

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion 686 - 4/21/97 (36-96)

Topic: Service of part-time village attorney as county committeeman of political party and endorsement of candidates

Digest: A part-time village attorney with prosecutorial duties may not serve as a county committeeman or endorse candidates for political office.

Code: DR 1-101(A)(5); EC 7-13; 9-2; 9-6.

QUESTIONS

- (1) May a part-time village attorney serve as a county committeeman for a political party?
- (2) May a part-time village attorney collect signatures on a designating petition for a political candidate?

OPINION

The question of whether municipal attorneys may engage in political activity has been addressed by this Committee before, but we have not addressed the specific situation of a part-time village attorney. In our past analyses, the ability of a municipal attorney to participate in political activity consistent with the Code of Professional Responsibility has depended upon whether the attorney performs a prosecutorial function as part of the office. The importance of preserving the impartiality of the prosecutorial role has repeatedly led us to conclude that prosecutors must avoid partisan political activities. *See, e.g.,* N.Y. State 683 (1996); N.Y. State 675 (1995).

In New York State, district attorneys sometimes appoint village attorneys as assistant district attorneys to prosecute village ordinances, although the village is responsible for compensating the appointee. Such appointees' prosecutorial functions are ordinarily limited to the prosecution of violations of municipal codes.

This Committee, in N.Y. State 573 (1986), held that county attorneys, who also have only limited prosecutorial functions, are subject to the same limitations on political

activity as those that pertain to District Attorneys. In language particularly appropriate to any municipal attorney with a limited prosecutorial function, the Committee stated “[T]he 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.” N.Y. State 573. Similarly, we have held that town attorneys with prosecutorial functions may not serve as a member of a political party’s committee. N.Y. State 273 (1972).

The restrictions on the political activity of prosecutors have been recently reiterated in N.Y. State 683 (1996), which explains the reasons underlying the prohibition in detail. In essence, the restriction arises because prosecutors have a special duty to seek justice that imposes on them a responsibility “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.” N.Y. State 683; See EC 7-13. Thus, those having the role of prosecutor must stay as far above the political fray as possible in order to avoid engaging in conduct that is prejudicial to the administration of justice. DR 1-102(A)(5); EC 9-2, 9-6. This prohibition clearly applies to service as a party committeeman. N.Y. State 273 (1972); N.Y. State 217 (1971). Nor may a municipal attorney with prosecutorial functions circulate petitions, since asking voters to sign a petition is in effect endorsing the candidate whose petition is presented, and prosecuting attorneys may not ethically endorse candidates, with the limited exception that elected prosecuting attorneys may endorse a successor candidate. N.Y. State 272 (1972); N.Y. State 537 (1981). “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.” N.Y. State 272.

The Committee recognizes that these ethical proscriptions impinge on the rights of association of prosecutors, and has sought balance by permitting political contributions, N.Y. State 683, and attendance at political functions in certain limited situations. N.Y. State 573. However, to permit additional political activity would risk creating precisely the public perception of political influence that must be avoided.

We note that we have previously stated that if a town attorney waives the prosecutorial duties that are otherwise attendant to the office, “If such waiver is permitted and if by law such activities are not prohibited, service as a member of a political committee by a town attorney would not create an appearance of impropriety and would not be prohibited.” N.Y. State 273. This principle would be equally applicable to a village attorney who has no prosecutorial function in the first place, or who waives that role, if such a waiver is legally possible.

Finally, our opinions dealing with the separate question of whether part-time municipal attorneys with prosecutorial duties are disqualified from representing criminal defendants in their private practice, *e.g.*, N.Y. State 544 (1982), do not draw any distinction between part-time and full-time prosecutors, and we see no basis to draw such a distinction with respect to the scope of permissible political activity. The need to protect the public perception of fairness in the discharge of the prosecutorial function is present whether the prosecutor serves on a full- or part-time basis.

CONCLUSION

For the reasons stated, both questions are answered in the negative if the part-time village attorney performs a prosecutorial function.
