear at the offices of the Board and answer questions about proposed charges against him. After a continuance and respondent's effort to waive his required appearance, respondent did appear in January of 1998. However, he refused to answer any questions by the Board concerning the proposed charges against him or make any statement or give any information about the proposed charges. Respondent concedes he refused to answer questions, but did so on the advice of his attorney. His then attorney testified he gave respondent advice that based on his studied legal opinion respondent need not answer questions and could await a public hearing where his due process rights would be litigated if charges were to be filed against him.

THE FOUR ASSISTANT STATE'S ATTORNEYS

Each of the alleged victims of respondent's intimidating and sexually inappropriate behavior were identified by name in the courtroom when they testified and were publicly identified in the media accounts of the hearing in this matter. We need not recount the entirety of the evidence. The Courts Commission finds their testimony believable, consistent and persuasive.

One victim, Joan Pernecke, testified to a 1989 incident involving a ladies' lingerie catalog in a courtroom over which respondent presided. Her testimony was corroborated and credible, but the incident was six years prior to the behavior which is most deserving of our attention. Beginning in 1995 and continuing through mid-summer of 1997, respondent engaged in a series of intimidating and suggestive conversations at different times with Pernecke, Lorraine Scaduto, Kelli Husemann, and Deborah Lawler. He commented upon their clothing and bodies in suggestive ways. He persistently sought Scaduto's, Husemann's and Lawler's company for drinks or dinner. He gave out his phone number and sought theirs. He demonstrated his appreciation for their appearance by kissing his fingertips. This behavior occurred in the courtroom and in chambers. He persistently sought to be alone with them by inviting them to chambers. He ignored their refusals and was "obnoxiously" persistent.

He touched Pernecke's clothing above her left breast, embraced and kissed Husemann, rubbed

Lawler's hand and told her that her body distracted him in court. He asked Lawler to chambers, then grabbed her, wrapped his arms around her, rubbed her back and opined that she was sick and her husband was not taking care of her. He then kissed her on the mouth. When she pushed away and told him she was married, he commented that they could talk about it over drinks and dinner. Respondent called Lawler the next day and while impliedly apologizing for what he had done, sought once again to invite her out for drinks.

While some evidence presented by respondent contradicted parts of the testimony of the witnesses discussed above, the clear and convincing quality and quantity of evidence proves not only that key specific events occurred, but also demonstrate a regular pattern of misconduct deserving of a sanction if committed by anyone, let alone a judicial officer who used his position and power for his own self interest.

None of the behavior of respondent was sought or welcomed by the four victims. There is no suggestion any witness was flirtatious or suggestive to the respondent and then misunderstood when he reciprocated. Respondent denies any of the specific events occurred and denies he commented upon their clothing or bodies, or expressed appreciation for their appearance or invited them out for drinks or dinner.

We accept and believe the core testimony of the four victims, and the witnesses who corroborated their testimony, and we reject respondent's testimony and denials.

STATE'S ATTORNEY'S EMPLOYEE - FAILURE TO RECUSE

During 1989 and 1990 respondent became acquainted with a college student intern, Kimberly McCowan who, on the completion of her internship, was hired by the Cook County State's Attorneys Office to continue doing the same work she had been doing during her internship—interviewing victims of domestic violence, filling out both petitions for and orders of protection. She sometimes worked in respondent's courtroom and sometimes sat at the state's attorneys' table. While there was some dispute as to her duties and responsibilities, the weight of the evidence suggests she played a clerical role with modest responsibility and little discretion. At the same time, she worked for the prosecution on domestic violence cases, and was involved in cases that were presented by assistant state's attorneys to respondent for the entry of an order of protection. In some cases the subject respondent of the order of protection would not be present, but in other instances the subject respondent would be present either *pro se* or represented by counsel.

Her employment is significant because she and respondent began a romantic and sexual relationship, initiated by respondent, while she was working in the courtroom where respondent presided.

Some courtroom personnel and attorneys who frequented respondent's courtroom knew respondent and McCowan were dating. However, it is unlikely that the respondents in orders of protection issued by the judge knew the judge before whom they were appearing had a romantic relationship with someone working in that courtroom for the prosecution and who may have interviewed the victim. There is no evidence McCowan ever discussed a case with respondent or sought to influence him, but at a minimum respondent should have avoided initiating a romantic entanglement with someone in her position.

Respondent's behavior in this instance may give rise to an appearance of impropriety and could undermine public confidence in the integrity and impartiality of the judiciary. We nonetheless

recognize this consensual relationship did not appear to alter or influence the disposition of cases. We believe the conduct displayed a lack of sensitivity to the potential for conflict and the appearance of impropriety, but conclude the behavior in these specific circumstances was not violative of the Code of Judicial Conduct.

COURT REPORTER

In 1994-95, respondent began a romantic, sexual relationship with a court reporter who worked for a private agency but was assigned to the Daley Center. She worked for other judges but was at times assigned to the courtroom where respondent presided. On two occasions, respondent and Maria Miselli had sexual intercourse in his chambers. While there is some uncertainty regarding the days of the week and the times this behavior occurred, the weight of the evidence suggests one incident occurred late afternoon well after court was concluded on either a Friday or the day before a holiday. The second incident was on a Sunday evening. Court business and other personnel were not affected by the incidents.

