

NOTE: The following is a draft response to a request for an advisory opinion prepared for consideration by the Citizen's Ethics Advisory Board. It does not necessarily constitute the views of the Board.

TO: Board Members

FROM: Peter Lewandowski, Assistant General Counsel

RE: RAO 4580

DATE: January 19, 2007

INTRODUCTION

The Citizen's Ethics Advisory Board (Board) issues this advisory opinion in response to a request by Thomas K. Jones, Ethics Enforcement Officer with the Office of State Ethics (OSE). In that request, he asked whether his continuing involvement in an adjunct teaching position at the University of Connecticut School of Law (Law School) in any way violates the Code of Ethics for Public Officials (Code of Ethics).

RELEVANT FACTS

The following facts, presented in the request, are relevant to this opinion. Attorney Jones accepted the position of Ethics Enforcement Officer with the OSE this past fall. In his position as the Ethics Enforcement Officer, he is charged with the duty to monitor compliance with the Codes of Ethics and is solely responsible for initiating investigations of ethics violations by the regulated community, which includes, among others, public officials and state employees.

During the past six years, Attorney Jones has been an adjunct professor of law at the Law School during the spring semesters, teaching the second semester of "The Lawyering Process," a mandatory first-year lawyering-skills class. The class is a year-long course designed to introduce law students to fundamental skills of the profession – interviewing, negotiating, counseling, writing, oral advocacy, analysis and organization of legal issues, among others. Attorney Jones' teaching and class preparation duties have not interfered with his full-time employment in the past.

The Law School is a state institution which employs eight to twelve adjunct professors who are paid a nominal sum for teaching the lawyering skills course. All adjuncts teach the same curriculum and have full-time jobs in the field of law. Some adjuncts, including Attorney Jones, practice law in state government. As an adjunct professor, Attorney Jones is evaluated each year by both the students and the Director of the Lawyering Process Program, and, based on those evaluations, he is asked to return the following academic year. The evaluations are entirely merit based, and the criteria are entirely related to the ability of the adjunct to teach the curriculum.

Before accepting the position of the Ethics Enforcement Officer, the Law School had asked Attorney Jones to return to teaching the Lawyering Process class for the spring of 2007 under the same terms and conditions as in the past, and he accepted the offer. Attorney Jones indicated that the information covered in the class has nothing to do with the OSE or governmental ethics and that he will not receive anything of value other than the small salary received by all the adjuncts.

QUESTION

Attorney Jones asks whether it is permissible, under the Code of Ethics, for the Ethics Enforcement Officer of the OSE to continue to engage in other employment as an adjunct professor at the Law School without violating the Code of Ethics.

ANALYSIS

Although the Code of Ethics does not prevent a state employee from using his professional expertise for financial gain, it does contain significant restrictions on other employment. First, a state employee may not accept other employment that will impair his independence of judgment as to his state duties, or that will induce him to disclose confidential information acquired during the course of state work. General Statutes § 1-84 (b). Second, a state employee may not use his state position or confidential information acquired in the course of state duties for financial gain. General Statutes § 1-84 (c). Generally, those restrictions are violated when a state employee accepts employment with an individual or entity that can benefit from his official actions (e.g., the individual in his state capacity has specific regulatory, contractual, or supervisory authority over the other employer). Regs., Conn. State Agencies § 1-81-17.

In addition to the restrictions imposed by § 1-84 (b) and (c), there are specific statutory provisions imposed on the employees of the OSE in General Statutes § 1-80 (h) of the Code of Ethics. Specifically, the board members and staff of the OSE shall, among other things, “ (1) [o]bserve high standards of conduct so that the integrity and *independence* of the Citizen's Ethics Advisory Board and the Office of State Ethics may be preserved; (2) respect and comply with the law and conduct themselves at all times in a manner which *promotes public confidence in the integrity and impartiality* of the board and the Office of State Ethics.” (Emphasis added.) General Statutes § 1-80 (h).

The former State Ethics Commission (former Commission) concluded on numerous occasions that it is an impermissible conflict of interest for state supervisory and regulatory personnel to accept outside or other employment with individuals or entities they are authorized to regulate. One particular case which is most salient to the issues presented here is illustrated in Advisory Opinion No. 93-1. In that case, the former Commission ruled that the Executive Director of the Judicial Review Council was prohibited from pursuing active practice as a litigation attorney. It reasoned that the executive director's role as the investigator of claims of alleged misconduct against, among others, appellate and trial court judges, is a vital and highly sensitive one. In

comparing its own duties and responsibilities to the Judicial Review Council, the former Commission concluded that “just as it would be inappropriate for [its own] attorneys to appear before those they regulate, so it is inappropriate for the Judicial Review Council executive director – whose statutory responsibilities include the ability to investigate complaints filed with the Judicial Review Council – to appear as a paid legal representative before the very individuals he regulates.” Advisory Opinion No. 93-1.

