STATE OF CONNECTICUT
OFFICE OF STATE ETHICS

Declaratory Ruling 2015-A

April 16, 2015

Question Presented: **The petitioner asks whether guardians ad litem appointed by the court in family-relations matters are subject to the Code of Ethics for Public Officials.[1]**

Brief Answer: **We conclude that the guardians ad litem are not subject to the Code of Ethics for Public Officials, because they are not "public official[s]," as defined in General Statutes § 1-79 (11), "state employee[s]," as defined in § 1-79 (13), or "person[s] hired by the state as . . . independent contractor[s]," as set forth in General Statutes § 1-86e.**

At its December 18, 2014 regular meeting, the Citizen's Ethics Advisory Board ("board") granted the petition for a declaratory ruling submitted by Sgt. James Hemingway, Jr. Pursuant to § 1-92-39b of the Regulations of Connecticut State Agencies, the board agreed to issue a ruling by March 31, 2015, and subsequently extended that deadline to April 16, 2015. The board now issues this ruling in accordance with that regulation.

Background

Generally, a guardian ad litem ("GAL") is "[a] guardian . . . appointed by the court to appear in a lawsuit on behalf of an

[1]This ruling addresses guardians ad litem appointed in "family relations matters," as defined in General Statutes § 46b-1.

incompetent or minor party."[2]

In 2014, the General Assembly made major revisions to the statutory scheme governing GALs in family-relations matters.[3] It mandated, among other things, that the "Judicial Branch . . . develop a publication that informs parties to a family relations matter . . . about the roles and responsibilities of . . . the guardian ad litem for a minor child when such persons are appointed by the court to serve in a family relations matter."[4] The Judicial Branch subsequently developed this publication, which nicely sums up what a GAL is, what a GAL's role is, and who pays a GAL's fees:

> **What is a Guardian Ad Litem (GAL)?**
> A guardian ad litem, often referred to as a GAL, is an individual the court appoints, either upon motion of a party or when the court determines a GAL is necessary. The court will consider the appointment of a GAL if the parties are unable to resolve a parenting or child related dispute. In such event, the court appoints a GAL to ensure the child's best interests are represented during the course of the parties' dispute. . . .
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> **What is the role of a GAL?**
> In cases where the parties are unable to agree on a parenting plan or there is a child related dispute, the court may order a GAL to independently represent the best interests of the child. The GAL does not represent, the mother, father or any other party in the case. The GAL only represents the best interests of the child. The GAL does not make decisions for the court. The court may need the GAL to perform certain functions . . . [in order for it] to make a determination as to the best interests of the child. The court will specify the role of the GAL in each case.
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[2]Black's Law Dictionary (8th Ed. 2004).
[3]See Public Acts 2014, No. 14-3.
[4]Public Acts 2014, No. 14-3, § 6.

> **Who pays the GAL?**
> The parties to the case pay the fees of the GAL. . . . In some cases, the parties may qualify for the appointment of a GAL that is paid for by the state. . . .[5]

Analysis

With that brief background in mind, we turn to the question of whether GALs appointed by the court in family-relations matters are subject to the Code of Ethics for Public Officials[6] ("ethics code"). To be so, GALs must fit within one of three categories: (1) "public official," as defined in General Statutes § 1-79 (11); (2) "state employee," as defined in § 1-79 (13); or "person hired by the state as a consultant or independent contractor," as set forth in General Statutes § 1-86e.[7]

Whether GALs fit within any of those categories is a question of statutory construction, the "fundamental objective" of which "is to ascertain and give effect to the apparent intent of the legislature."[8] General Statutes § 1-2z directs us to consider, first, the text of the statute itself and how it relates to other statutes. If the meaning of the text is "plain and unambiguous and does not yield absurd or unworkable results," we may not consider "extratextual evidence of the meaning of the statute . . . ."[9] "When the relevant statutory text and [its] relationship . . . to other statutes do not reveal a meaning that is plain and unambiguous, our analysis is not limited, and we look to other factors relevant to determining [its] meaning . . . including its legislative history . . . and its purpose."[10]

1. GALs as "Public Official[s]"?

The ethics code defines "public official" as including various

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[5]State of Connecticut Judicial Branch, Guardian Ad Litem or Attorney For Minor Child in Family Matters (June, 2014), available at http://www.jud.ct.gov/Publications/FM224.pdf (last visited April 1, 2015).