Respondent grudgingly conceded during his testimony this conduct violated Illinois Supreme Court Rules 61 and 62. His testimony and demeanor suggested, however, that it became important and he came to regret and be embarrassed about the conduct <u>only</u> because it was discovered. Respondent also denied the improper use of his judicial chambers to engage in sex acts with Miselli when he filed his response to the JIB's complaint.

His denial was couched in terms of asserting his right to privacy under Article 1, §6 of the Constitution of the State of Illinois. However, rather than declining to answer on the basis of a right to privacy, he denied the conduct occurred. Later, in answers to interrogatories, he admitted the conduct. We note respondent has conceded the conduct was inappropriate and violated the Code of Judicial Conduct.

RESPONDENT'S REFUSAL TO RESPOND TO QUESTIONS

The JIB received complaints regarding respondent's conduct and began an investigation. Pursuant to Rule 4(d) of the JIB's rules of procedure, respondent was asked to appear at the JIB's offices to answer questions and respond to allegations of sexual harassment. After a continuance, respondent's counsel at that time, William Martin, received some details about the allegations regarding the four assistant state's attorneys, and the JIB also wrote "In addition, the Judicial Inquiry Board may choose to question Judge Spurlock about his general practices and demeanor throughout his entire tenure as a judge."

Thereafter, respondent sought to waive his 4(d) appearance before the JIB, but the JIB did not concur, and he appeared with counsel on January 9, 1998. At that proceeding respondent, both directly and through his counsel, refused to answer questions, present a defense, or make a statement. Respondent was advised by counsel he could decline to answer questions or present a defense and apparently agreed with his counsel's assessment it would not be in his best interests to do so because of the vague nature of the allegations and the suggestion the JIB might question his general practices and demeanor throughout his judicial career.

One underlying theme in William Martin's testimony (Mr. Martin withdrew as respondent's counsel in May 2001 and was called as a witness) was that the JIB was not sufficiently specific in its allegations, the allegations had received undue media attention and the respondent was not likely

to be treated fairly and objectively by the JIB—i.e. the JIB was going to file a complaint no matter what he did, so why answer questions if the fairness of the proceeding is suspect?

We need not speculate on whether respondent and his counsel had a good faith belief the 4(d) proceeding would be unfair. We choose to focus on the respondent's right to refuse to answer any questions. We acknowledge that refusal was based on counsel's advice.

The JIB contends a sitting member of the judiciary has a duty to participate in the process and respond to questions. The JIB has the right and obligation under our constitution to investigate allegations of judicial misconduct. The JIB asserts respondent's refusal to answer questions about his conduct during the 4(d) proceeding violated the Code of Judicial Conduct. We agree.

The Judicial Inquiry Board was established by the Illinois Constitution with "authority to conduct investigations, receive and initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission." Ill. Const. 1970, art. 6, §15(c). It has authority to establish its own rules as well as subpoena power. There is no reported Illinois case law on the issue of whether a judge must testify before the Board. However, the debates of the Constitutional Conventions as well as the Report of the Judiciary Committee indicate the framers' intent to create an autonomous and independent Inquiry Board, designed to protect the integrity of the judiciary.

The Constitution created an autonomous and independent Inquiry Board with full power to investigate complaints. In a two-tiered System, the Board has the power to draft its own rules and has subpoena power in order to conduct effective investigations. The proceedings of the Board remain confidential to permit rigorous investigation while protecting the judge under investigation. The results of the investigation become public only if the Board files a complaint with the Commission.

The independence and autonomy of the Inquiry Board, separate from any relationship to the Court Administrator, the Supreme Court or the Courts Commission, makes it a free-standing entity with the power to do a complete and thorough investigation. It need not rely on the Courts Commission or any other entity to investigate charges of misconduct. The idea a judge could refuse to testify at the Board level because the judge might later be compelled to testify at the Commission level, or because it would not be in the judge's best interest, is antithetical to the intent and spirit of the Constitution.

The same attorney who advised Judge Spurlock not to testify before the Board in 1998 introduced a second line of argument concerning the intent of the Constitution in his testimony before the Courts Commission in 2001. He testified the delegates to the convention, including Delegate Dawn Clark Netsch, described the Board process as both a sword and shield ("—this was to keep a judge from being harassed and it was a shield for a judge, not a sword for the JIB" [Testimony, p. 30]. [Also see references to the "shield" and "protection" pp. 12 and 43.]) He concluded from his reading of the debates that the judge was exempt from testifying. Delegate Netsch does refer to the proceedings before the Inquiry Board as a two-way street: "Protecting the independence and integrity of the Judiciary is in a sense, a two-way street. It involves protection of the public interest and of the judicial interest." 2 Record of Proceedings, Sixth Illinois Constitutional Convention 1185 (hereinafter cited as Proceedings).

Netsch was not discussing limiting the investigative power of the Board or the right of a judge not to testify as a method to protect the judicial interest. She was leading a debate on the composition of an independent and autonomous Inquiry Board and was arguing for a one-vote majority for lay members (non-lawyers and non-judges) on the Board. This proposal was designed to emphasize the Board's independence in its investigative function from the Commission—then

composed entirely of judges—in order, as Delegate Netsch describes it, "to produce credibility as far as the public is concerned and also credibility as far as the judiciary is concerned." 2 Proceedings 1185.

A series of United States Supreme Court decisions establish that judges and attorneys must answer questions posed to them by investigating disciplinary bodies unless they seek, on a question by question basis, a waiver from answering based on their Fifth Amendment right to be protected from giving evidence that might later be used against them in a criminal case. This is applicable for each step in a two-tiered system such as the Illinois judicial discipline system.

