



STATE OF CONNECTICUT
STATE ETHICS COMMISSION

ADVISORY OPINION NUMBER 86-11

Application of subsection 1-84b(b) to
an assistant attorney general

The assistant attorney general who heads the Antitrust/Consumer Protection/Charitable Trust Department of the Office of the Attorney General has asked how subsection 1-84b(b), General Statutes, would apply to him if he were to leave State service after the subsection becomes effective.

Subsection 1-84b(b) states:

(b) No former executive branch public official or state employee shall, for one year after leaving state service, represent anyone, other than the state, for compensation before the department, agency, board, commission, council or office in which he served at the time of his termination of service, concerning any matter in which the state has a substantial interest.

The subsection becomes effective January 7, 1987.

As an assistant attorney general and head of his department he assists the Attorney General in carrying out certain responsibilities assigned the Attorney General:

Enforcement of the Connecticut Anti-Trust Act, Chapter 624, General Statutes, and United States Anti-Trust Laws, 15 U.S.C. §§1 et seq.

Certifying informal dispute settlement procedures established by manufacturers of new motor vehicles. Section 42-182 General Statutes (part of the "Lemon Law")

Representing the public interest in protecting charitable gifts. Section 3-125, General Statutes

Enforcing the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§1981-1991

In addition, his department provides legal advice, and represents in court, the Department of Consumer Protection with respect to all statutes administered by that Department, such as:

Uniform Food, Drug and Cosmetic Act, Chapter 418, General Statutes

Health Clubs Act, Chapter 420, General Statutes

Controlled Substance Registration Act, Chapter 420c, General Statutes

State Child Protection Act, Chapter 420d, General Statutes

Unfair Trade Practices Act, Chapter 735a, General Statutes

Home Solicitations Sales Act, Chapter 740, General Statutes

Automobile Warranties Act ("Lemon Law"), Chapter 743b, General Statutes

All statutes administered by the occupational licensing boards which, pursuant to section 21a-6, General Statutes, are assigned to the Department of Consumer Protection

He also supervises personnel of the Attorney General's Office and the Department of Consumer Protection who jointly administer the Solicitation of Charitable Funds Act, Chapter 419d, General Statutes.

Finally, as authorized by subsection 51-285(b), General Statutes, the Chief State's Attorney has appointed him a special assistant state's attorney to prosecute regulatory crimes arising in the consumer protection area.

While the Ethics Commission was asked to explain how subsection 1-84b(b) will apply to a number of situations, it should be appreciated that there are other rules by which an attorney leaving a position in the executive branch of State Government after January 7, 1987, must abide.

He may not disclose or use confidential information gained in the course of and by reason of his official duties for the financial gain of anyone. Subsection 1-84a, General Statutes (a statutory provision currently in effect).

He may never represent anyone other than the State concerning any particular matter in which he participated personally and substantially while in State service and in which the State has a substantial interest. Subsection 1-84b(a), General Statutes, effective January 7, 1987.

Furthermore, the Rules of Professional Conduct, applicable to any attorney practicing in Connecticut, may impose greater restrictions on an attorney who leaves State service than does the Code of Ethics for Public Officials. Particularly likely to bear on the former State servant's private practice are: Rule 1.11, Successive Government and Private Employment, 1 Conn. Practice Bk. _____ and Rule 1.9, Conflict of Interest: Former Client, 1 Conn. Practice Bk. _____.

Addressing the questions upon which advice has been requested, and assuming that any representation is compensated

1. Am I a state employee covered by the terms of the statute?

A. Yes. Subsection 1-79(k), General Statutes.

2. What is meant by the phrase "represent anyone...before the...office?"

A. The language has the same meaning as that in subsection 1-84(d), General Statutes, concerning appearing or taking any other action on behalf of another before the listed agencies. You may not reveal your involvement in the matter by a physical appearance before the office involved, by submitting a document on which your name appears, by making a telephone call during which you identify yourself, or by other action which discloses to the office that you represent someone in the case. See Ethics Commission Advisory Opinion No. 79-6, 40 Conn. L. J. No. 38, p. 27 (March 20, 1979).

More particularly, if I, as a licensed attorney within this state, become a member or associate of a law firm, or an employee of a corporation:

a. May I represent a client in any court, state or federal, if said client is sued by the State of Connecticut, Office of the Attorney General?

