NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion – 573 — 1/7/86 (36-85)

Topic: District Attorneys and County Attorneys and their assistants; political activities.

Digest: District Attorney, not involved in own re-election campaign, may attend political or social functions of a political party, either as paying or invited guest only in certain circumstances; same proscriptions apply to his assistants; County Attorney and his assistants , same proscriptions on political activities as apply to District Attorneys.

Modifies N.Y. State 568 (1985)

QUESTIONS

(1) When may a district attorney or his assistants attend a political or social function of a political party?

(2) Do the same standards apply to the county attorneys and their assistants?

OPINION

In N.Y. State 568 (1985), this Committee concluded that it is not ethically proper for a district attorney to attend political and social functions of a political party except when the district attorney is involved in his or her own campaign for reelection, and that the same proscription applies to assistant district attorneys. At least implicit in the opinion was that the same proscription applies to others, such as County and Town Attorneys and their assistants, if they exercise prosecutorial duties.

Following issuance of N.Y. State 568, the District Attorneys Association, State of New York, and the New York State Association of County Attorneys have both urged that the conclusion there reached be reconsidered. The District Attorneys Association has urged that N.Y. State 568 should be modified. The County Attorneys Association has urged that N.Y. State 568 should not apply at all to county attorneys.

In response to the opinion, both Associations have, for the first time, adopted codes of conduct dealing with the subject of proper and improper political activity of their members. In their codes, the District Attorneys have rejected in part, and the County Attorneys in whole, the conclusion reached in N.Y. State 568.

A majority of the Committee has decided that the conclusion reached in N.Y. State 568 should be modified in the respects hereinafter discussed. A majority of the Committee also has concluded that N.Y. State 568, as so modified, should apply to county attorneys and their assistants.

PART I — DISTRICT ATTORNEYS

As appears from a reading of N.Y. State 568, this Committee has long been of the view that the duties of a prosecutor are in major respects incompatible with partisan political activity. Thus, prior to N.Y. State 568, the Committee had adopted opinions stating that a prosecuting attorney should not be a member of a committee of a political party or a member of a political club, or campaign for or endorse candidates for public office except for endorsing a successor candidate. The attendance at political or social functions of a political party was added by N.Y. State 568 to the list of prohibited political activities of a prosecutor.

As discussed extensively in N.Y. State 568, the underlying rationale of that opinion, as well as prior opinions of this Committee, was that, given the place of a prosecutor in our system of justice, it is essential that he avoid not only the actuality but also the appearance of bias or favoritism in his prosecutorial decisions and, particularly, that he avoid even the appearance that political considerations affect those decisions. In N.Y. State 568, the Committee further pointed to the fact that, so far as it could determine, no recognized statewide or nationwide professional association of prosecutors or others had

ever promulgated any guidelines or suggested guidelines setting forth the parameters of acceptable political behavior of prosecutors. As had been true in the past, the Committee, "(t)o fill this void," turned to the rules governing judicial officers on the basis that, in the respect pertinent to political activity, the role of prosecutor is analogous to that of judge.

The representatives of the District Attorneys Association have assured the Committee that they accept this Committee's opinions prior to N.Y. State 568 that limit political activity by prosecutors, and that their dispute is only with the breadth of the blanket per se extension of prohibited political activities added by N.Y. State 568. They urge that this extension is inappropriate in its breadth for a number of reasons. The principal one is that, since the office of district attorney is, under the New York Constitution, an elective office, the district attorneys must, of necessity, still be permitted some minimum level of political association, particularly since their prospective election opponents may freely engage in such activity. In this connection, they point out that the elective terms of judges are characteristically much longer. As a corollary to this, the District Attorneys Association urges that the Committee exaggerates the effects of district attorneys' attending political functions upon the public perception of impartiality.*

A majority of the Committee has concluded that the strict *per se* rule laid down by N.Y. State 568 should be modified, based primarily on three considerations. *First,* the Committee recognizes that the office of district attorney is an elective one. While opinions of this Committee have for many years con-

