

IVI-IPO 2006 COOK COUNTY APPELLATE COURT QUESTIONNAIRE – Section 1
(Revised 1/5/06)

DATE 1/10/06

PARTY Democratic

CANDIDATE FOR Judge, Illinois Appellate Court, First District **VACANCY** Hartigan

NAME Kathleen G. Kennedy

WEB SITE pending

CAMPAIGN ADDRESS 5224 W. Davis St., Skokie, IL. 60077

CAMPAIGN PHONE (847) 966-2719 **FAX** pending

CAMPAIGN MANAGER Freya Fung

NUMBER OF PETITION SIGNATURES FILED 5880 **NUMBER REQUIRED** 3621

Elective or appointive public and/or party offices previously held including dates.

Cook County Circuit Court Judge, December 2, 1996 to present.

Other elective offices for which you have been a candidate.

None

Principal business, educational, professional and civic activities of the past ten years.

Please see the summary in my response to the Alliance Questionnaire which is submitted in conjunction with this response. In addition, please note that I have always chosen public service careers as the best way for me to contribute to the legal profession and my community. I have served in the Domestic Relations Division of the Circuit Court of Cook County throughout my nine-year judicial career. For six years (1996-2003) I was assigned to the Expedited Child Support Section of the Domestic Relations Division of the Circuit Court, where I heard cases involving paternity and child support, criminal and civil contempt, as well as child custody and visitation. Currently I am an expedited hearing judge handling a variety of family law matters including contested divorces. As a lawyer I clerked for Justice Dom J. Rizzi on the Illinois Appellate Court (1982-1985) and Judge Joan Humphrey Lefkow (1985-1989) on the United States District Court. I also supervised the appeals and class action litigation section of the Office of the Cook County Public Guardian (1989-1994 and 4/1996-12/1996), working primarily on cases involving child abuse and neglect. In addition, I served as a hearing officer in the Child Protection Division of the Cook County Circuit Court (11/94-4/96).

I taught Juvenile Law as an adjunct professor at DePaul University College of Law one semester per year over a six-year period (1994-2000). In addition, I participated as (a) guest faculty, Loyola University Chicago School

of Law, Childlaw Trial Practice Course 2004, (b) judicial moderator, Child Representative Continuing Legal Education Seminar, Parentage Court Roundtable Discussion, May 2002, (c) guest speaker, Chicago Bar Association Matrimonial Law Committee, 604(b) evaluations from a judge's perspective, October 2001, (d) guest speaker, Expedited Child Support Continuing Education and Training Program, *pro se* litigants, June 2001 and (e) panelist, Chicago Bar Association Matrimonial Law Committee, persuasive writing in domestic relations cases, November 2000.

As a single mother of three since 1989 I have focused virtually all of my non-work time on my children, participating in their activities and contributing when possible by speaking at school events such as "Women in Public Service Day." As my youngest began college this year I plan to become more active in the community through volunteer work after the March primary election. Prior to my election as a judge, I volunteered on an Oak Park Library fundraising committee.

What subjects have you studied and what experience have you had which will be most helpful to you in the office you seek?

Along with my service as a law clerk, an assistant public guardian and a juvenile court hearing officer, I chose to work with law students as an adjunct professor as a means to preparing excellent new lawyers and improving my skills as well, proving over and over to myself that we learn much from those we teach. Self-improvement and skill enhancement are enduring goals for me evident in the continuing judicial education in which I actively participate, from learning about areas with which I am less familiar such as adoption law (April 2003 seminar), to increasing my knowledge on a particular subject such as trial order and opinion writing (February 2005 seminar). Also, I have been selected and trained to be a mentor to other judges. Initially I aspired to be a judge because of my passion for the law, my compassion for the litigants and my knowledge that I would work very hard to be an excellent judge. My aspiration to move from the trial court to the appellate court is motivated by the same concerns. In addition, I believe that I have the intellectual ability to bring a level of scholarship to appellate review, although I will certainly miss the people-contact of trial court work.

The experience which will be most helpful to me in the Appellate Court comes from my nine successful years in the trial court handling a variety of legal issues with knowledge and skill. I have written numerous decisions discussing and explaining the reasoning for my rulings because I believe so strongly that well-reasoned decisions are part of the process that is due every litigant. Additional invaluable experience includes my judicial clerkships during which I learned as a young lawyer from two outstanding jurists with reputations for scholarship and moral courage.

Please detail your prior political activity, if any. Give positions held, dates, organizational memberships, role you played in political campaigns.

My prior political activity consists of (a) my primary election campaign for Cook County Circuit Court Judge from the 11th subcircuit from December 1995 to March 1996 (the general election race was uncontested in November 1996), and (b) my retention election campaign in 2002.

