

NEW HAMPSHIRE BAR ASSOCIATION

Public Prosecutors and Referral Fees

Ethics Committee Opinion #2022-23/02

ABSTRACT:

A New Hampshire public prosecutor may not enter into a referral fee agreement with an active New Hampshire lawyer for matters that arose from the prosecutor's work as a prosecutor.

ANNOTATIONS:

A referral fee agreement benefitting a prosecutor creates a significant risk of a concurrent conflict of interest arising from the prosecutor's personal interests in the potential referral fee. This personal interest materially limits the prosecutor's ability to make fair and impartial decisions regarding the disposition of the matter that is connected to the referral fee agreement. It may also violate a number of statutes regulating gifts and compensation paid to public officials and public servants.

OPINION:

At the onset of the analysis, there are statutory prohibitions that limit most New Hampshire prosecutors from engaging in the private practice of law or accepting fees or emoluments for providing legal services. NH RSA 7:6-d prohibits "[t]he attorney general, deputy attorney general, assistant attorneys general and all attorneys employed by the department of justice" from "directly or indirectly engag[ing] in the private practice of law, nor shall they accept any fees or emoluments other than their official salaries for any legal services." There are similar prohibitions on the Rockingham County Attorney, Cheshire County Attorney, Belknap County Attorney, Sullivan County Attorney, Strafford County Attorney, Carroll County Attorney, and Coös County Attorney. *See* RSA 7:34-a et seq. 7:34-g. As of the drafting of this opinion, there are no statutory prohibitions barring the Merrimack County Attorney, Grafton County Attorney, or Hillsborough County Attorney from engaging in the private practice of law. While the statutes prohibiting the seven County Attorneys from engaging in the private practice of law do not explicitly reference assistant county attorneys, those County Attorneys may have office policies that prohibit the assistant county attorneys from engaging in the private practice of law or accepting fees or emoluments.

Aside from the statutes governing the Attorney General's Office and the County Attorney's discussed *supra*, there are other laws prohibiting public employees from benefitting financially from their employment. For example, executive branch public officials and employees are prohibited from accepting gifts or improper compensation. *See* NH RSA 15-B:3 (prohibiting gifts to public officials); NH RSA 15-B:1 (defining public official). Additionally, NH RSA 640:4 prohibits "public servants" from "accept[ing] or agree[ing] to accept any pecuniary benefit in return for having given a decision, opinion, recommendation, nomination, vote, otherwise exercised his discretion, or for having violated his duty..." It is very possible that a referral fee would be captured by NH RSA 640:4 as a "pecuniary benefit." Additionally, most political

subdivisions—counties, cities, towns and school boards—have adopted such prohibitions as matters of employee policy or more specifically as rules governing public sector attorney conflicts of interest.

Additionally, as the assistant county attorney's authority derives from the County Attorney and Attorney General, it is possible that the assistant county attorney may not do that which the County Attorney is prohibited from doing. But even for those prosecutors that are not statutorily barred from engaging in the private practice of law, they must still examine whether the Rules of Professional Conduct permit them to enter into a referral fee agreement with an active New Hampshire lawyer for matters that arose from the prosecutor's work as a public prosecutor.

NH RPC R. 1.11(d)(1) subjects lawyers currently serving as a public officer or employee to the conflict of interest rules, NH RPC R. 1.7, unless there is a law expressly exempting the public attorney from those conflict rules. The Committee is unaware of any New Hampshire law exempting prosecutors from the conflict rules.

In turn, NH RPC R. 1.7 governs conflicts of interest and prohibits a lawyer from a representation if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." NH RPC R. 1.7(a)(2). In the present hypothetical, the concurrent conflict arises from the public prosecutor's responsibility to his client, the State of New Hampshire. As a prosecutor, the lawyer has the "the responsibility of a minister of justice..." and "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Comment 1 to NH RPC R. 3.8.

A conflict also flows from the second part of NH RPC R. 1.7(a)(2), which states that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited... by a personal interest of the lawyer." Here that personal interest would be the referral fee agreement and the resulting referral fee. The prosecutor's interest in the referral fee materially limits the prosecutor's ability to fulfill her obligations as a minister of justice.

Waiving the conflict of interest under NH RPC R. 1.7(b) is also problematic. A concurrent conflict of interest may be waivable, if (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing. NH RPC R. 1.7(b).

In the present scenario, it is not clear to the Committee, as a legal matter, who would be authorized to execute "informed consent, confirmed in writing." While a prosecutor may be employed as a town or city employee, county employee, state employee, or private attorney under contract, a prosecutor represents the State of New Hampshire in a criminal prosecution. The Committee offers no opinion on who would be authorized to make such a decision on behalf of the State of

New Hampshire, but believes that such a conflict would only be waivable, if at all, in rare and extraordinary circumstances. The present scenario certainly does not qualify as such a circumstance. Additionally, each referral would need its own waiver due to the unique issues presented by every criminal prosecution. But, referral fees in this scenario constitute, in the Committee's opinion, such a pernicious practice that the conflict should be unwaivable due to the prosecutor's unique role as a minister of justice.

For the foregoing reasons, the Committee concludes that a prosecutor is not likely to be able to ethically receive a referral fee arising from a matter in which the prosecutor participated in the criminal prosecution.

NH RULES OF PROFESSIONAL CONDUCT:

Rule 1.7

Rule 3.8

Rule 1.11(d)(1)

Rule 1.7(a)(2) and (b)(2)

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

Conflict of Interest: "Member of a Firm Appearing Before Governmental Board When Another Member of the Same Firm is a Member of the Board" Formal Opinion #1997-98/1 (1998)

This opinion is the most recent of a series of opinions addressing New Hampshire Rule 1.11A, and making that rule inapplicable, because that rule relates to attorneys in private practice, not public attorneys.

SUBJECTS:

Public Officials

Public Sector Attorneys

Conflict of Interest

Referral Fees

By the NHBA Ethics Committee

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