[6]Chapter 10, part I, of the General Statutes.

[7]See Advisory Opinion No. 2001-2, Connecticut Law Journal, Vol. 62, No. 31, p. 7D (January 30, 2001) (addressing whether the ethics code applies to state marshals).

[8](Internal quotation marks omitted.) *State* v. *Brown*, 310 Conn. 693, 702 (2013).

[9]General Statutes § 1-2z.

[10]*Viera* v. *Cohen*, 283 Conn. 412, 421 (2007).

categories of individuals, but there is only one category in which GALs can even arguably fit, as italicized below:

> any state-wide elected officer, any member or member-elect of the General Assembly, *any person appointed to any office of the* legislative, *judicial* or executive *branch of state government by the Governor or an appointee of the Governor*, with or without the advice and consent of the General Assembly, any public member or representative of the teachers' unions or state employees' unions appointed to the Investment Advisory Council pursuant to subsection (a) of section 3-13b, any person appointed or elected by the General Assembly or by any member of either house thereof, any member or director of a quasi-public agency and the spouse of the Governor, but does not include a member of an advisory board, a judge of any court either elected or appointed or a senator or representative in Congress.[11]

To fit within that category, GALs must be appointed to a judicial-branch office by the governor or a gubernatorial appointee. We know, from above, that GALs are not appointed by the governor, but by "[t]he court,"[12] i.e., a Superior Court judge, so the issue is whether such judges are gubernatorial appointees. Our state constitution provides the answer: "The judges of the . . . superior court shall, *upon the nomination by the Governor, be appointed by the general assembly* . . . ."[13] Because Superior Court judges are nominated, rather than appointed, by the governor, they are not gubernatorial appointees. That means that GALs are not appointed by a gubernatorial appointee (or, as noted above, the governor), which in turn means that they do not fit within the only category of "public official" that was even a possibility. Hence, we must conclude that they are not "public officials" under the ethics code.[14]

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[11](Emphasis added.) General Statutes § 1-79 (11).

[12]General Statutes § 46b-54.

[13](Emphasis added.) Conn. Const., art. V, § 2, as amended by article XX of the amendments.

[14]See Advisory Opinion No. 2012-2, Connecticut Law Journal, Vol. 73, No. 33, p. 5C (February 14, 2012) ("According to the Connecticut Constitution, judges are appointed, not by the Governor [who simply nominates them], but by the General Assembly. That said, CBEC members

2. GALs as "State Employee[s]"?

The ethics code defines "state employee," in relevant part, as "any employee in the executive, legislative or judicial branch of state government, whether in the classified or unclassified service and whether full or part-time, and any employee of a quasi-public agency . . . ."[15] We can strip away most of that language, as GALs are clearly not employees in the executive or legislative branches, or employees of a quasi-public agency. That leaves whether GALs are "*employee[s]* in the . . . judicial branch of state government . . . ."[16] For the reasons that follow, we believe that GALs are more properly classified as independent contractors than "employees."[17]

"[O]ne is an employee of another when he renders a service for the other and when what he agrees to do, or is directed to do, is subject to the will of the other in the mode and manner in which the service is to be done and in the means to be employed in its accomplishment as well as in the result to be attained."[18] In contrast, "[an] independent contractor is one who . . . contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work."[19] That is, "[a]n independent contractor relinquishes control to the entity that hires him or her of the results of his or her work only."[20] "The fundamental distinction," then, "between an employee and an independent contractor depends upon the existence or nonexistence of the *right to*

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are not appointed by appointees of the Governor and are therefore not 'public officials,' meaning they are not subject to the Ethics Code.").

