

CONNECTICUT STATE ETHICS COMMISSION
97 ELM STREET (REAR)
HARTFORD, CONN. 06106

In the Matter of a Request
for a Declaratory Ruling

88-C

Carl V. Pantaleo, Esq.
Applicant

Attorney Carl V. Pantaleo has asked the Ethics Commission whether it is proper for an attorney who is a legislator and member of the Judiciary Committee to: 1. appear in front of a Probate Court; 2. receive appointments from a Probate Court; or 3. have fees approved or granted by a Probate Court. 4. Additionally, Attorney Pantaleo has asked whether, under the preceding circumstances, it would be a conflict of interests for the attorney/legislator to take official action affecting the Probate Courts.

Connecticut's Probate Courts have jurisdiction over a wide range of subjects including wills, intestate estates, adoptions, termination of parental rights, guardianships, conservatorships, trusts, and commitment proceedings. Title 45, General Statutes. As part of their authority, the Probate Courts have the power to appoint persons, including attorneys, to carry out various statutory responsibilities.

For example, pursuant to Section 45-45e, General Statutes, the Probate Court is directed to "...appoint counsel to represent or appear on behalf of any minor..." in guardianship proceedings. Counsel also is to be provided whenever the Probate Court makes a determination on involuntary appointment of a conservator of the person or the estate. Section 45-70c, id. In addition, an attorney is necessary when the Probate Court decides whether or not a respondent is capable of giving informed consent to sterilization. Section 45-78t, id. Likewise, an attorney for respondent is required whenever the Probate Court decides on the appointment of a guardian for a mentally retarded person. Section 45-325, id. Lastly, often an attorney is appointed as the required guardian ad litem for a minor or incompetent parent in a termination of parental rights case. Section 45-61e, id.

The process by which the Probate Court selects an attorney varies depending on the statutory provision in question. For instance, in cases regarding informed consent to sterilization counsel is appointed, on a rotating basis, from a panel of approved attorneys established by the Probate Court Administrator. Section 45-78t, General Statutes. However, in most cases substantial discretion is vested in the presiding judge. According to the Office of the Probate Court Administrator, in these cases judges are encouraged to make appointments, on a rotating basis, from a list of interested attorneys; but are not required to do so. Therefore, a probate judge may, in a particular case, select a certain attorney based on the belief that the attorney is best suited to represent the client in question.

In all the above cited examples, if the represented party is unable to afford an attorney, the Probate Court is authorized to pay the cost of counsel. Compensation is determined by the Judicial Department, and payment rates are, in almost all instances, well below those of the private sector. If the represented party is able to pay for counsel, attorney's fees first must be approved by the Probate Court.

1. The Ethics Commission has previously decided that a member of Connecticut's part-time Legislature who is an attorney may practice before the State's Probate Courts. Ethics Commission Advisory Opinion No. 79-7, 40 Conn. L.J. No. 38, p. 27 (March 20, 1979). In that and other Opinions the Commission has noted that the Code of Ethics for Public Officials, Chapter 10, Part I, General Statutes, specifically bars public officials and State employees, as well as their firms, from compensated appearances before the State agencies listed in subsection 1-84(d), General Statutes. Other appearances before the State, including its courts, are not prohibited by the Code, unless another provision is applicable because of the individual's official position or duties.

As a member of the Judiciary Committee a legislator would have particular authority over the Probate Courts. Among its powers, the Committee has cognizance over all matters relating to Probate Courts. Joint Rules of the Senate and House of Representatives, p. 2 (1987). However, the Ethics Commission does not believe that this authority is so great as to require the extreme step of a prohibition on appearances by members of the Committee before these Courts. In this regard, it should be noted that probate judges are elected not appointed; and, therefore, do not have to be confirmed by the Judiciary Committee. Section 45-5, General Statutes. In fact, upon review it would appear that the Committee's authority is focused

mainly on substantive aspects of the law in this area, and not on control of those who preside over and staff the Probate Courts. See, e.g., Chapter 774, id.

2. and 3. We now turn to the related questions of whether it is proper for an attorney/legislator to receive appointments from or have fees approved or granted by a Probate Court. Court appointments, including appointments by a Probate Court, are exempt from the open and public contract process of subsection 1-84(i), General Statutes. Therefore, if a legislator receives such appointments, it must be under circumstances which assure the public that improper official influence is not involved. Most importantly, any impartial review of a Probate Court's actions on appointments and fees should reveal no inordinate number of appointments, inconsistent and excessive fees, or other anomalies when a member of the General Assembly is concerned. Any such deviation from the norm which resulted in financial benefit to the legislator would create the appearance that the official had violated the Code by using public position to obtain private gain. Subsection 1-84(c), id.

4. Lastly, we take up the question of whether the attorney/legislator may take official action on Probate matters. If, while engaged in the practice of Probate law, a legislator was required to take official action on any matter which would affect his financial interests as a member of the Probate bar, he must proceed in accordance with subsection 1-86(a), General Statutes. For example, if a bill was raised in the Judiciary Committee which would have the effect of increasing statutory fees for attorneys practicing before the Probate Courts, the legislator would have to either abstain from any official action on the bill or file a statement with the Ethics Commission, signed under penalty of false statement, explaining why he could act on the matter fairly and in the public interest despite the potential conflict. Id.

However, if any financial benefit or detriment at issue could be expected to accrue to the legislator to a greater extent than other members of his profession or occupation, the legislator would be precluded from acting. Subsections 1-84(a) and (c), Section 1-85, General Statutes.

Finally, when no financial consequence to the legislator is involved, or the effect is no different than that on a substantial segment of the general public, the individual may take unrestricted official action on Probate matters.

In summary, attorneys who are legislators and members of the Judiciary Committee may practice before the State's Probate

Courts. They may receive appointments from and have fees approved and granted by these Courts, as long as the frequency of appointments and level of fees is consistent with that received by probate attorneys who are not State officials. When confronted with a potential conflict of interests, probate attorney/legislators must proceed in accordance with the applicable provisions of Sections 1-84, 1-85, and 1-86 of the Code of Ethics for Public Officials, as must all legislators when their private financial interests are involved.

By order of the Commission,



William A. Elrick
Chairperson

Dated 8-1-88