

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1996-97/6
Conflict of Interest: Part-time Municipal Prosecutor Representing
Criminal Defendants in Courts Other Than Where He/She Prosecutes
March 25, 1997

RULE REFERENCES:

*1.7
*1.6
*3.8
*7.1
*8.4(d)

SUBJECTS:

*Conflict of Interest *Criminal Representation
*Confidentiality *Adverse Representation
*Prosecutor *Appearance of Impropriety
*Consent *Consultation

STATUTORY REFERENCES:

*RSA 7:34-a
*RSA 7:34-b
*RSA 7:34-c
*RSA 7:34-d
*RSA 7:34-e
*RSA 7:34-f
*RSA 41:10-a
*RSA 502:26-c

CODE REFERENCES:

*Canon 6

ANNOTATION:

A part-time district court prosecutor is prohibited from representing criminal defendants in any court because if a non-waivable conflict of interest. (Rule 1.7).

QUESTION:

May an attorney who is a part-time district court prosecutor serving several towns represent criminal defendants or juvenile delinquents in district courts other than where he/she prosecutes?

RESPONSE:

It is an unethical conflict of interest for an attorney who is a part-time district court prosecutor to represent criminal defendants or juvenile delinquents in other district courts. Such a direct, adverse conflict of interest is unwaivable under the Rules of Professional Conduct.¹

A criminal prosecutor, whether serving as Attorney General, County Attorney or as a local part-time area prosecutor, represents the people of this State, and for purposes of analysis under the Rules of Professional Conduct, has the State as his or her client.² While a particular prosecutor's jurisdiction may be parochial, he or she represents all the people of the State, not simply the local citizens in the counties or towns who employ that prosecutor. The necessity of this conclusion is apparent when the statewide effect of conviction, acquittal or nolle prosequi of any criminal charge is considered.

Rule 1.7 of the New Hampshire Rules of Professional Conduct states:

“(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation and with knowledge of the consequences.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation and with knowledge of the consequences...”

In 1988, this Committee concluded that a lawyer may not serve as a part-time municipal prosecutor and as a criminal defense lawyer in the same district court. NH Op 1987-88/13 (Conflict of Interest: Municipal Prosecutor Representing Criminal Defendants in Same District Court). The Committee found that an actual conflict of interest would exist and that the maintenance of the high standards of confidentiality would likely be impossible in such a situation.

At that time, we specifically declined to answer the broader question posed by the inquiring attorney. (Id at fn. 2) However, the same analysis which underlies that opinion compels the same conclusion to the present inquiry. A part-time prosecutor cannot at the same time represent criminal defendants in any other court in this state.³

This Committee's 1988 opinion quoted at length from a 1935 ABA Ethics Opinion which bears repeating:

A public prosecutor has as his client the state. It is obvious, therefore, that he cannot appear for any defendant in cases in which the state is an adverse party. The second paragraph of Canon 6 provides in substance that a lawyer cannot represent conflicting interests “except by express consent of all concerned given after a full disclosure of the facts.” In Opinion 16, it was held that the prosecutor could not represent both the public and the defendant, and that a law firm cannot serve two masters, because, “The positions are inherently antagonistic and this would be so irrespective of Canon 6. No question of consent can be involved as the public is concerned and it cannot consent.”

A lawyer could not reasonably believe that representing the State in one court and a criminal defendant in another courthouse would not adversely affect his or her relationship with either client, for purpose of Rule 1.7(a)(1). An example was noted in the earlier opinion; an attorney cannot possibly defend the accuracy and reliability of a breathalyzer machine in one case and zealously attack the

credibility of the same machine or type of machine later the same day in another court. What if one of the prosecutor's "local" criminal clients wants to appeal an issue to the state supreme court? The prosecutor might find herself or himself obliged to attack the laws or criminal procedures she or he has sworn to enforce and defend. What if a criminal defendant confides information about crimes occurring in the prosecutor's jurisdiction, perhaps criminal investigations he or she is assisting the police with? What about cases involving the state police, or other state law enforcement agencies or county sheriff's department which have state-wide jurisdiction? Could the part-time prosecutor call them as a government's witness in one case in one courthouse and then be impeaching the same witness or agency in another courthouse a day later without disserving the state or the criminal client or both? "Loyalty is an essential element in the lawyer's professional relationship with a client." ABA Model Code Comment to Rule 1.7, cited in NH Op 1992-93/12.

Other jurisdictions have also concluded that part-time prosecutors cannot serve as counsel for criminal defendants in other courts in the same state: "A lawyer who has contracted with the town to serve as deputy counsel for the prosecution of traffic cases for the purposes of plea negotiations may not represent criminal defendants in any of the state's courts." NY State Bar Association Committee on Professional Ethics Opinion 657 (12/22/93) (emphasis added) reported at ABA/BNA Lawyer's Manual on Professional Conduct 1001:6109. See also, In re Kentucky Bar Association Opinion E-291 (1980) ("Associate of part-time county prosecutor may not represent criminal defendants in any court in the state.")

A current treatise on professional responsibility of criminal lawyers states unequivocally:

Part-time prosecutors should not be defending criminal cases in other counties in the same state. Part-time prosecutors still have the state as a regular client in one county. The rule should seem obvious, but obviousness does not prevent violations. Part-time prosecutors should be barred from defending criminal cases at all.