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* The representatives of the District Attorneys Association also assert an inconsistency between the limitation that N.Y. State 568 imposes on their activities and the limitations that are imposed on activities of United States Attorneys, and point out that some District Attorneys also serve as part-time United States Attorneys. In this connection, they point to Federal regulations and a memorandum of the Attorney General of the United States relating to prohibitions imposed by the Hatch Act (5 U.S.C. §7324 *et seq.*) upon political activities of United States government employees, including United States Attorneys, which prohibitions do not include attendance at political functions. The Committee does not agree that the ethical opinions it expresses are inapplicable to the conduct of members of the New York bar who happen to be serving in the United States Attorneys office, unless there is some federal preemption that releases such lawyers, while so serving, from ethical constraints applicable to other members of the New York bar. Whether there is any such preemption is a question of law, and the Committee does not express opinions on questions of law. That conduct is not illegal under the Hatch Act does not, standing alone, mean that it is ethical.

cluded that, nevertheless, the political activity of the officeholder should be sharply restricted, it recognizes that there is no accepted objective criteria that permits bright clear lines to be drawn. While the judicial analogy is a valid one, it is not a perfect one, and any conclusion as to where to draw the line must necessarily involve major judgmental elements.

Second, a basic underpinning of N.Y. State 568, as well as prior opinions, is that the problem is one of appearances, *i.e.*, the danger that the public will perceive that the prosecutor may be allowing political considerations to affect his prosecutorial decisions. The District Attorneys Association, on the other hand, asserts that the Committee exaggerates this danger where the prosecutor merely *attends* a political function, as distinguished from speaking at such function or otherwise taking steps that publicize his presence. While the Committee is not convinced of the Association's position in this regard, it is concerned about a *per se* rule being grounded upon a factual premise upon which reasonable persons may differ.

Third, and most significantly, in response to N.Y. State 568, the District Attorneys Association has, for the first time, adopted a code of conduct governing political activities of its members. That code of conduct, as represented to the Committee, codifies the prohibitions prescribed in opinions of the Committee prior to N.Y. State 568 and, with respect to the situation dealt with in N.Y. State 568, provides as follows:

> While attending a political social function, District Attorneys or assistant district attorneys shall not speak at such function; they shall not publicize their attendance at such function; nor shall they act in a manner which in any way could be construed as having a partisan or political purpose; nor shall they act in any manner which could be interpreted as lending the prestige and weight of their office to the political party or function.

As noted above, N.Y. State 568 referred to the absence of any guidelines promulgated by any statewide or nationwide association setting forth the parameters of acceptable political behavior of prosecutors. It pointed out that this left a "void" which the Committee, over the years, has had to attempt to fill. The code adopted by the District Attorneys Association in response to N.Y. State 568 reflects a genuine sensitivity to the problem by the District Attorneys Association and the willingness of that Association to deal with the

problem by self-regulation. The Committee considers this to be a salutary development and, while the Committee is not prepared without question to accept as adequate whatever self-regulatory code a particular group of the bar may adopt (see Part II below, for example), it is prepared to accord some deference to such a code that evidences a genuine sensitivity to the problem, particularly where the issue falls in an uncharted area.

In light of the foregoing, the Committee has concluded that the rule against prosecutors (and their assistants) simply attending political and social functions of a political party should not be a per se rule. Rather, the decision of whether or not to attend such a function is one that should be made on the basis of all the circumstances and in the light of the basic concern for the public perception. Clearly, the prosecutor should neither be a speaker at such a function nor publicize his or her attendance. Beyond that, the question becomes one with respect to which the prosecutor must weigh such factors as the potential that substantial publicity might nevertheless be given to his presence, the nature of the function, and the potential appearance that the prosecutor is influenced by considerations of party politics or is lending the prestige and weight of his office to the function or sponsoring organization. If, for example, his presence is likely to be significantly publicized, he generally should conclude not to attend. Further, if the function is during an election campaign (at a time when the prosecutor is not himself a candidate) and the primary purpose of the function is to further the campaign of one or more of the candidates, his attendance comes too close to appearing to be an endorsement of the candidate or candidates, and he should conclude not to attend.

