



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1071 (10/9/15)

Topic: Partisan political activities by municipal attorney charged with investigating police misconduct

Digest: A municipal attorney may not engage in partisan political activity while employed by an agency that is charged by law to investigate police misconduct, is given the power to compel attendance of witnesses and the production of documents, and is authorized to refer misconduct to the Police Department for administrative prosecution or referral to criminal prosecutors.

Rules: Rule 8.4(d)

FACTS

1. A municipal charter establishes a Civilian Complaint Review Board, or “CCRB,” to investigate complaints against specific types of police misconduct, including the use of excessive or unnecessary force or the abuse of authority. The charter mandates that the mayor appoint members of the public to the CCRB, of which the municipal legislature designates a certain number, and the police department a certain number, with the mayor designating the rest, such that the CCRB majority consists of mayoral or legislative designees. A member of the CCRB need not be a lawyer, but may hold no other public office. Only the police department designees may have a law enforcement background, a restriction that does not apply to the CCRB’s staff.

2. The municipal charter requires the police department to cooperate with the CCRB’s investigations. The municipal charter and the rules of the CCRB allow the CCRB to investigate complaints against police officers, including the right to review all pertinent documents, to interview witnesses, including the subject(s) of the investigation, and to compel, through compulsory process, the appearance of witnesses and the production of documents. Upon conclusion of its investigation, a panel of the CCRB issues findings and recommendations based on a “preponderance of the evidence” standard. The CCRB’s rules provide that the findings may range from “Substantiated,” which means that the alleged acts did occur and did constitute misconduct, to other categories such as “Unsubstantiated,” “Exonerated,” “Unfounded,” “Complaint Withdrawn,” and the like. A finding that a complaint is “Substantiated” is accompanied by the CCRB’s recommendation on disciplinary action, including any interim actions such as suspension or reassignment pending further proceedings.

3. The CCRB has no power to impose a sanction on a police officer; only the mayor-appointed head of the Police Department may do so. The CCRB also has no power to refer misconduct to prosecutorial authorities; again, only the Police Department may do so. When examining a police officer who is the subject of an investigation, the CCRB rules require that the

CCRB investigator must notify the subject of his or her constitutional rights, including the right not to testify (which the CCRB must report to the Police Department), and, if the officer chooses to testify, that his or her statements cannot be used in any subsequent criminal proceeding. If during the course of its investigation the CCRB uncovers misconduct outside the scope of the CCRB's jurisdiction (for example, an alleged false statement under oath), then the CCRB may not investigate that misconduct but instead must report the misconduct to the Police Department.

4. By reason of a Memorandum of Understanding ("MOU") between the CCRB and the Police Department, the CCRB administratively prosecutes any "Substantiated" complaint before a Police Department tribunal unless the head of the Police Department determines that such prosecution would be "detrimental" to the Department's disciplinary process. The MOU limits the Department head in making such a determination to those instances in which there are parallel or related criminal investigations or when he or she decides that the "interests of justice" require no further action in light of the absence of any prior disciplinary history on the part of the police officer.

5. CCRB attorneys, who must be trained in the "policies and procedures" of the Police Department's disciplinary standards, prepare the "Charges and Specifications" against the subject officer, and present the evidence in support of a Substantiated complaint at an administrative hearing. The CCRB is required to provide status reports to the Department concerning the prosecution, including any plea bargains, which the CCRB is permitted to negotiate subject to approval of the Department. The tribunal, conducted by a Department hearing officer, may or may not issue a report. Whether or not the hearing officer does so, the CCRB may provide the Police Department with its own report and recommendation.

