NEW YORK STATE BAR ASSOCIATION

ONE ELK STREET

ALBANY, NEW YORK 12207

TEL (518) 463-3200



Committee on Professional Ethics

Opinion #552 - 10/31/83 (35-83)

Topic:

Prosecuting attorneys; political activities;

endorsement of successor

candidate.

Digest:

Incumbent district at-

torney not running

for reelection may en-

dorse a successor

candidate.

Clarifies N.Y. State 272 (1972) and N.Y. State 537 (1981)

Code:

Canon 9;

canon 9;

EC 7-13, 8-6, 8-8, 9-1,

9-2, 9-6

QUESTION

May a district attorney, who is not a candidate for reelection, publicly endorse a successor candidate?

OPINION

This Committee has consistently recognized the "basic incompatibility between the duties of a public prosecutor and partisan politics" and the ethical impropriety of prosecutors engaging in political activities that utilize their "'public position to further [their] professional success or personal interests'." N.Y. State 513 (1979), quoting from ABA 192 (1939); and see, e.g., N.Y. State 537 (1981), N.Y. State 476 (1977), N.Y. State 273 (1972), N.Y. State 272 (1972), N.Y. State 264 (1972), N.Y. State 241 (1972) and N.Y. State 217 (1971). Prosecutors should "avoid conduct which may lead the public to conclude that [those] in such a position utilize . . . [their] public position for [their] personal interests" and "must forego active campaigning for candidates for public office in order that [they] may properly discharge the obligation of [their] . . . office. " N.Y. State 537 (1981). As we also pointed out in N.Y. State 476 (1977), "the rule is designed to avoid the appearance of impropriety, rather than impropriety per se," and is thus subject to appropriate exceptions. $\overline{\text{See}}$ also N.Y. State 273 (1972); Canon 9, EC 7-13, 8-8, 9-1, 9-2 and 9-6.

The situation here presented is one that on balance appears to justify a limited exception to the normal rule that would make a partisan political endorsement inappropriate. Where the district attorney is not a candidate for reelection, there would be no per se appearance of using the public office to advance an incumbent's professional success or personal

interests. Where there is no appearance of impropriety, there is no reason why the electorate should not have the retiring district attorney's views as to which candidate is better or best qualified to succeed to the office. This exception would not, however, be applicable to the endorsement of candidates for other offices, or in situations where the retiring district attorney is a candidate for some other office.

Should a retiring prosecutor choose to endorse a successor's candidacy while still in office, his endorsement should be based upon his perceptions of the candidate's qualifications, not upon personal or partisan political considerations. Furthermore, such an endorsement would be inappropriate even where based upon honest perceptions of qualifications, if there is any substantial appearance of also being based upon personal or partisan political considerations. Cf. EC 8-6.

For the reasons stated, and subject to the foregoing limitations, we answer the question posed in the affirmative.