

Nebraska Judicial Ethics Opinion 08-1

Question Presented--

Can a judge attend or participate in a political party caucus held to elect delegates committed to a certain presidential candidate in that political party?

Conclusion

Attending or participating in a political party caucus is incompatible with the Nebraska Code of Judicial Conduct, Canon 5A(1)(b) and (d).

Statement of Facts

A judge writes for an advisory opinion on the question presented. A political party caucus is a public meeting of legal voters who are registered in a certain political party. The caucus is held for the purpose of electing delegates committed to a certain presidential candidate. Only persons registered as voters of that political party may attend and vote at the caucus. Absentee preference cards may be obtained but are limited to a few narrow criteria, not applicable to a sitting judge. In general, caucus participants move to different areas of the room and form a preference group that supports a certain candidate or declare themselves as “uncommitted.” During the caucus, supporters of candidates will select a spokesperson who can try to persuade others to join their preference group. Realignment can occur. Eventually, individuals are elected as delegates committed to a certain presidential candidate and sign pledges to support their candidate at future proceedings of that political party.

Applicable Code Sections

Neb. Code of Jud. Cond., Canon 5A(1)(b) and (d)

References in Addition to Nebraska Code of Judicial Conduct

Nebraska Judicial Ethics Opinion 98-3

Nebraska Judicial Ethics Opinion 06-3

Kansas Judicial Ethics Opinion JE-24

Commonwealth of Virginia Judicial Ethics Opinion 99-6

Utah Ethics Informal Opinion 88-7

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* (4th ed. 2007)

Discussion

The following Canon of the Code of Judicial Conduct applies to the question presented:

CANON 5

A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity

A. Standards of Political Conduct in General for All Judges and Candidates.

(1) Except as authorized in sections 5B(2) and 5C(1) a judge or a candidate for retention in or appointment to a judicial office shall not:

....

(b) Publicly endorse or publicly oppose another candidate for public office;

....

(d) Attend political gatherings[.]

In general, judges may not engage in political activity unrelated to their own campaigns. See Nebraska Judicial Ethics Opinion 06-3. By accepting their office, judges have voluntarily surrendered their ability to participate in a political process except as voters and as otherwise permitted by Canon 5. See Nebraska Judicial Ethics Opinion 98-3.

The circumstances and procedures of a political party caucus give rise to the conclusion that such a caucus is a “political gathering” for purposes of Canon 5A(1)(d), and mere attendance at it would violate the Code. It is a public meeting used to elect delegates who will vote for the selection of the party’s presidential nominee. See Kansas Judicial Ethics Opinion JE-24 (judge may not attend or speak on behalf of a candidate for election as a delegate or vote at the caucus for delegates); Utah Ethics Informal Opinion 88-7 (the party caucus is clearly a “political gathering”).

In addition, a caucus is a public meeting where participants publicly endorse or publicly oppose another candidate for public office by either actions or words or both. At a caucus, a participant may publicly endorse a candidate without saying a single word by simply standing or congregating with other participants favoring a certain candidate and thereby opposing another candidate. Thus, participating in the proceedings of a caucus would constitute a public endorsement of a candidate in violation of Canon 5A(1)(b).

Further, the exceptions noted in Canons 5B(2) and 5C(1) are not applicable. Canon 5B(2) applies to candidates seeking appointment to judicial or other governmental offices and Canon 5C(1) applies to those judges who have drawn active opposition. Lastly, Canon 5D states that “[a] judge shall not engage in any political activity except (1) as authorized under any other section of this Code; (2) on behalf of measures to improve the law, the legal system, or the administration of justice; or (3) as expressly authorized by law.” “Any other political activity” would encompass participating in a political party caucus, since a caucus is not directed toward “improv[ing] the law, the legal system, or the administration of justice.” See Commonwealth of Virginia Judicial Ethics Opinion 99-6 (majority opinion prohibits judges from participating in “firehouse primaries” and primaries in part because they are not directed toward improving the law, the legal system, or the administration of justice).

The Committee therefore concludes that since a political party caucus to elect delegates to vote for a presidential nominee is a political gathering, the requirements of Canon 5A(1)(d) prohibit a judge from attending. The Committee further concludes that participating in the caucus would constitute a public endorsement in violation of Canon 5A(1)(b). We recognize that the comment to Canon 5A states, “A judge or candidate for judicial office retains the right to participate in the political process as a voter.” However, the Committee believes that this comment addresses voting in an election where ballot secrecy is preserved and is not applicable to a public caucus process.

Disclaimer

This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion pursuant to appendix A of the Nebraska Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Judicial Ethics Committee.

APPROVED AND ADOPTED
BY THE COMMITTEE ON FEBRUARY 8, 2008

*Judge John F. Steinheider
Judge Carlton E. Clark – dissent attached
Judge John A. Colborn (not participating)
Judge Robert B. Ensz
Judge Lawrence D. Gendler
Judge William B. Cassel
Judge Sandra L. Dougherty*

Judge Carlton E. Clark, dissenting

I respectfully dissent from the majority opinion.

Judges retain the right to participate in the political process as voters in both primary and general elections. A judge does not forfeit the right to vote. Because Nebraska employs caucuses rather than secret ballot voting in the Democratic Party election, then even though a caucus participant may take a public stand in favor of a particular candidate, it should not be counted as a prohibited endorsement, because there is no other way to vote.