

Political Party Caucuses and Primaries/ Inaugural Events

Several judicial ethics committees have advised that a judge may not participate in a political party caucus but may vote in a political party primary.

Noting that the state code of judicial conduct prohibits a judge from attending a political gathering, the Nebraska advisory committee concluded that “the circumstances and procedures of a political party caucus give rise to the conclusion that such a caucus is a ‘political gathering’” because “it is a public meeting used to elect delegates who will vote for the selection of the party’s presidential nominee.” Further noting that caucus participants publicly endorse a candidate for public office by “simply standing or congregating” with others favoring that candidate, the committee stated that participating in a caucus would constitute a public endorsement of a candidate in violation of the code. *Nebraska Advisory Opinion 08-1. Accord Colorado Advisory Opinion 2008-2; Utah Formal Advisory Opinion 02-1; Washington Advisory Opinion 08-1.*

Acknowledging that the code expressly allows a judge “to participate in the political process as a voter,” the Nebraska committee concluded “this comment addresses voting in an election where ballot secrecy is preserved and is not applicable to a public caucus process.” One member of the committee dissented, arguing that, if a state employs caucuses rather than secret ballot voting, “it should not be counted as a prohibited endorsement, because there is no other way to vote.”

Party primary

In contrast, a judge may participate in a primary election. The Utah judicial ethics committee distinguished primaries from caucuses by noting that participation in a primary “would be witnessed by relatively few and would have no impact on the perceived impartiality of the judiciary.”

Registering with a political party is largely a private act, known only to the judge and the individual or individuals accepting the judge’s application. Although the information then becomes public, such information is rarely sought out or disclosed.

The election process is also relatively private. A judge appearing at a polling place will be seen by few people and the perception of the appearance is most likely to be recognition of the fact that the judge is participating in an election process, and not a perception that the judge is tied to any political ideology.

Utah Formal Advisory Opinion 02-1. The opinion emphasized that the “public recognizes the rights of judges as cit-

izens and understands that a judge’s participation in that process does not have significant meaning related to the integrity and partiality of the judiciary,” adding “the political proclivities of a judge are not so closely watched by the public that reasonable conclusions could be drawn from a judge’s participation in the primary election process.” The Utah committee also noted the potential for disenfranchisement if judges were prohibited from participating in primary elections.

Reaching the same conclusion, the Colorado advisory committee emphasized that primary elections are designed to guarantee the anonymity of a voter’s choice of party and preferred candidates and that participation does not give rise to a public endorsement of the political party. *Colorado Advisory Opinion 2008-2.* The opinion noted that primary elections are run by state election officials and all expenses are paid by the state or county. *Accord Washington Advisory Opinion 08-1.*

After the Virginia advisory committee issued an opinion stating that judges could not vote in primary elections (*Virginia Advisory Opinion 99-6*), the state supreme court adopted commentary to the code of judicial conduct to specifically allow that conduct. The comments explain:

A judge may vote in a primary election conducted by the State Board of Elections that is open to all registered voters qualified to vote Voting in such a primary election does not constitute attending a “political gathering” . . . or constitute engaging “in any other political activity” The act of a judge voting in a primary election is the discharge of an honorable civic duty and an obligation of responsible citizenship.


The statutory requirements for voting in a primary election distinguish voting in a primary election by a judge from a “political gathering” . . . because there is no registration by political affiliation, no loyalty or political party oath required to vote, and no pledge of support for any person or political group.

