

DOCKET NO. HHD-CV-10-6008194-S

SUSAN BYSIEWICZ,  
in her individual capacity

SUPERIOR COURT  
J.D. OF HARTFORD

VS.

NANCY DINARDO, in her official capacity as  
Chair of the Connecticut Democratic Party and  
State Democratic Central Committee,  
THE CONNECTICUT DEMOCRATIC PARTY,  
and THE STATE OF CONNECTICUT/OFFICE  
OF THE SECRETARY OF THE STATE.

APRIL 9, 2010

**PLAINTIFF'S TRIAL BRIEF**

This case concerns (1) whether the plaintiff, a candidate for attorney general who has been a member of the Connecticut Bar in good standing since 1986, and Secretary of the State since 1999, has "at least ten years active practice at the bar of the state" as required by Conn. Gen. Stat. § 3-124, and (2) whether these statutory requirements for the office of Attorney General violate Article Sixth, § 10 of the Connecticut Constitution.

In deciding both of the plaintiff's claims – statutory and constitutional – this Court must resolve any doubt in her favor because of the well-settled presumption of eligibility for office. In a democracy, it is for the voters to decide whom they want to represent them and only the most compelling legal argument to the contrary should deny them that right:

Since the right to participate in the government is the common right of all, it is the unqualified right of any eligible person within the state to aspire to any of these offices, and equally the unqualified right of the people of the state to choose from among those aspiring the persons who shall hold such offices. It must follow from these considerations that eligibility to an office in the state is to be presumed rather than to be denied, and must further follow that any doubt as to the eligibility of any person to hold an office must be resolved against the doubt.

*Gerberding v. Munro*, 949 P.2d 1366, 1373 (Wash. 1998) (quoting a 1930 Washington case); accord, *Carter v. Commission on Qualifications of Judicial Appointments*, 93 P.2d 140 (Calif. 1939) (“[a]mbiguities are to be resolved in favor of eligibility to office”); *Cathcart v. Meyer*, 88 P.3d 1050, 1070 (Wyo. 2004) (adopting policy that “there is a strong presumption in favor of eligibility for office”); *Cannon v. Gardner*, 611 P.2d 1207, 1211 (Utah 1980) (“there is a presumption in favor of eligibility of one who has been so chosen and elected to public office, and any doubts as to such eligibility should be resolved in his favor”); *Scharn v. Ecker*, 218 N.W.2d 478, 480 (S.D. 1974) (same).

**I. The plaintiff satisfies the requirements of Conn. Gen. Stat. § 3-124 to serve as Attorney General because she is an elector and an attorney who has engaged in active practice at the bar of this state for more than ten years.**

Conn. Gen. Stat. § 3-124 requires the Attorney General to “be an elector of this state and an attorney at law of at least ten years’ active practice at the bar of this state.” Based on her eleven years of service as Secretary of the State and six years in private practice in Connecticut, the plaintiff more than meets the requirement of “ten years’ active practice at the bar of this state.” She therefore is qualified to serve as Attorney General.<sup>1</sup>

Section 3-124 does not define “active practice”. However, numerous legal authorities make it clear that the proper construction of “active practice” encompasses a broad spectrum of legal work and is not limited merely to appearing in court or representing clients

The basic principles governing statutory construction are well-settled:

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<sup>1</sup> It is undisputed that the plaintiff is “an elector,” as she resides and is registered to vote in Middletown and is over the age of eighteen. Similarly, the evidence will definitively establish that the plaintiff has been an attorney at law admitted to the Connecticut Bar since 1986.

When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.

*Goldstar Medical Services, Inc. v. Dept. of Social Services*, 288 Conn. 790, 802-03 (2008)

(ellipses in original).

The first tool of construction, the text of § 3-124, provides some indication of the considerable breadth of the term “active practice”. Webster’s Dictionary defines “active” as “engaged in an action or activity,” and “practice,” in this context, as “the exercise of a profession or occupation”. Webster’s Third New International Dictionary (Unabridged), pp. 22, 1780 (2002 Ed.). Thus, rather than delineating a specific type or types of experience required of the Attorney General – for example, by requiring the handling of a certain number of court cases, or specialization in a certain kind of legal work – the plain language § 3-124 simply requires engagement in the profession of being an attorney for ten years. Although these common definitions do not directly address the question of what being an attorney encompasses, it is hard to imagine broader language.<sup>2</sup>

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<sup>2</sup> Other, more specialized definitions augment this construction. For example, Black’s Law Dictionary defines “[p]ractice of law” as “[t]he rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent. It is not limited to appearing in court, or advising and performing of services in the conduct of the various shapes of litigation . . . and in larger sense *includes legal advice and counsel* and preparation of legal instruments by which legal rights and obligations are established.” BLACK’S LAW DICTIONARY, p. 813 (Abr. 6<sup>th</sup> Ed. 1991) (emphasis added).

There is no legislative history for § 3-124, and its requirement of “ten years’ active practice” has not changed since the statute was enacted in 1897. However, another tool of statutory construction, that of related common law principles, makes it clear that: (1) “active” does not mean that a certain amount of time, or certain percentage of daily activity, must be spent actually practicing law; and (2) “practice” of law means far more than just appearing in court or representing clients.

When the legislature enacted § 3-124, the governing rules of practice – the 1890 Rules – contemplated only two possible statuses for an attorney: admitted to the bar, and suspended or displaced. See 1890 Rules of Practice, 58 Conn. 561, 589-92. The binary system in place in 1897 makes it likely that the drafters of § 3-124, who are presumed to have been aware of relevant legal principles applicable to their statutory enactments, used the term “active” in the sense of being admitted to the bar and not suspended or displaced, and nothing more. Had the legislature meant something more than that, given the extant rules of practice, it likely would have gone into detail as to what sort of activity level was necessary to serve as Attorney General. As such, and in light of the effect that the constitutional presumption of eligibility for office must have on this Court’s construction of § 3-124, “active” should not be taken to mean that a certain number of hours, or percentage of time, must be spent on the practice of law.

Even if this Court considers the evolving statuses of lawyers since 1897, that evolution assists the plaintiff. The current rules contain four possible statuses: active member in good standing, retired under Practice Book § 2-55, inactive under Practice Book § 2-56, and suspended or disbarred. A retired lawyer “shall no longer be eligible to practice law in this state.” P.B. § 2-55. Likewise a lawyer in inactive status today “shall be

precluded from practicing law.” P.B. § 2-56. Thus “active” status today, as in 1897, simply means eligible to practice law and is distinguished from those statuses in which one is not eligible to practice law.

