

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1995-96/8
Collection of Fees in Diversionary Sentencing Program
March 21, 1996

RULE REFERENCES:

*Rule 1.15
*Rule 3.8
*Rule 8.4

CODE REFERENCES:

*EC-9
*DR-9-101

SUBJECTS:

ANNOTATION:

QUESTIONS:

1. May a prosecutor collect, hold, and distribute fees from defendants charged with alcohol-related violations who have voluntarily agreed to participate in a diversion program?
2. Does a prosecutor's clerical and administrative assistance to such a program create an impermissible appearance of impropriety?

FACTS:

A local police department has created a sentencing diversion program for individuals under the age of 21 who have been charged with unlawful possession of alcohol for the first time. A person charged with such a violation is given the opportunity to voluntarily attend an eight (8) hour educational program on alcohol abuse and provide eight (8) hours of community service. The individual is not prosecuted if they successfully complete the program. The program participants must pay an \$85 fee which covers the cost of the program. It is not a punitive fine. The inquiring attorney is the local prosecutor. He has agreed to provide administrative support for the program by collecting the fees and processing the associated paperwork. The prosecutor would disburse the funds to pay the program's expenses. The prosecutor is not an instructor in the program and would not personally or directly receive any of the funds. The funds would be maintained in a separate, special account. However, the prosecutor would reimburse his office for its actual expenses in providing clerical and administrative support to the program.

The prosecutor is not involved in presenting the program as an option to the suspect or in any way influencing the suspect's decision to voluntarily participate in it. He does not provide any legal advice or services to the program or its participants. However, if the person does not complete the program, the prosecutor is responsible for prosecuting the person for the original violation.

RESPONSE:

Rule of Professional Conduct 1.15(a)(1) states:

Property of clients or third persons which a lawyer is holding in the lawyer's possession in connection with a representation shall be held separate from the lawyer's own property. Funds shall be deposited in one or more clearly designated trust accounts in accordance with the provisions of the New Hampshire Supreme Court Rules. All other property shall be identified as property of the client, promptly upon receipt, and safeguarded.

The critical question in this inquiry is whether the lawyer is holding funds "in connection with a representation." There is a split in the Committee over the resolution of this issue. On the one hand, some Committee members believe that payments to a precharge/pre-trial program is not related to the prosecutor's general overall representation of citizens within the prosecutor's jurisdiction. On the other hand, a prosecutor is generally regarded as a servant of the municipality and the program represents one of a panoply of programs available to a municipality in resolving criminal complaints. This, combined with the potential that the prosecutor may become re-involved in a criminal proceeding if the suspect fails to satisfy the program's requirements and the potential that the prosecutor might use the program in a post-charge situation, leads other committee members to believe that the prosecutor's activities are "in connection with a representation."

Fortunately, under the facts of this inquiry, the prosecutor plans to keep funds in a separate account subject to separate bookkeeping and accounting procedures which in essence, complies with Rule 1.15(a)(1). The Committee unanimously endorses the adoption and maintenance of such safeguards. Whether the Supreme Court intends to subject such an account to the requirements of Supreme Court Rule 50 is beyond the jurisdiction of this Committee. However, the prosecutor would be well-advised to maintain the program account within the requirements of the Supreme Court Rule, unless the Court rules to the contrary.

It is also important to note that the attorney would be entering into a fiduciary relationship with the program. Any violation of the high standards applicable to a fiduciary might subject the attorney to sanctions under the general prohibition against dishonesty and fraud found in Rules of Professional Conduct 8.4.¹

Furthermore, this Committee has previously held that attorney's engaged in "law-related" activities may be subject to the Rules of Professional Conduct. See NH OP 1987-88/2 Dual Practice Attorney as a Realtor. But see NH OP 1993-94/4 Practicing Attorney/Marital Mediator Association in Business with Non-Attorney Representation of Mediation Couple.

The inquiring attorney has also voiced concern that his assistance to this laudable program would create an impermissible appearance of impropriety. Under the present Rules of Professional Conduct adopted in 1986, the members of this bar are no longer subject to "an appearance of impropriety" standard of conduct.²

However, the Supreme Court, in a case decided pursuant to the Code of Professional Responsibility but after the adoption of the Rules, stated:

It is a profession where one 'seeks to avoid even the appearance of impropriety' and thus strives to live by a higher standard of conduct than a lay person. The duty to 'avoid even the appearance of impropriety' is not

to be taken lightly because attorneys constitute a profession essential to society (citations and internal quotations omitted).

Wehringer's Case, 130 N.H. 707, 719 (1988).

A prosecutor is held to higher standards of conduct than other attorneys. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." A.B.A. Model Code Comments to Rule 3.8 "Special Responsibilities of a Prosecutor." See also Ethics Committee Advisory Opinion 1987-88/13. Furthermore, reference should be made to A.B.A. Standards for Criminal Justice 2nd Ed. 1979: Prosecutorial Function Standard 31.2 Conflicts of Interest: "A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties."

Applying this higher standard of scrutiny to the prosecutor's desire to assist this beneficial program, no impropriety or appearance of impropriety is apparent. A prosecutor's primary duty is not to prosecute and convict criminals but to see that justice is done. See United States v. Berger, 295 U.S. 78, 88 (1935); State v. Bujnowski, 130 N.H. 1, 5 (1987). Allowing young first offenders to avoid the lifetime stigma of a criminal record, to do useful community service, and to be educated at an impressionable age about the dangers of alcohol are all consistent with the highest goals of the criminal justice system and thus are a fortiori consistent with a prosecutor's duty to do justice. The fact that the participants must fund the program themselves and that the fees are funneled through the prosecutor's office does not detract from this conclusion.

¹ Rule 8.4 Misconduct states in part:

It is professional misconduct for a lawyer to:

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

See also Wolfram, Modern Legal Ethics, West. Pub. (1986) p. 178, ABA/BNA Lawyer's Manual on Professional Conduct, 45: 105-106.

²Under the Code of Professional Responsibility, Canon A provided "A lawyer should avoid even the appearance of professional impropriety." See also DR9-101 "Avoiding Even the Appearance of Impropriety."