As concisely as possible, state why you feel you should be endorsed over the other candidate(s). What goals for the office you seek are most important to you personally?

To begin, I feel that the endorsement process should have three components, first, to identify the nature of the work of an appellate court judge; second, to identify the qualities essential for excellent performance of the identified work; and third, after gathering information about the candidates, to select the candidate who possesses those qualities in abundance. In my view the IVI-IPO has a difficult task this year in endorsing one appellate court candidate over the others because most of the candidates have so much to offer. Nevertheless, I feel that I possess a unique and abundant combination of essential attributes which make me the candidate who should be endorsed over the others.

Many have written about the work of an appellate court judge but in the interest of conciseness I call your attention to the words of Dennis J. Sweeney in *Viewpoint, The Work of Appellate Judges*, 85 *Judicature* 59 (2001), who explains that “[t]he very heart of the work of appellate judges is principled decision making. They make choices among competing choices. And then, through the vehicle of a written opinion, explain to the world why they did what they did.” He also laments the fact that many appellate court judges relegate opinion-writing to their law clerks.

Many have written about the qualities of excellent judges. I call your attention to some of those mentioned by judges themselves during interviews by Howard Bashman in *How Appealing*, <http://legalaffairs.org/howappealing/>, a blog devoted to appellate litigation. For example, Chief Justice Shirley S. Abrahamson of the Supreme Court of Wisconsin believes that “[t]he qualities most needed in judges are courage and personal integrity, both of which are indispensable to independence.” Circuit Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit finds that appellate court candidates should have “both high intellect and good common sense. Complex and close cases require a keen analytical mind, but good judges also need common sense to appreciate how the decisions they make will operate outside the realm of legal theory.” Chief Judge Deanell Reece Tacha of the U.S. Court of Appeals for the Tenth Circuit points to collegiality as a quality with “behind the scenes” importance. She explains: “It is important to stress that this collegiality is not about agreeing or even necessarily getting along. It is instead about fostering an atmosphere of mutual respect and understanding, encouraging open dialogue, and facilitating opportunities for the judges to be together to discuss both legal and non-legal issues. Much has been written about the importance of collegiality on an appellate court,...I believe that after almost eighteen years of watching this process, I am increasingly convinced that this elusive but important concept of collegiality makes a difference in the quality of the law.” Circuit Judge William Curtis Bryson of the U.S. Court of Appeals for the Federal Circuit concurs,

noting that “A degree of humility and an even temperament are desirable qualities. ‘Robitis’ is an occupational hazard for judges, and a person who is arrogant and irascible to start with is at heightened risk of succumbing. Although most of an appellate judge's work is solitary, the appellate function is still collegial in essential respects, so an ability to work with colleagues is important. In addition, a fair dose of plain old horse sense is always useful. It is easy to get a little ethereal when parsing the precedents and counting the prongs of the multi-pronged tests, which can lead to a loss of perspective regarding the real world effect of what we are doing.” Finally, Circuit Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit suggests that an essential qualification for the job of judging is compassion.

My saying so cannot demonstrate to you that I am a person of courage and moral integrity with high intellect and good common sense, a keen analytical mind, a degree of humility and an even temperament, as well as the capacity for collegiality and the ability to work well with others and most important of all with an abundance of compassion. Yet my possession of those qualities is why I feel that I should be endorsed over the other candidates. Please ask those who know me (a list of references is found at page six of my response to the Alliance Questionnaire which is submitted in conjunction with this response).

Please state any evaluation ratings you have ever received for any judicial office by any bar association. List the office and the date of the election for which the evaluation was made. Please use the following format:

<i>Date</i>	<i>Position</i>	<i>Bar Association</i>	<i>Rating</i>
2002	Retention-Circuit Court	all	recommended
1996	Circuit Court	all	not qualified

When I ran for retention in 2002, the CBA and the bar associations participating in the Alliance of Bar Associations for Judicial Screening rated my qualifications based on my judicial performance from 1996 to 2002. They investigated and interviewed me and recommended that I be retained. The CBA summarized its 2002 findings: “Judge Kennedy is a hardworking judge who is well regarded for her diligence, knowledge of the law and fine judicial demeanor.”

When I ran initially in 1996 before I had judicial experience, the CBA and other bar associations rated me not qualified based on their expressed perception that I lacked courtroom and litigation experience. Around the time of my election to the Circuit Court I read with great interest an article in the National Law Journal by Harvey Berkman entitled “ABA’s ‘Unqualified’ Judges Doing Well.” National Law Journal, January 13, 1997, page A1. Mr. Berkman describes three federal judges who were rated unqualified by the ABA based on their lack of significant trial experience, but who, after more than two years on the bench, were rated from above average to superlative based on performance reviews by those who had appeared before them. According to Mr. Berkman the bar association criteria “while solidly based, may be limited in their predictive power.”