The United States Supreme Court has made it clear an official cannot be compelled without restrictions which protect his or her Fifth Amendment right to testify under penalty of removal from office. See *Garrity v. New Jersey*, 385 U.S. 493, 494 (1967); see also *Lefkowitz v. Turley*, 414 U.S. 70 (1973). Judges subject to investigation have not been successful in relying on these cases to avoid answering questions or producing documents for judicial disciplinary boards. Judges must appear before disciplinary bodies and testify but may invoke their Fifth Amendment privilege for questions that are potentially incriminating. In *McComb v. Superior Court*, the court found a judge who refused to appear for a deposition to be in contempt. (137 Cal. Rptr. 233 (Cal. Ct. App. 1977)). The court determined the purpose of disciplinary proceedings is "...to protect the public and litigants before the court from the official ministrations of a judge unfit for his high office" (*McComb* at 237), and a judge must appear before the body to testify and "...can refuse only to disclose a matter that may tend to incriminate him." *McComb* at 238.

Judges can be removed from office for failure to provide information to the first tier of a two-tiered judicial discipline system unless they seek and are granted the Fifth Amendment privilege. In *In re Glancy*, the Supreme Court of Pennsylvania addressed the issue of whether a judge may be removed from office for "refusing to provide information sought" in a disciplinary hearing. (527 A. 2d 997, 1005 (1987).) Two judges refused to file financial disclosures required by the Supreme Court. The Judicial Inquiry and Review Board—the first of a two-tiered system comparable to the Inquiry Board in the Illinois model—recommended their removal from office. The Supreme Court ruled they could not claim the Fifth Amendment privilege in choosing not to answer any of the Board's questions. The judges relied on the United States Supreme Court cases concerning compelled testimony, but the Pennsylvania court ruled that since the filing requirement did not require judges to waive the privilege in any future criminal case, it did not subject them to self-incrimination. The court went on to note "...although compliance with the reporting requirement is compulsory in the sense that one's right to hold judicial office is conditioned on it, there is not present the demand for total relinquishment of fifth amendment rights which was the constitutional defect in [*Garrity* and *Lefkowitz*]." *Glancy* at 1004-5.

A judge cannot assert a blanket privilege at a disciplinary hearing and refuse to answer all questions. In *In re Davis*, 946 P.2d 1033 (1997), a judge charged with violations of the Rules of the Nevada Commission on Judicial Discipline refused to answer even non-incriminating questions at a formal hearing. The court agreed with the Commission's conclusion the judge wrongfully asserted his Fifth Amendment privilege and ruled the Commission could inform the judiciary such "non-cooperation" is "an act of misconduct, subjecting the judge to discipline." *Davis* at 1041. The court further ruled "[h]aving found in the context of the formal hearing that appellant wrongfully asserted his Fifth Amendment privileges, the Commission was entitled to consider that fact along with the severity of the offenses in determining the extent and type of appropriate discipline." *Davis* at 1041.

Illinois rules governing the Board and Commission do not require a judge under investigation

to waive his or her Fifth Amendment privilege, consistent with the ruling in *In re Davis,* 946 P.2d at 1041. Judiciary discipline hearings in Illinois are not criminal. The Board promulgates its own rules and 4(h) stipulates the Board shall not be governed by formal rules of evidence. The Commission follows the Code of Civil Procedure, Illinois Supreme Court Rules and the rules of evidence applicable in civil cases in Illinois.

Illinois courts have ruled in a number of cases on the issue of attorney disciplinary hearings and Fifth Amendment privilege. In a series of cases involving attorneys before the Inquiry Board of the Attorney Registration and Disciplinary Commission (ARDC) our courts have followed the well-established principles of other jurisdictions. The ARDC process is a non-criminal disciplinary venue—parallel to the Illinois courts' disciplinary process—in which there is a five tiered process, ending with the Supreme Court, before each tier of which an attorney must appear and give testimony. *In re March,* 71 Ill. 2d 382 (1978) holds that in Illinois disciplinary hearings, attorneys are entitled to automatic Fifth Amendment protection against testifying or against the use of future testimony in a criminal proceeding. The attorney must specifically assert the privilege and cannot simply refuse to testify. The court held that compelling testimony at disciplinary hearings does not offend the essential purpose of enabling States to effectively enforce and maintain their standards of professional conduct. *March* at 398. Following this line of decisions, *March* holds if the testimony might incriminate, the lawyer may refuse to testify and may be granted immunity for the use of his testimony at future criminal proceedings, and that continued refusal to testify may result in disciplinary sanctions. *March* at 400.

Our Supreme Court upheld the same principle in *In re Zisook*, 88 Ill. 2d 321, 329-331 (1981). While defining the attorney disciplinary hearings as "quasi-criminal", the court held the Fifth Amendment privilege came into play only when the attorney under investigation had "reasonable grounds" to fear self-incrimination. The Court explicitly set out the requirements for a legal process: "the privilege against self-incrimination is not properly claimed by merely failing to appear," and the defendant "must appear as any other witness and assert the claimed privilege as to each incriminating question." *Zisook* at 335.

Significantly, at the time of the Board investigation, neither Judge Spurlock nor his attorney asserted the self-incrimination provision of the Illinois or United States Constitution.

