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Committee on Professional Ethics

NYSBA

Opinion # 568 - 2/7/85 (17-84)

Topic: District Attorneys and their assistants; political activities

Modified by #573

Digest: District Attorney, not involved in own re-election campaign, may not attend political or social functions of any political party, either as paying or invited guest; same proscriptions apply to his assistants.

Code: Canon 9; EC 7-13, 8-1, 8-2, 8-3, 8-8, 8-9; 9-1; 9-2; 9-6; DR 5-105(D), 7-103(A)(B)

Code of Judicial Conduct: Canon 4(A), 7

QUESTIONS

(1) May a district attorney attend a political or social function of his or any other political party, either as a paying or invited guest, when he is not a candidate for reelection?

(2) Do the same standards apply to the assistant district attorney?

OPINION

As stated in N.Y. State 513 (1979), "[t]he view that there is a basic incompatibility between the duties of a public prosecutor and partisan politics has long been embraced by this Committee." We explained in that opinion that "this view, drawn from Ethical Considerations and not from Disciplinary Rules, accommodates the unique role of the public prosecutor to perform, not only as an adversary seeking to convict, but as a lawyer bound to uphold the ends of justice. This "special duty" is explicitly recognized in EC 7-13 and has served as the predicate for a number of opinions issued by the Committee precluding the public prosecutor from participating in various forms of partisan political activity. See also DR 7-103(A)(B).

Thus, we have expressed the opinion that a prosecuting attorney may not, with ethical propriety, be a member of a town, city, county or state committee of a political party (N.Y. State 217 [1971]; N.Y. State 234 [1972]; N.Y. State 241 [1972]; N.Y. State 248 [1972]); or be a member of a political club (N.Y. State 264 [1972]; N.Y. State 264 [1972]; N.Y. State 476 [1977]); or campaign for candidates for public office (N.Y. State 272 [1972]), even during a year when he himself is a candidate for reelection (N.Y. State 537 [1981]), except that he may, under certain circumstances, endorse a successor candidate. N.Y. State 552 (1983).

In our prior opinions, these proscriptions have not been restricted to any particular type of prosecuting attorney but have included within their sweep the subordinate and superior alike of all public offices that exercise prosecutorial duties. See again, N.Y. State 272 (1972 [District Attorney and Assistant District Attorney]); N.Y. State 476 (1977 [Assistant County Attorney]); N.Y. State 241 (1972 [Assistant District Attorney and Assistant County Attorney]); N.Y. State 273 (1972 [Town Attorney]).[1] Thus, we have expressly stated the opinion that under DR 5-105(D) the assistant prosecutor must be viewed as an associate of a law firm, albeit his is a public rather than a private calling. N.Y. State 476 (1977); N.Y. State 419 (1975); N.Y. State 313 (1973); N.Y. State 227 (1972); N.Y. State 118 (1969). We explained the underlying rationale in N.Y. State 476 (1977), as follows:

> Whether the prosecutorial duties are exercised by a subordinate or his superior the suspicion attaches to the office and it is only natural to assume that the subordinate acts at the bidding of his superior. Similarly, it matters little that the political activities are merely those of the subordinate. Thus, all public offices

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1 It should be noted that we stated in N.Y. State 476 (1977) that "where it appears that the office will not actually exercise the duties of a public prosecutor, this Committee has acknowledged the existence of an exception to the rule." This exception, based upon the particular facts of a given case, may have particular application to County and Town Attorneys and their assistants. See, e.g., N.Y. State 273 (1972) as clarified in N.Y. State 476 (1977).

> which exercise prosecutorial duties are treated as private law firms for the purpose of determining whether disqualification should result from the application of DR 5-105(D).[2]

Consequently, we have consistently refused to draw any distinction between the superior and subordinate prosecutor, believing each to be bound by the same ethical proscriptions notwithstanding one be the assistant and the other the chief. This conclusion is not only indicated by DR 5-105(D) but is buttressed by our overriding sensitivity to the prosecutor's "special duty" which, because of the unique nature of a prosecutorial office, does not lend itself to a separate set of ethical standards for those who are appointed rather than elected to their prosecutorial positions. Thus, in N.Y. State 272 (1972), where we concluded that neither an Assistant District Attorney nor his superior may ethically campaign for candidates for public office, we elaborated on this "special duty" as follows:

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[2] In N.Y. State 426 (1975) this Committee collected the long series of opinions in a variety of situations that have endorsed the rule that where a lawyer is required to decline employment, no partner or associate of his or his firm may accept such employment. This rule cited 19 prior opinions of this Committee so holding. Subsequently, there are at least 16 additional opinions where, for the purposes of applying ethical precepts, the Committee has concluded that what is prohibited to a lawyer (including a member of the staff of the district attorney, public defender or legal service organization) is prohibited to his partner and associates (or fellow staff members). N.Y. State 543 (1983); N.Y. State 533 (1981); N.Y. State 513 (1979); N.Y. State 503 (1979); N.Y. State 497 (1978); N.Y. State 489 (1978); N.Y. State 484 (1978); N.Y. State 482 (1978); N.Y. State 476 (1977); N.Y. State 462 (1977); N.Y. State 450 (1976); N.Y. State 444 (1976); N.Y. State 438 (1976); N.Y. State 436 (1976); N.Y. State 433 (1976); N.Y. State 427 (1976). A narrow qualified exception to the rule is recognized in N.Y. State 502 (1979).

