

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2018-4, September 20, 2018

Question Presented: **Petitioner asks whether a professor at the University of Connecticut Health Center may—at the request of a law firm for which he has previously performed work in his state capacity (including work involving the matter at issue)—serve as an expert evaluator and witness in a lawsuit “brought against several individuals in their individual capacity [and not against the State itself] based on their actions while they were State employees employed by the State Department of Correction”**

Brief Answer: **Based on the facts presented, we conclude that the professor may serve as an expert evaluator and witness in the lawsuit—in either his personal or state capacity—provided that he receives no compensation or other financial gain for doing so.**

At its August 2018 regular meeting, the Citizen’s Ethics Advisory Board granted the petition for an advisory opinion submitted by Attorney Donald R. Seifel, Jr. The Board now issues this advisory opinion, which interprets the Code of Ethics for Public Officials¹ (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:

I represent Dr. Julian Ford who is a full-time professor in the Department of Psychiatry at the University of Connecticut Health Center. Dr. Ford has specialized expertise as a licensed clinical psychologist in an area within the field of psychiatry and is a nationally and internationally recognized expert in the diagnosis and treatment of traumatic stress (currently the President-elect of the International Society for Traumatic Stress Studies). Dr. Ford has been asked to serve as both an expert evaluator and expert witness by a plaintiff’s law firm on several cases that are directly related to his area of expertise.

As part of Dr. Ford’s employment with the State of Connecticut (“State”), he has conducted interviews with four of that law firm’s clients and for each client has provided the law firm a report documenting his findings, as well as testifying as an expert witness in court and in depositions for two of the firm’s cases. Dr. Ford has performed these interviews as well as serving as an expert witness in court and depositions

¹ Chapter 10, part I, of the General Statutes.

with the prior knowledge and consent of Dr. David Steffen, his supervisor and Chair of the Department of Psychiatry at the University of Connecticut Health Center. In each instance, the University of Connecticut Health Center invoiced the law firm with respect to the interview fees as well as the expert testimony fees and all such fees were subsequently paid directly to the University of Connecticut Health Center in support of Dr. Ford's faculty appointment, and at no time did Dr. Ford receive any direct economic or other remuneration.

Dr. Ford has now been asked by the same law firm to conduct a second evaluation with one of its clients and to serve as an expert witness for the plaintiff in that personal injury case regarding the psychological trauma which the plaintiff suffered as a result of being assaulted at the York Correction facility. Again, Dr. Ford is employed by the University of Connecticut Health Center. The plaintiff's suit is being brought against several individuals in their individual capacity based on their actions while they were State employees employed by the State Department of Corrections and ostensibly supervising various other State Department of Correction employees that assaulted the plaintiff while she was incarcerated at the York Correction facility. The underlying State Department of Correction employees have all admitted that the assault against the plaintiff occurred. The State is not a named defendant in this case; however, the State through the Attorney General's Office may intend to represent the individual defendants and may indemnify these individuals per Connecticut General Statutes Section 5-141 d. should a jury find against them in the plaintiffs personal injury suit.

Analysis

As to whether Dr. Ford is subject to the Code, the term "State employee" is defined therein to include, among others, "any employee in the executive . . . branch of state government, whether in the classified or unclassified service and whether full or part-time . . ." General Statutes § 1-79 (13). Dr. Ford is (in the petitioner's words) a "full-time professor in the Department of Psychiatry at the University of Connecticut Health Center" (UHC), which—according to the Connecticut State Register and Manual (2017)—is an executive-branch state agency. Clearly, then, he is a "State employee," meaning that he is subject to the Code, including its provisions pertaining to outside employment.

Among those provisions is General Statutes § 1-84 (d), to which the petitioner directs our attention, suggesting that Dr. Ford fits within one of its exceptions. The lengthiest of the Code's conflict provisions, § 1-84 (d) contains two general restrictions:

1. A state employee may not "agree to accept . . . any employment, fee or other thing of value, or portion thereof, for appearing, agreeing to appear, or taking any other action on behalf of another person" before the 11 enumerated state regulatory agencies.²

² The 11 state regulatory agencies listed in § 1-84 (d) include:

the Department of Banking, the Office of the Claims Commissioner, the Office of Health Care Access division within the Department of Public Health, the Insurance Department, the Department of Consumer Protection, the Department of Motor Vehicles, the State Insurance and Risk Management Board, the Department of Energy and Environmental Protection, the Public Utilities Regulatory Authority, the Connecticut Siting Council or the Connecticut Real Estate Commission

2. A state employee may not “be a member or employee of a partnership, association, professional corporation or sole proprietorship which [entity] . . . agrees to accept any employment, fee or other thing of value, or portion thereof, for appearing, agreeing to appear, or taking any other action on behalf of another person” before the 11 enumerated state regulatory agencies.

As for second restriction, there are no facts before us suggesting that, in performing the proposed work for the law firm, Dr. Ford would become one of its “member[s] or employee[s].” That said, even if the law firm is in the business of representing clients before any of the 11 enumerated state regulatory agencies, the second restriction is not triggered here. Nor is the first restriction triggered, as it applies only to compensated appearances and actions *before the 11 enumerated state regulatory agencies*—none of which are involved here. That is, the proposed work would involve Dr. Ford appearing—not before any of those agencies—but before the Superior Court in a personal-injury case. Given, then, that neither of § 1-84 (d)’s restrictions is triggered here, there is no need for us to determine whether Dr. Ford satisfies any of its exceptions.

