STATE OF CONNECTICUT
OFFICE OF STATE ETHICS

Declaratory Ruling 2015-C

June 18, 2015

Questions Presented: **The petitioner asks:**

(1) May an attorney/legislator vote "on a resolution for the appointment or re-appointment of a candidate for the position as Chief Justice of the Supreme Court . . . ?"

(2) May an attorney/legislator who practices in family court or serves as a guardian ad litem vote on House Bill No. 5505, 2015 Sess., titled "An Act Concerning Family Court Proceedings," or any subsequent proposed legislation with identical language?[1]

Brief Answers: **We conclude as follows:**

(1) Yes, unless the attorney/legislator has a case pending before the Supreme Court.

(2) Yes.

At its April 16, 2015 regular meeting, the Citizen's Ethics Advisory Board ("board") granted the petition for a declaratory ruling submitted by Daniel M. Lynch.[2] The board now issues this declaratory ruling in accordance with § 1-92-39b of the Regulations of

[1]Given our answer to this question, we need not answer the petitioner's third one, i.e., whether *any* attorney/legislator may vote on the bill at issue.

[2]Additional petitioners include Sara Littlefield and Christine Braccio.

Connecticut State Agencies.

Analysis

1. Voting on the appointment or reappointment of the Chief Justice of the Supreme Court.

According to the petitioner, members of the General Assembly ("legislators") who are attorneys "*should abstain* from voting on a resolution for the appointment or re-appointment of a candidate for the position as Chief Justice of the Supreme Court . . . ."[3] In support, he cites to two provisions in the Code of Ethics for Public Officials[4] ("ethics code"), General Statutes §§ 1-85 and 1-86 (a), but relies specifically on the latter, stating: "[T]hey are subject to *both sections* of the statutes . . . but it would seem most relevant to rely upon § 1-86, given that such reliance is more inclusive and protective of matters being considered from the standpoint of ethics."[5]

The flaw in that argument is that legislators are *not* subject to "both sections." In fact, they are expressly exempted from the very one upon which the petitioner mainly relies, namely, § 1-86 (a)—the "potential conflict" provision—which provides, in relevant part:

> Any public official . . . *other than an elected state official*, who, in the discharge of such official's . . . official duties, would be required to take an action that would affect a financial interest of such official . . . such official's . . . spouse, parent, brother, sister, child or the spouse of a child or a business with which such official . . . is associated, other than an interest of a de minimis nature, an interest that is not distinct from that of a substantial segment of the general public or an interest in substantial conflict with the performance of official duties as defined in section 1-85 has a potential conflict of interest. . . .[6]

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[3](Emphasis in original.) Brief of the Petitioner, Daniel M. Lynch (April 27, 2015) (on file with the Office of State Ethics) (hereinafter "Petitioner's Brief").

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

[5](Emphasis in original.) Petitioner's Brief.

[6](Emphasis added.)

There is no denying that legislators are "elected state official[s]"[7] (indeed, the petitioner concedes the fact) and, as such, are expressly exempted from the prohibition in § 1-86 (a) (and have been exempted from it since 1989[8]). Plainly, then, that provision cannot be said to bar them from taking part in the Chief Justice's appointment or reappointment.

That brings us to § 1-85—the "substantial conflict" provision—which, though it applies to legislators, contains a much more circumscribed prohibition than that in § 1-86 (a). Subject to an exception to be discussed later, § 1-85 provides that a "public official, including an elected state official," has a "substantial conflict" and "may not take official action on [a] matter" if the following is true: "he has reason to believe or expect that he, his spouse, a dependent child, or a business with which he is associated will derive a *direct* monetary gain or suffer a *direct* monetary loss . . . by reason of his official activity. . . ."[9] The key word there (at least for present purposes) is "direct," which has been defined to mean "absolute, immediate, or without intervening conditions."[10]

So, the question here is this: whether, in taking part in the Chief Justice's appointment or reappointment, an attorney/legislator can expect *immediate* (i.e., *without intervening conditions*) financial gain or loss to the attorney/legislator, his or her spouse, a dependent child, or an "associated" business.[11] Unless the attorney/legislator happens to be the Chief Justice's spouse—in which case there would be a clear-cut "substantial" conflict"[12]—it is difficult to conceive a single

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[7]See Conn. Const., art III.

[8]See Public Acts 1989, No. 89-97, § 6 (limiting applicability of § 1-86 (a) to public officials and state employees who are not elected state officials).

