

**THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT**

**MERRIMACK, SS.**

**SUPERIOR COURT**

State of New Hampshire

v.

Anna Barbara Hantz Marconi

No. 217-2024-CR-01167

**ORDER ON THE DEFENDANT'S MOTION TO DISQUALIFY THE ATTORNEY  
GENERAL'S OFFICE AND DISMISS ALL INDICTMENTS**

The Defendant, Anna Barbara Hantz Marconi, stands indicted on two Class B Felony charges of Criminal Solicitation of Improper Influence and Attempt to Commit Improper Influence, and five Class A Misdemeanor charges of Criminal Solicitation of Misuse of Position and Official Oppression, and Obstructing Government Administration. See Doc. 1–7. The Defendant has moved to disqualify Attorney General John Formella (“AG Formella”) and his office (the “AG’s office”) and to dismiss all indictments against her. Doc. 13. The State objected, Doc. 15, and the Defendant replied, Doc. 18. The Court held a hearing on this motion on December 2, 2024.<sup>1</sup> As explained below, the Defendant’s motion to disqualify and to dismiss is DENIED.

**BACKGROUND**

For the purposes of this motion, the Court relies on the following facts.<sup>2</sup> The Defendant is an Associate Justice of the New Hampshire Supreme Court and is married

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<sup>1</sup> The Defendant also filed a motion to dismiss under constitutional and judicial immunity grounds. Doc. 14. The parties agree that the disqualification motion should be taken up and decided before that motion. Accordingly, the Court limits this order to the Defendant’s motion to disqualify and dismiss and will schedule a further hearing on the Defendant’s alternative arguments.

<sup>2</sup> The Court understands the State to not dispute the included facts solely for the purposes of this motion.

to Geno Marconi, Director of the Division of Ports and Harbors of the Pease Development Authority, who, at all relevant times, was under investigation by the AG's office.

On October 16, 2024, the Defendant was indicted by a Merrimack County grand jury on seven charges relating to alleged attempts to interfere with the investigation into her husband. The indictments were presented to the grand jury by the AG's office. The State alleges the Defendant improperly attempted to influence the investigation into her husband through conversations with Governor Christopher Sununu and Pease Development Authority Chair Steve Duprey. Governor Sununu is mentioned by name in five of the seven indictments, including both felony indictments and is likely to be one of the State's key witnesses in the case. Also on October 16, 2024, AG Formella issued a press release announcing the indictments against the Defendant.

The Defendant asserts that AG Formella and the AG's office have conflicts of interest and therefore must be disqualified. AG Formella has served as New Hampshire's Attorney General since April 22, 2021, and was nominated to that position by Governor Sununu. AG Formella also worked on Governor Sununu's campaign and transition teams and served as Governor's legal counsel during the Governor's first four years in office. Prior to Sununu's election as Governor, AG Formella, as a private attorney, represented Sununu in his personal capacity.

## **ANALYSIS**

The Defendant argues that AG Formella and all attorneys within the AG's office have conflicts of interest that violate New Hampshire Rule of Professional Conduct 1.7 and her right to due process under the state and federal constitutions. The State

contends that neither AG Formella nor the other Assistant Attorneys General (“AAGs”) are conflicted or require disqualification. The Defendant supports her argument through several theories, which the Court addresses in turn.

A. Whether AG Formella has a Conflict in his Professional Capacity

The Defendant argues that AG Formella has a conflict of interest in his professional capacity because the Governor is AG Formella’s current client, as well as former client, and the duties he owes to the Governor of loyalty and confidentiality conflict with his duty to be an impartial and fair prosecutor. The Defendant asserts such dueling obligations creates a direct conflict, see N.H. R. Prof. Conduct 1.7(a)(1), and imposes a significant risk that AG Formella’s representation of the State will be materially limited, see N.H. R. Prof. Conduct 1.7 (a)(2).

The State disagrees and contends that New Hampshire law recognizes that government attorneys do not have the same ethical obligations as private attorneys and may represent competing interests without violating due process or the rules of professional conduct.

New Hampshire Rule of Professional Conduct 1.7(a) states:

- (a) Except as provided in paragraphs (b) and (c), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
  - (2) 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.