In terms of what constitutes practice itself, one instructive related principle comes from decisions concerning the unauthorized practice of law. In that context, the Supreme Court frequently has noted: “Attempts to define the practice of law have not been particularly successful. The reason for this is the broad field covered.” *Statewide Grievance Committee v. Patton*, 239 Conn. 251, 254 (1996). In *Patton*, the Court went on to hold: “The practice of law consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It *embraces the giving of legal advice on a variety of subjects* and . . . require[s] in many aspects a high degree of legal skill and great capacity for adaptation to difficult and complex situations.” *Id.* at 254-55 (emphasis added); see also Connecticut Bar Association Professional Ethics Committee Formal Op. 48 (2003) (“legal research, advice and document drafting” constitute practice of law). Among the activities held by the Court to be covered by this extremely broad standard are the preparation of legal documents; see *Patton*, 239 Conn. at 255; legal advice as to the proper elements of trusts and wills; see *Grievance Committee v. Dacey*, 154 Conn. 129, 142-44 (1966); and the giving of certificates as to the validity of land titles; see *Grievance Committee of the Bar of New Haven County v. Payne*, 128 Conn. 325, 330 (1941).

Section 2-44A(a) of the Practice Book offers a similarly broad view. It states:

The practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person. This includes, but is not limited to: . . .

(2) Giving advice or counsel to persons concerning or with respect to their legal rights or responsibilities or with regard to any matter involving the application of legal principles to rights, duties, obligations or liabilities.

Practice Book § 2-44A(a).

The Preamble to the Rules of Professional Conduct echoes § 2-44A(a):

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As evaluator, a lawyer examines a client's legal affairs and reports about them to the client or to others on the client's behalf. . . .

As a public citizen, a lawyer *should seek improvement of the law*, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, *employ that knowledge in reform of the law* and work to strengthen legal education.

Preamble to the Rules of Professional Conduct (emphasis added).

Two particular aspects of this broad notion of the practice of law are of particular significance for this case: the giving of legal advice concerning legal rights, obligations and principles and efforts to seek improvement of and reform the law. As discussed below, these are core tasks performed on many occasions by the plaintiff during her eleven years as Secretary of the State.

Other states have a similar understanding of the wide scope of activities that are the practice of law. The Ohio Supreme Court recently noted, in language similar to that of *Patton, supra*, that

[t]he practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, *and in general all advice to clients and all action taken for them in matters connected with the law.*

*Disciplinary Counsel v. Brown*, 905 N.E.2d 163, 168 (Ohio 2009) (emphasis added).

Numerous other courts have held, like *Patton* and *Brown*, that the giving of legal advice constitutes the practice of law. See, e.g., *In re Evans*, 413 B.R. 315, 325 (Bankr. E.D. Va. 2009) (“[i]n Virginia, one is considered to be practicing law when he furnishes another advice or service under circumstances which imply his possession and use of legal knowledge or skill”); *People v. Harris*, 915 N.E.2d 103, 109 (Ill. App. Ct. 2009), *appeal denied*, 235 Ill.2d 596 (2010) (“[t]he practice of law includes the giving of advice or the rendition of any service requiring the use of any degree of legal knowledge or skill”); *In re Wiles*, 210 P.3d 613, 618 (Kan. 2009) (practice of law “in a larger sense . . . includes legal advice and counsel”); *In re Reynoso*, 477 F.3d 1117, 1125 (9th Cir. 2007) (“California courts have long accepted that, in a general sense, the practice of law includes legal advice and counsel”); *People v. Shell*, 148 P.3d 162, 174 (Colo. 2006) (“one of the touchstones of Colorado’s ban on the unauthorized practice of law is an unlicensed person offering advice or judgment about legal matters to another person for use in a specific legal setting”); *Oregon State Bar v. Taub*, 78 P.3d 114, 116 (Or. Ct. App. 2003) (practice of law includes “advice given that involves the application of legal principles”).<sup>3</sup>

<sup>3</sup> The method of defining the practice of law varies from state to state. Some states have codified a similarly broad definition of the active practice of law by statute or court rule. See, e.g., Ky. Sup. Ct. R. § 3.020 (“[t]he practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy *in or out of court*, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services”) (emphasis added); Md. Code Ann., Bus. Occ. & Prof. § 10-

Moreover, the giving of such advice does not have to be in the traditional context of a law office to constitute the practice of law. As the Florida Supreme Court noted:

[I]t is not the nature of the agency or body before which the acts are done, *or even whether they are done before a tribunal of any sort or in the private office of an individual*, that determines whether that which is done constitutes the practice of law. *The best test, it seems to us, is what is done, not where, for the safest measure is the character of the acts themselves.* If they constitute the practice of law the fact that they are done in the private office of the one who performs them or before a nonjudicial body in no way changes their character.

*The Florida Bar re Advisory Opinion on Nonlawyer Representation in Sec. Arbitration*, 696 So.2d 1178, 1181-82 (Fla. 1997) (emphasis added); see Ky. Sup. Ct. R. § 3.020, *supra*, n.3.

In addition to giving advice on legal issues, and offering a learned opinion concerning the meaning or interpretation of the law, advocating for changes to, or reform of, the existing law can constitute the practice of law. Although no Connecticut court has addressed this question, the California Supreme Court did in *Baron v. City of Los Angeles*, 469 P.2d 353 (Cal. 1970). In *Baron*, the Court considered whether lobbying activities constitute the practice of law and recognized that

It is difficult to draw logical distinctions among the varied services performed by lawyers for their clients and to determine that only some of the services constitute the "practice of law." In a pragmatic sense, the practice of law encompasses all of the activities engaged in by attorneys in a representative capacity, *including legislative advocacy.*

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101(h)(1) (practice of law includes "giving legal advice"); Miss. Code Ann. § 73-3-120 ("practice of law" shall include any person holding himself out as a practicing attorney or *occupying any position* in which he may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document or law") (emphasis added); N.D. Adm. to Prac. R. 3.1 §1-B-1 ("The 'active practice of law' means that an attorney has been engaged in the practice of law, which includes private practice, house counsel, public employment, or academic employment"); Wyo. R & Proc. R. 303 ("active, authorized practice of law" includes "[f]urnishing legal counsel," and "[i]nterpreting and giving advice regarding the law and legal issues").

*Id.* at 357 (emphasis added). The Court went on to note, as in many of the above cases, “that the resolution of legal questions for another by advice and action is practicing law if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind.” *Id.* at 358 (quotation marks omitted).

The Preamble to the Rules of Professional Conduct supports this view. The Preamble expressly states that one of a lawyer’s roles is to serve as a public citizen concerned with the improvement of our legal system – and that in this role, “a lawyer should seek improvement of the law . . . and employ that knowledge in reform of the law.” Preamble, *supra*. Legislative advocacy encompasses both of these activities.