[9](Emphasis added.)

[10]State Ethics Commission Declaratory Ruling 92-C, p. 2 (December 7, 1992), citing The American Heritage Dictionary of the English Language, p. 373, Houghton Rifflin Company (1979).

[11]Under General Statutes § 1-79 (2), an "associated" business is a for-profit or not-for-profit business entity in which a public official, state employee, or member of his or her immediate family is, among other things, "a director, officer, owner, [or] limited or general partner . . . ." There is an exception for not-for-profit entities in which such individuals serve as unpaid directors or officers. General Statutes § 1-79 (2).

[12]Cf. Regs., Conn. State Agencies § 1-81-28 (a) ("[f]or example, a state employee required, in the course of his or her official duties, to determine

scenario in which an attorney/legislator could have such an expectation. And absent such an expectation, there is no "substantial conflict," meaning that § 1-85 would not bar the attorney/legislator from voting on the Chief Justice's appointment or reappointment.

There are, however, two other ethics code provisions that come into play here, subsections (b) and (c) of General Statutes § 1-84. Under § 1-84 (b), a public official may not "accept other employment which will . . . impair his independence of judgment as to his official duties . . . ." And under § 1-84 (c), a public official may not "use his public office . . . to obtain financial gain for himself, his spouse, child, child's spouse, parent, brother or sister or a business with which he is associated." It is these provisions—not §§ 1-85 and 1-86 (a)—to which the State Ethics Commission ("commission") looked when dealing with similar issues in Declaratory Ruling 89-D and Advisory Opinion No. 99-8.

Declaratory Ruling 89-D involved whether an attorney/legislator, particularly one serving on the legislature's judiciary committee, could "practice before the State's courts."[13] "Yes," the commission answered, noting that to conclude otherwise would result in equally untenable alternatives: either it would "virtually eliminate" outside employment for many of them, or it would require them to relinquish their positions on the judiciary committee and, hence, fundamentally alter its composition.[14] Of particular relevance here, though, is the commission's closing paragraph:

> The [c]ommission does, however, advise against *any attorney in the General Assembly taking part in the reappointment process of a judge before whom the legislator has a pending case.* Under such circumstances, the distinct possibility of inadvertent use of official position in violation of § 1-84 (c) . . . is too great to allow.[15]

Whereas that ruling dealt with an attorney/legislator taking part in the *re*appointment of a *Superior* Court judge before whom he or

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whether a consulting contract should be awarded to his or her spouse has a substantial conflict, and may not take official action on the matter").

[13]State Ethics Commission Declaratory Ruling 89-D, p. 1 (June 5, 1989).

[14]Id., 2-3.

[15](Emphasis added.) Id., 3.

she has a pending case, Advisory Opinion No. 99-8 tackled a related but more specific issue: whether an attorney/legislator on the judiciary committee could take part in a judge's *appointment or reappointment* to the *Appellate* Court if he or she has a case pending before it.[16] The commission began by distinguishing the Appellate Court from the Superior Court, noting that the latter had 174 judges, while the former had just "nine judges who sit in panels of three, or en banc"; and that, unlike a pending Superior Court case, a pending Appellate Court case "will . . . be heard, if at all, by a full third of its members."[17]

The commission then explained that "an inadvertent use of office" would exist in "any case where prospective clients . . . even incorrectly perceive potential advantage over opposing parties by virtue of" hiring the attorney/legislator.[18] Further, those not represented by the legislator will assume that the legislator's "clients are being favored by the Court over which he or she has such significant official influence . . . ."[19] The commission thus barred the attorney/legislator from taking part not only in a judge's reappointment, but also in his or her appointment, explaining: Unlike "the Superior Court, where the attorney[/legislator] may theoretically have a case before the nominee at some undetermined point in the future, here the legislator has a pending matter before the nine member tribunal to which the judge seeks appointment."[20] This conclusion, it believed, would safeguard against both "use of office in violation of § 1-84 (c)" and "a public surmise that the attorney-[legislator's] independence of judgment is impaired [under § 1-84 (b)] due to his or her misplaced considerations made on behalf of a paying client."[21]

Like the Appellate Court, the Supreme Court has far fewer members (it has seven) than the Superior Court,[22] and its members "sit en banc—in panels of seven—in all cases in which there are no disqualifications."[23] That said, the use-of-office and independence-

[16]Advisory Opinion No. 99-8, Connecticut Law Journal, Vol. 60, No. 45, p. 3D (May 11, 1999).

