



Committee on Professional Ethics

Opinion #476 - 12/29/77 (92-77)

Topic: Assistant county attorney;
political activities.

Clarifies #273

Digest: Assistant county attorney
may not be active member
of political club although
he personally has no
prosecutorial duties.

Code: EC 7-13, 8-8, 9-2, 9-6;
DR 5-105(D).

QUESTION

The office of county attorney is vested with various prosecutorial duties. The duties of assistant county attorneys are determined by the county attorney.

Under the circumstances stated, may an assistant county attorney, who personally has no prosecutorial duties, be an active member of a political club?

OPINION

This Committee has long been committed to the proposition that the lawyer staff of a public office with prosecutorial duties is ethically precluded from active membership in political organizations. See, e.g., N.Y. State 272 (1972), N.Y. State 264 (1972), N.Y. State 241 (1972), N.Y. State 217 (1971).

The rule is grounded on various ethical considerations articulated by the Code and is intended to eliminate any suspicion that the broad discretion accorded public prosecutors might be abused for reasons of partisan politics. See EC 7-13, EC 8-8, EC 9-2, EC 9-6.

Recognizing that the rule is designed to avoid the appearance of impropriety, rather than impropriety per se, 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. So it was that in N.Y. State 273 (1972) we explained:

"When by statute, ordinance or resolution a town attorney is granted authority in criminal matters but by custom and long standing practice does not make use of such power, the appearance of impropriety is substantially reduced, if not entirely eliminated."

We then noted that it might be possible for the town attorney to "waive" all prosecutorial duties and concluded that:

"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."

Herein it should be observed that the gravamen of the exception recognized in N.Y. State 273, supra, relates to the activities of the office, not merely to the activities of one of its staff. 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 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). N.Y. State 419 (1975).

Applying these principles to the question posed, we find the fact that the assistant county attorney does not personally exercise any of the prosecutorial duties with which the office of county attorney has been vested insufficient to justify his active participation in partisan politics.

For the reasons stated, the question posed is answered in the negative.