Further, that the Secretary of the State does not have to be an attorney does not alter the conclusion that the plaintiff was actively practicing law by performing these functions. Lay people often engage in activities which, were they to be performed by an attorney, would constitute the practice of law. See *Benninghof v. Superior Court*, 136 Cal. App. 4<sup>th</sup> 61, 69 (Cal. Ct. App. 2006) (representation of another at state administrative hearing practice of law even though non-lawyers are authorized to do so because “laypeople may practice law when authorized pursuant to statute or court rule”); *Gmerek v. State Ethics Comm’n*, 751 A.2d 1241, 1257 (Pa. Commw. Ct. 2000) *aff’d*, 807 A.2d 812 (Pa. 2002) (“it is clear that there are activities that may properly be performed by nonlawyers which are considered to be the ‘practice of law’ when performed by lawyers”).

In *Goldenberg v. Corporate Air, Inc.*, 189 Conn. 504 (1983), overruled on other grounds by *Burger & Burger, Inc. v. Murren*, 202 Conn. 660 (1987), an adjuster employed by an insurance company happened to be a lawyer. While adjusters obviously do not need to be lawyers, the fact that the adjuster was one made him subject to the Rules of

Professional Conduct, and specifically in that case to the conflict of interest rules. Likewise in *In re Darlene C.*, 247 Conn. 1 (1998), a non-lawyer was authorized by statute to file termination of parental rights petitions in the Superior Court, even though that would obviously constitute the practice of law if performed by a lawyer. See also *Grievance Committee v. Payne*, supra (title search and certification of title held to be practice of law).

In sum, the term “active practice” encompasses a wide variety of activities and is not limited to appearing in court or representing clients. So long as the endeavor demands the “reasonably demand the application of a trained legal mind,” *Baron*, 469 P.2d at 358, a lawyer performing it is engaged in the active practice of law.

Section 3-124 also does not define “at the bar of this state”. The most sensible construction of that phrase, based on the tools of statutory construction discussed above, is that “at the bar of this state” means that the attorney in question must be a member in good standing of the Connecticut bar during the ten (or more) years when she engaged in the active practice of law.

First, the language of the statute governing the admission of attorneys and the unauthorized practice of law in effect in 1897, General Statutes § 784, supports this construction because it contains a crucial extra word before “at the bar,” namely, “plead”. See *Tayco Corp. v. Planning & Zoning Comm’n of Wallingford*, 294 Conn. 673, 679 (2010) (relationship to other statutes one of the primary tools of statutory construction). At the time when the legislature enacted § 3-124, § 784 provided: “The superior court may admit and cause to be sworn as attorneys such persons as are qualified therefor, agreeably to the rules established by the judges of said court; and no other person than an attorney so admitted shall *plead* at the bar of any court in this state, except in his own cause; and said

judges may establish rules relative to the admission, qualifications, practice, and removal of attorneys.” § 784 (emphasis added) (quoted in *Fairfield County Bar v. Taylor*, 60 Conn. 11 (1891)). Note the use of the additional word “plead” in § 784 – a word that is notably absent from § 3-124 – when discussing actual appearance in court by an attorney. Had the legislature intended for § 3-124 to require something more than bar membership, in particular appearing in court, it would have included similar language in § 3-124. That the legislature chose not to do so speaks volumes.<sup>4</sup>

Several Supreme Court decisions imply a similar result. In *Application of Courtney*, 162 Conn. 518 (1972), for instance, the Supreme Court considered the appeal of an individual whose temporary license to practice law had been revoked because he had attended an unaccredited law school. *Id.* at 519-21. In the course of discussing the origin of the court’s broad authority to suspend or disbar an attorney, the Supreme Court noted: “To disbar, however, is to deprive of the right to appear in court as an attorney . . . and refers to a court’s *rescinding an attorney’s license to practice at its bar . . . .*” *Id.* at 522 (emphasis added; citations omitted). *Courtney* suggests that practice “at” the bar refers to an attorney’s licensure – i.e., his admission to the bar – and cases from the time of the passage of § 3-124 express a similar notion. See, e.g., *Slade v. Harris*, 105 Conn. 436,

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<sup>4</sup> Moreover, construing “at the bar” as used in § 3-124 to require ten years’ worth of trial experience would lead to the irrational result, in the present day, that *only* those attorneys who had spent at least ten years litigating cases in court could serve as Attorney General. Even if that was a necessity at the time of the passage of § 3-124 – because, at that time, the Attorney General did not have subordinates who could appear in court on his behalf – the job of a modern Attorney General is far different. In 2010, an Attorney General supervises a staff of experienced litigators and provides policy direction for the office and the fulfillment of those functions does not require ten years of experience personally trying cases.

445 (1927) (discussion of plaintiff's "standing at the bar" to demonstrate his high reputation as an attorney); *Stoddard v. Sagal*, 86 Conn. 346, 347 (1912) (same).

The present Rules of Practice echo this construction by their use of "at the bar" to indicate only bar membership. See Practice Book §§ 2-16 ("[a]n attorney who is in good standing at the bar of another state"); 2-24 ("[a]n attorney who is admitted to practice at the bar of another state"); 62-8A(b) ("[a]ny attorney who is in good standing at the bar of another state"). All three of these rules use the phrase "at the bar" simply to mean that an attorney is a member of a bar and not that an attorney has practiced in court.

In this case, it is clear that the plaintiff satisfies the requirements of § 3-124. First, simply by virtue of her office, the plaintiff has been required by statute during her entire tenure as Secretary of the State to perform activities that constitute the practice of law. Under Conn. Gen. Stat. §§ 9-3 & 9-4, for instance, the Secretary, as Commissioner of Elections, issues "regulations, declaratory rulings, instructions and opinions" on issues of election law; § 9-3; advises local election officials "in connection with the proper methods of conducting elections and referenda"; § 9-4(1); and prepares "regulations and instructions for the conduct of elections"; § 9-4(2). Likewise, the Secretary oversees the Elections Division, which, pursuant to Title 9 of the General Statutes, has numerous statutory responsibilities as to the conduct of elections and must often provide legal advice, or legal opinions, in the course of the administration of the election process. All of these activities fall squarely within the rubric of "the giving of legal advice on a variety of subjects and . . . require in many aspects a high degree of legal skill and great capacity for adaptation to difficult and complex situations." *Patton*, 239 Conn. at 254-55.

Moreover, the evidence in this case will demonstrate that the plaintiff herself has engaged in the active practice of law, while a member in good standing of the Connecticut bar, for far longer than ten years. First, it is undisputed that the plaintiff was in private practice in Connecticut for six years. From 1988-1992, she worked at Robinson & Cole, practicing corporate and business law; and from 1992-1994, she worked at Aetna Insurance Company, practicing health care law.