Thus, Rule 1.7(a) imposes an objective test to determine whether a concurrent conflict of interest exists. In re Clauson’s Case, 164 N.H. 183, 190 (2012).

While Rule 1.7 applies to both private and government attorneys, State v. Collins, 2024 N.H. 7, ¶ 15, New Hampshire law also mandates that prosecuting attorneys have an independent duty to administer justice impartially, see Rogowicz v. O'Connell, 147 N.H. 270, 274 (2001). “It is the prosecutor’s duty to ‘remain under appropriate restraint and to avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he or she is entitled.’” Id. (quoting *Am.Jur.2d Prosecuting Attorneys* § 23 (1997)); Collins, 2024 N.H. 7, ¶ 15; N.H. R. Prof. Conduct 3.8, Comment [1] (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”)

As Attorney General, AG Formella also has statutorily imposed duties to oversee the enforcement of New Hampshire’s criminal laws and to represent the executive branch in civil matters. See RSA 7:6 (“The attorney general shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts”); RSA 21-M:2 (establishing the Department of Justice under executive direction of the attorney general and mandating it to “[a]dvis[e] and represent[ ] the state and its executive branch agencies in all civil legal matters.”).

Given AG Formella’s various duties, the Court must determine whether AG Formella is able to maintain impartiality despite his client’s role as a fact witness in this case. “Deciding whether a prosecutor or other lawyer has a conflict of interest that creates a significant risk requires a judgment informed by common sense, experience, and conventional professional understandings.” Bruce A. Green & Rebecca

Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 487–88 (2017).

In both her initial and reply briefs, the Defendant argues that Rogowicz is the key New Hampshire Supreme Court case relevant to this issue, and that it stands for the proposition that a prosecutor cannot be impartial when he represents a party involved in the prosecution, such as a witness or victim.<sup>3</sup> In that case, Ms. Rogowicz filed a domestic violence petition against the defendant. Rogowicz, 147 N.H. at 272. The protective order was granted and, about a month later, the defendant allegedly violated it. Id. After the county prosecutor declined to pursue the matter, a private attorney filed an appearance on behalf of Ms. Rogowicz to prosecute the defendant for criminal contempt. Id. Among other arguments, the defendant moved to preclude the private attorney from prosecuting the case because she was serving two roles, representing both Ms. Rogowicz and the State. Id. Like here, the defendant was concerned that the prosecutor's obligation to comply with discovery requests would conflict with the duty to protect material covered by the attorney-client privilege. Id.

In its ruling, the New Hampshire Supreme Court adopted a 1987 holding of the United States Supreme Court that “counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a [criminal] contempt action alleging a violation of that order.” Id. at 274 (quoting Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 809 (1987)). Applying that holding, the Court ruled that the private prosecutor should have been disqualified. However, the Court further noted that “[t]he

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<sup>3</sup> The Defendant also cites Price v. Commonwealth, 72 Va. App. 474 (2020), as persuasive authority. Price contains similar circumstances, reasoning, and holdings as those in Rogowicz.

appearance of impropriety and the potential for conflicts of interest are inherent in such a situation.” Id. at 275. The Court elaborated,

In this case, Rogowicz was the beneficiary of the protective order allegedly violated by the defendant. [The private attorney] appeared on behalf of Rogowicz, and clearly represented her interests, while prosecuting the defendant for criminal contempt based upon a violation of the protective order. Further, the potential for the private interests of Rogowicz to influence the discharge of [the private attorney’s] prosecutorial duties was readily apparent. Accordingly, [the private attorney] should have been disqualified.

Id.

The facts of Rogowicz are distinguishable from the instant case. First, unlike the private attorney’s representation of Rogowicz, AG Formella’s representation of the Governor is unrelated to this prosecution. Second, unlike the private attorney, AG Formella is the Attorney General and, as such, he is statutorily mandated to enforce the entirety of New Hampshire criminal law and represent the executive branch in civil matters.

While the Defendant argues that the Rogowicz Court did not differentiate between private and public prosecutors, the New Hampshire Supreme Court has recognized that the ethical obligations of private and public attorneys are not identical. See Appeal of Trotzer, 143 N.H. 64, 68 (1998). Unlike private attorneys, government attorneys are presumptively entrusted to be impartial unless a defendant can demonstrate actual bias. See id.; In re Huston, 150 N.H. 410, 413 (2003) (declining to overrule Trotzer); cf. ABA Criminal Justice Standards for the Prosecution Function § 3.13 (4th Ed. 2017) (“The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim.”).

