New York State Bar Association

Committee on Professional Ethics

Opinion 683

Topic: Campaign activities by Assistant District Attorney

Digest: Assistant District Attorney may not participate in campaign activities on behalf of the incumbent District Attorney

Affirms N.Y. State 675 (1995)

Code: DR 1-102(A)(5); DR 5-101(A); EC 5-2; EC 7-13; EC 8-8

QUESTION

May an Assistant District Attorney participate in reelection campaign activities for the incumbent District Attorney?

OPINION

In N.Y. State 675 (1995), this Committee concluded that it is ethically improper for an Assistant District Attorney to participate in campaign activities as part of the incumbent District Attorney's reelection campaign, because this partisan political activity would undermine the Assistant District Attorney's ability to exercise professional discretion in an impartial, nonpartisan manner. We distinguished N.Y. State 537 (1981), which found that, of necessity, an elected District Attorney must be permitted to engage in political activity in running for reelection. We perceived no comparable necessity for Assistant District Attorneys to participate in their superior's partisan political activity.

After we issued N.Y. State 675, the New York State District Attorneys Association urged us to reconsider our opinion. Representatives of the District Attorneys Association met with us to explain their disagreement. Having fully considered their views, we nevertheless adhere to our previous opinion. However, we take this opportunity to elaborate on our earlier opinion.

Our starting point is that, unlike lawyers representing private clients, prosecutors

have a duty to "seek justice."[1] The prosecutor's "quasi-judicial function"[2] implies special professional obligations that set prosecutors apart from other lawyers.[3]

The prosecutor's duty to seek justice derives in large part from the prosecutor's unique role: the prosecutor acts on behalf of a party, the State, whose ends are to ensure the fairness and reliability of the criminal justice process.

> This special duty [to seek justice] exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all. …[4]

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[1] Ethical Consideration ("EC") 7-13; *see also ABA Standards for Criminal Justice Prosecution Function and Defense Function* [hereinafter "ABA Standards"], Standard 3-1.2(C)(3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); ABA Model Rules of Professional Conduct [hereafter "ABA Model Rules"], Rule 3.8 comment ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Robert H. Jackson, *The Federal Prosecutor,* 31 J. Crim. L. & Criminology 3, 4 (1940) ("Although the government technically loses its case, it has really won if justice has been done."); *see generally* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,* 44 Vand. L. Rev. 45 (1991).

[2] N.Y. State 568 (1985) (quoting *Schumer v. Holtzman,* 60 N.Y.2d 46, 51, 467 N.Y.S.2d 182, 184 (1983)); *accord* ABA Standards, Standard 3-1.2(b) ("The prosecutor is an administrator of justice, an advocate, and an officer of the court").

[3] *See* EC 7-13 (referring to the prosecutor's "special duty"); ABA Model Rules, Rule 3.8 (entitled "Special Responsibilities of a Prosecutor").

[4] EC 7-13.

As the Supreme Court has recognized:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935); *see also* Monroe H. Freedman, *Understanding Lawyers' Ethics* 213 (1990) ("Special ethical rules are appropriate for prosecutors because the role of the prosecutor is significantly different from that of other lawyers."); *id.* at 215 ("the prosecutor's ethical standards . . . are different as a result of the prosecutor's distinctive role in the administration of justice").

This role imposes a responsibility on prosecutors not only to ensure the fairness of the process by which a criminal conviction is attained, but also to avoid the public perception that criminal proceedings are unfair.[5]

The prosecutor's duty to seek justice is essential in light of the extraordinary power that prosecutors wield. Prosecutors represent a party whose resources and powers can be matched by few if any adversaries. In criminal prosecutions, the sovereign exercises the power, on behalf of the grand jury, to compel the production of evidence and the attendance of witnesses at ex parte grand jury proceedings; the power to apply for search warrants, arrest warrants and authorization to conduct wiretaps; the power to grant individuals immunity from prosecution in exchange for their assistance in a criminal prosecution; the power to seek an order compelling witnesses to testify before the grand jury or at a criminal trial in exchange for a promise that their testimony will not be used against them; the power to initiate criminal proceedings (including deciding whom to charge and which charges to bring); and the power to forgo or dismiss some criminal charges in exchange for a guilty plea to others. These powers are ordinarily denied to all others within society and are generally denied even to the State in other legal settings.[6]

