

## Informal Opinion 16-01

March 23, 2016

**Question:** A judge has asked whether judges may participate in online voting for the presidential race during party caucuses where one must first register with a particular political party before casting a vote.

**Answer:** A judge may vote in conjunction with a caucus meeting if it has replaced a normal primary election function, even when participation is conditioned on pre-registering with a particular political party, as long as voting does not require participation in the caucus meeting itself.

### Discussion:

[Formal Opinion 02-1](#) provides much of the discussion required for this opinion. The Judicial Council has previously made clear that "[a] judge may not attend a party caucus [, but a] judge may vote in a primary election even when participation is conditioned on party affiliation." In making this determination, the Judicial Council relied on several canons of the Code of Judicial Conduct, namely Canon 1, Canon 2A, and Canon 5B.<sup>1</sup>

The relevant ethics provisions are now found in Canon 1 and Canon 4. Rule 1.2 in Canon 1 of the Code of Judicial Conduct states:

A judge should act at all times in a manner that promotes-and shall not undermine-public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

Rule 4.1(A) in Canon 4 provides specific guidance on political affiliations and political activities:

A judge . . . shall not: (1) act as a leader in, or hold office in, a political organization; (2) make speeches on behalf of a political organization; (3) publicly endorse or oppose a candidate for any public office; (4) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate for public office; (5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office; (6) publicly identify himself or herself as a member of a political organization, except as necessary to vote in an election . . . .

As the Judicial Council observed in [Formal Opinion 02-1](#), "Party caucuses are conducted during election years. At the caucuses, people gather to discuss issues and to vote for delegates

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<sup>1</sup> The Code of Judicial Conduct was amended in 2010 and the concepts from these Canons are now found in Canons 1 and 2.

who will vote at the political party conventions. Each caucus meeting is sponsored by a partisan political party, typically either the Democrats or the Republicans." But, it noted, [Informal Opinion 88-7](#) specifically prohibited judges from attending a party caucus because it was a "mass meeting" and "a political gathering," which was expressly prohibited under Canon 5B.<sup>2</sup> That would hold true today except for a change this year in how the two dominant political parties are administering their Utah caucuses.

This year, both the Democratic Party and the Republican Party are permitting registered voters to vote for presidential candidates in conjunction with their caucuses, rather than through the normal primary election process. And each party is allowing voting without attending the caucus itself. The Democrats require voters to check in, fill out a ballot, and then drop it off. Voters then have the option of proceeding to the caucus meeting to vote for state delegates. The process at the Republican's caucus is not as clear, but those who register with the party no later than a week before the caucus may vote online for presidential candidates. By itself, the ability to vote online removes the concerns of physically attending a caucus.

Although the caucuses this year are being partially treated as presidential primaries, the answer to the judge's question in this opinion is largely the same as the answer in [Formal Opinion 02-1](#), because the voting can be separated from the caucus. By having the presidential candidate voting process removed from the caucus meeting, a judge who participates in this way will not run afoul of Canon 4.

Just as in 2002, "the Republican party is limiting its election to registered party members[, but t]he Democratic party...is not limited to registered party members." As such, it is worth reiterating the Judicial Council's opinion on registering with political parties. "Although the Ethics Advisory Committee has previously determined that a judge may not maintain membership in an organization that endorses candidates for partisan political office," a judge is not prohibited from voting in an election, even if it means registering with a political party first.

The Code is concerned with public endorsements and affiliations by judges. The Code does not specifically prohibit party affiliation in this circumstance. 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.

[Formal Opinion 02-1](#). As noted above, when the Code of Judicial Conduct was amended in 2010 language was added to specifically state that a judge may publicly identify with a political organization when "necessary to vote in an election." Canon 4, Rule 4.1(A)(6).

The Republican Party online voting system removes the problem of judges attending caucuses, and because the Democratic Party has an equivalent method of voting outside of its

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<sup>2</sup> Canon 4 differs from Canon 5B in that it does not expressly prohibit attendance at a "political gathering." However, rule 4.1 prohibits attendance at events sponsored by a political organization, which would include caucuses.

caucus meeting, a judge is not forced to choose one party over the other when voting in the presidential primary. Both processes allow judges to vote without having to attend the actual caucus. Other political parties also appear to be holding caucuses this year, but it is not clear whether they are taking the same approach as the two dominant parties in allowing their party members to vote for a presidential candidate. The general prohibition against caucus participation by judges applies to those political parties, but the prohibition would not apply to their primary elections.

The judges who requested the 2002 ethics advisory opinion "stressed the fact that many elections are decided at the primary stage." This year is no different, so the possibility of disenfranchisement by disallowing judges to participate in the Democratic and Republican caucuses is real. Voting is "relatively private," especially when it is done online, as the Republican Party is allowing. But even if a judge visits a caucus site solely for the purpose of voting for a presidential candidate, the public will likely view the judge as exercising his or her right to participate in the election process, not supporting a particular political ideology. The act of visiting a caucus site solely for the purpose of voting for a presidential candidate does not undermine the integrity and impartiality of the judiciary.