It is essential that not only the actuality but the appearance of bias or favoritism be avoided by one holding the power to recommend indictment. The public should be reassured that prosecuting attorneys do not, and of equal importance, do not appear to, engage in partisan politics. Suspicion that a prosecuting attorney permits political considerations to affect his decisions should be avoided. Prosecuting attorneys who take active part in campaigns or political activities by way of endorsing candidates, making appearances or speeches in public or before political gatherings or otherwise lend the prestige of their office to any political party incur the risk of public disenchantment with the entire judicial system. Acceptance of the office of prosecuting attorney carries with it the obligation to refrain from partisan politics.

A prosecuting attorney assumes high duty, and has imposed upon him grave responsibilities. He may be the means of much good or much mischief. Interests of vast magnitude are intrusted to him; confidence is reposed in him; life, liberty, character and property should be protected by him. He should guard, with jealous watchfulness, his own reputation, as well as that of his profession and the court.

The principle to be applied is that an attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his personal interests or those of his friends. ABA 192 (1939).

The public prosecutor should not take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere granted must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor occupies a

> dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence not only in his profession, but in government and the very ideal of justice itself. Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1218 (1958). Actively campaigning for candidates for public office is one of the rights a public prosecutor must forego in order to properly discharge the obligations of his office.

While we have thereby clearly recognized and articulated in our opinions the prosecutor's "special duty", our Code offers little guidance as to the types of political activities which warrant proscription. We are guided at best by reference to a number of broad-based Ethical Considerations (see again EC 7-13; also EC 8-8, 9-1, 9-2 and 9-6) and Canon 9's overall admonition against the appearance of impropriety. See, e.g., N.Y. State 552 (1983).[3]

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[3] By contrast, federal Civil Service Rules implementing the Hatch Act (5 U.S.C. §7324 et seq.), which proscribes federal employees from taking "an active part in political management or in political campaigns" (§7324(a)(2)), specify those activities which are "Permissible Activities" (5 CFR pt. 733), and thus afford specific guidance. In respect to the issue of the constitutionality of proscribed political activities contemplated by statutes such as the Hatch Act, the Supreme Court in U.S. Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973) gave its approbation to laws barring the following types of partisan political activity: (1) holding partisan public office; (2) working at election polls; (3) acting as party paymaster for other party workers; (4) organizing a political party or club; (5) actively participating in fund-raising activities for a partisan candidate or political party; (6) becoming a partisan candidate or campaigning for a candidate for public office; (7) initiating or circulating a partisan nominating petition or soliciting votes; (8) serving as a delegate, alternate delegate or proxy to a political party convention. See 413 U.S. at 556.

Curiously, there is a dearth of precedent outside of our State addressing the ethics of prescribed and proscribed political activities by prosecutorial offices and their personnel. Maru's Digest of Bar Association Ethics Opinions reports only one decision from a sister state[4] and, aside from some occasional general expressions exhorting the public prosecutor to perform his duties in a professional and nonpartisan manner (see, e.g., National District Attorney's Association National Prosecution Standards, First Edition, §1.3 [1977]), and suggesting a resignation or a leave of absence during periods when the prosecutor seeks other elective office (ABA Association Project on Standards for Criminal Justice, §2.3 [Approved 1971]), there do not appear to be any binding or even suggested guidelines from either the State or National District Attorney's Association or from any other recognized statewide or national professional association setting forth the parameters of acceptable political behavior.[5]

To fill this void we have historically turned for explicit guidance to the rules which have been promulgated for judicial office holders, believing that "[i]nsofar as political activity is concerned the position of a district attorney or prosecuting attorney is analogous to that of a judge." N.Y. State 537 (1981); see again N.Y. State 217 (1971); N.Y. State 241 (1972). As the Committee's opinion in N.Y. State 537 (1981) explains:

> Each position carries with it the obligation to refrain from partisan politics. Each should guard with jealous watchfulness his own reputation as well as that of his profession and the court. Each should avoid conduct which may lead the public to conclude that one in such position utilizes his public position for his personal interest. Each must forego active campaigning for candidates for public office in order that each may properly discharge the obligation of his elective office.

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[4] The Digest reports a decision from the Oregon Ethics Committee (Maru, No. 9756) holding, contrary to our Committee's decisions, that a district attorney may chair another's campaign committee. Oregon Desk Book (Opinion 195, April 16, 1971).

[5] In the absence of guidelines, some local prosecutorial offices have established internal manuals which in part touch upon the issue.