Second, during her eleven-plus years as Secretary of the State, the plaintiff has regularly engaged in numerous activities that constitute the practice of law. The plaintiff will present substantial testimony and documentary evidence that she has provided legal advice to constituents, businesses, town election officials and others; worked with the Attorney General's Office with respect to litigation in which the Secretary of the State was a named defendant and with respect to the enforcement of business laws; supervised a staff of 8-12 lawyers and paralegals; collaborated on proposals for draft legislation and regulations relevant to the tasks performed by her office; monitored, analyzed and testified on proposed state and federal legislation that might impact the core functions of her office; and advocated for reform of the law at the state and federal level in areas relevant to the core functions of her office.

These activities certainly come under the extremely broad definition of the practice of law discussed above. The giving of legal advice to constituents, businesses, town election officials and others, for instance, is one of the central functions of an attorney. Likewise, legislative advocacy, in the form of proposals for draft legislation and efforts to reform the law, is one of the legal activities specifically mentioned in the Preamble to our Rules of Professional Conduct. Furthermore, while the word "active" was not included in §

3-124 to require proof of quantity of practice, even if the Court concludes that it was, the evidence will establish that the plaintiff has performed all of these tasks on a regular and consistent basis since she was sworn in as Secretary in 1999.

For those reasons, this Court should hold that the plaintiff satisfies the requirements of § 3-124.

**II. The Statutory Requirements to be Attorney General are Unconstitutional**

In the alternative, the requirements of § 3-124 that the Attorney General of this state have “at least ten years active practice at the bar of this state” violate Article Sixth, §10 of the Connecticut Constitution. Section 10 states:

Every elector who has attained the age of eighteen years shall be eligible to any office in the state, but no person who has attained the age of eighteen shall be eligible therefor, except in cases provided for in this constitution.

Article Fourth, § 1 provides for the office of Attorney General:

A general election for governor, lieutenant-governor, secretary of the state, treasurer, comptroller and attorney general shall be held on the Tuesday after the first Monday of November, 1974, and quadrennially thereafter.

The plaintiff will analyze the constitutional question under the six-prong framework of *State v. Geisler*, 222 Conn. 672, 685 (1992), as the Attorney General did in his Formal Opinion of February 2, 2010 (Formal Op. 2010-001, attached hereto).

**(1) Text**

The text of the Constitution itself is the most important factor in determining what the Constitution means. See *Connecticut Coalition for Justice in Education Funding, Inc. v. Reil*, 295 Conn. 240 (2010). The text of § 10 is emphatic. It starts with “Every elector,”

then continues with “*shall* be eligible to *any* office<sup>5</sup> in the state,” and concludes with “except in cases provided for *in this constitution*.”

“Every” means “all.” See *AvalonBay Communities, Inc. v. Zoning Com’n of Town of Stratford*, 280 Conn. 405, 414 (2006) (using the words “every” and “all” interchangeably); *King v. Board of Education*, 203 Conn. 324, 334 (1987) (same). “Shall” is generally mandatory. *Southwick at Milford Condominium Ass’n, Inc. v. 523 Wheelers Farm Road, Milford, LLC*, 294 Conn. 311, 319 (2009) (“It is well established that the legislature’s use of the word ‘shall’ suggests a mandatory command”). “Any” in this context means “every.” *Gipson v. Commissioner of Correction*, 257 Conn. 632, 640 (2001) (“[T]he word any in statutes is generally used in the sense of all or every and its meaning is comprehensive in scope and inclusive in range . . .”); see also *AvalonBay Communities*, 280 Conn. at 414-15 (noting that the meaning of the word ‘any’ “depends on the context and subject matter of the law” and that “sweeping language” by the legislature “counsels a broad, rather than a narrow, meaning”).

These words of the text make it clear that the exception clause is the *only* exception. The exception clause emphasizes in its specific reference to the Constitution itself that the first clause otherwise brooks no exceptions.<sup>6</sup> See *Blumenthal v. Barnes*, 261 Conn. 434, 462-63 (2002) (applying principle of *inclusio unius est exclusio alterius* to powers of Attorney General’s office).

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<sup>5</sup> The Supreme Court has construed “office” to mean “constitutional office”. *Adams v. Rubinow*, 157 Conn. 150, 176-77 (1968).

<sup>6</sup> The exception clause must refer to the first clause of § 10. See footnote 4, *infra*. The Attorney General’s Opinion does not claim otherwise.

The Constitution does provide for qualifications for some of its offices. The Governor must be at least age 30, and so must the Lieutenant-Governor. Article Fifth, §§ 5, 6. Legislators have residency requirements. Article Third, §§ 3, 4. Judges generally may not hold office after age 70. Article Fifth, § 6. However, the Constitution prescribes no qualifications for the other constitutional officers, including Attorney General. Even the duties of the Attorney General are not constitutionally mandated. The only place where that office is mentioned in the Constitution is in Article Fourth, §1.

The Attorney General's nine-page Opinion spends exactly one sentence on the text of the Constitution:

In the present case, although the text of Article Sixth, § 10, might be read literally to mean that the sole qualification for any office in the state, including Attorney General, is that the candidate be an elector who has attained the age of eighteen, the history of the provision suggests that this reading was not the framers' intent with regard to candidates for Attorney General.

Opinion, page 3. "Might be read literally to mean" is an odd way to start (and end) an analysis of the constitutional text. Odder still is the implication in the last seven words of the sentence that §10 permits statutory qualifications for Attorney General but prohibits them for Governor, Lieutenant-Governor, Secretary of the State, Treasurer and Comptroller. There is no textual basis for such a distinction.

The only reasonable conclusion from reading the text is that it overwhelmingly supports the plaintiff's position that the statutory requirement for the Attorney General to have "at least ten years active practice at the bar of this state" is unconstitutional.

## **(2) Connecticut Appellate Cases**

There are no Connecticut appellate cases construing either Article Sixth, § 10 or Article Fourth, § 1. There is, however, a trial court decision that preliminarily addressed the

very issue in this case. In *Field v. Shaffer*, No. 221180 (Superior Court, J.D. of Hartford), the court (Satter, J.) issued a preliminary mandamus because “the plaintiff [who had been licensed as an attorney for less than 10 years] has made a prima facie case in support of his attack on the constitutionality of § 3-124.”

The Attorney General’s Opinion brushes *Field* aside as offering “no useful guidance” on the constitutional question. But Judge Satter must have thought highly enough of the plaintiff’s argument to grant the extraordinary remedy of a preliminary mandamus.

### (3) Federal Precedent

Federal precedent is highly favorable to the plaintiff because, even without a provision in the United States Constitution analogous to Article Sixth, § 10, the United States Supreme Court has held that the states cannot impose qualifications for a congressional seat that are greater than what the Constitution itself imposes.

In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), the Court invalidated a state constitutional provision setting a term limit for members of Congress. While no federal constitutional provision expressly prevented the states from enacting a term limit, there were federal constitutional provisions establishing certain age, citizenship and residency qualifications. Article I, §§ 2, 3. *U.S. Term Limits* held that those were the only permissible qualifications because “the people should choose when they please to govern them.” *Id.* at 819.