A. Yes, insofar as subsection 1-84b(b) is concerned. The forum before which you would be appearing is the court, not the Office of the Attorney General. Events are being overseen by other than your former agency.

b. May I represent a client that wishes to file a complaint against any agency, board, commission, council, office, or employee thereof, with either a state or federal agency, e.g. Claims Commissioner, or in state or federal court, if said agency, board, commission, council, office or employee is represented by the Office of the Attorney General?

A. Yes, insofar as subsection 1-84b(b) is concerned, unless the agency etc. which is hearing the complaint is one in which you were serving upon leaving State service. See the answer to question 3.

c. Does "representing" anyone "before" an office include appearing as an adversary to, or as co-plaintiff or co-defendant with, the Office of the Attorney General in an administrative or judicial action?

A. No, unless the adjudicating or hearing agency is the one in which you were serving upon leaving State service.

d. May I represent a client before any state agency, board, commission, council or office, acting in a rule-making, investigatory, prosecutorial, or adjudicative capacity if said agency, board, commission, council or office is represented by the Office of the Attorney General?

A. Yes, insofar as subsection 1-84b(b) is concerned, unless the hearing or adjudicating agency is the one in which you were serving upon leaving State service.

3. Do I, within the meaning of Conn. Gen. Stat. §1-84b(b), "serve at the time of [my] termination of service" the Office of the Attorney General only, my client agencies as enumerated above, or any agency of the state represented by the Office of the Attorney General?

A. At the time of leaving State service you will have been serving in at least two elements of State government. One is the Office of the Attorney General, which employs you. The other is the joint Office of the Attorney General/Department of Consumer Protection unit which administers the Solicitation of Charitable Funds Act, which you head. You do not "serve in" the Department of Consumer Protection. You have an attorney-client relationship with that Department. Possible service in the Division of Criminal Justice is discussed in the

answer to question 10.

4. If I am disqualified under any factual situation contemplated by Conn. Gen. Stat. §1-84b(b), does such disqualification also disqualify the law firm with which I am associated or of which I am a member?

A. Subsection 1-84b(b) does not disqualify the law firm. (Rule 1-11, Rules of Professional Conduct, might.)

5. What is a matter, within the meaning of Conn. Gen. Stat. §1-84b(b), "in which the state has a substantial interest?"

A. "Matter" should be given its ordinary meaning. Subsection 1-1(a), General Statutes. "Matter" is that "which is, or is to be, considered, dealt with, or carried out; concern; hence, indefinitely, a thing or things". Webster's New International Dictionary 1515 (2d ed. unabr.). "Matter" is intended to be anything before a State agency for advice, consideration, resolution, disposition, etc. It should be construed broadly because subsection 1-84b(b) is not concerned with matters with which a former State employee had some relationship before leaving State service, but the mere fact that the former State employee had been working in a particular agency before terminating State service.

Similarly, "substantial" in "substantial interest" should be construed literally as meaning "of substance". A substantial interest is one of substance, rather than form. It is an interest in a matter before a State agency in which the State has an interest of substance, as opposed to a formal interest, because the matter affects the State's rights, duties, or property in a significant way. For example, if the issue were whether a retired State employee's retirement benefits upon his death go to one person or another, each claiming to be an eligible spouse, or whether the benefits go to a beneficiary or the deceased's estate, the matter is one which the State does not have a substantial interest. It is a stakeholder. It will pay the same amount, whatever the decision, and has only a formal interest in who will receive the benefits. On the other hand, the State would have a substantial interest if the question were whether or not any benefits were due when a retired State employee died. The decision would determine whether or not the State was obligated to pay a benefit.

6. May I represent a client under investigation by the Attorney General under the Connecticut Anti-Trust Act, Conn.

Gen. Stat. §35-42?

A. No, unless the representation consists of advice or assistance such that the fact of the representation is not disclosed to the Office of the Attorney General. The investigation would be a matter before the Office of the Attorney General in which the State has an interest which, because of its duty to protect its citizens from actions in restraint of trade and from monopolies, is substantial. While the matter is being considered in the Office of the Attorney General, obvious representation is forbidden. Should the Attorney General bring an anti-trust action in court, the former State employee could represent his client before that forum insofar as subsection 1-84b(b) is concerned.

7. May I represent a client being evaluated by or seeking certification from the Attorney General under the Lemon Law, Conn. Gen. Stat. §42-182?