RESPONDENT'S CONDUCT & THE JUDICIAL PROCESS

Respondent's conduct toward the four assistant state's attorneys does not reflect the high standard of conduct or demeanor required of judicial officers. He exploited his position and attempted to use his judicial office to create an inappropriate intimacy that was not only improper but unwelcome. The specific incidents of misconduct and the pattern of his misconduct demonstrate respondent failed to uphold the integrity of the judiciary, failed to conduct himself in a manner that promotes public confidence in the judiciary and failed to be courteous and dignified to the four assistant State's Attorneys who practiced before him.

His conduct was offensive to those individuals, and an embarrassment to the robe. While many character and reputation witnesses extolled his judicial ability and competence, his own behavior paints a picture of someone lacking both the dignity and character to hold judicial office.

We further note that respondent's response to the complaint denied any knowledge he requested Lawler to come to his chambers on or about July 24, 1997. Yet, at hearing, respondent testified he had a clear recollection of the substance and tenor of the conversation that occurred when

he called her into chambers on that date to upbraid her for her unprofessional and inappropriate behavior. There is a powerful and persuasive inference that respondent carefully and conveniently tailored his testimony to explain why Lawler came into his chambers on that date in response to a wealth of evidence that she was in his chambers on that date and something occurred that prompted her to abruptly depart the chambers and courtroom while upset. In short, his testimony was false.

We have previously noted respondent's romantic involvement with McCowan was an error in judgment deserving of criticism, but in the limited circumstances of this case, did not create the appearance of impropriety.

Respondent's use of chambers as a venue to satisfy his sexual desires was more than ill-advised, and embarrassing. It calls into question and undermines his judgment. Further, his initial denial such behavior occurred was false.

Last, we consider his refusal to answer questions when required to appear before the JIB. We believe his refusal was violative of the code of Judicial Conduct. The integrity of the judiciary requires the full cooperation of a judge who is issued a 4(d) letter. Respondent had no right to place his self interest above the JIB's authority, or the public's faith in the judiciary.

However, this is an issue of first impression in Illinois, and respondent sought and followed the advice of well-respected, experienced and capable counsel. We are loathe to judge respondent harshly on this issue because of its complexity and the advice he received. A well reasoned argument can be made that a respondent can choose whether to answer questions. Rule 4(e) could be so interpreted. It is an argument we have rejected, but not without thoughtful consideration.

Further, we believe the respondent was understandably apprehensive when a supplement to the Rule 4(d) letter requiring him to appear to respond to allegations of sexual harassment also stated "the Judicial Inquiry Board may choose to question Judge Spurlock about his general practices and demeanor throughout his entire tenure as a judge." This language did not provide notice of the substance of any proposed charge as required by Rule 4(d).

Thus, we conclude this violation need not play a significant part in the sanction we decide to impose.

SANCTION

The Supreme Court of Washington suggested the following nonexclusive factors in determining an appropriate sanction for judicial misconduct: (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent and frequency of occurrence of the acts of misconduct; (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge's official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (I) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires. *In re Deming*, 736 P.2d 639, 659 (1987).

Respondent's offensive and sexually inappropriate behavior directed toward the four assistant state's attorneys demonstrated a regular and frequent pattern of misconduct. The behavior occurred primarily in chambers immediately adjacent to the courtroom, and while he was acting in his official capacity. He has not acknowledged the improprieties, and has denied they occurred. Such conduct diminishes the integrity of and respect for the judiciary. Finally, respondent exploited his position

to satisfy his personal desires. We conclude the respondent should be removed from office. The respondent is ordered removed from his judicial office 30 days from the filing of this order.

Respondent removed from office.

McMORROW, concurring in part and dissenting in part:

Although I agree with much of the majority's opinion, I depart from my colleagues' analysis in certain important respects. To make clear my points of departure, I will follow the organizational structure adopted by the majority, which has divided the allegations and evidence in this case into the categories set forth below.

THE FOUR ASSISTANT STATE'S ATTORNEYS

The Judicial Inquiry Board (Board) has alleged that the respondent, Associate Judge Oliver M. Spurlock, over the course of several years, made a variety of sexually suggestive and inappropriate comments and engaged in inappropriate physical conduct toward four female assistant state's attorneys who were assigned to his courtroom and who appeared before him in his capacity as an associate judge. The Board presented numerous witnesses in support of these allegations. The testimony of these witnesses, which is accurately recounted in the majority opinion, was consistent and credible. After carefully considering this testimony, I conclude, like the majority, that the Board has proven the factual allegations relating to the assistant state's attorneys by clear and convincing evidence (see Rules of Procedure of the Illinois Courts Commission, Rule 11).

I further agree that respondent's behavior towards the assistant state's attorneys violated the Code of Judicial Conduct. Supreme Court Rules 61, 62A and 63A(3) provide, in pertinent part:

> Rule 61: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."
>
> Rule 62A: "A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
>
> Rule 63A(3): "A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity ***."

In making the unwanted sexual advances to the assistant state's attorneys, respondent failed to observe high standards of conduct to preserve the integrity of the judiciary; he failed to conduct himself in a manner that promotes public confidence in the integrity of the judiciary; and he was neither dignified nor courteous to the assistant state's attorneys.

STATE'S ATTORNEY'S EMPLOYEE - FAILURE To RECUSE

The Board has alleged that, during 1989 and 1990, respondent had a consensual romantic

relationship with a clerical employee of the Cook County State's Attorney's Office; that this employee had a role in preparing petitions for orders of protection; and that this employee occasionally sat at counsel's table with the assistant state's attorneys while the petitions were heard and ruled upon by respondent. The Board contends that respondent should have recused himself from those cases in which the employee was involved.