A Superior Court judge examined this issue – the right of the voters to choose whom they please to govern them – in the context of New Haven’s durational residency requirements for mayor in *Schiavone v. DeStefano*, 48 Conn. Sup. 521 (2001) (Blue, J.).

Judge Blue's discussion of the federal precedents and federal history is highly relevant to the present controversy and cannot be improved upon by rephrasing.

Madison recognized in *The Federalist* No. 57 that the rights of electors and candidates are inextricably bound together. "Who are to be the objects of popular choice?" he asked. His answer was, "Every citizen whose merit may recommend him to the esteem and confidence of his country." J. Madison, "The Federalist" No. 57, reprinted in 2 *The Debate on the Constitution* (1993) p. 214. Madison's view was consistent with that of other prominent members of the founders' generation. See *Powell v. McCormack*, 395 U.S. 486, 540-41, 547-48, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). Hamilton, for example, argued before the New York ratification convention that, "[T]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect, in proportion as the current of popular favour is checked.-This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed." A. Hamilton, 2 *The Debate on the Constitution*, supra, p. 772. Paraphrasing Madison, *Powell* explains that, "[T]his principle is undermined as much by limiting whom the people can select as by limiting the franchise itself." *Powell v. McCormack*, supra, at 547, 89 S.Ct. 1944.

*Id.* at 535-36.

The last point in the quotation – that the liberty of popular election is undermined by limiting whom the people can select to represent them – echoes one of the greatest cases in the history of the Connecticut Supreme Court:

All restrictions upon human liberty, all claims for special privileges, are to be regarded as having the presumption of law against them, and as standing upon their defense, and can be sustained, if at all by valid legislation, only by the clear expression or clear implication of the law.

*In re Hall*, 50 Conn. 131, 137-38 (1882) (holding that women had the right to be attorneys).

If the federal Constitution, which has no provision remotely analogous to Article Sixth, § 10, permits no requirements for public office other than those stated in the Constitution itself, *a fortiori* Article Sixth, § 10, which speaks directly to Madison's and Hamilton's concerns that the voters should be able to vote for whomever they please, does so as well.

#### (4) Sibling-State Precedents

The Washington Supreme Court in *Gerberding, supra*, 949 P.2d at 1375, has held that “qualifications may not be supplemented by a legislative act where qualifications for the state officers have been expressly stated” in the state constitution. Moreover, *Gerberding* cites cases from the highest courts of 13 other states to similar effect. *Id.*; see, e.g., *In re Opinion of Justices*, 135 N.E. 305, 306 (Mass. 1922) (“[w]here qualifications of voters or officers are fixed by the Constitution the Legislature cannot add to or subtract from them”); *Imbrie v. Marsh*, 71 A.2d 352, 356 (N.J. 1950) (“[t]he legislature cannot add to the constitutional qualifications of an officer”).

Of even more significance is Article VII, § 6 of the Minnesota Constitution, which states:

Every person who by the provisions of this article is entitled to vote at any election and is 21 years of age is eligible for any office by the people in the district wherein he has resided 30 days previous to the election, except as otherwise provided in this constitution, or the constitution and law of the United States.

A long line of Minnesota cases holds that this provision prevents the legislature from requiring that municipal judges and county attorneys even be members of the bar. See *State ex rel. Boedigheimer v. Welter*, 293 N.W.2d 914, 915 (1940) (“[t]he legislature cannot impose greater restrictions or exact other qualifications for eligibility to constitutional office than are prescribed in the Constitution”), and cases cited therein.

The Attorney General’s Opinion does not cite any of these twentieth century cases. The Opinion’s one out-of-state citation is to *Black v. Trower*, 79 Va. 123, 127 (1884), construing the following language of the Virginia Constitution: “All persons entitled to vote shall be eligible to any office within the gift of the people, except as restricted in this constitution.” *Black* states in dicta that legislative requirements that are “essential” to the

performance of the office would not violate this constitutional provision. But *Black* supports the plaintiff because its actual holding, as the Attorney General's Opinion mentions in footnote 7, is that the Virginia legislature could not constitutionally require members of electoral boards to be landowners because "such a qualification is not essential to the discharge of the duties imposed by the act." *Id.* at 127. The *Black* dicta is of no moment in this case because, even if being a licensed attorney is essential to the office of Attorney General, the plaintiff is one. The Attorney General's Opinion does not suggest that ten years active practice at the bar of this state, if the phrase means more than being licensed for ten years, is essential to that office.

#### (5) Connecticut Constitutional History

The Constitution adopted in 1818 stated: "Every elector shall be eligible to any office in this state, except in cases provided in this Constitution." Article Sixth, § 4. This provision was adopted without debate. Wesley W. Horton, "Annotated Debates of the 1818 Constitutional Convention," 65 Conn. B.J. SI 1, 65 (January 1991).<sup>7</sup> While the framers in 1818 knew nothing of an Attorney General, they wrote the language broadly enough to apply to whatever constitutional offices might be created in the future. Article Sixth, §4 was continued verbatim in Article Sixth, § 10 of the present Constitution in 1965.

In 1970, the current language of § 10 was adopted except that the age requirement was 21. Amendments, Article II, § 3. The age requirement was reduced to 18 in 1980. Amendments, Article XV. There is no constitutional history regarding these amendments

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<sup>7</sup> The vote was on the Committee draft, which listed the provision as § 5. *Id.* at SI-85, 97.

that is relevant to the current controversy.<sup>8</sup> See 22 H.R. Proc., Pt. 18, 1979 Sess., pp. 6093-98 (discussing H.J.R. 103: resolution approving an amendment to the constitution concerning the eligibility of a person seeking state office); 22 S. Proc., Pt. 17, 1979 Sess., pp. 5849-53 (same).

Meanwhile, the office of Attorney General was created statutorily in 1897, and was made a constitutional office in 1970. Amendments, Article I. The history of that office is comprehensively discussed in *Blumenthal v. Barnes*, supra. All that can be made of the constitutional debates in 1970, as the Attorney General's Opinion notes at page 4, is that the General Assembly wanted to make it a constitutional office immune from statutory abolition. See 13 H.R. Proc., Pt. 3, 1969 Sess., pp. 1289-90; 13 S. Proc., Pt. 3, 1969 Sess., pp. 1282-83. The debates are silent about the existing statutory qualifications for that office or their relationship to Article Sixth, §10.