[17]Id.

[18]Id., 4D.

[19]Id.

[20]Id.

[21]Id.

[22]See General Statutes § 51-198 (a).

[23]Press Release, Connecticut Judicial Branch, Notice Re: En Banc Procedures for the Connecticut Supreme Court (September 1, 2009),

of-judgment concerns expressed in Advisory Opinion No. 99-8 are equally present when it comes to the Supreme Court (if not more so, given that it generally sits en banc). Accordingly, we conclude that an attorney/legislator (regardless of whether he or she is on the judiciary committee[24]) may not take part in an individual's appointment or reappointment to the Supreme Court (as Chief Justice or not) if he or she has a case pending before it.

The petitioner would have us treat the Chief Justice's appointment or reappointment differently, barring an attorney/legislator from taking part in it even if he or she has no case pending before the Supreme Court. His reasoning: The Chief Justice serves both a judicial role *and an administrative one*, as he or she is the "head of the Judicial Department and . . . [is] responsible for its administration."[25] As such, the Chief Justice "directs the efforts of thousands of employees and a budget exceeding $600 million annually," and appoints individuals to the boards, councils, etc., that "establish rules, consider disciplinary issues, and otherwise have influence and/or impact on attorneys and judges in Connecticut."[26] Thus, says the petitioner, there is a "perception of impropriety" and "actual impropriety . . . if attorneys were voting, yet simultaneously engaged in the business of law practice in Connecticut, bound by Court rules, procedures, and discipline as ultimately set in place by the very person or position for whom they would be voting."[27]

We can quickly dispense with the petitioner's argument about a "perception of impropriety." To borrow language from Advisory Opinion No. 2009-7, "[t]he Code does not speak of appearances of conflict, only actualities. That being the case, in interpreting and enforcing the Code [we are] limited, by statute, from addressing

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available at http://www.jud.ct.gov/external/news/press293.htm (last visited June 9, 2015).

[24]Although Advisory Opinion No. 99-8 dealt specifically with members of the judiciary committee who were attorneys, we see no reason to limit our conclusion to such committee members, particularly in light of Declaratory Ruling 92-C, in which (again) the commission "advise[d] against *any attorney in the General Assembly* taking part in the reappointment process of a judge before whom the legislator has a pending case."

[25]General Statutes § 51-1b (a).

[26]Petitioner's Brief.

[27]Id.

appearances or perceptions of conflict of interest."[28]

As for the argument about "actual impropriety," it must be remembered that our conclusion above (and that in Advisory Opinion No. 99-8) is grounded in subsections (b) and (c) of § 1-84, about which the commission had this to say:

> It is exceedingly difficult to apply the . . . use of office and acceptance of outside employment provisions (subsections 1-84 (b) and (c), General Statutes) to the members of Connecticut's part-time General Assembly. The great majority of legislators must, of economic necessity, pursue outside employment while in public service. *Under the circumstances, potential conflicts of interests are inevitable.* In reaching its decisions, the Commission must determine when these conflicts . . . are *so significant as to require prohibiting the conduct in question.*[29]

In other words, these provisions have been applied to legislators' outside work "*[o]nly* in instances of the *most specific and direct conflict*"[30]—not in instances involving vague assertions of potential conflict.

Which is precisely what we have here. That is, the petitioner argues that every attorney/legislator should be banned from voting on the Chief Justice's appointment or reappointment, and why: because they "should not have the opportunity to set the stage for *future benefit or even the appearance of future benefit*, nor should they have to fear that a vote in one direction or another *may somehow* have a negative impact on their employment . . . ."[31] Notice, there is no claim of a "specific or direct conflict"—as when an

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[28](Internal quotation marks omitted.) Connecticut Law Journal, Vol. 61, No. 11, p. 14C (September 15, 2009).

[29](Emphasis added.) Advisory Opinion No. 89-7, Connecticut Law Journal, Vol. 50, No. 35, pp. 8C-9C (February 28, 1989). The part-time nature of the General Assembly, and the consequent fact that most legislators "have jobs on the outside," was the very reason given for exempting legislators from § 1-86 (a), the ethics code's "potential conflict" provision. 32 H. Proc., Pt. 11, 1989 Sess., p. 3725.

[30](Emphasis added.) Advisory Opinion No. 91-7, Connecticut Law Journal, Vol. 52, No. 40, p. 3C (April 2, 1991).