The Defendant argues that Trotzer and Huston are not controlling because any potential conflict of the AAGs in those cases included horizontal, rather than vertical, privity.<sup>4</sup> Even so, the Court finds their guidance regarding the difference between the ethical duties of private and public attorneys relevant. In Trotzer, the Court stated that “[w]here investigative, accusative, and adjudicative functions are commingled within a single administrative agency, a party alleging a due process violation must show actual bias in order to prevail.” 143 N.H. at 68. While the Court noted that the two AAGs who appeared in the case worked in different bureaus within the AG’s office and had different immediate supervisors, the Attorney General would have served as the ultimate supervisor to them both and, as he does in all cases involving the AG’s office, would have been the prosecuting attorney of record. See RSA 21-M:2.

In Huston, the Court was invited to overrule Trotzer. There, the petitioner argued that Trotzer “creates an ethical double standard for public and private attorneys, permitting public attorneys to do what private attorneys cannot.” 150 N.H. at 412. In declining the petitioner’s invitation to so overrule, the Court explained,

The petitioner’s argument rests upon a false premise. He assumes that the ethical obligations of private and public attorneys are identical in all circumstances. They are not. Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers differ from those of private attorneys. Accordingly, public and private attorneys have different ethical obligations in some circumstances. Lawyers under the supervision of the attorney general, for instance, may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. The rules of professional conduct do not abrogate this authority.

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<sup>4</sup> In her reply, the Defendant points to Pascoe v. Wilson, 416 S.C. 628 (2016), and State v. Breeze, 873 P.2d 627 (Alaska Ct. App. 1994), for further support. The Court finds these cases distinguishable from the instant case. Consequentially, the Court does not find them persuasive.

Id. at 413.

Thus, by requiring a defendant to demonstrate actual bias, the Trotzer and Huston Courts provide a practical balance between providing a defendant with an opportunity to challenge those who prosecute them with the broad statutory authority placed in the hands of the Attorney General. The Supreme Court of Hawai'i follows a similar practical approach. See State v. Klattenhoff, 801 P.2d 548, 551 (1990) (“[D]ue to the AG’s statutorily mandated role in our legal system, we cannot mechanically apply the Code of Professional Responsibility to the AG’s office . . . We recognize, as do the majority of states, that due to the multiple duties statutorily imposed upon the AG’s office, the ethical rules for private law firms are not necessarily applicable, in all cases, to the AG’s office.”).

The Defendant asserts that if AG Formella is permitted to prosecute this case, he will not be able to fulfill his duties of loyalty and confidentiality to the Governor while also complying with his duty to produce exculpatory evidence to the Defendant, including impeachment evidence, nor fairly assess the merits of the case.

The Court acknowledges that these situations create the possibility of a material limitation or that other conflicts may rise. However, based on the record before the Court, the Court cannot find that there is a significant risk of such occurrence. It is possible that AG Formella could receive privileged or confidential information related to the Governor that is also potentially exculpatory and, therefore, must be turned over to the defense. Such an occasion could give rise to a conflict. However, as stated in In re Clauson’s Case,

The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in

interest will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

164 N.H. at 188 (quoting 2004 ABA Model Rule 1.7, Comment 8). This focus on the likelihood of a divergence of interests and any divergence's effect on the case is consistent with the Court's holding in Trotzer that a defendant must do more than point to a possible conflict. 143 N.H. at 68. Under the Supreme Court's precedents, a defendant must do more than speculate about a potential conflict but rather demonstrate that one is likely to occur.

The Court recognizes that in Clauson's Case, the Supreme Court ultimately upheld a Professional Conduct Committee ruling that an attorney who represented a husband and wife in various stages of litigation, violated Rule 1.7. 164 N.H. at 185. However, the circumstances of Clauson's Case are distinguishable. There, the wife asked a private attorney for help in vacating a no-contact order prohibiting contact between her and her husband. Id. at 186. The attorney obtained the husband's verbal permission to represent him in lifting the no-contact order, then filed a motion to do so on behalf of the husband and wife. Id. At a hearing on the motion, the husband was arraigned and entered a not guilty plea through the attorney. Id. The attorney subsequently represented the husband in his criminal case and the charges were ultimately placed on file without a finding pending certain conditions. Id.