Our perception that the judicial analogue is appropriate is buttressed by judicial holdings that "[w]hen a prosecutor represents the public in bringing those accused of crime to justice, he may be viewed as performing a quasi-judicial function" (Schumer v. Holtzman, 60 N.Y.2d 46, 51, 467 N.Y.S.2d 182, 184 [1983]; see also Davis Const. Corp. v. County of Suffolk, 112 Misc.2d 652, 447 N.Y.S.2d 355, 362-364 [Sup. Ct., Suffolk County, 1982], aff'd 95 A.D.2d 819, 464 N.Y.S.2d 519 [2d Dept. 1983]), as well as by statutory provisions, such as Section 73(8) of the Public Officers Law, making the district attorney, his assistant and the judge all ineligible for service as a "party officer."[6]

Canon 7 of our Code of Judicial Conduct, instructing a judge to "refrain from political activity inappropriate to his judicial office", provides in subsection A(1)(c) that, except when he is a candidate for election or reelection to a judicial post, a judge or candidate should not "solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions." (Emphasis supplied)

Rules adopted by the Judicial Conference reinforce the strictures of the Canon by specifying amongst proscribed political activity "the purchase, directly or indirectly, of tickets to politically-sponsored dinners or other affairs, or attendance at such dinners or other affairs" except, once again, during certain time periods surrounding a candidacy for elective judicial office. 22 NYCRR §100.7(a); emphasis supplied.

While we have not always adhered to the judicial analogue (see, e.g., N.Y. State 264 [1972] holding that a prosecuting attorney may make contributions to a political party, and cf.

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6 The statute provides: "No party officer while serving as such shall be eligible to serve as a judge of any court of record, attorney-general, district attorney or assistant district attorney. As used in this subdivision, the term 'party officer' shall mean a member of a national committee, an officer or member of a state committee or a county chairman of any political party."

Canon 7(a)(1)(c) of the Code of Judicial Conduct and §100.7(b) of the Rules of the Judicial Conference), choosing to evaluate the problems confronting the State's prosecutors on a case by case basis in recognition that the realities and responsibilities of their offices do not always mirror the realities and responsibilities of the judicial office, we see no reason why the strictures of the Code of Judicial Conduct and the Rules of the Judicial Conference proscribing attendance at politically-sponsored dinners or other affairs should not apply with equal force to the prosecuting attorney and his or her assistants, be they paying or invited guests.

Nor do we draw a distinction between political parties or the nature of the political function, except to note that we do not intend thereby to preclude the prosecutor from engaging in those types of quasi-judicial activities set forth in Canon 4 of the Code of Judicial Conduct. Thus, provided the affair is devoid of political partisanship, the mere sponsorship, without more, by a political party of an educational program concerning the law, the legal system, and the administration of justice, should not under normal circumstances prohibit a prosecuting attorney from participating as a speaker, writer, lecturer or teacher at such an event. See, Code of Judicial Conduct, Canon 4(A); also EC 8-1, 8-2, 8-3, 8-9.

What we find to be ethically proscribed, therefore, is attendance at any meeting, other than during a period of candidacy, be it designated as "political", "social" or otherwise, which has as its underlying purpose the aggrandizement or enhancement of the purposes, function or public image of a political party or one of its candidates, rather than of the legal profession or the administration of justice.

In respect to the period of candidacy, we reject the rather cumbersome time periods set forth in subdivision (a)(1) of the Judicial Conference Rules[7], preferring to abide by the

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[7]The subdivision delineates a time frame running from nine months before a primary election, nominating convention, party caucus or other party meeting for nominating a candidate for elective judicial office to three months after the general election "or the first day of February after the general election, whichever is sooner."

period of time marked by the onset of a candidacy under Section 17-100(2) of the Election Law[8] until the date of the general election or any period prior thereto if the candidacy is sooner terminated.

We caution, however, that it would be ethically improper for a prosecuting attorney to avoid the ethical proscriptions by seeking an "early" candidacy. An announced candidacy during any year other than the year of election should be viewed with suspicion.

However, in recognizing that a prosecuting attorney seeking reelection is not bound by the same limitations on his conduct as otherwise attach when he is not a candidate for reelection, we do so not for ethical reasons but under a notion of necessity in deference to the realities of the political elective process. Our Committee on Judicial Election Monitoring has recognized the same necessity in respect to judicial candidates. N.Y. State Judicial Election Monitoring Committee, Opinion #1, dated 9/28/83.

Subject to the above qualifications, we accordingly answer the first question in the negative and the second in the affirmative.[9]

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[8]As set forth therein: "The word 'candidate' shall be deemed to apply to any person seeking a nomination, designation, or election to a public office or party office." (Emphasis supplied.)

[9]This opinion does not intend to address, or deal with, the subject of whether, or the extent to which, assistant district attorneys may engage in political activities related to the candidacy of a person for the office of district attorney during the period when the district attorney may himself engage in such activities. Accordingly, nothing said in this opinion is intended to be construed as expressing a view on that subject.