As then-Attorney General Robert H. Jackson, later to become a Supreme Court Justice and the chief prosecutor at the Nuremberg War Crimes Trials, reflected in a 1940 address to a conference of federal prosecutors:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. … While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he

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[5] *See* N.Y. State 272 (1972) ("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."); *see also* National District Attorneys Association, *National Prosecution Standards*, Standard 25.1, comment (1977) ("As a public prosecutor constantly in the public eye, it is imperative that the prosecutor … `avoid even the appearance of professional impropriety.'"); *see generally* Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 Am. J. Crim. L. 323, 323-25 (1989).

[6] *See generally* Bruce A. Green, *After the Fall: The Criminal Law Enforcement Response to the S&L Crisis*, 59 Fordham L. Rev. S155, S177-78 (1991).

is one of the worst.[7]

Attorney General Jackson appropriately perceived that prosecutors' "immense power to strike at citizens" demands that prosecutors possess a dedication to "the spirit of fair play and decency" and an attitude that is "dispassionate, reasonable and just."[8]

We take as a further premise that the responsibility to "seek justice" is not a responsibility of the elected District Attorney alone, but a professional responsibility of each individual prosecutor. Much of the power of a District Attorney's office is delegated to appointed prosecutors. For example, an elected District Attorney generally delegates to individual Assistant District Attorneys the authority to decide whom to investigate or arrest, what if any charges to present to the grand jury, what position to take with respect to plea bargaining or sentencing, and the like. It would not be possible in most jurisdictions in this State for a District Attorney personally to exercise this authority in all cases. Even in individual cases in which the District Attorney personally makes these decisions, Assistant District Attorneys typically have responsibility for providing much of the information and advice on which the decisions are made. Consequently, the position of Assistant District Attorney is far from ministerial. Individual prosecutors exercise both enormous power and enormous discretion.

In light of their duty to seek justice, individual prosecutors have a responsibility both to exercise their discretion in a disinterested, nonpartisan fashion and to avoid appearances that they are doing otherwise. Indeed, a prosecutor who exercised prosecutorial discretion to advance his or her own political interests or those of another would be engaging in "conduct that is prejudicial to the administration of justice" in violation of DR 1-102(A)(5).[9] Thus, we have recognized: "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 decision should be avoided."[10] Likewise, the ABA Standards recognize, generally, that "[a] prosecutor should avoid a conflict of interest with respect to his or her official duties," and, specifically, that "[a] prosecutor should not permit his or her official judgment or obligations to be affected by his or her own political … or personal interests."[11]

When a prosecutor's interests conflict with his or her professional duties in ways

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[7] Robert H. Jackson, *supra* note 1, at 3.

[8] *Id.* at 3-4.

[9] *Cf. In re Rook,* 556 P.2d 1351 (Or. 1976) (disciplining local prosecutor for offering a plea agreement to one group of defendants but not to other similarly situated defendants solely because they were represented by lawyers whom the prosecutor disliked).

[10] N.Y. State 272 (1972).

[11] Standard 3-1.3(A) & (f).

that could not reasonably have been anticipated and avoided, the prosecutor can do no better than to refrain from exercising authority in the matter.[12] When it is possible to do so, however, prosecutors, like judges, must take reasonable steps to avoid professional and personal activities that will interfere with their ability to serve in a disinterested fashion.[13] This includes refraining from partisan political activity that will impair the prosecutor's ability to exercise professional judgment in a manner that is unaffected by his or her political or personal interests.[14]

In light of these general considerations, this Committee has issued more than a dozen opinions concerning the limits on prosecutors' participation in partisan political activity. Our leading opinion, N.Y. State 272 (1972), concluded that neither elected district and county attorneys nor their assistants may campaign for candidates for public office. In the quarter-century since we issued that opinion, the Code of Professional Responsibility has been reviewed and amended in this State on various occasions. During that time, no changes have been made or, to our knowledge, seriously considered, that would call for reexamining the premise that prosecutors must generally refrain from partisan political activity in order to ensure the appearance and reality of nonpartisan decisionmaking.