A. No. That would be a matter in the Office of the Attorney General in which the State has a substantial interest: ensuring that the informal dispute settlement procedure satisfies the requirements of Federal regulations and State statutes and therefore protects adequately Connecticut citizens who purchase new motor vehicles.

8. May I represent a client involving any charitable trust matter, Conn. Gen. Stat. §3-125?

A. Before the Office of the Attorney General, no. The State is not a stakeholder in the case of charitable trusts, for the public has an interest in them which the Attorney General is directed to protect.

9. May I represent a client involving any matter arising under the Solicitation of Charitable Funds Act, Chapter 419d?

A. Not before the Office of the Attorney General or the joint agency which administers the Act--agencies in which serving upon termination of State service--if the representation is disclosed to the Office or joint agency.

10. May I represent a client charged with any state criminal offense?

A. It depends upon whether you served in the Division of Criminal Justice, and where the representation takes place. It may be possible that a person is designated a special assistant state's attorney as a formality, almost as a courtesy, because

of his position. However, if either you or someone in your department, while you are department head, prosecutes one or more criminal cases you should be considered as serving in the Division of Criminal Justice.

If a person served in the Division of Criminal Justice, as explained above, he could represent a client before a grand jury, bail commissioner, or in State or federal court. If being "charged" with a criminal offense means that the matter has not proceeded beyond action by the Division of Criminal Justice, the person could not represent the client in a manner obvious to the Division.

11. May I represent a client charged with a state criminal offense which I had the authority to prosecute as a special assistant state's attorney?

A. Insofar as subsection 1-84b(b) is concerned, the answer to question 10 applies.

12. May I represent a client before a Department of Consumer Protection Automobile Dispute Settlement [Arbitration] Panel under Conn. Gen. Stat. §42-181, as amended by 1985 Conn. Pub. Acts No. 85-331, §2?

A. Yes, insofar as subsection 1-84b(b) is concerned.

13. Does Conn. Gen. Stat. §1-84b(b) apply to a state employee that terminates state service prior to January 7, 1987, but some portion of the one year period after said termination from state service occurs after January 7, 1987?

A. No. Subsection 1-84b(b) applies only to State employees who leave State service after January 7, 1987, with the one year period commencing upon terminating State service. State employees who leave State service January 7, 1987, or earlier, are not subject to the subsection at all.

The legislature did not discuss subsection 1-84b(b) in the course of enacting it. It accepted the language proposed by the Codes of Ethics Study Committee established by section 7, Public Act No. 82-423. The Study Committee justified enactment of the restriction as follows:

"A second revolving door conflict, actions taken by the employee after leaving government service, is addressed by two types of legislation. The first aims to preclude the former official from exerting undue influence over his former agency, the second from intentionally or subconsciously misusing

confidential information acquired in office.

"Restrictions of the first type are aimed at contact with the former agency, since any contact could result in preferential treatment by virtue of the individual's former status. Whether or not the matter involved is one with which the individual had contact as a public employee is irrelevant. The undue influence guarded against is that which results from mere association with the former agency. In fact this undue influence may be strongest where informal communications between the agency and a former agency employee are concerned since no official records of the contact will be kept. A cooling period combats the exertion of undue influence, since that influence tends to fade with time."

...

"The measures proposed below minimize the opportunity for wrong-doing; they foster public confidence in government by reducing the appearance of impropriety (the focus is on those abuses which would be most visible to the public); and they uphold ethical precepts of the Code by making enforcement easier...." Report to the General Assembly by the Codes of Ethics Study Committee, January 15, 1983, in the course of explaining lines 364-397 of the draft bill submitted with the Report.

Most persons serving in State agencies are likely to develop not only friendships but to acquire debts of obligation from those hired, promoted, or otherwise benefitted by them. Subsection 1-84b(b) should be effective when a person leaves the Department of Environmental Protection, for example, and cannot represent anyone (other than the State) for compensation before that Department during a cooling-off period of one year. A senior member of the Attorney General's Office undoubtedly also will have acquired friendships and IOU's in both the Attorney General's Office and his client department. He would seem likely to be able to exercise, over department personnel from whom he seeks action on behalf of a client and assistant attorneys general who are on the other side of his cases, the influence which subsection 1-84b(b) was intended to prevent. Unless subsection 1-84b(b) is amended, however, the Commission must interpret the language which has been enacted, whatever the legislature intended.

By order of the Commission,

Julie Peck
Chairperson

Dated

Julie Peck
10/6/86