The Board has proven the factual basis of its allegations on this issue by clear and convincing evidence. However, I agree with the majority's conclusion that, under the particular circumstances of this case, respondent's failure to recuse himself did not violate the Code of Judicial Conduct.

COURT REPORTER

The Board has alleged that, on two occasions, respondent engaged in consensual sexual intercourse with a court reporter in his chambers. Respondent has conceded that these encounters took place and that they violated Supreme Court Rules 61 and 62A.

RESPONDENT'S REFUSAL TO RESPOND TO QUESTIONS

The Board wrote to respondent and asked him to appear before it to answer questions regarding the charges of sexually inappropriate behavior which are at issue in this case. Respondent appeared before the Board but declined to answer any questions or make any statement. The Board has alleged that respondent's refusal to answer its questions constitutes a breach of the Code of Judicial Conduct. Because of the importance of this issue to the judiciary, and because it has generated some confusion between the parties, I will address this issue at length.

On October 27, 1997, pursuant to Rule 4(d) of the Board's Rules of Procedure, the Board sent a letter to respondent asking that he appear at the Board's office. Rule 4(d) states:

> "(d) The Board shall, before proceeding to a determination that a reasonable basis exists to charge the judge before the Courts Commission, give the judge written notice of the substance of the proposed charge. This written notice will set forth a date, place and time at which the judge shall be required to appear before the Board, accompanied by counsel if the judge so elects."

In its letter, the Board told respondent that it was seeking his response to allegations that he had engaged in certain sexually inappropriate behavior in his courtroom and chambers. The Board also informed respondent that it was considering whether to bring formal charges against respondent based on these allegations.

Respondent requested and received a continuance of his appearance before the Board until January 9, 1998. On January 5, 1998, in response to respondent's request, the Board provided respondent with further information regarding the proposed charges. The Board also stated that it might question respondent "about his general practices and demeanor throughout his entire tenure as a judge." On January 7, 1998, respondent informed the Board that he did not wish to appear before the Board to answer its questions. Instead, respondent asked the Board to waive his Rule 4(d) appearance, pursuant to Rule 4(e) of the Board's Rules of Procedure. Rule 4(e) provides:

> "(e) During [the judge's] required appearance before the Board, the judge shall be questioned by the Board concerning the proposed charge, and the judge will given the opportunity to make such statement in respect to the proposed charge as he/she may desire. In addition, the judge will be given the opportunity to present to the Board such information, oral or written (including the names of any witness he/she may wish to have heard by the Board) in respect to the proposed charge as he/she may desire. Such written information and names of witnesses shall be forwarded to the Board not less than 5 days prior to the judge's appearance. A judge may, upon concurrence of the Board, in his/her own person or through counsel, in writing waive his/her required appearance before the Board to respond to charges."

Rule 4(e) states that a judge may waive his Rule 4(d) appearance, but that such a waiver requires the concurrence of the Board. In this case, the Board did not concur with respondent's request. Instead, the Board informed respondent that he was required to appear and answer questions.

Respondent appeared before the Board on January 9, 1998. At that time, respondent, through his counsel, politely but firmly refused to answer any of the Board's questions and refused to make any statement. In setting forth his client's reasons for refusing to answer the Board's questions, counsel for respondent made it clear that respondent was *not* asserting his fifth amendment right to avoid self-incrimination. Instead, respondent simply believed that answering the Board's questions was not mandatory under the Board's Rule 4(e). Counsel for respondent stated:

> "[W]e construe [Rule 4(e)] to at least appear to confer upon a judge the opportunity to decline to make a statement or present evidence[.] *** [I]t is our position that [the rule's] clear intent is the judge does not have to present his defense to the Judicial Inquiry Board if he chooses not to. *** [W]e believe that under this rule we do not have to present a defense or respond to questions, and we're prepared to accept whatever consequences may result from asserting that position."

After counsel had presented respondent's position, the Board again explained to respondent that it did not concur in his request to waive his appearance before the Board. The Board also informed respondent that, in its view, it not only had the right "but the obligation to investigate allegations of misconduct or impropriety. And that investigation includes asking questions of judges that are brought before it." The Board further stated that it might consider respondent's refusal to answer questions "to be a violation of [respondent's] judicial responsibilities." Respondent indicated that he understood the Board's position but that he would continue to decline to answer its questions. Shortly thereafter, the proceedings before the Board came to a close.

Subsequently, on March 24, 1998, and on April 24, 1998, the Board again sent letters to respondent requesting that he appear before the Board to answer its questions. Each letter related to new allegations concerning respondent's conduct. On both occasions, respondent's counsel advised the Board that respondent adhered to the position he had advanced in January 1998 and that he refused to answer any of the Board's questions.

Thereafter, the Board filed its complaint before this Commission. In its complaint, the Board has alleged that respondent's refusal to answer its questions violated the Code of Judicial Conduct, Illinois Supreme Court Rules 61 and 62A.

In addressing the Board's contention that respondent's failure to answer its questions violated

the Code of Judicial Conduct, it is worth repeating what is not at issue. Respondent is not arguing that he had a fifth amendment right to refuse to answer the Board's questions or that the Board improperly denied him the opportunity to exercise that right. As respondent explains, "[p]rivilege has nothing to do with the issue before the Commission." Instead, respondent's argument is focused primarily on the language and purpose of the Board's Rule 4(e). Thus, according to respondent, the primary issue before the Commission with respect to his refusal to answer the Board's questions is "one of statutory construction."