Additionally, because the area remains a gray one and one in which reasonable persons may conclude that attendance may have an adverse effect upon the public perception, an ethically sensitive district attorney should be commended for concluding to adopt a blanket prophylactic rule or practice, for himself and his assistants, of not attending any such functions.

In sum, while the Committee believes that it would be prudent practice for a district attorney not to attend any political or social functions of a political party, it has concluded that it should not adhere to the position that mere attendance is *per se* unethical in all cases.

PART II — COUNTY ATTORNEYS

The County Attorneys Association has made a much broader objection to N.Y. State 568. Indeed, its position is that not only should N.Y. State 568 not apply at all to county attorneys but also that prior opinions of the Committee restricting specified political activities of prosecutors should not apply to county attorneys. In response to N.Y. State 568, the County Attorneys have adopted "guidelines applicable to its members concerning acceptable ethical political conduct." But the only political conduct prohibited by these "guidelines" is as follows:

(A) Any act which may reasonably be construed as the use of their official title, authority, or influence for the purpose of interfering with or affecting the result of an election or for any other partisan political purpose;

(B) Directly or indirectly coerce, attempt to coerce, command or direct another officer or employee to pay, lend or contribute anything of value to a political party or person for political purposes;

(C) Actions based on favoritism or bias or designed to utilize public office for personal gain, or any action which may reasonably create the appearance of favoritism or bias or personal use of the public office.

Clearly these guidelines fall far too short of the Committee's opinions to be accorded the same deference we have accorded to the code adopted by the District Attorneys Association.

The County Attorneys Association, however, does not rely on these guidelines as support for its position. Rather, it urges that county attorneys should not be classified as prosecutors at all as respects restrictions on political activities. In essence, the Association says that the principal duties of county attorneys consist of providing legal advice and legal assistance to the county legislature and county executive and representing the county in civil matters and that only a minor portion of their duties are prosecutorial and these are "primarily" in acting for the presentment agency in juvenile delinquency proceedings.

Further, the County Attorneys Association asserts that county attorneys participate regularly in the making of political decisions by other officials due to

the very nature of their appointive office and its functions and that their enforced public silence in the political arena would elevate appearance over reality and "be nothing more than a hollow charade designed to fool the public."

On the other hand, this Committee, in N.Y. State 241 (1972) and N.Y. State 476 (1977), respectively, concluded that an assistant county attorney should not be a member of a committee of a political party or a member of a political club because of the prosecutorial duties of the county attorney's office. So far as we know, until the opinion in N.Y. State 568 was rendered, these opinions had not been challenged by the county attorneys. Further, in N.Y. State 257 (1972) as well, it was assumed for another purpose that the county attorney exercised prosecutorial duties. And in N.Y. State 171 (1970), the Committee expressed the view that a juvenile delinquency proceeding in Family Court is a criminal proceeding for purposes of applying ethical standards. McKinney's 1983 Practice Commentary and 1984 Supplementary Practice Commentary to 254 of the Family Court Act clearly express the view that the county attorney acts in the role of prosecutor in juvenile delinquency proceedings and is vested with substantial prosecutorial discretion although the county attorney, unlike the district attorney, is not the initial charging official.

Having considered the arguments of the County Attorneys Association, the Committee is not persuaded that it should abandon its historic position that county attorneys, because of their prosecutorial duties, are subject to the same ethical restrictions on political activities as the district attorneys. The duties incident to juvenile delinquency proceedings are prosecutorial and involve prosecutorial discretion, although to a lesser degree than is the case with criminal prosecutions by district attorneys. Further, the county attorney acts for the county in prosecuting administrative proceedings to enforce various local laws, and while those proceedings are not technically criminal, they do involve enforcement directed against individuals for violations punishable by fine.

In sum, the Committee continues to believe that public political activity of the county attorney can adversely affect the public perception of whether prosecutorial decisions of his office are made for non-political reasons. Accordingly, the Committee reaffirms its position that N.Y. State 568 (as modified by Part I above) applies as well to county attorneys and their assistants in offices exercising prosecutorial duties.

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