We have recognized, as an exception, that District Attorneys may properly participate in their own reelection campaigns. "We did so not because the concerns with respect to the public perception of the prosecutorial function were any less, but out of necessity because the District Attorney is an elective office."[15] Thus, this exception is driven by the exigencies of the electoral process. District Attorneys who are candidates must be able to participate actively in their own reelection campaigns, both to afford members of the public the information they need to make informed choices and to fairly compete with those campaigning against them.[16]

Whether a further exception should permit Assistant District Attorneys to

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12 *See, e.g.,* DR 5-101(A); N.Y. State 660 (1994) (assistant district attorney who is dating defendant's lawyer must be screened from all contact with the prosecution of the case).

13 EC 8-8; N.Y. State 606 (1990) ("A lawyer should not, after accepting employment, 'acquir[e] a property right or assum[e] a position that would tend to make his judgment less protective of the interest of his client.' EC 5-2. This responsibility devolves at least as heavily upon a public prosecutor as upon other advocates if not more so."); N.Y. State 272 (1972) ("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."); *see also* N.Y. State 537 (1981) ("Insofar as political activity is concerned the position of a district attorney or prosecuting attorney is analogous to that of a judge."); *compare* Code of Judicial Conduct, Canon 4(A).

14 N.Y. State 272 (1972); *compare* Code of Judicial Conduct, Canon 5A(1).

15 N.Y. State 675 (1995).

16 *See, e.g.,* N.Y. State 568 (1985).

participate in partisan political activity on behalf of the incumbent District Attorney depends, in part, on whether such participation poses an additional threat to the impartiality of prosecutorial decisionmaking. We take as a starting point that a District Attorney's partisan political activity unavoidably compromises the ability of his or her office to act, and appear to act, in a disinterested fashion. The question, however, is whether or not this problem would be exacerbated by the Assistant District Attorneys' partisan political activity on behalf of the District Attorney, and if so, whether necessity warrants a further exception to permit such political activity by Assistants.

In cases in which the District Attorney's political interests are apparently implicated--for example, cases in which the defendant or the defendant's lawyer contributed to the District Attorney's campaign or, conversely, supported the District Attorney's opponent--there is a significant risk that prosecutorial decisionmaking will appear to be biased either for or against the accused. In such cases, the participation of Assistant District Attorneys in the election campaign will reinforce the apparent partisanship of the office. This is especially likely to be true when the Assistant District Attorney with immediate responsibility for the prosecution actively took part in the District Attorney's campaign.

On the other hand, the Assistant District Attorneys' nonpartisanship will act as a counterweight to the District Attorney's apparent bias. As noted earlier, decisionmaking is often delegated, in whole or part, to an Assistant District Attorney and, when it is not, an Assistant District Attorney may nevertheless have a substantial role in advising the District Attorney. Thus, the nonpartisan Assistant District Attorney's responsibility for, or participation in, the case will provide some assurance that investigative decisions, bail decisions, charging decisions, plea bargaining decisions, sentencing decisions or other decisions exercised by prosecuting authorities will be, and appear to be, made in disinterested fashion, notwithstanding the District Attorney's political involvement.

We underscore that this Committee's concern exists wholly apart from the dangers, studied by others, that the District Attorney will improperly pressure or coerce subordinate lawyers to assist in the campaign, or that the resources of the District Attorney's office will be misused for political ends.[17] The solicitation of campaign

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[17] *See, e.g.,* N.Y.S. Comm'n on Government Integrity, *Evening the Odds: The Need to Restrict the Incumbent Advantage* (1989), *reprinted in Government Ethics Reform for the 1990s* 225-28 (B. Green, ed., 1991):

> Testimony from witnesses at the Commission's public hearing [into campaign solicitations by a District Attorney] made plain that no matter how the solicitation is phrased, many public employees, particularly those who serve at will, may feel that they must comply in order to maintain and improve their standing in the office. Such solicitations often breed a feeling of resentment and demoralization from both those who comply and those who resist. The "volunteers" may not want to work on the campaign. Those who refuse to volunteer feel that their [employment] may be in jeopardy because they do not comply.