IVI-IPO 2006 COOK COUNTY APPELLATE COURT QUESTIONNAIRE – Section 2

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the United States Supreme Court held that it violated the First Amendment to the United States Constitution for states to forbid judges and judicial candidates from “announcing” their positions on issues of interest to prospective voters. *See id.* at 788; *see also Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 229 (7th Cir. 1993). It is IVI-IPO’s position that *White* created a “safe harbor” for judicial candidates to “announce” their views without running afoul of judicial canons, such as Illinois’s current Canon 67, that purport to restrict judicial candidates’ free speech rights.

Illinois’s Canon 67 A.(3)(d)(i) states that all judges and candidates shall not “make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues within cases that are likely to come before the court.” IVI-IPO hereby expressly states that by answering the following questions we do not intend you to “make statements that commit or appear to commit [yourself] with respect to cases, controversies, or issues within cases that are likely to come before the court.” However, it is IVI-IPO’s position that in order for Canon 67 to survive constitutional scrutiny after *White* (at least “as applied”), it must permit judicial candidates to “announce” their positions on issues such as those the following questions present.

We have included this list of questions to assist us in determining whether to endorse your candidacy. Of course, you may answer or not answer the questions as you may choose. Although IVI-IPO strongly believes that “announcing” your answers to these questions without committing or appearing to commit yourself to ruling a certain way on them does not violate Canon 67, we recognize that the Illinois Judicial Ethics Committee has issued a different opinion. IVI-IPO disagrees with that opinion.¹ But if you are not comfortable answering the questions as posed, please respond as best as you can with an answer that can give us greater insight into who you are and how you feel personally about these issues. Any answer you are able to give will help us in our endorsement decision.

1. Without committing or appearing to commit yourself with respect to the issue of capital punishment that may come before you as a judge, please “announce” your position concerning the death penalty. First, irrespective of the current moratorium on carrying out the death penalty in Illinois, are you for or against the death penalty? Second, whether you are for or against the death penalty, please “announce” your reasons for being for it or against it, with particular reference to the four traditional goals of criminal punishment (deterrence, retribution, incapacitation, and rehabilitation), as well as any other reasons that you care to add.
2. Without committing or appearing to commit yourself with respect to abortion issues that may come before you as a judge, please “announce” your position concerning the right of a woman to have an abortion. First, are you for it or against it? Second, whether you are for it or against it, please “announce” your reasons for being for it or against it.
3. Without committing or appearing to commit yourself with respect to the issue of mandatory minimum

¹ In particular, IVI-IPO vigorously disputes the opinion’s statement that it “defies credulity to suppose that [IVI-IPO] would have asked the Questions unless it believed the answers would have some bearing on how the candidates would rule on those legal issues.” Op. at 3. We most decidedly do not so believe. We are merely asking the questions to determine your political orientation in general, across a broad spectrum of issues, not to determine how you might rule on any given issue in any given case.

sentencing that may come before you as a judge, please “announce” your position concerning mandatory minimum sentencing. First, are you for it or against it? Second, whether you are for it or against it, please “announce” your reasons for being for it or against it.

4. Without committing or appearing to commit yourself with respect to the issue of treating juvenile criminal offenders as adults that may come before you as a judge, please “announce” your position concerning treating juvenile criminal offenders as adults. First, are you for it or against it? Second, whether you are for it or against it, please “announce” your reasons for being for it or against it.
5. Without committing or appearing to commit yourself with respect to the issue of gay rights that may come before you as a judge, please “announce” your position concerning gay rights. Putting aside whether this is an issue for the legislature instead of the judiciary (since the Massachusetts Supreme Judicial Court seems to have done so), are you in favor of gay marriage? If not, are you in favor of civil unions instead?

First, I would like to express my appreciation to the IVI-IPO for asking me questions that gave me the opportunity to research important ethical issues, and, as a result, become a more well-informed and, I believe, a better judge. When I read Section 2 of the questionnaire for the first time I became perplexed at the possibility of disclosing personal views which would not be part of my decision-making process in any case. I said to myself, and to other judges, because Section 2 of the questionnaire has certainly been discussed among us, that if this were a trial I would sustain relevance objections to questions about my personal views. Then I set out, as I will set out if elected to the appellate court, to understand the issues and consider them with an open mind and make a principled choice. Of course this meant I had to back up, essentially remove my initial aversion to the questions and proceed in an unbiased manner.

