

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2024-01
(Finalized and effective October 29, 2024)

BACKGROUND:

Before becoming a judge, the requesting judge served as an election judge for the county in which the judge resides. Election judges are paid, temporary employees who are appointed by a county clerk and recorder to perform election duties. *See* § 1-6-101(1), C.R.S. (2024). Their tasks may include, but are not limited to, collecting ballots from secured drop box locations, verifying voter signatures, counting ballots, and assisting at voter service and polling centers. *See, e.g., MacGuire v. Houston*, 717 P.2d 948, 951 (Colo. 1986).

For partisan elections, all voter service and polling centers must have an equal number of election judges from each major political party. *See* § 1-6-109(1), C.R.S. (2024). Prior to beginning their duties, all election judges must take a self-affirming oath declaring their political party affiliation. § 1-6-114, C.R.S. (2024).¹

The requesting judge has asked if the judge may serve as an election judge in a partisan election.

ISSUE PRESENTED:

Whether a judge may serve as an election judge in a partisan election, which requires the judge to take a self-affirming oath that the judge is affiliated with a political party, without violating the Code of Judicial Conduct (“Code”).

SUMMARY:

The judge may not serve as an election judge for two reasons. First, publicly disclosing the judge’s political affiliation creates an appearance of impropriety and bias in favor of one political party, which violates Rule 1.2, Rule 3.1(C), and Canon 4. Second, Rule 3.4 prohibits judges from accepting appointments to governmental positions unless the position is one that concerns the law, the legal system, or the administration of justice; the duties of election judges concern none of these.

¹ For nonpartisan elections, election judges are not required to declare their affiliation when taking the oath or affirmation. *See* § 1-6-114(3), C.R.S. (2024). If an election judge is unaffiliated with a political party as shown in the statewide voter registration system, the election judge must declare that in the oath for partisan elections. *Id.*

APPLICABLE PROVISIONS OF THE CODE:

The applicable Code provisions fall into two categories: those requiring judges to be impartial, avoid impropriety, and avoid participation in politics, and those limiting extra-judicial government appointments.

First, Rule 1.2 provides that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” As explained in comment [1], “[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to the professional and personal conduct of a judge.” Likewise, Rule 3.1(C) prohibits judges from participating in extra-judicial activities that “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

Moreover, Canon 4 provides that “[a] judge . . . shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.” Rule 4.1(A), in relevant part, prohibits a judge from acting as a leader or holding office in a political organization, publicly endorsing or opposing a candidate for public office, or publicly identifying himself or herself as a candidate of a political organization. *See* C.J.C. Rule 4.1(A)(1), (3), and (6). Comment [1] explains the reason for limiting a judge’s political activity:

A judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges . . . must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.

Judges may register to vote as members of a political party. *See id.* at cmt [3]. They may also participate in the political process as voters in both primary and general elections, but they may not participate in a caucus-type election. *See id.* at cmt. [6].

Second, Rule 3.4 provides that “[a] judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.” As explained in comment [3] to the rule, “[a] judge should avoid participating in governmental boards or commissions that might lead to the judge's frequent disqualification or that might call into question the judge's impartiality.”

ANALYSIS:

The CJEB has not yet considered whether a judge may serve as an election judge during a partisan election, but as explained in detail below, we have two concerns about such participation. First, the self-affirming oath an election judge must take requires the judge to publicly disclose the judge’s political party affiliation. Second, any government appointment or

participation in politics is limited to that which concerns the law, the legal system, or the administration of justice.

A. Oath Disclosing Political Party Affiliation

Before discharging the duties of an election judge, the requesting judge must publicly disclose the judge's political party affiliation. Disclosing a preference for a political party undermines the independence, integrity, and impartiality of the judiciary and is contrary to Rule 1.2 and Canon 4, which expressly prohibit judges from engaging in political or campaign activities "inconsistent with the independence, integrity, or impartiality of the judiciary."