[15]General Statutes § 1-79 (13).

[16](Emphasis added.) General Statutes § 1-79 (13).

[17]Because the ethics code does not define the term "employee," we look (as do courts) to the "common-law right to control test," which "has been applied in several different factual circumstances to determine whether an employment relationship existed between parties." *Aumueller* v. *Optimus Management Group, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-10-6010073 (February 9, 2011).

[18](Internal quotation marks omitted.) *Compassionate Care, Inc.* v. *Travelers Indemnity Co.*, 147 Conn. App. 380, 391 (2013).

[19](Internal quotation marks omitted.) *Hunte* v. *Blumenthal*, 238 Conn. 146, 154 (1996).

[20](Internal quotation marks omitted.) *Compassionate Care, Inc.* v. *Travelers Indemnity Co.*, supra, 391.

control the means and methods of work."[21]

We must determine, therefore, whether the court (specifically, a Superior Court judge) "has reserved the right to control" GALs "in the discharge of their duties so as to render [them] . . . 'employees' . . . ."[22] In other words: "Has the [court] . . . the general authority to direct what shall be done [by GALs] and when and how it shall be done—the right of general control of the work?"[23] With respect to this issue, there does not appear to be any on-point Connecticut case law, so we look for guidance in answering it to a decision of New York's highest court, the New York Court of Appeals.

In *O'Brien* v. *Spitzer*, that court addressed whether the New York attorney general properly concluded that a private attorney appointed by the trial court as referee in a mortgage-foreclosure case was an independent contractor, not a state employee, and was thus not entitled to state-provided defense and indemnification.[24] According to the court, the conclusion had "ample basis," including that the referee "worked without day-to-day supervision"; "chose his own hours of work"; "selected the date for the foreclosure sale"; "performed his duties on a part-time basis, while also working for clients of his private law practice"; received compensation, not from the state, but from the sale proceeds; furnished his own "materials he needed for his work"; and "paid his own expenses . . . ."[25] The referee was, in the court's words, "substantially more independent from state control over his activities than a typical state employee."[26]

The *O'Brien* decision formed the basis of a subsequent opinion of the New York attorney general, involving whether compensated GALs serving in the Civil Court's Housing Part were "employees" and thus entitled to state-provided defense and indemnification.[27] Not so, according to the attorney general:

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[21](Emphasis added; internal quotation marks omitted.) *Hunte* v. *Blumenthal*, supra, 154.

[22]Id.

[23](Emphasis omitted; internal quotation marks omitted.) *Compassionate Care, Inc.* v. *Travelers Indemnity Co.*, supra, 147 Conn. App. 391.

[24]*O'Brien* v. *Spitzer*, 7 N.Y.3d 239, 241 (2006).

[25]Id., 242-43.

[26]Id., 243.

[27]Opinions, N.Y. Atty. Gen. No. 2006-F5 (October 24, 2006).

> Like the court-appointed referee found to be an independent contractor in *O'Brien*, a [GAL] works without day-to-day supervision from the court and, other than when required to appear in court, chooses his or her own hours of work. The [GAL] determines the amount of contact he or she will have with the represented litigant. Expenses incurred by the [GAL] are not reimbursed by the State. Moreover, the [GAL] exercises independent judgment with respect to the needs and interests of the represented litigant and represents those judgments to the Court.[28]

"[T]he manner in which the [GAL] conducts his or her work," said the attorney general, "precludes a conclusion that the [GAL] is an 'employee' . . . ."[29] That is, "the Court does not control the manner in which the work is performed, rendering [GALs] independent contractors."[30]

The same must be said here. As pointed out in a memorandum submitted by the Director of Legal Services for the Connecticut Judicial Branch, GALs in family-relations matters:

- "do not have offices at the court";
- provide their own "tools or workspace for the performance of [their GAL] duties";
- "are free to and do in fact perform work for other clients," as many of them "are attorneys who have, or work, in private law practices";
- are "free to perform the [court]-assigned duties in virtually any manner and at any time," provided that they complete "the assigned tasks by the deadline established by the court";
- choose their own hours of work, as "the court does not have the authority to prescribe how many hours the GAL may or must spend on a particular case or when or where those hours must be completed";

[28]Id.
[29]Id.
[30]Id.