Silence, however, is a weak reed to support the Attorney General's Opinion even if that silence were in the face of ambiguous language. See *State v. Salamon*, 287 Conn. 509, 528 (2008) (noting that legislative silence can be "ambiguous . . . and [therefore] an unreliable indicator of legislative intent"); *State v. Reynolds*, 264 Conn. 1, 79 (2003) ("[R]eliance on legislative silence is misplaced. It is a basic tenet of statutory construction that we rely on the intent of the legislature as that intent has been expressed"). In the face

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<sup>8</sup> One peculiar feature of these amendments is that the "but no person" clause was inserted in the middle of § 10. The "except" clause must be read to continue referring to the "Every elector" clause. It makes no sense for it to refer to the "but no person" clause because it would then mean someone under age 18 might be eligible. But that cannot be, because the first clause of § 10 requires an office holder to be an elector, and an elector must be 18. Article Sixth, § 1. It is likely that some clerk made a transposition error, because the original resolution put the 1970 amendment at the end, where it obviously belongs. H.J.R. 26, Comm. Constitutional Amendments, Jan. Sess. (Conn. 1969) (language of amendment as introduced to committee).

of the clear language of Article Sixth, §10, silence is no reed at all. That the legislators wanted to make the continuance of the office of Attorney General immune from abolition “by legislative whim,” as the Attorney General’s Opinion puts it, actually helps the plaintiff’s position, because it shows that the legislators were focused on the continued existence of the office and not on the qualifications for holding it.

#### (6) Contemporary Considerations

As the Attorney General’s Opinion mentions in footnote 6, when the office was created in 1897 one person, and one person only, ran the office. Today the Attorney General presides over a large office of lawyers and non-lawyers. See Henry S. Cohn, “The Creation and Evolution of the Office of Connecticut Attorney General,” 81 Conn. Bar J. 345, 368 (Dec. 2007). To succeed as Attorney General today, administrative ability is as least as important as experience personally litigating cases may have been in 1897. At the very least, the choice among those (and other) factors is one the citizens of Connecticut should be allowed to decide in the voting booth.

#### Summary

Of the six *Geisler* factors, by far the most important factor, the text itself, strongly supports the plaintiff. Of the other five, four support the plaintiff. The sixth, Connecticut appellate precedents, is neutral only in the sense that there are no precedents dealing with the constitutional provisions in question. But Connecticut appellate precedents are relevant and helpful to the plaintiff applying the other prongs, especially the textual analysis and constitutional history.

To the extent C.G.S. § 3-124 requires the plaintiff to have “at least ten years active practice at the bar of this state,” that statute is unconstitutional.

**Conclusion**

This Court should declare that the plaintiff is statutorily and constitutionally qualified for the office of Attorney General.

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Although we conclude that a court must ultimately address the fact-specific issue of a particular candidate's "active practice," we express no view on when and whether a court will find the matter within its jurisdiction. A court will demand that a proper plaintiff raise a "ripe" controversy before it will rule on the matter. Whether the candidate, a rival candidate or a member of the public is such a proper plaintiff; and whether it is enough for the candidate to have merely declared his or her candidacy (as opposed to receiving a nomination or being elected to office) for the matter to be ripe for adjudication is beyond the scope of this opinion.

#### I. Authority to provide legal opinions

The Attorney General has authority under Conn. Gen. Stat. § 3-125 to provide legal opinions to designated state officials on questions of law arising from the performance of their official duties. Because the issues of the constitutionality of Conn. Gen. Stat. § 3-124 and whether the phrase "active practice at the bar" constitutes more than simply bar membership are questions of law with general applicability to all candidates for the office of Attorney General in this or future elections, we will address them in this opinion.

There is no authority to provide legal advice to candidates for office on questions of law or fact related to their campaigns or candidacies. Thus, we cannot resolve the additional question you ask concerning the specific qualifications necessary to meet the "active practice" requirement, as it involves factual determinations more closely related to your status as a candidate for Attorney General.

The Connecticut courts have repeatedly held that deciding what constitutes the "practice of law" is a fact-bound inquiry that must be decided by the court on a case-by-case basis. As the Connecticut Supreme Court has explained:

In deciding whether certain conduct constitutes the practice of law, "the decisive question is whether the acts performed are such as are commonly understood to be the practice of law." Statewide Grievance Committee v. Patton, 239 Conn. 251, 254, 683 A.2d 1359 (1996). As judges, we are entrusted with the obligation of articulating that common understanding on a case-by-case basis. Because the language of the definition offers little guidance as applied to any particular set of facts, we are required to give content to the definition in each case based on our knowledge of the history, tradition and experience of the practice of law – and what has commonly been considered not to be the practice of law – in this state.

In re Darlene C., 247 Conn. 1, 15-16 (1998)(Borden, J., concurring)(internal quotation marks and brackets omitted).

Just as "[i]t would be difficult, if not impossible, to make an all-inclusive definition of the term 'practice of law,'" State Bar Assoc. v. Connecticut Bank & Trust Co., 20 Conn. Supp. 248, 259 (1957), it would be difficult, if not impossible, to make an all-inclusive definition of the term "active practice" of law. Instead, each case involves a fact-specific inquiry and determination that is beyond the authority of this office, which lacks the ability to develop an appropriate factual record or definitively resolve any factual disputes that may exist.

#### II. Discussion

The constitutionality of § 3-124 is an important and novel issue that has never been determined or analyzed by any court.<sup>1</sup> For the reasons that follow, we conclude that the qualifications for Attorney General set forth in Conn. Gen. Stat. § 3-124 are constitutional.

It is well-established that “[l]egislation is presumed to be constitutional, and a litigant challenging its validity has the heavy burden to establish its unconstitutionality beyond a reasonable doubt.” Batte-Holmgren v. Commissioner of Public Health, 281 Conn. 277, 299 n. 12 (2007); see also Honulik v. Greenwich, 293 Conn. 641, 647 (2009). “The court will indulge every presumption in favor of the statute’s constitutionality.” State v. Long, 268 Conn. 508, 521 (2004). “Therefore, ‘when a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear.’” Id. at 521, quoting State v. McCahill, 261 Conn. 492, 504 (2002). Thus, a court faced with the question whether Conn. Gen. Stat. § 3-124 is constitutional will start with the presumption that it is. “In case of real doubt a law must be sustained.” Honulik, 293 Conn. at 647.

You question whether Conn. Gen. Stat. § 3-124 is constitutional because it may conflict with and be superseded by Article Sixth, § 10, of the Connecticut constitution, which states that:

Every elector who has attained the age of eighteen years shall be eligible to any office in the state, but no person who has not attained the age of eighteen shall be eligible therefor, except in cases provided for in this constitution.<sup>2</sup>

In construing Article Sixth, § 10, like all provisions of the Connecticut constitution, six factors should be considered, as applicable. These are: “(1) the text of the operative constitutional provision; (2) holdings and dicta of th[e Supreme C]ourt and the Appellate Court; (3) persuasive and relevant federal precedent; (4) persuasive sister state decisions; (5) the history of the operative constitutional provision, including the historical constitutional setting and the debates of the framers; and (6) contemporary economic and sociological considerations, including relevant public policies.” Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 157 (2008), citing State v. Geisler, 222 Conn. 672, 685 (1992). A court construing the state constitution “also strive[s] to achieve a workable, commonsense construction that does not frustrate effective governmental functioning, at least where such is not clearly contraindicated by application of the [six] factors enumerated in Geisler.” Honulik, 293 Conn. 641, 648 n. 10 (2009). In the present case, although the text of Article Sixth, § 10, might be read literally to mean that the sole qualification for any office in the state, including Attorney General, is that the candidate be an elector who has attained the age of eighteen, the history of the provision suggests that this reading was not the framers’ intent with regard to candidates for Attorney General.