Even so, Dr. Ford’s proposed work for the law firm must still be analyzed in the light of the Code’s principal outside-employment provisions, subsections (b) and (c) of § 1-84. Under § 1-84 (b), a state employee may not “accept other employment which will either impair his independence of judgment as to his official duties or employment” And under § 1-84 (c), a state employee may not “use his public office or position . . . to obtain financial gain for himself” Subsections (b) and (c) of § 1-84 “do not prohibit a state employee from using his . . . expertise, including expertise gained in state service, for personal financial gain as long as no provision of the Code . . . is violated. . . .” Regs., Conn. State Agencies § 1-81-17.

Those provisions were applied to somewhat similar situations in a few informal staff opinions issued by the former State Ethics Commission (SEC):

- *SEC Request for Advisory Opinion No. 0891 (1992)*: A supervising chemist at the Department of Health Services Laboratory asked if he could “accept outside employment as a consultant and expert witness in the area of forensic science,” and the answer was this: “[Y]ou might be able to provide expert testimony in a civil action between two private parties involving a car accident, in which the cause of action is in dispute. *As long as the state clearly has no substantial interest in the matter*, your expert testimony would not violate the . . . Code.” (Emphasis added.)
- *SEC Request for Advisory Opinion No. 1286 (1994)*: An employee of the Department of Mental Retardation (DMR) asked whether she could “accept outside employment as a consultant in a lawsuit, brought by the parents of a DMR client who died a few years ago, against the treating doctor and hospital,” and the answer (in relevant part) was this: If “the attorney has asked you to participate *because your presence might appear to lend the imprimatur of the DMR to his suit*, your acceptance of the employment would be an improper use of office for financial gain.” (Emphasis added.)
- *SEC Request for Advisory Opinion No. 3068 (2002)*: An assistant attorney general asked if a training officer with the Connecticut Police Academy could accept outside employment as an expert witness in a case against the State of Connecticut brought by “the estate . . . of a man who died while undergo-

ing pre-employment physical assessment testing for the Department of Corrections,” and the answer (in relevant part) was this: “[I]t is apparent from his resume that [the training officer] has significant experience testifying as an expert witness. However, it is 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.* Consistent with that notion, there is little doubt in my mind that *at least one of the reasons that the Estate hired [the training officer] is because of his State position, i.e., his State position adds credibility to his testimony in support of a claim against the state.*” (Emphasis added.)

Here, although the State of Connecticut is not a named defendant in the lawsuit, the case involves *state* employees and their supervision of other *state* employees at a *state* facility. Indeed, the petitioner notes that the “State through the Attorney General’s Office may intend to represent the individual defendants and may indemnify these individuals . . . should a jury find against them in the plaintiff’s personal injury suit.” That said, we certainly cannot say (in the words of the first informal staff opinion discussed above) that “the state clearly has no substantial interest in the matter.” Not only that, it can be argued (to paraphrase the third informal staff opinion) that Dr. Ford’s position with the State “will add credibility to his work for” the law firm and its client, especially given that the lawsuit involves state employees and a state facility. It also can be argued (in the words of the second informal staff opinion) that Dr. Ford’s “presence might appear to lend the imprimatur of” the UCHC to the lawsuit.

We need not decide, though, whether those factors alone would constitute a use-of-office violation under § 1-84 (c), for there is another factor that tips the scales decisively in that direction: that Dr. Ford has already performed work for this law firm—indeed, work involving the very client at issue—and has done so (says the petitioner) “[a]s part of [his] employment with the State” That is, *in his capacity as a UCHC employee*, Dr. Ford “has conducted interviews with four of that law firm’s clients and for each client has provided the law firm a report documenting his findings, as well as testifying as an expert witness in court and in depositions for two of the firm’s cases.” And now, the law firm has asked him “to conduct *a second evaluation* with one of its clients and to serve as an expert witness for the plaintiff in that personal injury case” (Emphasis added.) For him to switch hats now and perform such work as outside “employment” would, we believe, constitute a use of office in violation of § 1-84 (c), particularly when combined with the other factors discussed above.

But our inquiry does not end there, for the term “employment,” as used in our outside-employment provisions, is defined by way of regulation as follows:

the term employment shall be construed to include any work or endeavor, whatever its form, undertaken *in order to obtain financial gain* (e.g., employee of a business, sole practitioner, independent contractor, investor, etc.). The term shall not, however, include any endeavor undertaken only as a hobby or solely for charitable, educational, or public service purposes, when no compensation or other financial gain for the individual . . . is involved.

(Emphasis added.) Regs., Conn. State Agencies § 1-81-14. Here, then, there would be no violation of § 1-84 (c) if Dr. Ford were to undertake the proposed work for the law firm—in either his private or state capacity—“for no compensation or other financial gain” After all, “[t]he conflict of interest provisions of the Code

. . . are all grounded on one rationale: public service is a public trust and must not be used for personal financial gain. *Absent this requisite gain, the tenets of the Code do not apply and the jurisdiction of [this office] is lacking.*” (Emphasis added.) Advisory Opinion No. 91-4.

Conclusion

Based on the facts presented, we conclude that Dr. Ford may, without violating the Code, serve as a consultant and expert witness in the lawsuit—in either his personal or state capacity—provided that he receives no compensation or other financial gain for doing so.

By order of the Board,

Dated 9/20/2018

/s/ Dena M. Castricone
Chairperson

Notice of Reprimand of Attorney

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by reviewing committees of the Statewide Grievance Committee:

Reviewing Committee Reprimand

August 10, 2018: Thomas Patrick Willcutts, Hartford, Connecticut – 302886

Copies of the full text of the decision of the Statewide Grievance Committee is available through the Committee's offices at Second Floor, Suite Two, 287 Main Street, East Hartford, Connecticut 06118-1885. The fee for copies is \$.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Michael P. Bowler

Statewide Bar Counsel
