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June 30, 1981

Honorable Sidney W. Wernick
Associate Justice
Supreme Judicial Court
Cumberland County Courthouse
142 Federal Street
Portland, Maine

Dear Justice Wernick:

You have requested an opinion from this office interpreting the limits imposed by 4 M.R.S.A. § 5 on a retired Law Court Justice who returns to private law practice.1/ The relevant language is as follows:

> The right of any justice drawing such [retirement] compensation to continue to receive it shall cease immediately if he acts as attorney or counsellor in any action or legal proceeding in which the State is an adverse party or has any interest adverse to the person or persons in whose behalf he acts.
>
> 4 M.R.S.A. § 5, 1st ¶, last sentence.

1/ Identical language appears in parallel provisions covering Superior Court Justices and District Court Judges. See 4 M.R.S.A. §§ 103 and 157-A.

The specific questions you have posed seek clarification of the broad language used in § 5.

Your first question is whether the use of the word "counsellor" in conjunction with the word "attorney" was intended by the Legislature to describe a relationship different from that of attorney and client such as a situation in which informal advice is rendered by a retired Justice but no attorney-client relationship is created. We think the use of the word "counsellor" in § 5 has no significance beyond that of further describing the attorney-client relationship. While we are aware of the rule of statutory construction which requires that whenever possible all words in a statute be accorded meaning, our research persuades us that there is no basis upon which to conclude that the use of the word "counsellor" broadens the reach of the statute.

In early English law, there was a distinction between an "attorney" and a "counsellor," see Oxford English Dictionary 139, 574 (Compact Ed.) but that distinction was not between an actual attorney and one who merely gave advice. Id. In any event, the distinction has fallen into disuse there and has historically been almost wholly unobserved in this country. Id. Such case law as exists uniformly supports the proposition that there is no current distinction between these terms. In re Paschal, 77 U.S. 483 (1870) (no distinction for purposes of attorney's lien); Stinson v. Hildrup, 23 Fed. Cas. 107 (Cir. Ct., N.D. Ill. 1878) (no distinction for purposes of signing pleadings); Pittman v. Castenbrook, 104 P. 698 (Cal. Ct. App. 1909) (no distinction for purposes of title used on affidavit); Magoon v. Lord-Young Engineering Co., Ltd., 22 Haw. 245 (1914) (no distinction in terms of managing case); Spencer v. Bush, 98 N.Y.S. 690 (S.Ct., Appellate Term, 1908) (no distinction for purposes of recovering for services); Ingraham v. Leland, 19 Vt. 304 (1847) (no distinction for purposes of determining whether person is "of counsel" in given case). We therefore conclude that the use of the word "counsellor" in § 5 was not intended to encompass the giving of informal advice and therefore that the statute's scope does not reach beyond the attorney-client relationship.

A second problem raised by the statute concerns the meaning of the phrase, "in any action or legal proceeding." We conclude that the Legislature employed that phrase in a broad sense, intending that it encompass both actions in court and quasi- and non-judicial administrative actions. As a general matter, the word "actions" has long been construed in this State as limited to suits in court and as not encompassing administrative proceedings." See Dickinson v. Maine Public Service Co., 223 A.2d 435, 436 (Me. 1966); Inhabitants of Webster v. County Comm'rs., 63 Me. 27 (1874). The word "proceeding" has been viewed much more

broadly. In Kennie v. City of Westbrook, 254 A.2d 39, 43 (Me. 1969), the Law Court stated that "the term 'proceeding' is a very comprehensive one and, generally speaking, means a prescribed course of action for enforcing legal rights and remedies." That "proceeding" may include such quasi- and non-judicial procedures as applying for a subdivision approval or a patent is also clear. Cardinali v. Planning Board of Lebanon, 373 A.2d 251 (Me. 1977); Schroeder, Siegried, Ryan & Vidas v. Modern Electric Products, Inc., 295 N.W.2d 514 (Minn. 1980).

