

STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

DATE ISSUED: December 6, 2011

ADVISORY OPINION: JE11-015

PROPRIETY OF A DISTRICT JUDGE OR JUSTICE OF THE PEACE BECOMING A CANDIDATE FOR APPOINTMENT TO UNEXPIRED TERM OF NONJUDICIAL ELECTIVE OFFICE WHILE RETAINING JUDICIAL OFFICE.

ISSUE

May a Nevada District Judge or Nevada Justice Court Judge retain their judicial office once they become a candidate for appointment to the unexpired term of office for the nonjudicial elective office of district attorney?

ANSWER

No. The office of district attorney is a nonjudicial elective office and the Nevada Code of Judicial Conduct explicitly requires that a Nevada jurist serving in full-time capacity resign upon becoming a candidate for a nonjudicial elective office such as district attorney.

FACTS

A District Judge and a Justice of the Peace each have independently inquired whether a Nevada judicial officer serving in a full-time capacity must resign their judicial office if in connection with the death, resignation or other disability of an incumbent county prosecutor, they become a candidate for appointment to the unexpired term of office of district attorney.

DISCUSSION

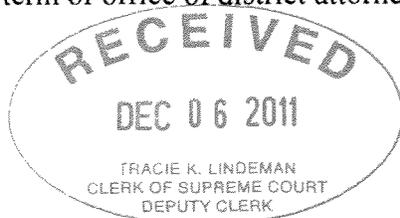
The Committee’s opinion evaluates the question presented only as it relates to compliance with the requirements of the Nevada Code of Judicial Conduct (the “NCJC”). *Rule 5 Governing Standing Comm. On Judicial Ethics.* Accordingly, this opinion is limited by the authority granted by Rule 5.

Canon 4 states, “[a] judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.” Nevada Code of Judicial Conduct, Canon 4. NCJC Rule 4.5, frequently referred to as the “resign to run” rule, provides that:

(A) Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law to continue to hold judicial office.

(B) Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

Nevada Code of Judicial Conduct, Canon 4, Rule 4.5. This proscription applies to all categories of judicial service except for jurists who serve as a pro tempore part-time judges. *See NCJC, Application IV(B)(3)(m).*



The commentary of the Supreme Court of Nevada on NCJC Rule 4.5 observes:

The “resign to run” rule set forth in paragraph (A) ensures that a judge cannot use the judicial office to promote his or her candidacy and prevents post-campaign retaliation from the judge in the event the judge is defeated in the election. When a judge is seeking appointive nonjudicial office, however, the dangers are not sufficient to warrant imposing the “resign to run” rule.

See Nevada Code of Judicial Conduct, Canon 4, Rule 4.5, *Comment [2]* to Rule 4.5. *See generally*, J. J. Alfini, S. Lubet, J. M. Shaman & C. G. Geyh, Judicial Conduct and Ethics § 11.11, at 11-64 to 11-66 (4th ed. 2007 & Supp. 2010). NCJC Rule 4.5 is directly taken from the 2007 American Bar Association Model Code of Judicial Conduct (the “2007 Model Code”). The 2007 Model Code modified the prior model rules to make explicit that the “resign to run” requirement applied to elective versus appointive nonjudicial office. *See* ABA Center for Prof. Resp., Model Code of Jud. Conduct 160-161 (2007).

The Constitution of Nevada likewise classifies public offices as either “elective” or “appointive.” *See, e.g.*, NEV. CONST. art 15, §10. The office of district attorney is a nonjudicial elective office. *See id.* art. 4, § 32; NEV. REV. STAT. § 252.020. As the Nevada Supreme Court has explained, the office of district attorney is created by the legislature as a county administrative or executive officer. *See, e.g., Lane v. District Court*, 104 Nev. 427, 437, 760 P.2d 1245 (1988).

When a vacancy occurs in the elective office of district attorney, state statute provides that a “permanent replacement” is appointed by the county commissioners and serves for the remainder of the unexpired term. NEV. REV. STAT. § 252.060. Although the replacement is appointed, the office of district attorney remains an elective office. *Cf. Op. Nev. Att’y Gen. No. 179* (Sept. 20, 1960)(the vacancy appointment under NRS 252.060 does not extend beyond the next biennial election).

The office of district attorney, therefore, is as a matter of law an elective nonjudicial office. Accordingly, NCJC Rule 4.5 mandates that a District Judge or Justice of the Peace resign their judicial office upon becoming a candidate for appointment to the unexpired term of the elective office of district attorney.

The Committee also notes that as to a District Judge, mere resignation appears ineffective to eliminate all impediments to pursuing the office of district attorney. In this regard, we observe that district judges are ineligible for any elective nonjudicial office “during the term for which they shall have been elected or appointed; . . .” NEV. CONST. art 6; § 11. Although beyond our authority to opine under Rule 5, we recommend that any jurist also evaluate the applicability of this constitutional limitation.

CONCLUSION

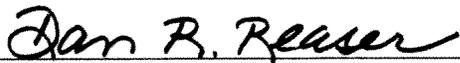
NCJC Rule 4.5(A) prohibits either a Nevada District Judge or Nevada Justice Court Judge from retaining their judicial office once they become a candidate for appointment to the unexpired term of office for the nonjudicial elective office of district attorney. Rules 4.5(A) and 4.5(B) distinguish between the legal classification

of a public office as “elective” or “appointive” and not on the means by which a particular candidate may be placed into that office by appointment or election.

REFERENCES

NEV. CONST. art 4, § 32, art. 6, § 11 & art 15, §10; NEV. REV. STAT. §§ 252.020 & .060; Lane v. District Court, 104 Nev. 427, 760 P.2d 1245 (1988); *Rule 5 Governing Standing Comm. On Judicial Ethics*; Nevada Code of Judicial Conduct, Canon 4; Nevada Code of Judicial Conduct, Rule 4.5; Nevada Code of Judicial Conduct, Application Part IV(B)(3)(m); Nevada Code of Judicial Conduct, *Comment [2]* to Rule 4.5; Op. Nev. Att’y Gen. No. 179 (Sept. 20, 1960); J. Alfini, S. Lubert, J. M. Shaman & C. G. Geyh, Judicial Conduct and Ethics § 11.11, at 11-64 to 11-66 (4th ed. 2007 & Supp. 2010); ABA Center for Prof. Resp., Model Code of Jud. Conduct 160-161 (2007).

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