The Court held that the attorney's joint representation violated Rule 1.7 because the attorney's duties to the wife significantly risked a material limitation of his representation of the husband. Id. at 189. The Court reasoned that the attorney had a responsibility to offer candid and independent advice to the wife, "which, if given, could

have conflicted with [the husband's] interest in removing the no-contact provision and defending against the underlying assault charge.” Id. The Court explained,

A disinterested lawyer might have examined the facts, explained to [the wife] the risks of telling the court that the assault never happened notwithstanding substantial evidence to the contrary, and accordingly, advised her to refrain from denying the assault took place. Similarly, a disinterested lawyer might have foreseen a possibility that [the wife] would change her mind and opt later to proceed as a willing witness for the prosecution.

Id.

However, unlike in Clauson's Case, here there is no evidence to support an argument that the State's interest in prosecuting this case is likely to diverge from that of the Governor. Further, unlike the situation in Clauson's Case, the Governor is the State's witness, not the Defendant's, and therefore the risk that a divergence will occur is substantially less. Without more, the Court determines that the Defendant has only demonstrated a possibility of a material limitation—not a significant risk of one.

The logical end of the Defendant's theory is that courts should disqualify the Attorney General from prosecuting any criminal case wherein a member of the executive branch would need to serve as a witness to bring a defendant to justice. The Court finds this theory runs counter to the statutory duties imposed on the Attorney General and is not supported by the Supreme Court's precedents.

Because the Court declines to disqualify AG Formella under this theory, it need not analyze whether any professional conflict of AG Formella requires the disqualification of the entire AG's office.

## B. Whether AG Formella has a Conflict in his Personal Capacity

The Defendant argues that AG Formella should be disqualified because he has a personal interest under Rule 1.7(a)(2) due to his history and relationship with Governor Sununu, and that such interest creates a significant risk that his representation of the State will be materially limited. The State contends that the Defendant's argument is unsupported by authority and is an unnecessary and extreme remedy under the circumstances. The Court agrees with the State.

Rule 1.7(a)(2) generally prohibits a lawyer from representing a client when there is a significant risk that the representation will be materially limited due to a personal interest of the lawyer. As explained by the Nevada Supreme Court,

Personal interests that may impair a lawyer's representation of a client include "the financial, business, property, professional or personal aspects of the lawyer's life." *Lawyer's Manual on Professional Conduct: Practice Guides*, 51 Conflicts of Interest 401.10 (ABA & Bureau of Nat'l Affairs, Inc. 2021). While the most obvious examples involve the lawyer's financial or familial relationships, not all personal conflicts fall into these areas. Restatement (Third) of the Law Governing Lawyers § 125, Comment (c) (Am. L. Inst. 2000). "Clients' interests also clash sometimes with their attorneys' own interests in their professional reputations and affiliations." 51 Conflicts of Interest at 401.20.190. Thus, a lawyer's political, social, professional, or emotional interests or beliefs may lead the lawyer to act in the lawyer's own self-interest or in others' interests, rather than in their client's best interest. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 472 (2017). Accordingly, determining if a lawyer's personal interests create a concurrent conflict with a client depends on the facts and circumstances of each case.

Matter of Discipline of Arabia, 495 P.3d 1103, 1112–13 (Nev. 2021); see also State v. Addison, 166 N.H. 115, 120 (2014) (rejecting a per se rule of disqualification due to an appearance of impropriety and, instead, applying a case-by-case approach).

The Defendant's argument is based on AG Formella's personal relationship with Governor Sununu. For the purposes of this motion, this relationship is demonstrated by

the undisputed facts that AG Formella previously worked for Governor Sununu as his private attorney prior to his election, and subsequently as part of the Governor's campaign and transition teams, as Governor's legal counsel, and as Attorney General.

First, the Court notes that the Defendant has not provided any case that directly supports her argument. In her reply brief, the Defendant stated that paragraphs 38–41 of her motion state that AG Formella has a personal interest under Rule 1.7(a)(2). However, the only case cited in those paragraphs is Clauson's Case, which the Court has examined and distinguished in Section A above.