[31](Emphasis added.) Petitioner's Brief.

attorney/legislator with a case pending before the Supreme Court votes on the Chief Justice's appointment or reappointment. Rather, there is the vague assertion that "somehow," at some "future" date, there "may" be some kind of benefit or detriment to the attorney/legislator stemming from his or her vote.

Given the lack of a "specific or direct conflict," we decline to interpret subsections (b) and (c) of § 1-84 as barring every attorney/legislator from taking part in the Chief Justice's appointment or reappointment. Only if an attorney/legislator has a case pending before the Supreme Court is he or she barred by subsections (b) and (c) from doing so.

2. Voting on House Bill No. 5505, 2015 Sess., entitled "An Act Concerning Family Court Proceedings," or any subsequent proposed legislation with identical language.

Next up is whether an attorney/legislator who practices in family court or serves as a guardian ad litem ("GAL") may vote on House Bill No. 5505, 2015 Sess., entitled "An Act Concerning Family Court Proceedings," or any subsequent proposed legislation with identical language. The petitioner thinks not and cites, once again, to §§ 1-85 and 1-86 (a). Section 1-86 (a), recall, does not apply to legislators, meaning that we need only address whether § 1-85, the "substantial conflict" provision, bars any such attorney/legislator from taking official action on House Bill No. 5505.

Without quoting House Bill No. 5505 in its entirety, suffice it to say that the bill, which has a proposed effective date of October 1, 2015, impacts family court proceedings in four ways:

- Section 1: A court may not "order that a parent have supervised visitation with his or her child, unless the court" makes at least one of four findings (e.g., "that such parent . . . has no established relationship with the child with whom visitation is sought").

- Section 2: "A person aggrieved by the action of a counsel or guardian ad litem for a minor child or children . . . may bring a civil action seeking appropriate relief," and "[i]t shall not be a defense to such civil action that the defendant is entitled to absolute, quasi-judicial immunity."

- Section 3: "[I]f a court orders that a parent [or child] undergo treatment or an evaluation from a licensed healthcare provider," it must allow the parent or parents the opportunity to select the provider.

- Section 4: "[C]ounsel or a guardian ad litem for the minor child or children" may no longer "be heard on a matter pertaining to a medical diagnosis or conclusion concerning a minor child made by a health care professional treating such child."

With that in mind, we return to § 1-85, the question being this: whether, in taking official action on House Bill No. 5505, an attorney/legislator who practices in family court or serves as a GAL "has reason to believe or expect that he, his spouse, a dependent child, or a business with which he is associated will derive a *direct* [i.e., *immediate, absolute or without intervening conditions*] monetary gain or suffer a direct monetary loss . . . ."[32] The answer has to be no, as will be shown by the juxtaposition of two prior decisions, one finding a "substantial conflict" (Advisory Opinion No. 2002-14), and one not (Declaratory Ruling 92-C).

In Advisory Opinion No. 2002-14, a legislator's law firm was one of roughly fifty creditors of Milford Academy, which owed it more than $17,000 for legal services.[33] The academy was also the subject of a foreclosure action, and so the city of Milford agreed to purchase the academy's land and lease it back to the academy, *on the condition that it pay its creditors in full*.[34] Lacking legal authority to issue the necessary bonds to finance the transaction, the city asked the legislator whose firm was one of the academy's creditors to seek legislation empowering it to do so.[35] He in turn asked the commission whether he could do so without violating the ethics code.[36] The relevant provision, said the commission, is § 1-85, which requires "direct" financial impact—i.e., financial impact "without intervening conditions."[37] And one could argue, it continued,

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[32](Emphasis added.) General Statutes § 1-85.

[33]Advisory Opinion No. 2002-14, Connecticut Law Journal, Vol. 64, No. 3, p. 18C (July 16, 2002).

[34]Id.

[35]Id.

[36]Id., 19C.

[37]Id.