In Advisory Opinion 2008-02, which was issued under the prior Code, we addressed the extent to which judges could participate in election politics. We determined that the requesting judge could not attend a political party caucus but that the judge could participate in a primary election. Our analysis hinged on the public appearance of partisan politics. By definition, a caucus is a partisan political gathering; by attending a caucus, the judge was publicly acknowledging that the judge was an elector of that political party. *See id.* at 2. In addition to undermining the judge's impartiality, we concluded that such conduct violated Canon 7A(1)(c), which prohibited attendance at political partisan gatherings.²

Conversely, we noted that voting in a primary election was done by secret ballot. The primary election process guaranteed the anonymity of the voter's choice, party affiliation, and the judge's preferred candidate. Although someone participating in a primary election was affiliated with a political party, that voter's registered party affiliation was private and could not be interpreted as a public endorsement of a political party or a political candidate. Thus, the key distinction was that the caucus was partisan and publicly acknowledged a judge's political affiliation, whereas the primary election did not reveal a judge's political affiliation.

By making the self-affirming oath necessary for the requesting judge to serve as an election judge, the judge would be expressing a preference for a political party, which is analogous to the public partisan behavior we cautioned against in Advisory Opinion 2008-02. Such behavior violates the requirement of Rule 1.2, Rule 3.1(C), and Canon 4, because it undermines the judge's independence, integrity, and impartiality. *See also* NY Jud. Adv. Op. 94-83 (Sept. 22, 1994) (town justice could not act as Republican Inspector of Elections, which required identifying oath, because the judge would be perceived as acting on behalf of a political party in violation of rule requiring judges to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

B. Election Judge Duties do not Concern the Law, Legal System, or Administration of Justice

Even if the judge did not need to declare party affiliation, serving as an election judge violates Rule 3.4 because the appointment does not concern the law, the legal system, or the administration of justice. Our determination is consistent with previous advisory opinions. In

² Canon 7A(1)(c) was the precursor to Rule 4.1(A).

Advisory Opinion 2006-08, which we decided under the previous Code, we determined that a judge could not accept an appointment to a blue-ribbon panel of dignitaries charged with reducing the state's contribution to climate change because the purpose of the panel was to make recommendations on climate control issues, which were unconnected to the law, legal system, or administration of justice. *But see* C.J.E.A.B. Ad. Op. 2006-07 (a judge could speak to civic groups, make monetary contributions to a political organization, and write in opposition to a citizen's initiative placing term limits on appellate judges because the measure affected the law, legal system, and administration of justice and judges are uniquely positioned to comment on such topics).

The judicial ethics committees of other jurisdictions have also determined that judges may not accept appointments or serve as election judges because the position is not one that concerns the law, the legal system, or the administration of justice. *See, e.g.*, NY Jud. Adv. Op. 20-129 (Oct. 9, 2020) (even if the position were non-partisan, judge could not accept election poll clerk appointment because the appointment did not concern matters improving the law, legal system, or administration of justice); WI Jud. Ethics Op. 08-1 (May 14, 2008) (even though appointment was non-partisan, judge could not serve as an election "greeter" because those duties concerned election matters unrelated to law, legal system, or administration of justice); *see also* MD Jud. Ethics Op. 2016-11 (Mar. 31, 2016) (a judge could not act as election judge because judges may not exercise executive powers and election judges possess executive powers such as arresting those in breach of the peace at a polling place).

CONCLUSION:

The requesting judge may not serve as an election judge because doing so requires public disclosure of the judge's political party and would create an appearance of impropriety and political partiality contrary to Rule 1.2, Rule 3.1(C), and Canon 4 of the Code. Even absent the political affiliation disclosure, the appointment violates Rule 3.4, which prohibits judges from being appointed to governmental positions that do not concern the law, the legal system, or the administration of justice.

FINALIZED AND EFFECTIVE this 29th day of October, 2024.