Second, even assuming AG Formella owes much of his legal career to Governor Sununu, the Court is not convinced that such a history requires disqualification without a factual basis to support a showing that AG Formella has been or will be unable to perform his statutorily mandated duty to remain impartial given his personal relationship with the Governor. Cf. Chief Disciplinary Couns. v. Zelotes, 98 A.3d 852, 860–63 (Conn. App. Ct. 2014) (finding that an attorney violated Rule 1.7 due to a personal interest when he maintained an intimate, nonsexual relationship with his client during his representation and therefore “lost all objectivity and the independent judgment needed to help [the client] . . .”).

As previously stated, Clauson's Case mandates that the Court focus on the likelihood that a divergence of interests will occur and the effect of any such divergence on the case. The record before the Court does not support a determination that the interests of AG Formella, the State, or the Governor are likely to diverge. Nor does the record support a conclusion that the relationship between AG Formella and Governor Sununu is so close or intimate that AG Formella has “lost all objectivity” or the ability to

provide “the independent judgment needed to help the client,” in this case, the State. Based on the accepted facts, the Court finds the Defendant’s argument that AG Formella has a personal relationship that imposes a significant risk of a material limitation to be speculative. The Court thus concludes that AG Formella’s disqualification would needlessly strip him of his statutory duty to prosecute this case.

Accordingly, the Court declines to disqualify AG Formella under this theory and thus need not analyze whether any personal conflict of AG Formella requires the disqualification of the entire AG’s office.

C. Whether the PIU Assistant Attorneys General have a Conflict

Third, the Defendant contends the AAGs within the Public Integrity Unit (“PIU”) of the AG’s office have a conflict due to their personal interests of continued employment and the Governor’s power over the PIU. The State asserts that the PIU AAGs do not have a conflict of interest under either of the Defendant’s theories.

The Court agrees with the State. While future employment may be considered a personal interest, see N.H. R. Prof. Conduct 1.7, 2004 ABA Model Rule Comment [10], the PIU attorneys are commissioned AAGs and their removal is directed by RSA 4:1. As such, their employment cannot be terminated without a petition for such removal, a public hearing, and Executive Council approval. Assuming the Defendant is correct that the Governor could dissolve the PIU by executive order, the PIU AAGs would still be commissioned officials subject to removal only through the statutory process outlined above.

Accordingly, because the Governor lacks any significant power over the PIU AAGs, they do not have a conflict due to a personal interest and the Court declines to disqualify them under this theory.

D. Potential Future Conflicts

Finally, the Defendant argues that if AG Formella and the AG's office are permitted to move forward with the case, additional conflicts are likely to arise if attorneys within the AG's office become witnesses in the case. The Court understands Defendant's assertion to be that AG Formella or other AAGs may become conflicted because they could, hypothetically, become witnesses if the Governor approached them with information regarding his conversation with the Defendant.

The Court dismisses such a theory as speculative. See Clauson's Case, supra Section A ("the mere possibility of subsequent harm does not itself require disclosure and consent"). In addition, the Court does not understand how such a hypothetical situation differs from the normal course. To disqualify the AG's office in such a situation would seem to require its disqualification any time the AG's office receives a tip regarding criminal activity, chooses to investigate, and ultimately finds probable cause to indict and prosecute. The Court does not understand how this process differs from the statutory duty of the AG's office to conduct criminal investigations and prosecutions. See RSA 21-M:2.

Accordingly, at this stage and upon the information provided, the Court declines to disqualify AG Formella or the AG's office under this theory.

## CONCLUSION

For the foregoing reasons, the Defendant's motion to disqualify and to dismiss is DENIED. Should the Defendant later find that she has suffered harm from an actual, not speculative conflict, she may challenge AG Formella' involvement with adequate supporting documentation. See In re Huston, 150 N.H. at 413; N.H. R. Crim. P. 35(i)(1); N.H. R. Prof. Conduct 1.7, 2004 ABA Model Rule Comment [4] ("If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b).").

The Court anticipates that the State will file a response to the Defendant's alternative motion to dismiss, see Doc. 14, within 15 days of the clerk's notice accompanying this order. See Doc. 17 (State's request for such relief).

SO ORDERED.

December 17, 2024  
Date

  
Judge Martin P. Honigberg