> that the potential payment to [the legislator's] law firm is insufficiently immediate to qualify as "direct", since an intervening condition, the purchase of the Academy property by the City, must first occur. In reality, however, the Agreement between the City and the Academy predates the request that [the legislator] now obtain the necessary municipal bonding authority to implement the deal. Given this fact, there is, at this time, no meaningful intervening condition, i.e., additional, substantive prerequisite, which must take place for the payment to the Senator's law firm to occur.[38]

Put another way, because of the pre-existing agreement, the legislator's law firm stood to be paid—no ifs, ands, or buts about it—the moment legislation passed authorizing the city to issue bonds. The legislator, therefore, had "reason to 'believe or expect' that his firm will receive a direct benefit following passage of the legislation," meaning that he also had a "substantial conflict" under § 1-85.[39]

By way of contrast is Declaratory Ruling 92-C, which involved a bill that made "changes to the No-Fault Motor Vehicle Insurance Law."[40] Among the changes was "an increase from $400 to $2250 for the amount of allowable expenses necessary for an accident victim to bring a personal injury lawsuit against the at-fault driver, effective for accidents occurring on or after January 1, 1993."[41] At issue was whether it was a "substantial conflict" under § 1-85 for tort-attorney/legislators to take official action on the bill.[42] According to the commission, because § 1-85 requires "that any financial impact be direct and specific, and because the change in the threshold was prospective only," "any future effect on a tort-attorney/legislator's financial interests resulting from a change in the legislation would be too speculative to meet the statutory standard."[43] Hence, no "substantial conflict" under § 1-85.

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[38]Id., 19C-20C.
[39]Id., 20C.
[40]Declaratory Ruling 92-C, supra, p. 1.
[41]Id.
[42]Id.
[43]Id., 2.

Like that ruling, but unlike Advisory Opinion No. 2002-14, any future effect on an attorney/legislator who practices in family court or serves as a GAL resulting from passage of House Bill No. 5505 is purely speculative. The petitioner concedes as much, stating, in reference to a current attorney/legislator who practices in family court, that she "*could* realize the loss of future business and also have increased liability if certain legislative reforms pass."[44] This may be true, and it would be relevant if legislators were subject to the "potential conflict" provision (§ 1-86 (a))—but they are not. They are subject to § 1-85, which requires, not that they "could" be impacted financially as a result of official action, but that they have an expectation of direct, immediate financial impact, without any intervening conditions—such as the filing of a civil action against them, which may *or may not* happen were the bill to pass.

But even if there was an expectation of direct financial impact, § 1-85 *still* would not bar the attorney/legislator from taking official action on House Bill No. 5505. The reason stems from a statutory exception to § 1-85's general rule. Under the exception, even if a public official can expect direct financial impact by reason of his or her official activity, there is no "substantial conflict" if what follows is true: "any benefit or detriment accrues to him . . . or a business with which he . . . is associated *as a member of a profession, occupation or group to no greater extent than any other member of such profession, occupation or group*."[45] To illustrate how this exception plays out, the regulations offer this example:

> For example, legislation limiting all medical malpractice victims' rights to legal recovery could potentially affect the financial interests of at least three specific groups in addition to the victims: doctors, tort-attorneys and insurers providing medical malpractice coverage. Under these circumstances, *each legislator/member of all three groups could take official action on the matter, notwithstanding the expectation of direct financial gain or loss*, provided that each legislator was affected no differently than the other members of his or her specific group.[46]

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[44]Petitioner's Brief.

[45](Emphasis added.) General Statutes § 1-85.

[46](Emphasis added.) Regs., Conn. State Agencies § 1-81-28 (d).

Here, the "group" whose financial interests could be affected by passage of House Bill No. 5505 would consist of individuals serving as "counsel or guardian ad litem for a minor child or children" in family relations proceedings. And there is absolutely nothing to suggest that an attorney/legislator would be affected any differently than the other members of the group. For example, each member (be it a legislator or not) would be prohibited from being "heard on . . . matter[s] pertaining to a medical diagnosis or conclusion concerning a minor child made by a health care professional treating such child."[47] Further, each member (again, be it a legislator or not) would be subject to civil actions by persons aggrieved by their actions as such, and would be prohibited from asserting "absolute, quasi-judicial immunity."[48] That being the case, § 1-85's exception applies, meaning that each legislator who is a member of the "group" may take official action on the bill, regardless of whether he or she has an expectation of direct financial impact.

Conclusion

Based on the foregoing, we conclude (1) that an attorney/legislator may take part in the Chief Justice's appointment or reappointment, unless he or she has a case pending before the Supreme Court; and (2) that an attorney/legislator who practices in family court or serves as a GAL may take official action on House Bill No. 5505, or any subsequent proposed legislation with identical language.

By order of the Board,

Dated 6/18/15

/s/ Charles F. Chiusano
Chairperson

[47]House Bill No. 5505.
[48]House Bill No. 5505.