To formulate a response to questions one through five I began with the cases you cited, *White* and *Buckley*, and moved from there to consider many law review articles on the subject of judicial campaign speech. At some point I was inspired to take this opportunity to reveal to you what is important about me as an appellate court candidate, which is how I would go about making a decision, and what is not, which is how I feel about issues that I recognize to be so significant that I am humbled and awed by the possibility that I would be among those chosen to decide them in a particular case. Finally, after considering my ethical obligation as thoroughly as possible in the time allotted to me, I must explain that my unwillingness to give you insight into how I personally feel about these issues is based not on comfort, but on my personal commitment to the highest, not the minimum standard of ethical judicial conduct. I respectfully direct you to the “Higher Ground Standards for Judicial Candidates” found at www.constitutionproject.org. There, you will encounter a description of the right to impartial justice which portrays the problem inherent in Section 2 of the questionnaire: “If you enter a courtroom as a litigant, you have the right to expect three things: That the judge is impartial. That the judge is fair. That the judge is knowledgeable about the law. Wouldn’t it be distressing if you had a case before a judge who had expressed an opposing position on cases such as yours during his or her campaign? Wouldn’t it be equally disconcerting to know that your opponent in the case was a major campaign contributor to the judge? Of

course it would. Justice that is absolutely impartial is a cornerstone of democracy.” Further, announcing views as you request threatens a serious strain on judicial resources stemming from potential substitution of judge motions and recusals. I do not claim but only aspire to be absolutely impartial. Perhaps this is not what you are looking for in an appellate court candidate, but this is one of the reasons that I believe the IVI-IPO, as well as groups with opposite views, should endorse me.

It is interesting that the headline today in the *Chicago Tribune* reads “Alito: ‘A Judge Can’t Have Any Agenda.’” At least one appellate court judge finds that even if a judge begins with an agenda he or she doesn’t maintain it. In his interview in *How Appealing* Circuit Judge Bruce M. Selya of the U.S. Court of Appeals for the First Circuit stated: “I don’t accept the premise that federal appellate judges decide cases based largely on personal preference. In my experience, the opposite is true. Most people rise to the challenge upon appointment and do not make decisions based solely on ideology... When one’s role changes, one recognizes that his responsibility is no longer to advocate his personal preferences, but, rather, to uphold and honor the rule of law.” Judge Roger J. Traynor, quoted by Circuit Judge William Curtis Bryson of the U.S. Court of Appeals for the Federal Circuit in *How Appealing* said this: “one entrusted with decision, traditionally above base prejudices, must also rise above the vanity of stubborn pre-conceptions, sometimes euphemistically called the courage of one’s convictions. He knows well enough that he must severely discount his own predilections of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed of his perception.” Because I aspire to approach every case impartially and with an open mind my personal views on some of the most controversial issues of our times are irrelevant.

The makings of a judicial philosophy receive considerable press these days, particularly with U.S. Supreme Court nominees in the news. We hear terms such as “activist” and “strict constructionist.” Cass Sunstein, a distinguished University of Chicago law professor, posits four interesting categories of judges in his book *Radicals in Robes: Why Extreme Right-Wing Courts are Wrong for America*. Yet in my view labels are not as helpful as a judge’s commitment to be fair, independent and open-minded. That commitment is the essence of my judicial philosophy. Webster’s II, New College Dictionary defines “philosophy” in the first place as “love and pursuit of wisdom by intellectual investigation and moral self-discipline.” Webster’s II, New College Dictionary 826 (2001). My judicial philosophy encompasses love and pursuit of principled decisions by intellectual investigation through the unbiased consideration of the parties’ submissions and the self-discipline to make decisions independently and in a timely manner. As an appellate court law clerk before reading the briefs I read the record in the cases to which I was assigned in order to get a preliminary sense of the overall fairness in the trial court “below.” This is an example of the open-mindedness to which I ascribe.

6. What do you believe are the major strengths and weaknesses of the Appellate Court? Would you change the manner in which the Appellate Court functions?

