

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS.

SUPERIOR COURT

213-2011-CR-00216

State

v.

Jason Talley

REPLY TO DEFENDANT'S OBJECTION TO MOTION TO QUASH

NOW COME Judge Edwin Kelly and Judge Tina Nadeau, by and through their attorneys, the Office of the Attorney General, and respectfully reply to the Defendant's Objection to Motion to Quash as follows.

1. The Defendant, through Bradley Jardis, has filed an objection to the motion to quash subpoenas issued to two judges in the above referenced matter. As the Defendant acknowledges, "the case law is not favorable to the premise that judges should be subject to depositions and/or subpoenas which require their providing evidence and testimony during a criminal trial." *Objection* at ¶3. This reply is, therefore, limited to responding to the request by the Defendant to deny the appearance of undersigned counsel based upon an allegation of conflict of interest.

2. The New Hampshire Supreme Court has long held that the role of the Office of the Attorney General ("OAG") is unique in the practice of law. In the case of *Appeal of Trotzer*, 143 N.H. 64 (1998), the Board of Examiners of Psychology and Mental Health Practice ("Mental Health Board") suspended the license of a New Hampshire psychologist after a hearing. At the hearing, Assistant Attorney General ("AAG") Dahlia George of the OAG's Consumer Protection and Antitrust Bureau acted as the administrative prosecutor and AAG Douglas Jones of the

OAG's Civil Bureau was assigned as legal counsel to the Mental Health Board. The psychologist appealed, claiming in relevant part that the Mental Health Board violated his right to due process under the State and Federal Constitutions by "failing to construct and maintain adequate walls of division between the assistant attorneys general who serve as prosecutor and counsel to the [Mental Health Board]." *Id.* at 66.

3. The Supreme Court made the following ruling regarding the dual capacity of OAG attorneys:

When a single individual commingles investigative, accusative, and adjudicative functions, the mere appearance of prejudice may be sufficient to violate due process. ... We have long recognized, however, that the legislature does not offend due process merely by assigning investigative and adjudicative functions to the same administrative body. ... Where 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. *See, e.g., Consumer Advocate*, 134 N.H. at 660, 597 A.2d at 533; *Scarborough v. Arnold*, 117 N.H. 803, 809-10, 379 A.2d 790, 794 (1977). In *Consumer Advocate*, we emphasized that without a showing of actual bias, administrative adjudicators are presumed "to be of conscience and capable of reaching a just and fair result." ... The party alleging bias has the burden of presenting sufficient evidence to rebut this presumption. ...

We agree with the State that "it is permissible for one assistant attorney general to represent the [b]oard in its quasi-judicial capacity and another assistant attorney general to prosecute" the case before the board, provided no actual bias exists. Here, Dr. Trotzer has failed to show actual bias. Attorney Jones, appointed legal counsel to the board, *see* RSA 330-A:15-a, II, did not participate in the investigation of Dr. Trotzer or in the preparation of allegations against him. ... Moreover, Attorney Jones and Attorney George were employed in different bureaus of the attorney general's office, with different supervisors and wholly distinct functions. After careful review of the record, we conclude that Dr. Trotzer's allegations of "collusion" between the assistant attorneys general are unfounded and do not support a claim of actual bias.

*Id.* at 68-69 (citations omitted).

4. In *Appeal of Roland E. Huston, Jr., D.V.M.*, 150 N.H. 410 (2003), the petitioner's license to practice veterinary medicine was suspended by the Board of Veterinary Medicine.

The petitioner asked the Supreme Court to overrule *Trotzer*. The Court declined, and found:

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. N.H. R. Prof. Conduct Scope. Accordingly, public and private attorneys have different ethical obligations in some circumstances. *See id.* 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." *Id.* The rules of professional conduct do not abrogate this authority. *Id.*

*Huston*, 150 N.H. at 413.

5. In this case, to the extent any criminal investigation is pending with the OAG based on a referral from Mr. Jardis or the Defendant, such an investigation would be handled by the OAG's Criminal Bureau. The Criminal Bureau is within the OAG's Division of Public Protection. The representation of the judges who have received subpoenas is being handled by the OAG's Civil Bureau, which is within the OAG's Division of Legal Counsel. The two bureaus have different functions, and the criminal bureau is not involved in the Civil Bureau's representation of the judges before this Court.

WHEREFORE, the State respectfully requests that this Honorable Court:

- (A) Deny the request to deny the appearance of undersigned counsel;
- (B) Quash the subpoenas issued to the judges in the above referenced matter; and
- (C) Grant such further relief as may be deemed just and proper.

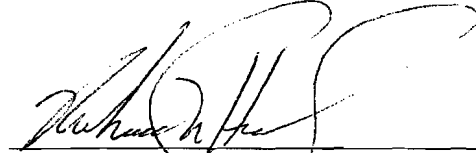
Respectfully submitted,

JUDGE EDWIN KELLY AND  
JUDGE TINA NADEAU

By their attorney,

MICHAEL A. DELANEY  
ATTORNEY GENERAL

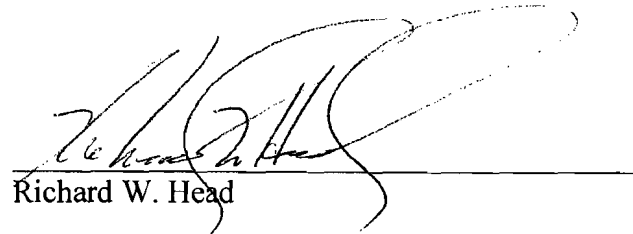
Date: March 21, 2012



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I hereby certify that a copy of the foregoing was mailed this day, postage prepaid, to John S. Webb, Esq., Cheshire County Attorney's Office, and Bradley Jarvis, 42 Main Street #27, Dover, NH 03820.



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Richard W. Head