

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion 696 - 8/25/97 (17-97)

Topic: Partisan political activities by municipal attorney charged with investigating public corruption

Digest: Municipal attorney charged with investigating public corruption may not participate in partisan political activities.

Code: DR 1-102(A)(5).

QUESTION

Do the ethical restrictions on the political activities of Assistant District Attorneys apply to lawyers employed by a municipality's Department of Investigation?

OPINION

The instant question is whether the restrictions in N.Y. State 683 (1996) on the partisan political activities of Assistant District Attorneys apply to Examining Attorneys employed by a municipality's Department of Investigation ("DOI"). We believe they do.

Pursuant to the municipality's charter, the DOI is headed by a Commissioner who must be an attorney and who must have "at least five years of law enforcement experience." The Commissioner is empowered to investigate "the affairs, functions, accounts, methods, personnel or efficiency of any [municipal] agency." If the matter investigated "involves or may involve allegations of criminal conduct," the Commissioner "shall ... forward a copy of his written report or statement of findings to the appropriate prosecuting attorney...." The jurisdiction of the DOI extends to "any agency, officer or employee" of the municipality, "any person or entity doing business" with the municipality, or "any person or entity who is paid or receives money" from or through the municipality or any agency thereof.

To carry out this mandate, the municipal charter also provides that the Commissioner and each of his or her deputies "shall have full power to compel the attendance of witnesses, to administer oaths and to examine such persons as he may deem necessary." Finally, the charter provides that the Inspectors General of other municipal agencies must be approved by the Commissioner who shall "promulgate standards of [their] conduct" as well as "monitor and evaluate [their activities] to assure uniformity...."

An Examining Attorney at the DOI has duties that include issuing subpoenas to compel the attendance of witnesses and the production of records; conducting depositions; auditing records; drafting investigative reports; and coordinating the field activities of detectives and accountants.

In Opinion 683, we determined that individual prosecutors have a responsibility to exercise their prosecutorial discretion in a disinterested, non-partisan fashion. We reasoned that a prosecutor who exercised prosecutorial discretion to advance his or her political interests, or who created the appearance of such conduct by participating in partisan political activity, would be engaging in "conduct that is prejudicial to the administration of justice" in violation of DR 1-102(A)(5). N.Y. State 683.

The rationale of Opinion 683 and its predecessors was the special duty of 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." N.Y. State 683. We stressed the extraordinary power and enormous discretion delegated to an Assistant District Attorney "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 to provide to the District Attorney "much of the information and advice on which [these] decisions are made." N.Y. State 683. We stated:

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.

N.Y. State 683.

Although DOI attorneys do not have authority to commence criminal proceedings, they are charged with performing investigative functions, including the 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 authority. Such investigatory activity is one function that may also be performed by prosecutors preparatory to the bringing of criminal charges. See, ABA Standards Relating to the Administration of Criminal Justice, § 3-3.1, entitled "Investigative Function of Prosecutor" (3d ed.). 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.

The DOI is charged with vast and virtually unreviewable discretion as to whom to investigate and for what. 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. In such circumstances, when the Examining Attorney investigates public officials, or members of the public doing business with municipal agencies, there is a risk that such investigative activities will actually, or will be perceived to, treat persons differently depending upon their political connections, and consequently the Examining Attorney's active participation in partisan politics of the sort described in N.Y. State 683 violates DR 1-102(A)(2) just as a prosecutor's does.

We recognize that the independent review by the prosecutor, who is already barred by Opinion 683 from engaging in partisan political activities, may be said to serve as a check and balance against politically partisan activity by the Examining Attorneys employed by the DOI. However, this check and balance is not sufficient. First, there can be little check and balance if the potential criminal conduct is overlooked and not investigated for actual or apparent partisan political reasons and the matter is never brought to the attention of a prosecutor. Second, even where a prosecutor reviews the written report or statement of findings submitted by the DOI and exercises the discretionary power to decline prosecution, individuals who are the subject of the inquiry may have already sustained, for actual or apparent partisan political reasons, substantial injury to their businesses, careers or reputations because an investigation into their activities was conducted.

CONCLUSION

An attorney who is employed by a municipal agency that is charged by law to investigate public corruption, given subpoena power to compel the attendance of witnesses and the production of documents, and authorized to refer matters for criminal prosecution, is subject to the same restrictions upon partisan political activity as are imposed upon Assistant District Attorneys pursuant to N.Y. State 683 (1996).