Connecticut’s 1818 constitution, generally regarded as the State’s first constitution, provided for the executive offices of Governor, Treasurer, Secretary, and Comptroller, and set forth, in very general terms, the primary duties of each office. See Conn. const. of 1818, Article Fourth, §§ 1, 17, 18, and 19. The 1818 constitution further provided, in language similar to that of Article Sixth, § 10, of the present day constitution, that “[e]very elector shall be eligible to any office in this state, except in cases provided for in this constitution.” Conn. const. of 1818, Article Sixth, § 4. Because the Office of the Attorney General was not created until 1897, see Conn. Public Acts 1897, c. 191, §1, and thus was not mentioned in the 1818 constitution, the framers could not have adopted the eligibility language in Article Sixth with the specific intent that it would apply to the office of the Attorney General.

In drafting the 1818 constitution and describing the roles of the constitutional officers, the framers drew upon existing statutory law. As the Connecticut Supreme Court explained in Dowe v. Egan, 133 Conn. 112 (1946):

After the independence of this country became established, the government of this state was carried on, as it had been before, under the charter of King Charles II granted in 1662. The broad powers given the General Assembly in that charter enabled it largely to shape by statute our form of government. The constitution adopted



qualifications for the Office of Attorney General. In light of this history, there was simply no need for the General Assembly, as the framers of the Amendment, to import the details of this pre-existing scheme into the constitution. The framers in 1970 were well aware of the existing statutes governing the Attorney General, and nothing in the legislative record suggests that they intended to alter the duties and qualifications set forth therein. As in Dowe, those statutes must inform our analysis of the framers' intent in drafting the constitutional provision. See Dowe v. Egan, 133 Conn. 112 (1946).

Given the long-standing existing statutory scheme, we conclude that the framers of the 1970 amendment adding the Attorney General to the constitution did not intend Article Sixth, § 10, to abrogate the existing statutory scheme and reduce the qualifications for the Office of the Attorney General to solely being an elector who has attained the age of eighteen. Indeed, the very title "Attorney General" strongly implied that the office would be held by an attorney. In fact, it would be impossible for the Attorney General personally to perform the duties that the framers clearly envisioned, such as appearing for and representing the Governor and other state officers in civil litigation, without being an attorney.<sup>6</sup> Because constitutional provisions, like statutes, must be construed to avoid bizarre or irrational results, State v. Ross, 272 Conn. 577, 608 (2005); American Promotional Events, Inc. v. Blumenthal, 285 Conn. 192, 205 (2008), Article Sixth, § 10, cannot be construed to preclude the General Assembly from imposing professional qualifications necessary to perform the duties of the office of the Attorney General.

The Virginia Supreme Court suggested a similar view in Black v. Trower, 79 Va. 123 (1884), explaining that constitutional eligibility provisions do not preclude a legislature from imposing professional qualifications that are essential to the performance of an office:

Thus, for example, it may be conceded that the legislature may require the office of public printer to be filled by a practical printer, or that the state board of health shall be composed of physicians, or that the judge of a city court shall possess the same qualifications as those prescribed by the constitution for circuit judges. For in such cases, the duties to be performed are of a peculiar and professional character, and the qualifications prescribed are essential to their performance. The power to prescribe them may therefore be said to exist by fair implication.

Id. at 127 (statutory citations omitted).<sup>7</sup>

To hold § 3-124 unconstitutional would require the logical leap that Article Sixth, § 10, intends that a nonlawyer can act as the State's chief civil legal officer. Whatever the meaning of other statutory provisions, such as § 3-124's "active practice" requirement, the constitution cannot reasonably be read to abolish all professional or educational qualifications for this position. An elector who is not an attorney cannot perform the essential duties of the Attorney General – providing a broad array of legal services to state government, including representing the State and its officials in complex and important legal proceedings in court. Such duties may not require actual appearance in court, but certainly include the ability to do so, as well as authority to sign pleadings, direct legal action to be commenced, resolve litigation, and other critical activities constituting the practice of law.

The fact that only an attorney can perform required duties, coupled with the long-standing statutory scheme in existence in 1970, leads to the conclusion that the framers must have intended to import the existing statutory duties and qualifications of the Office of Attorney General, and that Article Sixth, § 10, permitting any elector to be eligible for any office in the state, does not supplant the additional, existing statutory qualifications for the office of Attorney General.



attorney, so admitted, shall plead at the bar of any court of this State." Conn. Gen. Stat., Revision of 1888, section 784. Under current law, an attorney is prohibited from using the title "attorney at law" or "attorney" unless he or she is admitted to practice in this state. See Conn. Gen. Stat. § 51-88. Thus, the phrase "attorney at law" has long connoted, and still connotes, an individual who is admitted to the Connecticut bar. Accordingly, the phrase "active practice" must mean more than simply being a member of the bar because the phrase "attorney at law" independently incorporates that requirement. See American Promotional Events, Inc., supra, 285 Conn. at 203 (presuming that no part of a statute is superfluous).

In other jurisdictions, the phrase "active practice" has been defined to require more than merely being a member of the bar. For example, the Alaska Code requires that an applicant for a judgeship have engaged for the preceding eight years in the "active practice of law" and defines that phrase to include: "(1) sitting as a judge in a state or territorial court; (2) being actually engaged in advising and representing clients in matters of law; (3) rendering legal services to an agency, branch, or department of a civil government within the United States or a state or territory of the United States, in an elective, appointive or employed capacity; (4) serving as a professor, associate professor, or assistant professor in a law school accredited by the American Bar Association." Alaska Stat. § 22.05.070.

Similarly, Alabama defines the phrase "active practice of law" to include: "(a) Representation of one or more clients in the practice of law; (b) Service as a lawyer with a local, state, territorial, or federal agency, including military service; (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association; (d) Service as a judge in a federal, state, territorial, or local court of record; (e) Service as a judicial law clerk; or (f) Service as corporate counsel." Alabama Rules Governing Admission, Bar Rule III.A.2. See also Oregon Bar Admission Rule 15.05(8); Utah Code of Judicial Administration, Rule 14-705(b). In West Virginia, engagement in the "active practice of law" means "practice on a substantial basis motivated by a desire to earn a livelihood from that practice." W. Virginia Admission to Practice, Rule 4.0(a)(c). Other jurisdictions define "active practice" more simply, stating that it means an attorney who "has engaged in the practice of law, which includes, but is not limited to, private practice, house counsel, public employment, or academic employment." N.D. Admission to Practice Rule 3.1.B.1.; Texas State Bar Rules Art. XIII § 2(A).