Comment 6 to Rule 4.1 of the 2007 American Bar Association *Model Code of Judicial Conduct* provides:

Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections. For purposes of this Canon, participation in a caucus-type election procedure does not constitute public support for or endorsement of a political organization or candidate, and is not prohibited

(continued on page 11)

advising that a spouse could make a political contribution only from an account containing the spouse's separate funds and that she did not know what the index to the ethics opinions looked like. The Commission found that, notwithstanding her intent and her belief that the contribution was from her husband, the judge violated the prohibition on engaging in inappropriate political activity and contributing to a political organization or candidate, noting that because of the comingling of their funds, the contribution could not be considered to be from the husband's funds alone. *See also In Application of Gaulkin*, 351 A.2d 740 (1976) (use of any portion of marital assets for campaign contribution suggests at least indirect involvement of the judge); *In the Matter of Briggs*, 595 S.W.2d 270 (Missouri 1980) (given the "closely woven business and political aspects" of the judge and his wife, Missouri commission did not believe contributions by the judge's wife to a gubernatorial candidate were independent acts of which the judge was unaware).

A judge's spouse may make financial contributions to a candidate for political office from the spouse's separate account but not from a joint account. *Colorado Advisory Opinion 06-4*; *Kansas Advisory Opinion JE-13* (1985); *Nebraska Advisory Opinion 96-6*; *New York Advisory Opinion 95-138*; *New York Advisory Opinion 98-22*; *South Carolina Advisory Opinion 33-2001*; *West Virginia Advisory Opinion* (June 19, 1991); *West Virginia Advisory Opinion* (August 28, 1995). The Delaware code of judicial conduct provides that the checks by which a judge's spouse makes a campaign contribution "shall not include the name of the judge." Several advisory committees concur. *See Pennsylvania Informal Advisory Opinion 99-6-1*; *New York Advisory Opinion 98-111*. But *see California Advisory Opinion 49* (2000) (judge's spouse may contribute from a community property joint account without noting that the contribution is from the spouse alone or crossing the judge's printed name off the check). 

Political Party Caucuses and Primaries/Inaugural Events *continued from page 3*


Inaugural events

A judge may attend the inauguration of elected public officials. The South Carolina advisory committee explained that swearing-in ceremonies are "not political activities, but rather governmental activities in which every citizen regardless of their official position should be allowed to participate."

By attending the inauguration ceremonies . . . a judge simply participates as a spectator to a time honored tradition of government that symbolizes and celebrates the orderly and legal transition of elected officials. Also, by attending as a spectator the judge is merely showing respect, in a dignified manner, for a branch of government other than his own, which thus avoids harming the integrity and impartiality of the judiciary and avoids any appearance of impropriety.

South Carolina Advisory Opinion 2-1995. Accord *Colorado Advisory Opinion 2006-10* (gubernatorial inauguration); *Florida Advisory Opinion 92-41* (inauguration of the President of the United States); *New York Advisory Opinion 97-145* (municipally funded induction ceremony).

A judge may attend an inaugural ball or similar event as long as any fee charged covers only the costs, but a judge may not attend if the event is a fund-raiser for a political campaign or party. For example, the Colorado advisory committee opined that a judge may attend a dinner, concert, and whistle-stop tour following the gubernatorial inauguration where the events are open to the public at large and nominal fees cover the costs only and will not go to political party.

Colorado Advisory Opinion 2006-10. Accord *Florida Advisory Opinion 92-41* (judge may attend inaugural ball provided no funds are paid to a political organization and attendance is not limited to members of one party); *New York Advisory Opinion 97-145* (judge may not attend a ball following the inauguration where the \$250 ticket price will be used to pay debts incurred by the candidate during the campaign); *New York Advisory Opinion 98-12* (judge may attend an inaugural ball for a mayor where any proceeds will go to a charitable organization and the event is not a political gathering); *South Carolina Advisory Opinion 2-1995* (judge may attend inaugural ball if any fee paid to attend covers only the cost and will not be retained by any political party). Cf., *Arkansas Advisory Opinion 92-5* (judges who hold offices filled by election may purchase tickets to and attend an inaugural ball for the President regardless whether the ball is considered a political gathering and regardless whether the admission charge is used to defray the costs of the event, is given to a charitable organization, or is used to support Democratic Party activities). The Colorado advisory committee cautioned that, even if a judge may attend an inaugural event for the governor, the judge may not engage in fundraising to pay for attendance, should not use his or her attendance as an opportunity to seek elevation to a higher bench, should attend as any member of the public without being seated on the dais or in any position that suggests a particular allegiance with the governor, and should be identified to the extent possible by name without reference to the judicial title. *Colorado Advisory Opinion 2006-10*. 