Your third question arises out of the requirement in 4 M.R.S.A. § 5 that a retired justice not take cases in which the State is an "adverse party or has any interest adverse" to the retired justice's client. This language presents the most difficult problem of interpretation because no guidance is supplied by the language or other legislative sources by which to define the breadth of its reach. In light of the significant effect of the statute on a retired justice's professional activities, however, we think it should be narrowly interpreted so as to afford some measure of certainty to the scope of the prohibition.

The words "adverse party" have an established meaning. Where the State is an actual party to an action or proceeding, as those terms are interpreted above, a retired justice may not serve as an attorney for another party whose interests are opposed to those of the State.

More troublesome are the words "has any interest adverse [to the person represented by the retired justice]." They seem plainly to refer to situations in which the State is not an actual party but where the State's interests are at issue. The repetition of the technical term "adverse" suggests that the Legislature intended to include situations where the State's interest was somehow concretely adverse to those of the retired justice's client but where the State was nonetheless not a party. Therefore, we rule out situations where the State's interest is indirect, such as where it appears as amicus curiae or where its only involvement is as a result of the interposition of the unconstitutionality of a statute as a defense or claim in a private action.

It is more likely, in our view, that the Legislature was describing cases in which the State is the real party in interest without being a named party. A number of examples can be suggested. The State may choose to defend and indemnify a state employee who is sued under the Maine Tort Claims Act. See 14 M.R.S.A. § 8112(1). In this situation, while the State would not be a named party, its interests would certainly be at issue. In certain situations,

such as habeas corpus proceedings, the named defendant may be the specific custodian, such as the Warden of the State Prison, but it is the State whose interest in the confinement of the plaintiff is at stake. Another example occurs when allegations of unconstitutional action are made against a state officer, rather than the State itself, in an effort to circumvent issues of sovereign immunity or the 11th Amendment. See generally Cushing v. Cohen, 420 A.2d 918 (1980); Drake v. Smith, 390 A.2d 511 (Me. 1978).

While we are unable to formulate a simple test to cover all situations in which the State would have an adverse interest under 4 M.R.S.A. § 5, the above examples should give some guidance as to the thrust of the prohibition. As those examples demonstrate, we believe the type of situation contemplated by the Legislature was one in which an agent of the State is the party to the action or proceeding, but it is the State's interests which are truly at issue.

Two more points are made clear in the legislative debate. The Legislature intended to bar retired justices from representing defendants in criminal cases. 1941 Me. Leg. Rec. 980-81 (remarks of Rep. McGlauflin); 982-83 (remarks of Rep. Mills); 983-84 (remarks of Rep. Grua). In addition, the Legislature did not intend that the provision preclude a retired justice from participating in cases involving a municipality or other governmental entity. Id. 983-84 (remarks of Rep. Grua).

In the absence of specific factual situations, our interpretation of that part of 4 M.R.S.A. § 5 which prohibits retired justices of the Supreme Judicial Court from acting as attorneys in certain areas at the risk of losing their pensions has been rather broad. We can summarize those conclusions as follows. First, we think that the language in question prohibits a retired judge entirely from representing criminal defendants. Second, it precludes him or her from handling civil cases, including quasi- or nonjudicial administrative proceedings, where the State is a party in a posture opposing the judge's clients or where the State, although not a named party, is the real party in interest and its interests are opposed to those of the judge's client. Finally, a retired judge is not barred by § 5 from rendering informal advice where there is no attorney-client relationship.2/

2/ Consistent with a previous opinion of this office, Opinion of the Attorney General, December 5, 1978 (copy attached), we have found no basis upon which the prohibitions discussed herein can extend to a retired justice's law partners or associates. Similarly, we do not think that he or she is precluded from receiving compensation from a firm where a part of the firm's practice consists of cases which a retired justice could not take, as long as the justice has no involvement in those cases.

We hope that this information addresses your concerns. If you have any further questions, please feel free to contact this office.

Very truly yours,

JAMES E. TIERNEY
Attorney General

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Enclosure