A legitimate assessment of the strengths and weaknesses of the Appellate Court requires substantial knowledge of its workings. Unfortunately, my recent knowledge is incomplete, and my past knowledge, though thorough, may be outdated. Nevertheless, I have a few comments. As a trial judge I have observed a major strength in that the Appellate Court has a substantial output and accepts the responsibility to address comprehensively both the controversial and the mundane issues that come before it. As a trial judge in the Domestic Relations Division I recently observed another strength in the Appellate Court's application of relatively new Supreme Court Rule 306A, which governs expedited appeals in child custody cases. Specifically, the rule mandates that the trial court set a status hearing and exercise continuing jurisdiction over the preparation of the record on appeal. In one case I entered judgment on January 5, 2005. Post-trial motions led to orders entered on March 15, 2005 and a notice of appeal filed March 21, 2005. The Appellate Court entered its order affirming my judgment expeditiously, though not within the 150 days mandated by the rule, perhaps due to problems in the preparation of the record. As an experienced mediator committed to the use of mediation when appropriate throughout the justice system and a trial judge who has experienced the benefits of the mediation of child-related disputes, I believe the Appellate Court's mediation program to be a major strength which has yet to be fully realized. I believe weaknesses exist in the Appellate Court, and in the trial court as well, in that we are not where we should be technologically. Improvements are necessary, and may be under way, in the area of electronic filing. Similarly, I do not believe we are where we should be in both the Appellate and the trial courts with regard to comprehensive services for pro se litigants, though I believe another strength to be the tremendous progress we have made.

A judge may engage in activities to improve the law, the legal system and the administration of justice, so long as the judge in doing so "does not cast doubt on his or her capacity to decide impartially any issue that may come before him or her." See Supreme Court Rule 64 (Canon 4). I do not believe I would have the authority as an Appellate Court judge to change the manner in which the Appellate Court functions. I would certainly work hard to maintain high levels of timely decision-making. I would also participate in committee work to improve the court's overall functioning especially with regard to mediation, technology and pro se litigants as mentioned above.

7. Do you believe that Illinois Supreme Court Rule 23 is generally applied in the proper manner by the judges of the First District when they decide not to publish an opinion? Do you believe there are any reasons for not publishing opinions?

I have no reason to believe that the First District Appellate Court justices misapply Illinois Supreme Court Rule 23 and fail to use the criteria for determining whether a case may be disposed of by an opinion. In addition, the Rule's provision for motions to publish enables the justices to reconsider their initial application of the criteria and serves as a safeguard against misapplication. The Office of the Cook County Public Guardian succeeded on

motions to publish during the years when I supervised the Office's appeals unit. Rule 23 gives many valid reasons not to publish opinions. The overwhelming volume for courts and practitioners alike of a body of entirely precedential appellate decisions is a significant underlying concern.

8. What is the role of dissent in an intermediate appellate court? Under what conditions would you write a dissenting or concurring opinion?

I believe that dissent in an intermediate appellate court plays a critical role in furthering additional review of the issues before the court. Although total consensus is desirable, it is not always possible. I do not believe I would hesitate, consistent with my approach to judging set forth in my responses above, to write a dissenting opinion when I make a different choice than the majority's or to write a concurring opinion when I believe the reason for the majority's choice requires additional explanation.

9. Please comment on the Lockstep Doctrine that the protections of the Illinois Constitution's Bill of Rights must be interpreted in lockstep with the U.S. Supreme Court's interpretation of parallel provisions of the Federal Bill of Rights?

A recent Illinois Supreme Court case explains that "[f]or the court to diverge from [the] 'lockstep doctrine,' there must be evidence in the language of the state constitution or in the debates and committee reports from its drafting that shows the drafters intended the state constitution to be construed differently [from the United States Constitution]." See *People v. Moss*, 2005 Ill. LEXIS 2064 (Dec. 15, 2005). As an Appellate Court judge I would be bound, just as I am as a trial judge, by Illinois Supreme Court precedent. I would certainly keep an open mind and consider any evidence to which the State and the defendant pointed me to support their respective positions on the existence or non-existence of intent on the proper construction of the Illinois Constitution.

10. What is the appropriate role of economic analysis, and particularly cost benefit analysis, in appellate jurisprudence?

I would like to provide you with a well-reasoned, scholarly discussion of economic analysis in appellate jurisprudence, but I have no working knowledge in this area, and I lack the submissions of, for example, litigants who ask that I consider the issues in economic terms one way or the other. Stated differently, I would be open-minded in considering a party's presentation of his or her cost benefit analysis of a case. In his interview in *How Appealing* Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit, states that he supports economic analysis of law, yet he notes that he served for 10 years as an editor of the *Journal of Law and Economics*, but resigned in 1991 "because economic analysis of law is becoming increasingly technical, and [he] could not keep up with the literature in the depth required to select the best new work within a crowded field." Judge Easterbrook's acknowledgement of the complexity of this area makes this

short answer to your question reasonable under the circumstances. As I responded previously, I believe that a written explanation of the rationale behind the result is part of the process to which every litigant is due. Therefore, if an economic analysis were part of my decision-making I would make that analysis clear in my written opinion.