- "perform their services in temporary assignments" and "have no guarantee that the court will ask for their services on any regular basis"; and

- are, generally, compensated by the parties, not the state.

To be sure, the court does, as noted in the background section, exercise general authority over GALs. In fact, it is the court that appoints a GAL in a family-relations matter, upon its own motion or at the request of either party,[31] but generally only after the parties have been given an opportunity to select an individual to serve as a GAL for the minor child.[32] Further, it is the court that has control over whether to remove a GAL from a particular case.[33] Moreover, it is the court that sets the "specific nature" of the GAL's duties; the appointment end date; the deadline for the GAL to report to the court on his or her work; the fee schedule; and the proposed schedule for periodic review of the GAL's work, which must occur at least once every three months after the appointment.[34]

But that last point—concerning "*periodic* review" by the court—demonstrates precisely how limited the court's supervisory role over GALs actually is. In its memorandum, the Judicial Branch notes that it is "further evidence that the court has no authority to control how and when GALs execute their duties on a day-to-day basis. It is only after the fact that the court may review the activities that the GAL has performed."

Because the court maintains only general authority over the work of GALs in family-relations matters—primarily via appointment, removal, and periodic review—and very limited authority over "when and how it shall be done,"[35] they are more properly characterized as independent contractors than "employees."[36] And because they cannot be said to be "employees," it follows that they

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[31]General Statutes § 46b-54.

[32]General Statutes § 46b-12 (a).

[33]General Statutes § 46b-12c.

[34]General Statutes § 46b-12 (c).

[35](Emphasis omitted; internal quotation marks omitted.) *Compassionate Care, Inc.* v. *Travelers Indemnity Co.*, supra, 147 Conn. App. 391.

[36]See *Fleming* v. *Asbill*, 326 S.C. 49, 53 (1997) ("the relationship between the court and the guardian ad litem is not an employer-employee relationship").

cannot be said to be "state *employees*" under the ethics code's definition of that term.

3. GALs as "person[s] hired by the state as . . . independent contractor[s]"?

Section 1-86e, titled "Consultants and independent contractors, Prohibited Activities," provides, in relevant part, as follows:

> (a) No *person hired by the state as a consultant or independent contractor* shall:
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> (1) Use the authority provided to the person under the contract, or any confidential information acquired in the performance of the contract, to obtain financial gain for the person, an employee of the person or a member of the immediate family of any such person or employee;
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> (2) Accept another state contract which would impair the independent judgment of the person in the performance of the existing contract; or
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> (3) Accept anything of value based on an understanding that the actions of the person on behalf of the state would be influenced.[37]

For those prohibitions to apply, then, GALs must be three things: "person[s]," "hired by the state," and "independent contractor[s]." GALs are certainly "person[s]," a term defined in the ethics code to include, among other things, "individual[s]."[38] And as already discussed, GALs appear to be "independent contractor[s]" under the term's common-law definition[39]—a conclusion with which the Judicial Branch does not disagree: "Under this definition, a GAL

[37](Emphasis added.) General Statutes § 1-86e (a). Under subsection (b) of § 1-86e, "[n]o person shall give anything of value to a person hired by the state as a consultant or independent contractor based on an understanding that the actions of the consultant or independent contractor on behalf of the state would be influenced."

[38]General Statutes § 1-79 (9).