Common to all of these definitions is a requirement that the attorney have done more than merely be a member of the bar. Given this fact, coupled with the common understanding of the word "active," the principle that no words in a statute can be superfluous, and the Connecticut Supreme Court's construction of the phrase "actual practice," we conclude in response to your second question that the phrase "active practice" means more than simply being a member of the bar of the state in active status.

As explained above, with respect to your third question, the determination of whether particular conduct constitutes the "active practice" of law must be left to judicial determination pursuant to established judicial procedures.

The legislature may wish to provide more specific guidance on this question by more precisely defining "active practice."

### III. Conclusion

In sum, we conclude that the requirement of "ten years' active practice at the bar of this state" set forth in Conn. Gen. Stat. § 3-124 is not unconstitutional, and that it constitutes more than simply status as an active member of the bar. We also conclude that the determination of whether particular conduct constitutes the "active practice" of law must be left to legislative or judicial action.

Very truly yours,

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<sup>1</sup> The issue arose, but was never decided, in a 1978 case involving a candidate for Attorney General, A. Searle Field, who sued then-Secretary of the State Gloria Schaffer in Field v. Schaffer, No. 221180 (Conn. Superior Ct., Judicial District of Hartford), seeking a preliminary injunction and raising the same constitutional question you now raise. It was undisputed that Field lacked ten years of active practice at the Connecticut bar, and Secretary Schaffer, apparently on the advice of this office, refused to issue him nominating petitions. The Court granted Field a preliminary injunction and stated in conclusory fashion that he had made out a "prima facie case in support of his attack upon the constitutionality of § 3-124." Id.; Memorandum of Decision as to Issuance of a Preliminary Mandate (August 18, 1978) at 2 (Satter, J.). However, the Court did not analyze the issue, stating that it "has not been able to undertake the research necessary to decide the weighty constitutional issue before it"; *id.*; and the issue was never finally resolved because Mr. Field apparently withdrew his lawsuit before obtaining the necessary signatures to get his name on the ballot. Thus, the Field matter offers no useful guidance in resolving the question you present.

<sup>2</sup> This provision has been held to apply only to constitutional offices and not to statutory offices. See Adams v. Rubinow, 157 Conn. 150, 176 (1968); Hackett v. New Haven, 103 Conn. 157, 169 (1925).

<sup>3</sup> Section 2 stated that: "The attorney-general shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which the state's attorneys have direction. He shall advise and assist the state's attorneys if they so request. He shall appear for the state, the governor, the lieutenant-governor, the secretary, the treasurer, and the comptroller, and for all heads of departments and state boards, commissioners, agents, inspectors, librarian, committees, auditors, chemists, directors, harbor masters, and institutions, in all suits and other civil proceedings, excepting upon criminal recognizances and bail bonds, in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question in any court or other tribunal, as the duties of his office shall require; and all such suits shall be conducted by him or under his direction. When any measure affecting the state treasury shall be pending before any committee of the general assembly, such committee shall give him reasonable notice of the pendency of such measure, and he shall appear and take such action as he may deem to be for the best interests of the state, and he shall represent the public interest in the protection of any gifts, legacies, or devises, intended for public or charitable purposes. All legal services required by such officers and boards in matters relating to their official duties shall be performed by the attorney-general or under his direction. All writs, summonses, or other processes served upon such officers shall, forthwith, be transmitted by them to the attorney-general. All suits or other proceedings by them shall be brought by the attorney-general or under his direction. He shall, when required by either branch of the general assembly, give his opinion upon questions of law submitted to him by either of said branches." Conn. Public Acts 1897, c. 191, § 2.

<sup>4</sup> In addition to his duties set forth Conn. Public Acts 1897, c. 191, § 2, and codified at Conn. Gen. Stat. § 3-125, the Attorney General, as of 1970, was statutorily authorized to investigate and, with the approval of the governor, take action to protect interstate watercourses (Conn. Gen. Stat. § 3-126); with the approval of the governor to negotiate with other states concerning use, allocation or diversion of interstate watercourses (Conn. Gen. Stat. § 3-127); to institute legal proceedings against common carriers to obtain reasonable rates when directed by the governor (Conn. Gen. Stat. § 3-130); and to bring actions in the name of the unemployment security division of the department of labor to collect unemployment contributions and interest illegally owed to the state (Conn. Gen. Stat. § 31-274g).

<sup>5</sup> As amended by HJR No. 95, Article Fourth, § 1 states that "[a] general election for governor, lieutenant-governor, secretary of the state, treasurer, comptroller and attorney general shall be held on the Tuesday after the first Monday of November, 1974, and quadrennially thereafter."

<sup>2</sup> Throughout the history of the Office of the Attorney General and continuing to the present date, the Attorney General has, as the title suggests, frequently acted in his or her capacity as an attorney in representing the State in some of the most significant legal matters facing the citizenry. See generally, Cohn, Henry S., *The Creation and Evolution of the Office of Connecticut Attorney General*, 81 Conn. Bar J. 345 (Dec. 2007). Indeed, when the Office was first established, the Attorney General had the sole responsibility of performing the duties and responsibilities of the Office and had no deputies or assistants. See Id. at 355. It was not until 1927 that the Legislature even authorized the Attorney General to hire a deputy, as well as "such other assistants as he deems necessary subject to the approval of the Board of Finance and Control." Id. at 356

<sup>2</sup> At issue in Black was whether the legislature could statutorily require members of electoral boards to be freeholders (landowners) given a constitutional provision stating that "all persons entitled to vote shall be eligible to any office within the gift of the people, except as restricted in this constitution." The court concluded that the statutory provision was unconstitutional because it was not necessary to be a freeholder to be a voter and "[s]uch a qualification is not essential to the discharge of the duties [of the board] imposed by the act." Id. at 127. In other words, being a freeholder was not essential to performing the duties of the board.

<sup>3</sup> The Judicial Branch, which licenses attorneys, classifies attorneys' licenses in one of two statuses: active or inactive. A license is inactive when, for example, an attorney is disbarred, suspended, retired, deceased, disabled or has resigned. A license is active, if it is not "inactive." See <http://civilinquiry.jud.ct.gov/AttorneyFirmInquiry.aspx>.

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**CERTIFICATION**

I hereby certify that a true copy of the foregoing was emailed and mailed on April 9, 2010, to the following:

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