Recent Judicial Ethics Advisory Opinions: Family Matters

✦ A judge's spouse may circulate a nominating petition for a candidate in a non-judicial primary election. *Illinois Opinion 03-6.*

✦ A judge's spouse or other family member may circulate nominating petitions for candidates, work on a political campaign, and hold office in a political party or organization. *Arizona Opinion 03-5.*

✦ A judge's spouse may place in the front yard a campaign sign in support of a candidate (but should be discouraged from doing so) as long as it is made as clear as practical that the decision is that of the spouse and not the judge. A judge's spouse may contribute to the campaign of a candidate but may not use checks that include the judge's name. *Oklahoma Advisory Opinion 00-7.*

✦ A judge whose spouse is running for political office may permit his/her picture and name to be used in a campaign advertisement if no reference is made to the judicial office. *Oklahoma Opinion 00-6.*

✦ A judge whose spouse is a candidate for elective public office may appear in a family photograph to be used in the campaign provided no reference is made to the judge's title or position. The judge may accompany his or her spouse to civic and social functions that are within the normal activity of the organizations if the judge does not campaign. The judge should not co-host with the judge's spouse at a private party at the couple's summer home shortly after a fund-raiser held for the spouse at the home. *New York Opinion 04-41.*

✦ A judge whose spouse is running for the legislature may allow the spouse to use a family photograph in the campaign if the photograph iden-

tifies the judge only as a spouse and not as a judge. The judge may not accompany his or her spouse to partisan political functions, such as meetings or strategy sessions with supporters and advisors, or other gatherings for the spouse even if the functions are not fund-raisers. The judge may accompany his or her spouse to civic, social, religious, community, cultural, or recreational gatherings even if the spouse engages in some campaigning as long as the judge is discreet and low profile, is not introduced by title, and does not participate in any activity that could be seen as campaigning. *Vermont Opinion 2728-10 (2004).*

✦ The chief judge of a city court whose son or daughter has recently been elected to the same court must consult with and seek the approval of the deputy chief administrative judge in devising and implementing procedures for the judge's exercise of supervisory authority over his or her child. *New York Opinion 03-136.*

✦ The spouse of a chief district judge who has control over the assignment of cases may not serve as a district magistrate judge. The spouse of a district judge who is not the chief judge may serve as a district magistrate judge as long as the district judge does not consider appeals from decisions by the spouse. *Kansas Opinion JE-116 (2004).*

✦ A judge may not appoint his or her son or daughter as acting judge to serve during the judge's vacation. *Ohio Opinion 04-10.*

✦ A judge whose spouse is mayor is not disqualified from criminal jury trials, motions to suppress or exclude evidence, and

youthful offender applications or trials in which city police officers may be witnesses or from trials in which the defendants are charged with assault of a city police officer unless the judge's spouse has a personal interest or direct involvement in the case, but should disclose the relationship in all cases in which city police are witnesses. *Alabama Opinion 04-845.*

✦ Other judges in the court may appoint a judge's relative to represent indigent defendants in criminal cases and preside over cases in which the relative appears. *New York Opinion 03-19.*

✦ A judge may attend a meeting and informal appeal at a school regarding harassment of the judge's children and a special education child living temporarily with judge's family. The judge may write a letter seeking the appointment of a neutral with regard to the harassment and mention that he or she is a judge in a description of his or her background but should not use judicial stationery. *Illinois Opinion 04-1.*

✦ A judge whose spouse is a director of a parochial school may be included in a family photograph in an informational brochure about the school. *New York Opinion 04-37.*

✦ A judge may serve on the local school improvement council at the school attended by the judge's children. *West Virginia Opinion (October 12, 2004).*

✦ A judge as an ordinary spectator may observe his or her son or daughter arguing before an appellate court. *New York Opinion 04-126.*

The Center for Judicial Ethics website has links to judicial advisory committees at www.ajs.org/ethics/

Campaign and Political Activity Developments

This article up-dates information on the states' responses to recent federal decisions holding unconstitutional several canons in the code of judicial conduct regarding political activity. Previous articles were published in the summer 2002, winter 2005, and summer 2005 issues of the *Judicial Conduct Reporter*. A cumulative description is at www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf.