The impermissible conflict of interest for state supervisory and regulatory personnel to accept outside or other employment with individuals or entities they regulate is further underscored in Advisory Opinion No. 92-20. In that case, an employee of the state Department of Higher Education asked whether it was permissible to accept other employment as a part-time teacher at a public institution of higher learning in the state of Connecticut. Because the Department accredits and implements policies which affect institutions of higher learning in Connecticut, the former Commission concluded that “employees who are in a position to make, [or] contribute to, Department decisions regarding such policies, will be precluded from accepting employment with a Connecticut institution of higher education, either public or private, on the ground that their independence of judgment would be impaired.” *Id.*

Although the regulatory, supervisory and contractual powers of the Department of Education employees discussed in the above-cited opinions may be broad, the scope of Attorney Jones’ regulatory authority as the Ethics Enforcement Officer cannot be underestimated. The authority bestowed on the newly-created position of the Ethics Enforcement Officer is unique and unprecedented. As the Ethics Enforcement Officer of the OSE, he is charged with the supervision of the enforcement division. General Statutes § 1-81 (f). In that capacity, he has the non-delegable powers to file complaints and initiate investigations of ethics violations against public officials and state employees. General Statutes § 1-82 (a) (1). In addition, the Board recently interpreted the settlement provision of the Code of Ethics to allow the Ethics Enforcement Officer to resolve complaints prior to a finding of probable cause without the Board’s approval. Advisory Opinion No. 06-8. In essence, under current statutory provisions, the Ethics Enforcement Officer is the sole person in state government with the exclusive power to issue complaints and initiate investigations against all state employees, including those who work at the Law School. In other words, the position of the Ethics Enforcement Officer places Attorney Jones in a very similar situation faced by the executive director of the Judicial Review Council, whose statutory responsibilities of regulatory oversight and, in particular, the ability to initiate investigations of judicial misconduct were deemed to be non-delegable and inherently in conflict with the proposed outside/other employment.

Despite the fact that Attorney Jones’ position as an adjunct professor at the Law School may require limited interaction with the administration and full-time faculty members, he could still face a potential situation in which he must decide whether to prosecute a fellow Law School employee (including the Director of the Lawyering Process Program and the Dean of the Law School who supervise him) for alleged ethics violations. Unlike his previous full-time state employment, Attorney Jones now has

direct regulatory powers over his fellow state employees and public officials and their compliance with the state ethics laws. Therefore, it is impossible to ignore, or minimize, the Ethics Enforcement Officer's prosecutorial powers vis-à-vis his adjunct teaching position when the possibility of the inadvertent use of office for financial gain and impairment of independence of judgment is real, irrespective of their unlikely occurrence.

Further, the language of § 1-80 (h) places the Ethics Enforcement Officer under a very high level of scrutiny that transcends the monetary considerations implicit in the prohibitions under § 1-84 (b) and (c) of the Code of Ethics. The overarching consideration applicable to Attorney Jones' situation, of which the inadvertent use of office and impairment of independence of judgment is an integral part, is the impact on the public confidence in the independence and impartiality of the Ethics Enforcement Officer and ultimately the Board. The demands of such independence and impartiality in light of the statutory duties and responsibilities of the Ethics Enforcement Officer could be tested under a number of possible scenarios applicable to Attorney Jones' proposed teaching position irrespective of whether such position is pursued on a paid or voluntary basis. For example, his teaching position could inhibit him from acting on ethics violations by law school employees because of the chilling effect his OSE authority and actions could have on his professional relationship with the Law School administration and fellow faculty members. Other inhibitive factors that could play a role in his reluctance to prosecute fellow state employees for ethical violations could be, among other things, a possible loss of the current teaching position, inability to obtain a better or different class of students, or failure to secure future academic appointments, whether under the same or more beneficial terms and conditions.

Consequently, regardless of Attorney Jones' unquestionable honesty, integrity, and good faith intentions in performing his duties as regulator, the fact is that public confidence in his independence and impartiality could be questioned. In addition, the possibility of the inadvertent use of office and impairment of independence of judgment are real and exist particularly when one is faced with calculating personal costs and benefits while carrying out one's official duties and obligations. Without restrictions on the proposed other employment, for example, the OSE Ethics Enforcement Officer arguably could not be prevented from pursuing outside employment with a registered lobbyist, since both state employees and registered lobbyists fall under his regulatory purview.

CONCLUSION

It is the opinion of the Citizen's Ethics Advisory Board that Attorney Jones' proposed adjunct teaching position at the Law School is impermissible under the Code of Ethics whether such position is pursued on a paid or voluntary basis while serving as the Ethics Enforcement Officer of the OSE.