assistance from assistant prosecutors would merely compound the problem.[18] Our concern, to put it bluntly, is with the risk that prosecutors, in the exercise of their vast and virtually unreviewable discretion, will act or be perceived as acting to promote partisan political interests, including by actually or apparently treating members of the public differently depending on whether or not they have political connections. Although Assistant District Attorneys serve at the District Attorney's pleasure, and District Attorneys have ultimate responsibility for the workings of their offices, Assistant District Attorneys are more likely to exercise the considerable power delegated to them in a disinterested fashion insofar as they refrain personally from partisan political activity. Conversely, the danger of biased decisionmaking, or the appearance of it, is multiplied when Assistant District Attorneys actively take part in a District Attorney's political activities. This is true whether they do so of their own initiative or in response to solicitation by their superior.

Whether Assistant District Attorneys may properly participate in the District Attorney's reelection campaign also depends, however, on whether there is a necessity for them to do so. The information we have received from the District Attorneys Association does not undermine our earlier conclusion that there is no such necessity. We understand that Assistant District Attorneys have played a minimal role in the reelection campaigns of most District Attorneys in this State. District Attorneys have looked principally to others for assistance in seeking reelection. Incumbent District Attorneys can fairly present their record and viewpoints to the public without the active assistance of Assistant District Attorneys. Further, given the ethical restrictions on political activity by Assistant District Attorneys, their lack of involvement in the incumbent's campaign cannot reasonably be perceived as a lack of confidence in the District Attorney. Finally, we do not see how an incumbent District Attorney would be unfairly disadvantaged by not being able to draw on subordinate attorneys for campaign assistance. On the contrary, insofar as Assistant District Attorneys faithfully and skillfully carry out their prosecutorial responsibilities, they create a positive record of service on which the District Attorney may run, thereby placing the incumbent at a considerable advantage.

A further consideration is whether the need for disinterested decisionmaking by prosecutors is important enough to justify restrictions on Assistant District Attorneys' political activity. We believe that it is. Restrictions on judges' participation in campaign activities on behalf of others have been enforced in this State and elsewhere.[19]

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[18] *See id.* at 228 ("[S]olicitations for [campaign] assistance tend to politicize a public agency, thus threatening the public's confidence in the agency's neutrality and commitment to serve the public interest rather than private, political interests.").

[19] *See, e.g., In re Turner,* 573 So.2d 1 (Fla. 1990) (judge reprimanded for involvement in son's election campaign); *In re Sallee*, 579 N.E.2d 75 (Ind. 1991) (judge reprimanded for purporting to make campaign contribution in wife's name); *In re Decker* (N.Y. Comm'n on Judicial Conduct, Jan. 27, 1994) (judge admonished for publicly supporting county executive's campaign); *In re Martin*, 434 S.E.2d 262 (S.C. 1993) (judge reprimanded for, *inter alia*, placing campaign signs on his property); *In re Codispoti*, 438 S.E.2d 549 (W.Va. 1993) (judge censured for involvement in wife's judicial campaign).

Comparable restrictions on lawyers who serve in the quasi-judicial role of public prosecutor serve no less important ends.

The final issue is the scope of the necessary restrictions on prosecutors' political activity. We note that the restrictions identified in this Committee's prior opinions are less stringent than those imposed on judges by the Code of Judicial Conduct. The risk that a prosecutor will appear to be misusing his or her office for partisan ends is most serious when the prosecutor campaigns actively for a candidate for public office.[20] In N.Y. State. 675 (1995), we provided a non-exhaustive list of campaign activities that, in our judgment, present this risk.[21]

Our opinions recognize that prosecutors may engage in modes of political expression and association other than political campaigning that do not create an equivalent risk. For example, in N.Y. State 573 (1986), this Committee reconsidered an earlier opinion, N.Y. State 568 (1985), which had concluded that it is not ethically proper for a district attorney, other than one involved in his or her reelection campaign, to attend political party functions. We did so upon the request of the District Attorneys Association and others, in light of the District Attorneys Association's adoption of a code of conduct specifically addressing that issue. We concluded that, although prosecutors may not speak at political party functions, they may attend political party functions insofar as it is possible to avoid "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." N.Y. State 573 (1986). The line drawn in that opinion was neither crystal clear nor perfectly obvious. It was, however, consistent with the line drawn by the District Attorneys Association's then-newly adopted code of conduct--a line that we believed to be entitled to some deference, particularly insofar as it addressed an "issue [that] falls in an uncharted area."