Eleven states — **Arizona, Florida, Louisiana, Maryland, Minnesota, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, and Wisconsin** — have adopted the 2003 version of the canons from the American Bar Association that prohibit both judges at all times and judicial candidates during campaigns from making “with respect to cases, controversies or issues that are likely to come before the court, . . . pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.,,

Questionnaires

The supreme courts in **North Dakota, South Dakota, and Tennessee** have adopted commentary that allows candidates to answer questionnaires from issue advocacy or community organizations seeking to learn their views on disputed or controversial legal or political issues but warns them to “proceed with caution if they choose to respond., and “make clear their commitment to keeping an open mind while on the bench, regardless of their own personal views., That language has been proposed by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct but not yet adopted by the ABA House of Delegates, which will vote on the Joint Commission’s final submission in February 2007. South Dakota added the requirement that a copy of a response to such a questionnaire be

filed with the supreme court clerk.

Following a court decision holding the pledges and promises restriction unconstitutional at least as applied to questionnaires, the **Kentucky** Supreme Court amended the state’s code of judicial conduct to provide:

A judge or candidate for election to judicial office shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the court.

The **Michigan** judicial ethics advisory committee stated that, although the pledges or promises clause “is presumed constitutionally valid and enforceable.,, it must be “narrowly construed and cautiously applied to campaign speech.,, *Michigan Advisory Opinion JI-131* (2005). Thus, the committee advised that candidates may respond to questionnaires eliciting the candidates’ opinions on matters pending or impending in any court and to criticize the majority opinion of a divided court of last resort and the legal philosophy that underlies it.

Declining to consider whether the pledges and promises clause is unconstitutional, the **Kansas** advisory committee concluded that a candidate may not answer a questionnaire that asks for the candidate’s views on, for example, whether the state constitution is intended to protect a right to assisted suicide. *Kansas Advisory Opinion JE-139* (2006).

Campaign fund-raising

The **South Dakota** Supreme Court amended the code to expressly allow a judge or candidate to identify himself or herself as a member of a political party at any time and to speak to gatherings on his or her own behalf at any time. Further, the court eliminated the prohibitions on a judge or judicial can-

didate acting as a leader in a political organization, attending political gatherings, paying an assessment to or making a contribution to a political organization or candidate, and purchasing tickets for political party dinners or other functions.

In addition, the South Dakota court eliminated the prohibition on personally soliciting campaign contributions, although candidates are encouraged to establish campaign committees. The court did establish a \$1,000 limit on contributions and a time limit for fundraising. Commentary provides that contributions should not be knowingly solicited or accepted (1) from a party to litigation that is before the candidate, may reasonably be expected to come before the candidate if elected, or “has come before the candidate so recently that the knowing solicitation or acceptance of funds may give the appearance of improper use of the power or prestige of judicial office., or (2) from “any firm, corporation or other organization that has as one of its purposes the promotion of one side of a legal issue which may reasonably be expected to come before the candidate if elected.,, However, commentary allows the solicitation of contributions “from lawyers (including lawyers having cases before, or which may come before, the candidate), provided that the solicitation makes no reference, direct or indirect, to any particular pending or potential litigation.,,

The **Missouri** Supreme Court amended the state’s code of judicial conduct to allow candidates to solicit and accept campaign funds (except in a courthouse or on courthouse grounds) and to make a written solicitation for campaign funds to any person or group although candidates are prohibited from soliciting in person from persons likely to appear before the candidate if elected.