

11/19/91

N. H. ETHICS OPINIONS ANNOTATED

AO 1987-88/13

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1987-88/13
Conflict of Interest: Municipal Prosecutor Representing
Criminal Defendants in Same District Court
April 12, 1988

RULE REFERENCES:

- *Rule 1.6
- *Rule 1.7
- *Rule 1.9(b)
- *Rule 7.1
- *Rule 8.4(d)

CODE REFERENCES:

- *Canon 5
- *Canon 9

SUBJECTS:

- *Confidentiality
- *Conflict of Interest
- *Criminal Representation
- *Government Representation
- *Lawyer Official
- *Prosecutors
- *Public Officials

ANNOTATION:

A lawyer may not serve as a part-time municipal prosecutor and as criminal defense counsel in the same district court in that the potential for actual conflict of interest in this situation is real and substantial in both criminal and civil matters and that maintenance of the high standards of confidentiality seems impossible in such a situation. (Rules 1.6; 1.7)

The potential for later use of information gained in the representation of a former client, against that former client, and giving rise to a client's unjustified expectations about the results the lawyer can achieve, would exist where a part-time municipal prosecutor would act as a criminal defense counsel in the same district court. (Rules 7.1; 8.4(d))

QUESTION:

May an attorney, who is a part-time municipal prosecutor and a legal advisor to the town police department, represent criminal defendants or delinquent juveniles in the same district court where he acts as prosecutor?

RESPONSE:

N. H. ETHICS OPINIONS ANNOTATED

It is an unethical conflict of interest for an attorney who is a part-time municipal prosecutor to represent criminal defendants or juvenile delinquents in the same district court where the attorney acts as prosecutor.

All criminal prosecutors, whether serving as Attorney General, County Attorney or Municipal Attorney, represent the State.¹ The necessity of this conclusion is apparent when the statewide effect of conviction, acquittal or nol pros 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..."

There is no an Ethics Committee opinion which directly addresses this inquiry under the Rules. However, several pre-RPC opinions offer support for the Committee's conclusion. NH Op 81-11/10 held that a law firm may not represent defendants in criminal matters before the District Court of a municipality where that law firm represents the municipality on a nearly full-time basis.

The Committee's position was reaffirmed in NH Op 82-5/11, where it was indicated that the fact that the attorney would not provide representation in connection with any legal problems or questions which involve the administration of the district court or the police departments of either town the attorney represented did not change the Committee's conclusion that such conduct risked violation of Canons 5 and 9 of the Code of Professional Responsibility.

Citing the aforementioned opinions, the Ethics Committee in 1984 held that partners or associates of a city attorney may not represent a defendant in a criminal case which is prosecuted by the City Prosecutor. NH Op 83-4/12.²

The opinions noted above were based in part on Canon 9 which stated, "A lawyer should avoid even the appearance of professional impropriety." That provision finds no counterpart in the Rules of Professional Conduct adopted in 1986. However, those opinions were also based on Canon 5 which required a lawyer to "exercise independent professional judgment on behalf of a client".

The potential for actual conflict of interest existing in the situation presented by the inquiring attorney is real and substantial.

It is unrealistic to expect a lawyer to one minute forcefully argue the State's case for a harsh sentence and possibly the next minute argue against such a sentence for the same criminal offense in the same court room before the same judge. 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 moments later. Either the State or the attorney's defendant client will be disserved.

N. H. ETHICS OPINIONS ANNOTATED

The inquiring attorney has also voiced concern that a criminal defendant client may have a claim against the police or other law enforcement personnel who may be personal friends or professional colleagues of the attorney. This situation might cause the client to question the attorney's diligence and zeal in pursuit of these claims arising out of the alleged criminal incident. Avoidance of this problem is appropriate. See NH Op 82-5/11.

In 1935 the ABA issued an opinion which directly addresses the problem of conflict of interest in a fact pattern similar to that represented in the present inquiry. Formal Opinion 142 states, "The Committee is of the opinion that it is improper for an Assistant Prosecutor to defend any client in a criminal case".³

The Committee noted in its analysis:

"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."

Beyond conflict of interest, several other ethical considerations are implicated.

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.

This concern with a chilling effect on a defendant's disclosure of information to his or her attorney was referred to in NH Op 1982-3/3. That opinion advised that a part-time attorney could not maintain an office for a civil practice in a suite shared by three defense lawyers. The opinion suggested that the mere presence of a prosecutor in the same office would have a chilling effect on the defendant's disclosure of confidential information. Obviously, when the defense lawyer is a prosecutor that problem is exacerbated.

The potential for violation of Rule 1.9(b) ("A lawyer who has formerly represented a person in a matter shall not thereafter use information relating to the representation to the disadvantage of the former client...") is also present.

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).

N. H. ETHICS OPINIONS ANNOTATED

¹ "A crime is a public wrong, raising an issue between the State and the accused." McNamara, *New Hampshire Practice, Criminal Practice and Procedure*, Vol. I §1 citing Duval v. Duval 114 NH 422, 322 A.2d 1 (1974), State ex rel Brown v. Knowlton 102 NH 221, 152 A.2d 624 (1954). See also Soielman Motors v. Dodge 295 US 89, 79 LEd 1322, 1324-1325, 55 S.Ct. 678 (1935) which states that a district attorney (N.Y.), even though locally elected, performs a state function and is a part of the judicial system of the state.

² The present opinion does not address the broader question whether the inquiring prosecutor is prohibited from representing any criminal defendant in any other court in the state. NH Op 83-4/12 states "This opinion does not preclude the firm in question from representing criminal defendants who are being prosecuted by a town or city whose counsel are not attorneys in the firm." However reference should be made to ABA 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 official duties."

³ The facts in the opinion indicate that the job of Assistant Prosecutor was at best part time: "The duties of the assistant prosecutor are to prosecute cases on behalf of the state, when for any reason the regular prosecuting attorney is unable to do so."