Respondent contends that Rule 4(e) gives a judge the option to respond to questions when called before the Board, but that response is not required. Looking first at the language of the rule, respondent notes that Rule 4(e) states "the judge shall be questioned by the Board concerning the proposed charge." Respondent maintains that " '[q]uestioning' is different from 'answering' " and that his "refusal to give answers did not preclude the Board from asking questions." Respondent contends, therefore, that he "did not violate the literal terms of Rule."

Respondent also contends that a construction of Rule 4(e) which would require him to answer the Board's questions would be contrary to the rule's "intent and purpose." Respondent notes that proceedings before the Board, other than the filing of a complaint before the Commission, must be kept confidential. See Ill. Const. 1970, art. VI, §15(c); see also *Owen v. Mann*, 105 Ill. 2d 525, 532 (1985). Respondent argues that Rule 4(e) is designed solely to further this requirement of confidentiality. Respondent maintains that "Rule 4(e) gives a putative respondent before the Courts Commission an opportunity to tell his or her side of the story in an effort to dispel unfounded allegations before the filing of public charges. The fact that a respondent fails to avail himself or herself of that right, however, should not be fodder for judicial discipline." Respondent therefore concludes that, because the language and purpose of Rule 4(e) did not actually require him to answer the Board's questions, it follows that his failure to do so could not, in any way, have been a violation of the Code of Judicial Conduct.

Respondent's argument regarding the proper interpretation of the Board's Rule 4(e) is misplaced. This Courts Commission has no jurisdiction to interpret and finally determine the meaning of a rule of procedure promulgated by the Judicial Inquiry Board. The authority of the Courts Commission is circumscribed. It is limited to resolving three primary questions: (1) whether the alleged conduct of a respondent judge did, in fact, occur, (2) whether that conduct violated the Code of Judicial Conduct and, (3) if so, what sanction should be imposed. See, *e.g.*, *In re Campbell*, 2 Ill. Cts. Com. 113, 115 (1988). The Courts Commission necessarily has the power to interpret the Code of Judicial Conduct because such interpretation "is an inherent and inescapable part of [our] adjudicative process." *People ex rel. Judicial Inquiry Board v. Courts Commission*, 91 Ill. 2d 130, 135 (1982). But it has no authority to make an independent interpretation or construction of a statute. See *People ex rel. Harrod v. Illinois Courts Commission*, 69 Ill. 2d 445, 472-74 (1977) (it is not the Commission's function "to determine, construe, or interpret what the law should be"). Similarly, this Commission has no power to determine the meaning of one of the Board's rules of procedure in a final or dispositive way. Such a determination is simply outside the scope of the Commission's constitutional authority. The Board is an independent constitutional entity, completely separate from this Commission. The Board is not a subset of the Courts Commission and the relationship between the two organizations is not like that of an administrative hearing board reviewing the interpretations of rules made by an administrative hearing officer. Thus, simply put, if the Board states that one of its rules means one thing, it is not this Commission's function to hold that the rule means something else.

This is not to say, however, that ambiguity in the Board's directives or rules might never be a factor in determining whether a respondent judge has violated the Code of Judicial Conduct. For example, it would be difficult to find fault with a judge's failure to follow a Board's directive during an investigation of judicial misconduct if the judge did not clearly understand what that directive was. But that is not the situation here. In this case, the Board notified respondent regarding the allegations of sexual misconduct which are at issue in this case. The Board informed respondent in clear and certain terms what allegations it was investigating and that he was required to answer questions regarding these allegations pursuant to Rules 4(d) and (e) and pursuant to the Board's constitutional charge to investigate judicial misconduct. Respondent indicated that he understood the Board's position. He then declined to answer any of the Board's questions.

It is with the foregoing in mind that the issue of respondent's refusal to answer the Board's question must be framed. The issue before us is this: When the Judicial Inquiry Board has notified a judge that allegations of misconduct have been made against him, and when the Board has clearly informed the judge that it is investigating the allegations and that he is required to answer questions regarding the allegations, does the judge's subsequent blanket refusal to answer those questions violate the Code of Judicial Conduct where that refusal is not based on the assertion of any privilege but, instead, is based solely on the judge's personal desire not to respond? The answer is yes.

Supreme Court Rule 61 states that a "judge should participate in establishing, maintaining, and *enforcing*, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."(Emphasis added.) Supreme Court Rule 62A states that a judge should "conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The Board is given the authority, under our state constitution, "to conduct investigations" (Ill. Const. 1970, art. VI, §15(c)) into judicial misconduct. See also *Owen v. Mann*, 105 Ill. 2d 525, 532 (1985) (the authority to investigate judges for alleged misconduct is vested in the Board). A judge who refuses to answer relevant questions posed by the Board during the course of its investigation of misconduct is not "participating in *** enforcing *** high standards of conduct" as Supreme Court Rule 61 requires. To the contrary, a judge who refuses to answer questions relating to judicial misconduct is doing just the opposite, *i.e.*, frustrating the enforcement of high standards of conduct. Similarly, a judge who refuses to answer relevant questions is not "promot[ing] public confidence in the integrity" of the judiciary as Supreme Court Rule 62A requires. Instead, he is undermining that public confidence. Accordingly, a judge's *blanket* refusal to answer questions relating to charges of alleged misconduct violates Supreme Court Rules 61 and 62A.