QUESTION

6. May an attorney employee of the CCRB engage in partisan political activities?

OPINION

7. In N.Y. State 675 (1995), we concluded that an Assistant District Attorney may not ethically engage in campaign activities on behalf of an incumbent District Attorney who is seeking re-election. Such prohibited activities included circulating nominating petitions, campaigning at public events, writing letters to the editor and speaking with the media in support of the District Attorney's candidacy. In N.Y. State 683 (1996), upon a request for reconsideration of that opinion, we re-affirmed our conclusion that partisan political activity would be inconsistent with Disciplinary Rule 1-102(A)(5) of the then-applicable N.Y. Code of Professional Responsibility, which is the forerunner of Rule 8.4(d) of the New York Rules of Professional Conduct (the "Rules"). Both DR 1-102(A)(5) and Rule 8.4(d), in identical terms, forbid a lawyer to "engage in conduct that is prejudicial to the administration of justice." In N.Y. State 683, we reasoned that, unlike lawyers representing private clients, "prosecutors have a duty to seek justice," and that, in pursuing that duty, "individual prosecutors have a responsibility both to exercise their discretion in a disinterested, nonpartisan fashion and to avoid appearances that they are doing otherwise."

8. In N.Y. State 696 (1997), we concluded that this same restriction is applicable to lawyers

employed by a municipality's Department of Investigation, or "DOI." There, the municipal charter required that the DOI Commissioner be a lawyer with at least five years of law enforcement experience. The charter empowered the Commissioner to investigate the "affairs, functions, accounts, methods, personnel or efficiency" of any municipal agency. The duties of an attorney employed by the DOI included issuing subpoenas to compel the attendance of witnesses and the production of records; conducting examinations of individual witnesses and subjects; reviewing relevant records; drafting reports; and coordinating non-legal staff members. The charter required the DOI to refer any alleged criminal misconduct to prosecutorial authorities. We stated:

Just as is the case with a prosecutor, the actions and non-actions of an Examining Attorney can similarly be perceived as being influenced by partisan political interests if the Examining Attorney is also engaged in partisan political activities.

9. In likening the ethical issues raised in N.Y. State 696 to those of concern in the context of Assistant District Attorneys, we said that, "[a]lthough DOI attorneys do not have the authority to commence criminal proceedings, they are charged with performing investigative functions, including an investigation of criminal activity, and they have been given the subpoena power to compel the production of witnesses and documents. Moreover, if the DOI investigation concerns criminal conduct, it is mandatory that the results of the investigation be forwarded to a prosecuting attorney."

10. Other than in this last respect – that is, the obligation to refer criminal conduct to a prosecutor – the powers of the CCRB attorneys are substantially similar to those of the DOI attorneys at issue in N.Y. State 696. We do not believe that this distinction between the CCRB and DOI attorneys impacts the applicability of our prior opinions here. A CCRB attorney enjoys the same significant investigatory powers as an attorney at the DOI, including the powers to compel testimony, to subpoena documents, to review pertinent records, and to draft reports and recommendations on the products of the inquiry. Like the DOI, the CCRB has no power to impose a penalty, but the charter mandates the CCRB to report its conclusions to the Police Department, which does have the power to impose sanctions and may refer matters of criminal concern to the prosecutorial authorities. The words of N.Y. State 696 are thus equally applicable here: "As an active participant in the incipient but critical stage of the prosecutorial process, particularly in cases where public corruption is concerned, we consider an Examining Attorney at DOI to play a substantial criminal law enforcement role such that the ethical concerns we expressed in Opinion 683 apply to him or her with equal vigor."

11. We recognize that the scope of the CCRB's jurisdiction is narrower than that of a prosecutor or a DOI attorney. Nevertheless, the relationship between the police and members of society is at the core of law enforcement. Although the ultimate authority to regulate that relationship resides in the Police Department and the municipal government, the CCRB plays a critical role in influencing the judgments of those with the final say, and the checks and balances that the charter, rules, and the MOU create are not fully adequate to safeguard against the potential or the perception that political attitudes may affect the decision-making of attorneys who have within their power the ability to instigate (or not) further investigations and to affect (whether adversely or not) the careers and reputations of individuals they are charged with monitoring.

12. Of course, this opinion is subject to applicable law, including the First Amendment.

CONCLUSION

13. An attorney employed by a municipal agency that is (i) charged by law to investigate police misconduct, (ii) given the power to compel attendance of witnesses and the production of documents, and (iii) authorized to refer misconduct to the Police Department for administrative prosecution or referral to criminal prosecutors, may not engage in partisan political activity.

(22-15)