[39]See *Hunte* v. *Blumenthal*, supra, 238 Conn. 154 ("one who . . . contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work" [internal quotation marks omitted]).

would likely be classified as an independent contractor." The remaining issue, therefore, is whether, as independent contractors, GALs are "hired by the state."

The ethics code does not define the term "hired," so we look to its dictionary definition,[40] which is this: "To engage the labor or services of another for wages or other payment."[41] Citing this definition, the Judicial Branch argues that "[a] GAL is not truly hired by the state." In support, it argues that "a court only appoints a GAL and, as a matter of last resort, provides payment to the GAL only when the child's parents meet [certain] eligibility guidelines"; and that, even when the payment is made by the state, it is made for work done on behalf of the child—not on behalf of the state. "Essentially," the Judicial Branch notes, "the court operates only to facilitate a relationship between a GAL and the child."

We agree with the Judicial Branch to the extent that GALs are not "hired" in the traditional sense of the term, particularly given that GALs are, in fact, *appointed* pursuant to a detailed statutory scheme.[42] Not only that, GALs are paid, for the most part, by the parties, not the state[43]; are selected, for the most part, by the parties, not the court[44]; and have, as their role, "to speak on behalf of the best interest of the child,"[45] not on behalf of the state. That said, we cannot say that the "*hired* by the state" language in § 1-86e plainly and unambiguously captures court-*appointed* GALs in family-relations matters. "A review of [§ 1-86e's] history and purpose is, therefore, appropriate and instructive to our determination of its meaning."[46]

As for § 1-86e's legislative history, in testimony before the Government Administration and Elections Committee in support of

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[40]See General Statutes § 1-1 (a).

[41]Black's Law Dictionary (8th Ed. 2004).

[42]See *Clements* v. *Housing Authority*, 532 F.Supp.2d 700, 707 (D.N.J. 2007) ("the Board Members are not hired in the usual sense as they are appointed by the Borough").

[43]General Statutes § 46b-62 (a).

[44]General Statutes § 46b-12 (a).

[45]*In re Tayquon H.*, 76 Conn. App. 693, 704 (2003).

[46]*Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 401-02 (2008).

the bill underlying that provision,[47] Alan Plofsky, Executive Director and General Counsel of the State Ethics Commission, commented as follows:

> If you're a state employee . . . you're covered by all code provisions. But if you're hired as an independent contractor—the ubiquitous "consultant", you're covered by no code provision. *You could use confidential state information. You could sell it. You could do virtually anything. Award a contract to yourself.* The intent here is just to apply some of the basic conflict-of-interest provisions of the code to consultants. . . . We don't want to frustrate the state in getting consultants by applying all kinds of revolving door provisions and other laws. But just the basic, common sense . . . *don't award a contract to yourself. You're covered by the bribery provisions, and don't use confidential information while you're working for the state.*[48]

As for § 1-86e's purpose, the State Ethics Commission expressed it in these terms:

> [T]he application of § l-86e to independent contractors and consultants is not intended to interfere with their business, but rather *to prevent a private entity from using state money to, for example, hire immediate family members without appropriate [state] oversight* . . . . A conflict of interest exists only if there is a *nexus between the facts in question and the state money and authority granted to the independent contractor* or consultant by contract.[49]

As § 1-86e's history and purpose attest, the harm sought to be prevented was a state-hired contractor's abuse, for financial gain, of two things: state funds and confidential state information—*things that GALs do not even have access to*. Indeed, the Judicial Branch

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[47]"Hearings before legislative committees are a recognized source of legislative history." *Toise* v. *Rowe*, 243 Conn. 623, 630 (1998).

[48](Emphasis added.) Conn. Joint Standing Committee Hearings, Government Administration and Elections, Pt. 1, 1991 Sess., p. 195.