Notably, this Commission has reached this conclusion in the past. In *In re Campbell*, 2 Ill. Cts. Com. 113 (1988), the respondent judge appeared before the Board in response to charges that he had discharged his secretary after she ended her romantic relationship with him. When the Board questioned the judge about the nature of his relationship with his secretary, he invoked his right to privacy and refused to answer. The judge persisted in his refusal even after the Board informed him that such refusal could, in itself, be a basis for a disciplinary proceeding before the Commission. *Campbell*, 2 Ill. Cts. Com. at 124.

This Commission concluded that the judge's refusal to answer the Board's questions violated Supreme Court Rules 61 and 62A. The Commission stated:

> "Preservation of the integrity of the judiciary necessarily entails a duty to be forthcoming in answer to questions directly related to the performance of judicial functions, including

> administrative duties. The questions posed to the respondent were intended to elicit the possible motivation for firing his secretary and, because that motivation was the basis of inquiry into charges against the respondent, honest disclosure was required." *Campbell*, 2 Ill. Cts. Com. at 124.

See also *In re Zisook*, 88 Ill. 2d 321, 331 (1981) (holding in an attorney discipline case that an attorney has an obligation to cooperate with "the Attorney Registration and Disciplinary Commission, in the performance of its duty to police the legal profession in this State"); *In re Smith*, 168 Ill. 2d 269, 296 (1995) ("Cooperation in the disciplinary proceeding is an additional factor that this court weighs in the determination of a disciplinary sanction"); *In re Samuels*, 126 Ill. 2d 509, 531 (1989) (same); *In re Levin*, 118 Ill. 2d 77, 89 (1987)(same); *In re Pass*, 105 Ill. 2d 366, 371 (1985)(same).

Respondent's filings before this Commission suggest an alternative argument to his contention that he could properly refuse to answer the Board's questions under the plain language of Rule 4(e). In his memorandum of law in support of his motion to dismiss the Board's complaint, respondent highlights the Board's letter of January 5, 1998. In that letter, the Board stated that it might question respondent "about his general practices and demeanor throughout his entire tenure as a judge." Respondent maintains that the Board's statement that it might question him about his "general practices and demeanor" was overly broad and placed him in "the position of having to defend an entire career at the whim of whatever questions the [Board] wanted to ask him about the entirety of his judicial career for nearly a decade. Such a procedure could not have been contemplated by the authors of the Illinois Constitution who created a Judicial Inquiry Board, not a Star Chamber." Although respondent does not put it in precisely these terms, it appears that he is contending that he could properly decline to appear before the Board because of the possibility it might ask a wide range of questions, some of which might be unrelated to the allegations of misconduct which prompted the Board's original 4(d) letter.

Whether a judge's failure to cooperate with a Board investigation is, in itself, an ethical offense must be determined on a case-by-case basis. Clearly, a judge would not be frustrating an investigation of the Board, and hence would not be violating Supreme Court Rules 61 and 62A, if the judge refused to appear before the Board to answer questions which had nothing to do with any alleged misconduct. In this case, however, even assuming that the Board's statement in the January 5 letter was "overbroad" (a point the Board disputes), the Board did more than notify respondent that it might question him about his "general practices and demeanor." Pursuant to its Rules 4(d) and (e), the Board notified respondent of the specific nature of the allegations made against him, informed him that it was investigating the allegations, and stated that respondent was required to appear before it to answer questions regarding the allegations. Because respondent had been properly notified, he had an ethical obligation to appear before the Board pursuant to Supreme Court Rules 61 and 62A and respond to the Board's questions relating to the alleged misconduct. See *In re Campbell*, 2 Ill. Cts. Com. 113, 123-24 (1988). If the Board had begun to ask questions that had nothing to do with the misconduct, which is essentially the concern raised by respondent here, respondent could have, with impunity, refused to answer. A refusal to answer irrelevant questions would not have impeded the Board's investigation and, therefore, could not have been sanctioned as a violation of Supreme Court Rules 61 and 62A. But contrary to the position apparently being advanced by respondent in this case, the mere possibility that the Board might ask irrelevant questions was not enough, by itself, to excuse an otherwise properly required appearance before the Board.

Respondent further argues that he should not be sanctioned for failing to answer the Board's questions because Rule 4(e) is unconstitutional. According to respondent, Rule 4(e) does not provide an objective standard to govern the Board's concurrence or non-concurrence in a judge's waiver of appearance. Thus, respondent maintains that Rule 4(e) violates the due process clause of the state and federal constitutions. This Commission cannot properly address this issue because, just as it has no authority to interpret or construe a state statute, it has no authority to independently interpret the meaning of the state or federal constitution. See *People ex rel. Harrod v. Illinois Courts Commission*, 69 Ill. 2d 445, 472-74 (1977).