Also, part-time prosecutors are far more likely to encounter representational conflicts with the accused and witnesses.

Hall, John Wesley, Jr., Professional Responsibility of the Criminal Lawyer, 2d, 1996, § 13.6.

Even if this initial conflict hurdle was overcome, it would be impossible for the prosecutor to secure the State's consent "after consultation and with knowledge of the consequences" without violating his or her strict duty of confidentiality and loyalty to the criminal defendant they seek to represent.⁴

This Committee noted in its earlier opinion:

Criminal conduct is not circumscribed, defined, or limited by town boundaries. It would seem impossible for an attorney to strictly maintain the high standards of confidentiality demanded by Rule 1.6 when that attorney is representing the State and advising a police organization (not to mention the inquiring attorney's status as a Special Police Officer) when the attorney is at the same time sharing the confidences of criminal defendants in neighboring towns. An indigent defendant who has the inquiring attorney appointed to represent him or her may well be reluctant to share all relevant information about his or her case with the attorney for fear that information may be made known to law enforcement authorities in the vicinity.

Similarly, a law enforcement officer might be reluctant to be candid with a prosecutor who might use that information against the government in another case.

The Opinion also noted other potential ethical pitfalls for a part-time prosecutor seeking to represent criminal defendants:

Furthermore, the inquiring attorney's intimate relation with local law enforcement authorities and that attorney's special relationship with the court as a prosecutor, raise the possibility of inadvertent violation of Rule 7.1 forbidding communication which is likely to create an unjustified expectation about the results the lawyer can achieve or which states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law. This same concern is addressed in Rule 8.4(d) which states, "It is professional misconduct for a lawyer to . . . state or imply an ability to influence improperly a government agency or official." It is clear that the inquiring attorney would likely attract criminal defendant clients with just those kinds of improper expectations of influence and results. (See NH Op 82-3/3 which refers to this problem existing if a part-time county attorney shared office space with defense lawyers.)

Finally it is worth repeating that a prosecutor is held to a higher standard of conduct than other attorneys, which may include the avoidance of even the appearance of impropriety.⁵

1 This opinion is strictly limited to the conduct of prosecutors, who, as is noted below, are held to higher ethical standard under the Rules. Secondly, this opinion does not address the issue of successive government and private employment which is controlled under Rule 1.11.

2 "A crime is a public wrong raising an issue between the State and the accused." McNamara, 1 New Hampshire Practice, Criminal Practice and Procedure § 1 (2nd ed.), citing Duval v. Duval, 114 N.H. 422, 322 A.2d 1 (1974) and State ex. Rel Brown v. Knowlton, 102 N.H. 221, 152, A.2d 624 (1954).

In regards to local prosecutors (municipal prosecutors) RSA 41:10-a states in part:

The selectmen of towns or the appropriate appointing authorities are hereby authorized to appoint and compensate one or more qualified members of the New Hampshire bar to serve as municipal prosecutors to represent the state, in place of police officers, in cases involving civil causes, violations and misdemeanors within the jurisdiction of the municipal or district courts...(Emphasis added).

RSA 502:26-c: Municipal Prosecutors states:

Prosecutors appointed under the provisions of RSA 41:10-a are hereby empowered to represent the state in municipal courts in cases within the jurisdiction of said courts unless the prosecutorial jurisdiction over a particular case or class of cases is preempted by the county attorney or the attorney general. (emphasis added).

Local prosecutors are subject to the control of the County Attorney and ultimately to the Attorney General. R. McNamara, 1 New Hampshire Practice, Criminal Practice and Procedure § 13 (2nd ed.). See also, Eames v. Rudman, 115 N.H. 91, 333 A.2d 157 (1975).

3 It is interesting to note that state law specifically prohibits some part-time county attorneys from practicing criminal law: NH RSA 7:34-f states:

Private Practice Restricted; Carroll County: The Carroll county attorney shall not directly or indirectly engage in the private practice of criminal law or accept any fees or compensation other than his official salary for any legal services in the field of criminal law. He may engage in the private practice of civil law.

(See also N.H. RSA 7:34-c: Private Practice Restricted: Belknap County)

4 Take note that the New Hampshire standard for waiver of a conflict under Rules 1.7 and 1.8 is stricter than under the ABA Model Code. The clients may consent only after consultation and with knowledge of the consequences. The New Hampshire Comment to Rule 1.7 states: “This language is added to make it clear that merely disclosing a conflict of interest is not sufficient. Instead, the lawyer who seeks to represent clients having adverse, or potentially adverse, interest must first effectively communicate the risks and consequences of his common representation to his clients, so the clients will have actual knowledge of the consequences that could occur as a result of the lawyer’s divided loyalties.”

5 In dicta, the Committee has recently stated:

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.

NH Op 1995/96-8: Collection of Fees in Diversionary Sentencing Program

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."

Wehringer’s Case, 130 N.H. 707, 719 (1988) (citations omitted).

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 3-1.2 Conflicts of Interest: “A prosecutor should avoid the appearance or reality of a conflict of interest with respect to officials duties.” (Footnotes omitted).