



## Committee on Professional Ethics

Opinion #420 - 10/29/75 (43-75) Topic: Prosecutor's public statements; ex parte communications to court.

Digest: Prosecutor must exercise extreme caution in public statements and may not send ex parte communications to judges concerning general policy on sentencing recommendations.

Code: EC 2-5, 7-13, 7-33, 7-35  
DR 7-110  
Canon 9

### QUESTION

May a district attorney make public statements announcing the general policy of his office to recommend jail sentences for all defendants who may be convicted of a particular crime, and may he transmit ex parte communications to judges within his county making the same recommendation?

### OPINION

The responsibility of a prosecuting attorney differs from that of the usual advocate; his duty is to seek justice, not merely to convict. EC 7-13; see also, ABA Standards Relating to the Prosecution Function 1.1(c), Approved Draft [hereinafter cited as PF]. At the same time, a prosecuting attorney is also bound by the standards of professional conduct which apply to all attorneys. PF 1.1(d).

Dignified statements made by a prosecutor to inform the public, in advance, of his general policy regarding sentencing recommendations is not improper per se. However, such statements must be carefully phrased to avoid misleading the public by appearing to give the impression that a general solution is necessarily applicable to all individual situations without regard to material variances in fact patterns or other circumstances. EC 2-5. Furthermore, any public statements which are designed to sway or inflame public opinion, to gain political advantage rather than provide education, or to attempt to influence or intimidate the judiciary are clearly improper. EC 7-33; Canon 9. Since it is incumbent upon a prosecutor to insure the impartiality and fairness of judicial proceedings, any public statements regarding sentencing recommendations should note the discretionary role of the judiciary in sentencing procedures.

The second question raised in the instance inquiry concerns communications to judges recommending a general sentencing policy in all cases where defendants have been convicted of a particular crime. Unsolicited communications to judges regarding general sentencing recommendations can only be deemed ex parte communications to a court and, as such, are ordinarily improper. EC 7-35; DR 7-110; PF 2.8(c);

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N.Y. State 325 (1974); N.Y. City 887 (1975). The primary justification for such a practice by prosecutors is that it may be difficult to make sentencing recommendations on a case-by-case basis. The proposed practice would be improper because individual defendants and their counsel might not be made aware of the prosecutor's prior recommendation to a judge about to pass sentence. By statute in New York, both the prosecutor and the defense lawyer have an absolute right to make sentencing recommendations at trial after conviction. N.Y. Criminal Proc. L. Sec. 380.50. In exercising his right to make sentencing recommendations at that time, the prosecutor serves justice by avoiding surprise and permitting a response by the convicted defendant.

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