



# STATE OF CONNECTICUT OFFICE OF STATE ETHICS

## Advisory Opinion No. 2018-3

September 20, 2018

**Questions  
Presented:**

The petitioner's principal question is whether a Department of Public Health ("DPH") Board Member may accept compensation as a consultant or expert witness in civil medical malpractice claims while concurrently serving on the DPH Board that regulates healthcare professionals.<sup>1</sup>

**Brief Answer:**

We conclude that a DPH board member may engage in private consultancy/ expert witness work, provided he or she meets the four part test set forth in this opinion.

At its July 2018 regular meeting, the Citizen's Ethics Advisory Board granted the petition for an advisory opinion submitted by Commissioner Raul Pino, of the Department of Public Health ("DPH"). The Board now issues this advisory opinion, which interprets the Code of Ethics for Public Officials<sup>2</sup> ("Ethics Code"), is binding on the Board concerning the person who requested it and who acted in good-faith reliance thereon, and is based on the facts provided by the petitioner.

### **Facts**

The following facts, as set forth by the petitioner, are relevant to this opinion:

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<sup>1</sup>The Petitioner also asks an ancillary question, namely, whether any distinction exists under the Ethics Code if a current DPH Board member serves as a paid expert consultant for either a defendant healthcare practitioner or a plaintiff patient in a civil medical malpractice case. The conclusion reached in this opinion with respect to the principal question renders this ancillary question moot.

<sup>2</sup>Chapter 10, part I, of the General Statutes.

The Department of Public Health (“DPH”) respectfully petitions the Citizen’s Ethics Advisory Board for an advisory opinion concerning the application of the Code of Ethics for Public Officials, Connecticut General Statutes Section 1-79 *et seq.*, to certain circumstances involving professional members of the professional healthcare boards and commissions identified pursuant to Section 19a-14(b) of the General Statutes (e.g., Connecticut Medical Examining Board, Connecticut State Board of Examiners for Nursing, Dental Commission, Board of Examiners for Psychologists, etc.) (collectively, “DPH Boards”).

As the Office of State Ethics recognized in Advisory Opinion No. 1994-16, while a particular member of a DPH Board is not compensated for service to a professional board or commission, he or she is a “public official” as that term is defined in the Code of Ethics and exercises the power of the state. *See* Conn. Gen. Stat. §§ 1-79 (11). *See also* Ethics Commission Declaratory Ruling 1985-B, *In re Michael J. Zazzaro, D.M.D.* Likewise, the DPH controls “the allocation, disbursement and budgeting of funds appropriated to the department for the operation of the boards and commissions” which are “within the Department of Public Health.” Conn. Gen. Stat. § 19a-14(a)(1). DPH Board authority includes hearing and deciding matters concerning the suspension or revocation of healthcare licenses and adjudicating complaints against practitioners and imposing sanctions when appropriate. *See, e.g.,* Advisory Opinion No. 1994-16; Declaratory Ruling 1985-B; Conn. Gen. Stat. §§ 20-8a(f) (Medical Board); 20-90(b) (Nursing Board); 20-103a(b) (Dental Commission); 20-186a (Psychology Board).

In Advisory Opinion No. 1994-16, the Office of State Ethics opined, in part, that a then current attorney member of the Connecticut Medical Examining Board was prohibited, under the Code of Ethics for Public Officials, from “representing anyone with regard to an investigation which might ultimately be resolved by that board” as “the acceptance of such employment in his private capacity would violate Conn. Gen. Stat. § 1-84 (b), which prohibits the acceptance of outside employment by a public official if such employment would impair his independence of judgment with regard to his official

duties.” In addition, the board member’s “effectiveness, if not his impartiality, as a [DPH Board] member would most certainly be jeopardized by his acceptance of private casework subject to [the DPH Board’s] jurisdiction.” *Citing* Advisory Opinion No. 1993-10.

Moreover, the Office of State Ethics found that the acceptance of such employment “would also be an inappropriate use of office in violation of Conn. Gen. Stat. § 1-84 (c) [(no public official ... shall use his public office or position ... to obtain financial gain for himself)]” as the individual’s position as a board member “lends his private practice in this area a credibility among potential clients which does not arise from his expertise alone, but rather results from this use of office, however inadvertent.” Advisory Opinion No. 1994-16.