[49](Emphasis added.) Advisory Opinion No. 99-14, Connecticut Law Journal, Vol. 61, No. 2, p. 7C (July 13, 1999).

notes that "GALs do not have influence in directing state funds nor do they have access to state materials or information that could be used for personal gain." Given that the harm sought to be prevented by § 1-86e bears no relationship to the work performed by GALs, we cannot reasonably suppose that the legislature intended for these court appointees—who, again, are generally not even paid or selected by the state—to be subject to the provision. We conclude, therefore, that GALs are not "person[s] hired by the state as . . . independent contractor[s]," within the meaning of § 1-86e.

Having concluded that GALs in family-relations matters are not "person[s] hired by the state as . . . independent contractor[s]," as set forth in § 1-86e, or "state employee[s]," as defined in § 1-79 (13), or "public official[s]," as defined in § 1-79 (11), it follows that they are not subject to the ethics code.[50]

Buttressing this conclusion is the General Assembly's apparent (and very recent) recognition of that fact, as evidenced by the following exchange that occurred in a judiciary-committee hearing between the committee co-chair Senator Eric Coleman and Representative Edwin Vargas, Jr., concerning the 2014 legislative overhaul of the GAL system:

> Representative Vargas: Frankly one of the things that we all agreed on was that *we needed some kind of code of ethics or code of standards.* I don't see too much in the Senate Bill 494, so I hope that it'll get amended to have some teeth in it, because I think *as a minimum, we need a code of conduct. We need supervision for the guardians ad litem*, if we're going to keep them. We need evaluations.
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[50]We note that there is absolutely no language in the statutory provisions pertaining to GALs suggesting that they are subject to the state ethics code—as there is, by way of example, in the enabling legislation of the Bioscience Innovation Advisory Committee: "All members of the advisory committee shall be deemed public officials *and shall adhere to the code of ethics for public officials set forth in chapter 10*." (Emphasis added.) General Statutes § 32-41bb (e).

> Senator Coleman: Thank you. We appreciate your testimony. *Would you share with us if you've given any thought to who should be doing or accomplishing the oversight of GALs*?
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> Representative Vargas: Well, it could be a unit specialized in that. I think we should probably fund it. Because people have told me, well, you know, these professional boards, like the mental health professionals have their professional boards where you can go and file a complaint with their colleagues or attorneys have the Bar Association, and you can file a complaint with their colleagues at the bar. *Unfortunately the mechanisms that exist now are not working for people*. . . .[51]

Notice, there was no mention there (or anywhere else, as far as we can tell) of GALs being subject to the state ethics code, which, at that point, had been in existence for more than thirty-five years.[52] The focus, instead, was on the creation of a (then non-existent) "code of ethics or code of standards" for GALs.

And that is precisely what the General Assembly subsequently mandated. In Public Acts 2014, No. 2014-207, § 16, the legislature required the Judicial Branch to "develop and implement a professional code of conduct applicable to any . . . guardian ad litem for a minor child appointed in a family relations matter . . . ." The Judicial Branch did so, and GALs are now subject to the "Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem."[53] This "Code of Conduct" addresses a variety of GAL issues, including "Conflicts of Interest," "Maintain[ing] Independence," "Professional Conduct," "Record Keeping," and "Removal," to which GALs are subject "for a violation of this Code of Conduct or for failure to comply with the court's order of appointment."[54]

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[51](Emphasis added.) Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2014 Sess., pp. 3729-31.

[52]See Public Acts 1977, No. 77-600.

[53]State of Connecticut Judicial Branch, Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem, available at http://www.jud.ct.gov/family/GAL_code.pdf (last visited April 1, 2015).

[54]Id.

Conclusion

Based on the foregoing, we conclude that GALs appointed in family-relations matters are not subject to the ethics code, because they are not "public official[s]," as defined in § 1-79 (11), "state employee[s]," as defined in § 1-79 (13), or "person[s] hired by the state as . . . independent contractor[s]," as set forth in § 1-86e.

By order of the Board,

Dated 4/16/15

/s/Charles F. Chiusano
Chairperson