

New York State Bar Association Committee on Professional Ethics

Opinion 675 - 10/31/95 (54-95)

Topic: Campaign activities by
assistant district attorney

Digest: Assistant district attorney
may not participate in
campaign activities on
behalf of another running
for public office

Code: EC 7-13; EC 8-8

QUESTION

May an assistant district attorney participate in campaign activities as part of the re-election campaign of the incumbent District Attorney?

OPINION

In a number of opinions, this Committee has expressed the view that "there is a basic incompatibility between the duties of a public prosecutor and partisan politics." *See, e.g.*, N.Y. State 513 (1979). The special duty of a prosecutor to uphold the ends of justice, as is well expressed in EC 7-13, is the predicate for our opinions "precluding the public prosecutor from participating in various forms of partisan political activity." N.Y. State 568 (1985). We explained the ethical concern as follows:

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. 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. Prosecuting attorneys who take active part in campaigns or political activities by way of endorsing candidates, making appearances or speeches in public or before political gatherings or otherwise lend the prestige of their office to any political party incur the risk of public disenchantment with the entire judicial system. Acceptance of the office of prosecuting attorney carries with it the obligation to refrain

from partisan politics.

N.Y. State 272 (1972).

We previously have opined that a prosecuting attorney may not campaign for candidates for public office. N.Y. State 272. We opined that this proscription applies not only to the District Attorney, but also to subordinate attorneys, such as an assistant district attorney. *Id.* We explained the rationale for this position as follows:

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.

N.Y. State 476 (1977); *see also* EC 8-8 ("A lawyer who is a public officer . . . should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with the lawyer's official duties.")

Our prior opinions, however, reserved the question of whether an "assistant district attorney may engage in political activities related to the candidacy of a person for the office of district attorney during the period when the district attorney may himself engage in such activities." N.Y. State 568 at n.9 ("nothing said in this opinion is intended to be construed as expressing a view on that subject").

In the situation posited, the District Attorney may engage in political activity because the District Attorney is running for reelection. We previously have opined that the District Attorney may participate in his or her own campaign for re-election. N.Y. State 537 (1981). 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.

However, in recognizing that a prosecuting attorney seeking reelection is not bound by the same limitations on his conduct as otherwise attach when he is not a candidate for reelection, we do so not for ethical reasons but under a notion of necessity in deference to the realities of the political elective process.

N.Y. State 568; *see* N.Y. State Judicial Election Monitoring Committee, Opinion # 1 (1983) (recognizing the same necessity with respect to judicial candidates).

This rule of necessity has no applicability, however, to assistant district attorneys. There is no need, occasioned by the necessity of the District Attorney's reelection campaign, for an assistant district attorney to participate in partisan political activity.

Our lessening of the strictures applicable to the District Attorney is limited solely to the District Attorney's *own* campaign for elected judicial office. We have opined that, even during the period when the District Attorney may participate in his or her own campaign, the District Attorney may not participate in partisan political activity on behalf of another candidate. It follows, therefore, that an assistant district attorney may not participate in the District Attorney's campaign because it is not his or her *own* campaign.

Accordingly, an 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. An assistant district attorney may, however, make financial contributions to the District Attorney's campaign committee, as we have previously opined that contributions to a political party are permitted. N.Y. State 264 (1972).

CONCLUSION

For the reasons given and subject to the qualification discussed above, the question is answered in the negative.
