

# Nebraska Judicial Ethics Committee Opinion 12-3

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## ***Question Presented--***

*May a person who has previously filed for election as a delegate to a county post primary political party convention and who by reason of the number of persons filing will automatically be certified by the election commissioner as an elected delegate avoid being in violation of the Nebraska Revised Code of Judicial Conduct upon seeking appointment to judicial office?*

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## **Conclusion**

A judicial candidate who formally and in writing resigns or declines to serve as a delegate or prospective delegate to a county post primary political party convention prior to formally applying for a judicial vacancy is not in violation of the Nebraska Revised Code of Judicial Conduct.

## **Statement of Facts**

An attorney has expressed his intention to apply for a judicial vacancy. The attorney has yet to formally apply for the position but has made his intention known to others by electronic mail including personnel within the court administrator's office. The attorney has previously filed for election as a delegate to a Nebraska post primary political party convention. The deadline to withdraw his candidacy was March 1, 2012, and his election is guaranteed because of the number of persons who filed to become a delegate. Under Neb. Rev. Stat. § 32-811(3) (Supp. 2011), "If the number of candidates for delegates to a county...political party convention are the same in number or less than the number of candidates to be elected, the names shall not appear on the primary election ballot and those so filed shall receive a certificate of election." County post primary conventions are required to be held during the first 10 days of June. See Neb. Rev. Stat. § 32-707(1) (Cum. Supp. 2010). The attorney wishes to take any necessary action, such as submitting a resignation or letter declining to serve, in order for him to apply for the vacant judgeship. However, he is concerned that because the party convention does not convene until at least June 1, 2012, and may not adjourn until June 10, 2012, the Nebraska Revised Judicial Code of Conduct prevents him from applying for this vacancy.

## **Applicable Code Sections**

Terminology

Neb. Rev. Code of Judicial Conduct, Canon 4 (§ 5-304.0) and § 5-304.1

Neb. Rev. Code of Judicial Conduct, Appendix A

## **References in Addition to Nebraska Revised Code of Judicial Conduct**

Florida Judicial Ethics Advisory Opinion 2006-08

Georgia Judicial Qualifications Commission Opinion No. 108 (February 29, 1988)

Neb. Rev. Stat. §§ 32-703 (Reissue 2008), 32-707 (Cum. Supp. 2010), and 32-811 (Supp. 2011)

## Discussion

An attorney seeking to apply for a vacant judgeship has previously filed to be a delegate to a political party county convention. The time for withdrawing his name has past, and he is guaranteed election because of the number of candidates who have filed. The county election commissioner will deliver to the temporary secretary for the county political party the properly certified roll showing the attorney's name as an elected delegate to the county party post primary convention. See § 32-811. The attorney wishes to resign or otherwise decline to accept election as a delegate; however, he is concerned that because the post primary party convention will not convene until June 1, 2012, and may not end until June 10, 2012, that he is ineligible to apply for a judicial vacancy as he will hold a political office and be in violation of Neb. Rev. Code of Judicial Conduct Canon 4 (§ 5-304.0) and § 5-304.1. In summary, the three questions presented are as follows: (1) is the attorney a judicial candidate granting this committee jurisdiction or should the committee entertain the request on its own motion, (2) is a delegate to a post primary political party county convention a leader or office holder under our Nebraska Revised Code of Judicial Conduct, and (3) if these questions are answered in the affirmative, can this individual resign and avoid being in violation of the Nebraska Revised Code of Judicial Conduct should he apply for a judicial vacancy?

The attorney made his request for an opinion from this committee through electronic mail directed to an employee of the court administrator's office. In that electronic mail, he expressed his intention to apply for a judgeship. Appendix A to the Nebraska Revised Code of Judicial Conduct empowers this committee to express its opinion with respect to the Code "either on its own initiative, [or] at the request of a judge or candidate for judicial office." The Code defines "judicial candidate" as "any person . . . who is seeking selection for . . . judicial office by . . . appointment." Further, the Code specifies that "[a] person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority," or in certain other ways not relevant here. In 2006, a Florida ethics committee was asked to render an opinion on behalf of an attorney under similar circumstances. The Florida committee concluded it had jurisdiction to entertain the request. It also determined that the inquiring attorney was a judicial candidate and could not remain an advisor to a political party executive committee. See Florida Judicial Ethics Opinion 2006-08. We think the inquiring attorney here qualifies as a judicial candidate under the Nebraska Revised Code of Judicial Conduct, and we also think clarifying the issue is important enough that even if the attorney is technically not yet a candidate, we would issue an opinion on our own initiative pursuant to Appendix A of the Code.

The attorney submitting this inquiry will be certified as an elected delegate to a county political party post primary convention. See § 32-707. The Nebraska Revised Code of Judicial Conduct defines "political organization" as "a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office." And with certain exceptions not relevant here, § 5-304.1(A)(1) of the Code prohibits a judicial candidate from "act[ing] as a leader in, or hold[ing] an office in, a political organization." Georgia has previously determined that a delegate is a leadership position within a political organization. See Georgia Judicial Qualifications Commission Opinion No. 108 (February 29, 1988). We agree.

As such, the remaining question is whether or not the attorney's resignation as a delegate is effective prior to the convening of the party county convention or is he prevented from resigning or declining election as a delegate under the circumstances. Nebraska law contemplates that circumstances may arise where delegates elected to attend a county post primary political party county convention may resign or decline to serve. "In case of a vacancy in the elected delegates, such elected delegates present shall have the power to fill any vacancy from the qualified registered voters of the precinct in which the vacancy exists." See § 32-707(2). In addition, Nebraska requires that political parties comply with certain statutory conditions. "Whenever the act is in conformity with national political party rules as to the election of delegates, the election procedures found in the act shall be followed." Neb. Rev. Stat. § 32-703 (Reissue 2008). While state law does not dictate all of the procedures adopted by political parties, it is clear that for a variety of reasons delegates that are duly elected may be unable to serve and a state statute directs how such a vacancy shall be filled. We think that includes the situation here and conclude that a prospective or duly elected delegate to a post primary political party county convention may resign or decline to serve in advance of the membership convening and thereby avoid being in violation of the Nebraska Revised Code of Judicial Conduct. We suggest that in addition to a resignation or declination letter being sent to the temporary county party central committee, the judicial candidate should mail a copy of the letter to the state party chair. The resignation or declination letter should be unequivocal and unconditional and be sent prior to filing the application for judicial appointment. Further, the candidate should, in the application documents, disclose the circumstances and actions taken to the nominating committee for the specific judicial vacancy. By virtue of this decision, we also want to make it clear, for example, that a sitting County Attorney, Public Defender, or their deputies who seek to apply for a judicial vacancy are not in violation of the Nebraska Revised Code of Judicial Conduct by merely holding office and conducting their statutory duties. That is, we do not view such public officials or officers, by virtue of such offices, as within the definition of a "political organization."

### **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 Revised 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 MARCH 23, 20112

*Judge Lawrence D. Gendler  
Judge William B. Cassel  
Judge J Russell Derr  
Judge Linda S. Caster Senff  
Judge Max J. Kelch  
Judge Edward D. Steenburg  
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