Having reaffirmed, as a general matter, that a judge's refusal to answer questions when called before the Board pursuant to Rules 4(d) and (e) may constitute judicial misconduct, I would nevertheless not impose a sanction for respondent's refusal to answer questions in the present case. Respondent's "statutory construction" argument with respect to the Board's Rules 4(d) and (e) was made in reliance on the advice of his able counsel, was made in good faith and was one of first impression before this Commission. Moreover, although respondent's "statutory construction" argument is fundamentally untenable because, as discussed above, it is based on the erroneous premise that it is the function of this Commission to judicially interpret the Board's rules, the Board itself has never challenged this underlying premise. Instead, in its filing and arguments before this Commission, the Board has simply disputed the merits of respondent's argument. The Board argues only that respondent has misread its rules and then offers its own "statutory construction" of those rules. The Board's failure to grasp the mistaken premise in respondent's "statutory construction" argument suggests confusion on this issue that makes sanction unwarranted. Accordingly, under these circumstances, I conclude, like the majority, that any sanction imposed on respondent may not be based upon his failure to answer the Board's questions in this case.

SANCTION

The majority has concluded that respondent violated the Code of Judicial Conduct, and may be sanctioned, on the following principal grounds: (1) respondent made sexually inappropriate comments and engaged in sexually inappropriate physical conduct toward four female assistant state's attorneys who appeared before him in his capacity as an associate judge, and (2) on two occasions, respondent engaged in consensual sexual intercourse with a court reporter in his chambers. Based on this conduct, the majority concludes that respondent has exploited his power and position as judge and should be removed from office. I respectfully disagree.

Much of respondent's behavior, such as inviting the assistant state's attorneys to dinner and asking for their phone numbers, while annoying, was not sanctionable misconduct. In my view, only certain incidents, such as the repeated suggestive comments regarding the assistant state's attorneys appearance and the unwelcome physical contact, constitute sanctionable misconduct. Because respondent was in a position of authority, these latter incidents created a hostile working environment for the assistant state's attorneys. It is to this extent that I view respondent's behavior as unacceptable and deserving of some sanction.

While each judicial discipline case must be judged on its own facts, I believe that *In re Keith*, 3 Ill. Cts. Com. 38 (1994), the most recent decision of this Commission to order removal of a judge from office, is instructive on the issue of whether respondent should be removed from the bench. In *Keith*, the respondent judge presided over a high-volume, traffic and misdemeanor courtroom. The Board filed a complaint alleging numerous acts of misconduct and, following a hearing, this

Commission concluded that the judge had flagrantly abused the power of his office and had repeatedly undermined the integrity of the judicial process. For example, on one occasion, as the judge assumed the bench, he informed the people in his courtroom that there would no talking and that everyone without a traffic ticket had to leave. The husband of a traffic offender leaned over to his wife and whispered (inaudibly to the courtroom) that he would be outside. The judge saw the whispering and ordered the husband to stand and approach the bench. The judge ordered the husband to apologize and then had the husband taken to a holding cell, where he was held for over an hour. The Commission concluded that "jailing a man for whispering inaudibly to his wife is outrageous and a gross abuse of a judge's power of contempt." *Keith*, 3 Ill. Cts. Com. at 54. On an other occasion, the judge held a woman in contempt for asking questions out of turn and imposed a jail sentence of 96 hours. The Commission found this contempt sentence "arbitrary and vindictive," and further stated that the judge's actions "shock[ed] the collective conscience" of the Commission. Other abuses of judicial power committed by the judge included doubling a traffic offender's fine when she asked a question and, in an "act of gross intimidation," threatening to double the fine again if she spoke further (*Keith*, 3 Ill. Cts. Com. at 66-67) and, on a separate occasion, increasing a traffic offender's fine by $25 and doubling the period of license suspension because the offender was five minutes late to court (*Keith*, 3 Ill. Cts. Com. at 68). Based on these actions, and others, the Commission concluded that the judge had

> "demonstrated a consistent pattern of conduct evincing a complete lack of judicial temperament and demeanor, a disrespect for judicial process and procedures, and a deep seated personal contempt and disrespect for citizens appearing in his courtroom. In short, he has conducted himself as a mean-spirited judicial tyrant." *Keith*, 3 Ill. Cts. Com. at 71.

Accordingly, the Commission ordered the judge removed from the bench.

The present case, in contrast to *Keith*, is not one where respondent has abused the power of his office or subverted the integrity of judicial process and procedure. With respect to the assistant state's attorneys, there is no evidence that respondent used his judicial power as leverage in an attempt to force the attorneys to acquiesce to his advances. There is no evidence, for example, that respondent threatened to rule against the assistant state's attorneys in their cases if they did not accept his invitations. Nor is there evidence that he threatened to use his authority or influence to affect their employment if they refused his advances. In short, there is no evidence, and the Board has not argued, that respondent exploited or abused his judicial power by engaging in *quid pro quo* harassment.

Further, both with respect to the assistant state's attorneys and with respect to the two instances of sexual intercourse committed in chambers, I note that there is no evidence that this conduct affected the judicial process in any way. Indeed, there is no evidence that respondent's behavior had any effect on the cases being heard in his courtroom or on any of the litigants who appeared before him. In sum, while I conclude that respondent failed to maintain the standards of behavior expected of a judge and, thus, demeaned the dignity and stature of his office, he did not, as the majority suggests, commit the far more serious offense of exploiting or abusing his power as a judge, or subverting the integrity of the judicial process, as was the case in *Keith*.

Respondent's conduct violated the Code of Judicial Conduct. However, the sanction imposed by this Commission must be in proportion to the ethical offense committed. While serious, I do not believe that respondent's misconduct merits the most severe sanction that this Commission may

impose. Instead, I would impose upon respondent a 12 month suspension without pay.

For the foregoing reasons, I respectfully concur in part and dissent in part.

BUCKLEY joins in this partial concurrence and dissent.