Additionally, our opinions for almost a quarter-century have distinguished between soliciting campaign contributions from others and personally contributing to an election campaign:

> Although it is improper for a prosecuting attorney to *solicit* funds or to lend his name to the solicitation of funds (except when he is a candidate for election or reelection) as the lending of the prestige and power of the public prosecutor's office to such solicitation gives the appearance of impropriety, N.Y. State 248 (1972), the *contributions* by the public prosecutor do not give rise to the same infirmities. Accordingly, it is not

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[20] N.Y. State 272 (1972) ("It is improper for a district attorney to campaign actively for candidates for public office. . ."); *id.* ("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.")

[21] We stated: "[A]n assistant district attorney, for example, may not circulate nominating petitions, campaign at public events, write letters to the editor or speak with the media in support of the District Attorney's candidacy." N.Y. State 675 (1995).

> improper for a prosecuting attorney or his assistants to make contributions to a political party.[22]

Thus, as a general rule, a prosecutor may make contributions to, but not actively campaign for, candidates for public office.

In contrast, the Code of Judicial Conduct makes no distinction between these activities. Canon 5(A)(1)(e) forbids a judge not only from soliciting campaign funding, but also from making campaign contributions. Its principal purpose in doing so is "[t]o avoid enabling judges to lend the prestige of their offices to advance the private interests of others."[23]

Our opinions take a less restrictive approach in the case of prosecutors based in part on the judgment that personal campaign contributions made by prosecutors--and, especially, by assistant prosecutors--are less likely to be viewed as attempts to place the prestige of their public office behind private interests. As importantly, our opinions reflect the judgment that a prosecutor's impartiality--both actual and apparent--is compromised less seriously when the prosecutor's political expression is limited to personal campaign contributions than when he or she actively contributes time and effort to a political campaign. Although we recognize that the line might reasonably have been drawn somewhat differently,[24] our past opinions distinguishing between campaign contributions and active campaigning have been relied upon since 1972 and we see no compelling reason to reconsider them.

Lastly, we note that a District Attorney's solicitation of financial support from his or her subordinates may present ethical problems from the District Attorney's perspective.[25] However, this Opinion addresses exclusively the conduct of subordinate lawyers in a District Attorney's office. The relevant Ethical Considerations are concerned with preserving Assistant District Attorneys' ability to exercise prosecutorial discretion in a nonpartisan fashion, and not with protecting them from potential coercion by their superior. Accordingly, we see no basis for concluding that Assistant District Attorneys may not contribute to the incumbent District Attorney's election campaign, when they may contribute to the election campaigns of all other candidates.

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[22] N.Y. State 264 (1972) (emphasis in original).

[23] Jeffrey M. Shaman, et al., *Judicial Conduct and Ethics* § 11.07 at 365 (2d ed. 1990).

[24] Restrictions in other states on political contributions by public officials have been found to promote essentially the same interests as restrictions on campaign activities. *See, e.g., Reeder v. Kansas City Bd. of Police Comm'rs*, 796 F.2d 1050, 1052 (8th Cir. 1986) (upholding Missouri statute prohibiting officers and employees of the Kansas City Police Department from making any contribution for "any political purpose whatsoever"), *cert. denied*, 479 U.S. 1065 (1987).

[25] *See* N.Y. City 1994-7 (candidates for District Attorney should not personally solicit campaign contributions, but may establish committees to do so).

CONCLUSION

For the reasons given, we adhere to the opinion expressed in New York State 675 (1995), that it is improper for an Assistant District Attorney to participate actively in the incumbent District Attorney's reelection campaign.