The DPH respectfully requests an advisory opinion as to whether an equivalent conclusion results with respect to a healthcare practitioner – currently serving on a DPH Board – who may accept compensation as a paid consultant/expert for parties to civil medical malpractice claims (*e.g.*, a current physician member of the Medical Board is offered compensation as an expert consultant for a defendant physician in a medical malpractice case; a current dentist member of the Dental Commission is offered compensation as an expert consultant for a plaintiff patient in a dental malpractice case). Finally, the DPH respectfully requests that the advisory opinion address whether any distinction exists under the Code of Ethics for Public Officials (in particular, consideration of Conn. Gen. Stat. § 1-84 (c)) should a current DPH Board member serve as a paid expert consultant for (i) a *defendant healthcare practitioner* or (ii) a *plaintiff patient* in a civil medical malpractice case.

### Analysis

As a preliminary matter, considering the manner of their appointment and the state regulatory authority they exercise,<sup>3</sup> members of the professional healthcare boards and commissions identified in § 19a-14(b) of the General

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<sup>3</sup>See General Statutes §§ 20-8a, 20-128a, 20-88, 20-103a, 20-186, 20-196, 20-139a, 20-235a, 20-208, 20-35, 20-25, 20-51, 20-268, and 20-67.

Statutes (collectively referred to as “DPH Boards”)<sup>4</sup> are “public officials” for purposes of the Ethics Code<sup>5</sup> and, therefore, must adhere to its provisions, including the outside employment rules.

This Board and its predecessor agency, the State Ethics Commission (“Commission”), consistently noted, that the Ethics Code does not contain a blanket prohibition against outside employment, but it does impose significant restrictions on that employment. The Ethics Code has two long-established provisions that govern the outside employment activities of public officials and state employees. First, under General Statutes § 1-84 (b), a public official or state employee shall not “accept other employment which will either impair his independence of judgment as to his official duties or employment or require him, or induce him, to disclose confidential information acquired by him in the course of and by reason of his official duties.”<sup>6</sup> Second, under General Statutes § 1-84 (c), a public official or state employee shall not “use his public office or position or any confidential information received through his holding such public office or position to obtain financial gain for himself . . . .”<sup>7</sup> Generally, these provisions prohibit outside employment in a situation in which an outside employer can benefit from the state employee’s official actions—for example, the state employee, in his state job, has supervisory, contractual or regulatory authority over the outside employer.<sup>8</sup>

The issue of privately compensated consultancy and expert testimony work by members of state boards and other governmental institutions has been addressed in a number of formal and informal opinions.

In Advisory Opinion No. 1994-16, specifically cited by the Petitioner, a member of the Connecticut Medical Examining Board (“CMEB”) was prohibited from engaging in representation of individuals who may possibly

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<sup>4</sup>Connecticut Medical Examining Board; Connecticut State Board of Examiners for Optometrists; Connecticut State Board of Examiners for Nursing; Dental Commission; Board of Examiners of Psychologists; Connecticut Board of Veterinary Medicine; Connecticut State Board of Examiners for Opticians; Connecticut State Board of Examiners for Barbers and Hairdressers and Cosmeticians; Connecticut Board of Examiners of Embalmers and Funeral Directors; State Board of Naturopathic Examiners; State Board of Chiropractic Examiners; Connecticut Board of Examiners in Podiatry; Board of Examiners of Electrologists; and Connecticut State Board of Examiners for Physical Therapists.

<sup>5</sup>General Statutes § 1-79 (11).

<sup>6</sup>General Statutes § 1-84 (b).

<sup>7</sup>General Statutes § 1-84 (c).

<sup>8</sup>Regs., Conn. State Agencies § 1-81-17.

come before the medical board on which he serves. Such representation, the Commission reasoned, would impair the member's independence of judgment with regard to his official duties in violation of § 1-84 (b).<sup>9</sup> Further, the Commission concluded that the board member's service on the medical board lends his private work a credibility before potential clients and, as such, results in the use of office, however inadvertent, in violation of § 1-84 (c).<sup>10</sup>

Similarly, a member of the Dental Commission was restricted from becoming a paid consultant "whose duties include inspecting dental facilities and investigating dental professionals concerning matters which might result in disciplinary proceeding before the [Dental] Commission," as such work would impair the member's independence of judgment in violation of § 1-84 (b).<sup>11</sup>

In contrast, in Advisory Opinion No. 89-8, a member of the State Board of Chiropractic Examiners was permitted to provide licensed insurance carriers paid professional assessments of patient records in order to determine whether chiropractic treatment was appropriate. The member was also permitted to engage in no fee blind peer reviews of other individuals practicing chiropractic medicine in Connecticut where the identity of the chiropractor and patient was not revealed.<sup>12</sup> The reason for permitting such activity was the board member's commitment to abstain from any matters involving his private assessments and reviews.

Although abstention from matters involving prior private consultancy or expert witness work mitigates impairment-of- independence-of-judgment concerns under the Ethics Code, such private work remains problematic under the "use of office" provision of § 1-84 (c) when private work is offered based on a board member's official authority rather than his or her expertise. This concern is highlighted whenever outside counsel seeks to bolster their cases by hiring state officials as expert witnesses or consultants, thus raising questions about the use of office by a hired state employee or official, regardless of how inadvertent.

Illustrative of this concern is Request for Advisory Opinion No. 3068 (2002), in which the estate of a man who died, while undergoing pre-

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<sup>9</sup>Advisory Opinion No. 1994-16, Connecticut Law Journal, Vol. 56, No. 11, p. 2B (September 13, 1994).

<sup>10</sup>Id.

<sup>11</sup>Declaratory Ruling 1985-B.

<sup>12</sup>Advisory Opinion No. 1989-8, Connecticut Law Journal, Vol. 50, No. 40, p. 1C (April 4, 1989).

employment physical assessment testing for the Department of Corrections, hired a training officer with the Connecticut Police Academy as its expert on proper pre-employment testing procedures. In the opinion, a staff attorney of the former State Ethics Commission noted that, although it was apparent that the training officer had significant experience testifying as an expert witness, it was equally apparent that his “position with the state will add credibility to his work for the Estate, especially where, as in this case, the Estate is making a claim against [his] ultimate employer, the state of Connecticut.” The staff attorney further noted in the opinion that “one of the reasons that the Estate hired [the training officer as an expert witness] is because of his State position, e.g., his state position adds credibility to his testimony in support of a claim against the state.”<sup>13</sup>

In Request for Advisory Opinion No. 3185 (2003), the question was whether a member of the state Home Inspection Licensing Board (“HILB”) could serve as a compensated expert witness in a case pending in Superior Court, but not before the HILB. The board member was permitted to do so, provided that the following considerations were met: “(1) the individual in question had previously been used as an expert witness prior to his acceptance of a seat on the [HILB]; (2) the request to serve as such a witness comes because of his prior expertise and not as a result of his [HILB] position, and; (3) there is no foreseeable chance that the matter will come before the [HILB].”<sup>14</sup> The opinion noted further that “the board member should not accept this work if the matter was at one time before the [HILB] prior to the Superior Court action,” and “in order to avoid a use of office under [§] 1-84 (c), the number of cases taken by the board member should remain consistent with his caseload prior to his acceptance of the [HILB] position.”<sup>15</sup>

Here, the Petitioner’s inquiry asks this Board to determine whether the conclusion reached in Advisory Opinion No. 1994-16 applies to DPH Board members who may accept compensation as paid consultants and/or experts in civil malpractice claims. In that opinion, as noted above, the prohibition on private consultancy/expert witness work by a member of the CMEB was imposed because matters on which the member was to provide private expert consultancy were likely to come before the CMEB and, therefore, exposed him to violations of § 1-84 (b) and (c). Although we affirm the conclusions reached in that opinion, the scope of the Petitioner’s inquiry may extend to scenarios where matters under review of a DPH Board member, who acts as

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<sup>13</sup>Request for Advisory Opinion No. 3068 (2002).

<sup>14</sup>Request for Advisory Opinion No. 3185 (2003).

<sup>15</sup>Id.

an expert consultant/witness in a private capacity, may or may not come before the regulatory board.

In order to capture a broad range of situations, beyond the specific one addressed in Advisory Opinion No. 1994-16, we adopt a four part test, elements of which are set forth in Request for Advisory Opinion No. 3185 (2003), noted above. Under this test, a DPH board member may engage in private consultancy/ expert witness work provided he or she meets the following criteria:

- 1) a DPH Board member had previously been used as an expert witness prior to his or her acceptance of a seat on a DPH Board;
- 2) the request to serve as a consultant and/or expert witness is made because of a DPH Board member's prior expertise and not as a result of his or her DPH Board position;
- 3) there is no foreseeable chance that the matter on which consultancy and/or expert witness service will be provided will come before the DPH Board to which he or she has been appointed. In the event the matter does come before the DPH Board, the DPH Board member shall recuse himself or herself; and
- 4) a DPH Board member should not accept private consultancy/expert witness work if the matter on which he or she is to provide private expertise was at one time before the DPH Board on which he or she now serves.

### Conclusion

Based on the foregoing, we conclude that a DPH board member may engage in private consultancy/ expert witness work, provided he or she meets the four part test set forth in this opinion.

By order of the Board,

Dated 9/27/18

Dena M. Castricone  
Chairperson